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

MEMORIAL

16 January 2019

SQUIRE PATTON BOGGS

nstlaw/&Stankovic&Partners

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I. INTRODUCTION

A. Preliminary statement

1. This Memorial (the "**Memorial**") is filed 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. This arbitration is conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**"). Sembi invokes investment protections 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 the Canadian Claimants invoke investment protections 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**" and, with the Cyprus-Serbia BIT, the "**Treaties**").

3. The Claimants have filed a comprehensive Request for Arbitration dated 9 February 2018, which sets out the Claimants' factual and legal submissions in considerable detail. The Memorial completes and expands on these submissions. To avoid unnecessary re-phrasing and/or cross-referencing to a different document, the Memorial intentionally repeats entire sections of the Request for Arbitration, including the summary of Claimants' claims, with no or minimal changes.

B. Summary of Claimants' claim

4. 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**").

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

6. 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 interest in BD Agro's equity, not including the Indirect Shareholding and Mr. Rand's outstanding loans to BD Agro, was EUR 61.5 million.[1]

7. 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**").[2] 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.

8. 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.[3] 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.[4] 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.[5]

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1 Richard Hern Expert Report dated 16 January 2019, ¶ 166.

2 William Rand Witness Statement dated 5 February 2018, ¶¶ 14-15.

3 W. Rand WS, ¶ 11; Djura Obradović Witness Statement dated 20 September 2017, ¶ 6.

4 W. Rand WS, ¶ 17; Obradović WS, ¶ 7.

5 W. Rand WS, ¶ 20; Obradović WS, ¶ 11.

9. 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,[6] and invest an additional approximately EUR 2 million in BD Agro.[7] 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.[8] The Share Pledge Agreement expressly provided for the expiry of the pledge on the Privatized Shares upon the full payment of the purchase price.[9]

10. 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.[10] 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.[11] BD Agro's herd was enlarged and replaced with new cows from the best 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.[12] BD Agro was repeatedly praised as the most modern dairy farm in the Balkans and the best milk producer in Serbia.

11. The additional EUR 2 million investment required under the Privatization Agreement was made by October 2006[13] and, through a capital increase, the

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

7 Privatization Agreement, Article 5.2.1, **CE-17**.

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

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

10 W. Rand WS, ¶¶ 24-25; Obradović WS, ¶¶ 16-17.

11 W. Rand WS, ¶ 26.

12 W. Rand WS, ¶ 29.

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

shareholding in the beneficial ownership of Mr. Rand—and the nominal ownership of Mr. Obradović—increased to 75.87%.

12. In 2008, the beneficial ownership of BD Agro was restructured to also involve all of the other Claimants. In February 2008, Sembi agreed to pay Mr. Obradović's debts to third persons, the Lundin family from Geneva and the Privatization Agency, and acquired the beneficial ownership and contractual rights to assets held by Mr. Obradović in relation to BD Agro.[14] These assets included the Beneficially Owned Shares and Mr. Obradović's shareholder loans to BD Agro.[15]

13. 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.[16]

14. 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.

15. On 1 March 2011, Mr. Obradović received from the Privatization Agency written notice alleging certain breaches of the Privatization Agreement.[17] 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.

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14 W. Rand WS, ¶ 31.

15 W. Rand WS, ¶ 31.

16 Obradović WS, ¶¶ 16-17.

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

16. One month later, on 8 April 2011, the Privatization Agency received the last instalment of the purchase price,[18] upon which the alleged violation of the restriction on BD Agro's pledging of 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.

17. 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.

18. 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 Beneficially Owned Shares upon full payment of the purchase price[19], the Privatization Agency simply refused to release the pledge. The Privatization Agency did not bother to offer any legal justification for the refusal.

19. 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 Beneficially Owned Shares.

20. 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.*"[20]

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18 Confirmation of the Privatization Agency on the Buyer's Full Payment of the Purchase Price dated 6 January 2012, **CE-19**.

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

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

21. Despite the clear instructions from the Ministry of Economy, the Privatization Agency was still refusing to release the pledge. The only apparent concession was that by the end of 2012, the Privatization Agency stopped repeating its unjustified demands that BD Agro cure the purported violations of the Privatization Agreement.

22. 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]***."[21]

23. 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, despite their efforts, their involvement did not result in the Privatization Agency changing its position.[22]

24. As a result of the Privatization Agency's unlawful refusal to release the pledge over the Beneficially Owned Shares, Mr. Obradović was not able to transfer nominal ownership of the Beneficially Owned Shares to the Claimants. The Privatization Agency also would not allow for the assignment of the Privatization Agreement to a company controlled by Mr. Rand.[23]

25. 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

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

22 Igor Markićević Second Witness Statement dated 16 January 2019, ¶¶ 27-29; Erinn Broshko Second Witness Statement dated 16 January 2019, ¶¶ 17-18.

23 W. Rand WS, ¶¶ 45-48; Markićević Second WS, ¶¶ 30-32; Broshko Second WS, ¶¶ 19-21.

reorganize its debts in a court sanctioned pre-pack reorganization plan.[24] The company's creditors holding a majority of the then outstanding debt voted in favor of the reorganization.[25]

26. 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,[26] he concocted an absurd legal theory that, by failing to declare the Privatization Agreement terminated, 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 declared the Privatization Agreement terminated. The Claimants, Mr. Obradović and BD Agro were not informed about the Ombudsman's initiative.

27. Both the Ministry of Economy and the Privatization Agency explained to the Ombudsman that they had not declared the Privatization Agreement terminated because such declaration would have been unlawful. The Ombudsman, however, ignored their explanations.

28. 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 declare the Privatization Agreement terminated.[27] 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.

29. 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

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24 Markićević Second WS, ¶ 46; Broshko Second WS, ¶ 29.

25 Markićević Second WS, ¶ 91.

26 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**.

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

lacked due process because he never heard from 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.

30. 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*."[28]

31. The Ministry of Economy and the Privatization Agency then gave in, disregarded their own economic assessment and the 2013 Legal Opinion and declared the Privatization Agreement terminated on 28 September 2015.[29] The only purported justification for that decision was that BD Agro had failed to cure the alleged violation of the restriction on pledging BD Agro's land.

32. The declaration of termination was clearly unlawful for any number of reasons. To name just a few: (*i*) there was no violation of the Privatization Agreement; (*ii*) 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; (*iii*) the allegedly violated restriction no longer applied; (*iv*) the Privatization Agreement did not provide for termination in case of violation of the restriction on pledging; (*v*) 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; and (*vi*) the termination was grossly disproportionate because the alleged violation, a purportedly non-compliant pledge of a small land plot owned by BD Agro, did not impugn on any cognizable legal interest of the Republic of Serbia or any other person.

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

29 Minutes of the Session of the Commission dated 28 September 2015, **CE-117**; Materials for the Session of the Commission held on 28 September 2015, **CE-89**; Notice on Termination of the Privatization Agreement, dated 28 September 2015, **CE-50**.

33. On 21 October 2015, the Privatization Agency followed up on the declaration of termination. Without giving the Claimants and Mr. Obradović any opportunity to challenge the unlawful declaration of 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.[30] 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.

34. The Serbian Government did not offer to pay any compensation, not even to return the purchase price paid for the Privatized Shares.

35. Serbia's acts constitute a blatant example of direct expropriation and violation of several other substantive protections granted to Sembi under the Cyprus-Serbia BIT and to the Canadian Claimants under the Canada-Serbia BIT.

36. On 8 August 2017, the Claimants served on Serbia a written notification of this investment dispute (the "**Notice of Dispute**")[31] and invited Serbia to settle it amicably. Serbia confirmed receipt of the Notice of Dispute,[32] 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.

C. Organization of the Request for Arbitration

37. This Memorial 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;

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

31 Claimants' Notice of Dispute, **CE-82**.

32 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**.

d. Section IV explains Jurisdiction;

e. Section V addresses Attribution;

f. Section VI sets out Serbia's Violations of the Treaties;

g. Section VII addresses Damages;

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

38. This submission is also accompanied by three witness statements and three expert reports, including:

a. Witness Statement of Mr. Aksel Azrac;

b. Second Witness Statement of Mr. Erinn Broshko;

c. Second Witness Statement of Mr. Igor Markićević;

d. Expert Report of Mr. Agis Georgiades;

e. Expert Report of Mr. Miloš Milošević; and

f. Expert Report of Dr. Richard Hern.

II. THE PARTIES

A. Claimants

39. **Mr. Rand** is a Canadian national residing at 2136 Southwest Marine Drive, Vancouver, British Colombia, V6P 6B5, Canada.[33]

40. 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.

41. 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 the British Virgin Islands.[34]

42. 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.

43. 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.

44. 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

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33 Copy of Canadian passport issued to W. Rand, **CE-2**.

34 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**").[35]

45. **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.[36] Rand Investments is one of the two owners of Sembi, another claimant.

46. **Sembi** is a limited liability company organized under the laws of Cyprus with its seat at 2 Corner of Prodromos Street & Zinonos Kitieos, Palaceview House 2064, Nicosia, Cyprus.

47. Between 22 February 2008 and the unlawful expropriation on 21 October 2015, Sembi was the direct beneficial owner of the Beneficially Owned Shares.

48. Sembi was also a channel for Mr. Rand's control over BD Agro.[37] 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.[38]

49. 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.[39] 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 11 million. Any remaining proceeds are to be distributed to the Ahola Family Trust.

50. 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

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

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

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

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

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

Harry Leander Rand.[40] 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.

51. **Ms. Kathleen Elizabeth Rand** is a daughter of Mr. Rand and a Canadian national residing at #105 - 338 Drake Street, Vancouver, British Colombia, V6B 6A8, Canada.[41] As one of the beneficial owners of Sembi, Ms. Kathleen Elizabeth Rand also was a partial beneficial owner of the Beneficially Owned Shares.

52. **Ms. Allison Ruth Rand** is a daughter of Mr. Rand and a Canadian national residing at 2136 Southwest Marine Drive, Vancouver, British Colombia, V6P 6B5, Canada.[42] As one of the beneficial owners of Sembi, Ms. Alison Ruth Rand also was a partial beneficial owner of the Beneficially Owned Shares.

53. **Mr. Robert Harry Leander Rand** is the son of Mr. Rand and a Canadian national residing at 2136 Southwest Marine Drive, Vancouver, British Colombia, V6P 6B5, Canada.[43] As one of the beneficial owners of Sembi, Mr. Robert Harry Leander Rand also was a partial beneficial owner of the Beneficially Owned Shares.

54. The investment structure as of the expropriation date of 21 October 2015 is shown on the following chart:

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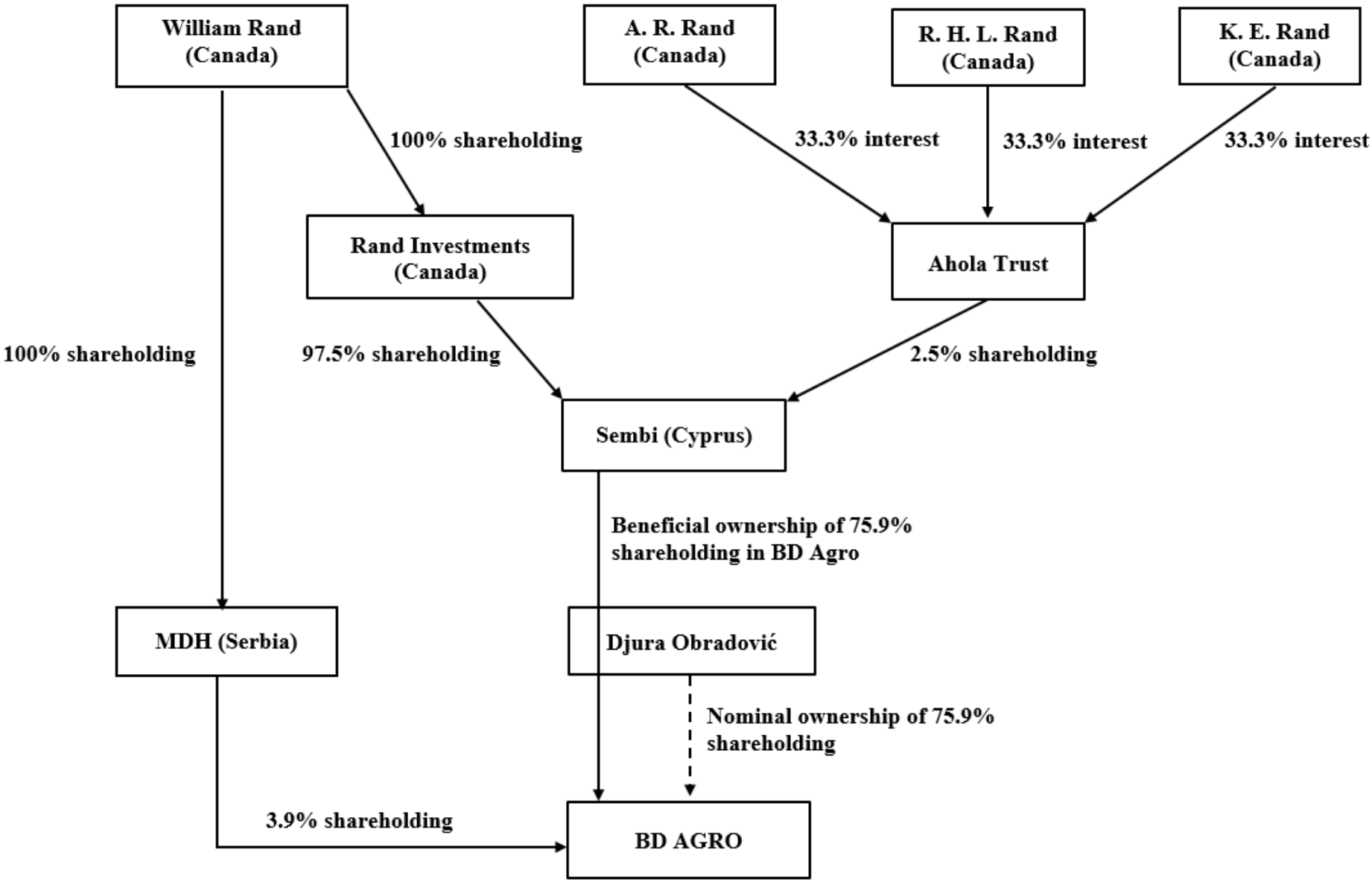
40 The Ahola Family Trust Indenture, Schedule B, **CE-8**.

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

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

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


William Rand (Canada)
A. R. Rand (Canada)
R. H. L. Rand (Canada)
K. E. Rand (Canada)
100% shareholding
33.3% interest
33.3% interest
33.3% interest
Rand Investments (Canada)
Ahola Trust
100% shareholding
97.5% shareholding
2.5% shareholding
Sembi (Cyprus)
Beneficial ownership of 75.9% shareholding in BD Agro
MDH (Serbia)
Djura Obradović
Nominal ownership of 75.9% shareholding
3.9% shareholding
BD AGRO

55. All Claimants are jointly represented by:

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56. All electronic correspondence in this arbitration should be sent to the Claimants' counsel at the addresses set out above. All hardcopy correspondence in this arbitration should be sent solely to the Claimants' counsel's Prague address.

B. Respondent

57. The Respondent is the Republic of Serbia represented by the Government of the Republic of Serbia.

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III. FACTUAL BACKGROUND

A. Pre-privatization history of BD Agro

59. 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.

60. The concept of social ownership was developed in communist Yugoslavia after its departure from the Soviet bloc in 1950's.[44] Socially-owned companies did not have a specific owner[45] and were self-managed by their workers who gained this right based on their employment, not ownership.[46] In reality, socially-owned companies remained under strong State control.[47]

61. In 1990s, to facilitate the transformation process from the system of self-managed socially-owned enterprises to a market economy, Serbia decided to repeal the social-ownership structures by way of privatization of socially-owned companies.[48]

62. The privatization and transformation process was long stalled due to the economic and political difficulties associated with the disintegration of Yugoslavia and the economic sanctions imposed by the United Nations, the European Union and the United States.

63. Both the sanctions and the resulting economic breakdown in 1990's and early 2000's 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.

64. The privatization process re-started in 2001 with the adoption of the new Law on Privatization.[49] The underlying goal of privatization of socially-owned companies was

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44 Miloš Milošević Expert Report dated 16 January 2019, ¶¶ 16-18.

45 *Ibid.*, ¶ 19.

46 *Ibid.*

47 *Ibid.*, ¶ 20.

48 *Ibid.*, ¶¶ 21-27.

49 The 2001 Law on Privatization, **CE-220**.

the development of the Serbian economy, social security and economic well-being.[50] Serbia pursued privatization because it would create favorable conditions for the country's economic development and social stability[51] by attracting foreign capital to the country.[52]

B. Privatization of BD Agro

65. 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.

66. 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.[53] 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 international relations and competitiveness. With the Government demonstrating their unequivocal support, Mr. Rand agreed to participate in the privatization process.[54]

67. 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.[55]

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50 Milošević ER, ¶ 28.

51 *Ibid.*, ¶¶ 29-31.

52 *Ibid.*, ¶ 32.

53 *See e.g.* E-mail from Lj. Jovanović to W. Rand dated 16 May 2005, **CE-13**.

54 E-mail from W. Rand to P. Bubalo dated 4 June 2005; E-mail from Lj. Jovanović to W. Rand dated 6 June 2005, **CE-14**.

55 W. Rand WS, ¶ 20; Obradović WS, ¶¶ 10-11.

68. 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.[56]

69. 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.

70. 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.[57] 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.

71. On 29 September 2005, Mr. Obradović was the successful bidder in the public auction for the Privatized Shares.

72. 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 e-mail, Mr. Jovanović stated that he "*presume[d] that [Mr. Obradović] ha[d] already informed [Mr. Rand] that [they] all succeeded in farm acquisition.*"[58]

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56 W. Rand WS, ¶ 15, ¶ 20; Obradović WS, ¶ 11.

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

58 E-mail from Lj. Jovanović to W. Rand dated 29 September 2005, **CE-16**.

73. On 4 October 2005, Mr. Obradović entered into the Privatization Agreement with the Privatization Agency.[59] 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,[60] and a commitment to invest further RSD 168,683,000 (approximately EUR 1,982,000)[61] in BD Agro within the following year.[62]

74. Mr. Obradović and the Privatization Agency were not in an equal position when entering into the Privatization Agreement.[63] The content of the Privatization Agreement was non-negotiable and most of its provisions were prescribed by mandatory provisions of Serbian law. The Privatization Agency entered into the Privatization Agreement not as the owner of the Privatized Shares—which it was not—but as a holder of public authority conferred to it by the Law on Privatization Agency and the Law on Privatization.[64] This reflected the fact that the privatization process had broader, non-commercial objectives of transformation of the Serbian economy.[65]

75. 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.[66] The pledge was established by registration with the Central Securities Depository and Clearing House.[67] The pledge could only be removed with the consent of the Privatization Agency[68] and made it impossible to transfer the Privatized Shares without such consent.

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59 Privatization Agreement dated 4 October 2005, **CE-17**.

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

61 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**.

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

63 Milošević ER, ¶¶ 59-69.

64 *Ibid.*, ¶ 48.

65 *Ibid.*, ¶ 59.

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

67 Milošević ER, ¶ 127.

68 *Ibid.*, ¶ 130.

76. 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 for these contractually agreed upon investments were extended.[69] 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.[70] The guarantees were provided as agreed.[71]

77. 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 nominal shareholding, and, in turn, Mr. Rand's beneficial shareholding, in BD Agro increased from 70% to 75.87%.

78. 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.[72] Consequently, the Privatization Agency released the bank guarantees securing this obligation.

79. 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.[73]

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

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

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

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

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

80. 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.*"[74] Under Serbian law, the payment of the full purchase price marks the date of consummation of the agreement, after which it cannot be declared terminated.[75]

C. Operation of BD Agro after privatization

81. 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.[76]

82. 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.[77] 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.[78] The total cost of these improvements was approximately EUR 8.7 million.[79] 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.[80]

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

75 Milošević ER, ¶¶ 73 *et seq.*

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

77 W. Rand WS, ¶ 26.

78 *Ibid*.

79 *Ibid*.

80 *Ibid.*, ¶ 27.

83. 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.[81]

84. 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.[82] The cost was approximately EUR 7.9 million, and was in part financed directly by 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.[83]

85. 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.[84] 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.[85]

86. 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.[86]

87. 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*

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81 *Ibid.*, ¶ 26.

82 *Ibid.*, ¶ 29.

83 Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 607, 759.00 executed on 21 October 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 460,216.00 executed on 24 December 2008 **CE-21**; Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 695,030.90 executed on 21 October 2008; Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 124,100 executed on 9 December 2008, Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 309,415 executed on 22 December 2008, **CE-22**; Confirmation of wire transfer from W. Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-23**; Confirmation of wire transfer from W. Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-24**.

84 W. Rand WS, ¶ 29.

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

86 W. Rand WS, ¶ 27.

only in Serbia, but also in Europe."[87] 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.[88]

D. 2008 restructuring of beneficial ownership

88. 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.[89] In the beginning of 2008, the Lundin family decided to exit the project.[90] Mr. Rand replaced the Lundins' funds with his own funds, channeled through Sembi.

89. On 22 February 2008, Mr. Obradović, the Lundin Family, Mr. Rand and Sembi entered into an agreement, governed by Serbian law, on the repayment of the Lundins' funds by Sembi whereby Sembi agreed to repay EUR 9 million to the Lundin Family.[91] The Lundin Family in turn 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.[92]

90. In a second agreement as of the same date, governed by Cypriot law, between Sembi and Mr. Obradović, 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.[93] The loans provided by the Lundins to Mr. Obradović included EUR 9

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

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

89 W. Rand WS, ¶¶ 16 and 23; Obradović WS, ¶ 15; Aksel Azrac Witness Statement dated 16 January 2019, ¶¶ 12 and 13.

90 Azrac WS, ¶ 15.

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

92 *Ibid.*

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

million owing to the Lundin Family and EUR 4.8 million owing to certain of the Lundins' associated entities represented by 1875 Finance.[94]

91. In consideration thereof, Mr. Obradović agreed to transfer to Sembi "*all of his right, title and interest in and to [the Privatization Agreement]*" as well as any other assets held by Mr. Obradović and related to the business of BD Agro.[95] Such assets included the Beneficially Owned Shares and Mr. Obradović's shareholder loans to BD Agro.

92. Sembi thus became the beneficial owner of all of BD Agro shares nominally held by Mr. Obradović.[96]

93. By October 2010, Sembi had repaid to the Lundins EUR 5.6 million out of the EUR 13.8 million commitment. Sembi made the payments to Ian Lundin, the Lundins' lawyers, FBT Avocats, and the Lundins' company, Tacll Asset Corp.[97] The funds for such payments were advanced to Sembi by Mr. Rand personally, from Mr. Rand's personal account and from the account of Indonesian Developments Co. Ltd., a British Columbia company wholly-owned by Mr. Rand.[98]

94. The Lundins then agreed to waive the outstanding balance of the debt as a token of appreciation of their long-standing successful business relationship and friendship with Mr. Rand.[99]

95. As late Adolf Lundin, the founder of the Lundin family's wealth, explained in his autobiography, the Lundins consider Mr. Rand, with whom they have been working

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94 Azrak WS, ¶ 13.

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

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

97 Confirmation of wire transfer from Sembi to I. Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-57**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-58**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-59**; W. Rand WS, ¶ 33; Azrac WS, ¶ 16.

98 Confirmation of EUR 3,610,000.00 wire transfer from W. Rand to Sembi executed on 3 August 2008, **CE-60**; Confirmation of EUR 2.001.000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-61**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-56**; Register of Directors of Indonesian Developments Co. Ltd., **CE-75**; W. Rand WS, ¶ 33.

99 W. Rand WS, ¶ 33; Azrac WS, ¶ 16.

since mid-1970s,[100] as "*one of [their] most trusted legal advisors*"[101] and their "*closest colleagues.*"[102] Mr. Adolf Lundin praised Mr. Rand for his negotiating skills that helped the Lundins to prevent or successfully address difficulties in "*all the negations [they] have been involved in.*"[103] The decades-long fruitful cooperation between the Lundins and Mr. Rand continues to this day, as Mr. Rand still serves on the board of directors of a number of companies owned by the Lundins.[104]

E. Privatization Agency's 2011 final control

96. The Privatization Agreement included a number of provisions restricting transactions with BD Agro's 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, without paying the full purchase price and making the required investments.

97. The Privatization Agency was required by law to conduct periodic controls of BD Agro to monitor compliance with such restrictions. The Privatization Agency also had a statutory obligation to report any deficiencies to the Ministry of Economy and to give the buyer a deadline to remedy the deficiencies.[105]

98. 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.[106] The report from the final control was delivered to Mr. Obradović on 1 March 2011.[107]

99. The report from the final control and the accompanying notice incorrectly claimed certain violations of the terms of the Privatization Agreement, including the restriction

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100 Robert Eriksson, Adolf Lundin: No Guts No Glory, AffarsInformation Ehrenblad Editions AB, 2003, p. 138, **CE-374**.

101 *Ibid.*

102 *Ibid*., p. 270.

103 *Ibid*., p. 138.

104 W. Rand WS, ¶ 8.

105 Milošević ER, ¶ 66.

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

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

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.[108]

100. 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.
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> 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].[109]

101. 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.[110]

102. 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.[111]

103. From its very nature, the slaughter of cows cannot be regarded as a sale, assignment or any other alienation of BD Agro's assets within the meaning of Article 5.3.3 of the Privatization Agreement because it did not involve transfer of ownership to a third

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108 *Ibid.*, pp. 21-30, **CE-30**.

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

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

111 *Ibid.*, p. 20, **CE-30**.

person[112] and the destruction of fixed assets does not fall within that category.[113] Therefore, the value of the slaughtered cows cannot be counted towards the limits on alienation set forth in Article 5.3.3 of the Privatization Agreement.

104. Furthermore, the slaughter cannot be considered as an act of disposition also because it was a mere enforcement of the Ministry of Agriculture's order,[114] rather than an act of the buyer's volition.[115]

105. Additionally, 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.[116] 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.[117] Consequently, it should have been clear to the Privatization Agency that Article 5.3.3 was not violated.

106. Finally, Article 5.3.3 could not be violated by the actions of BD Agro. This provision only imposes obligations on Mr. Obradović, as the buyer, and not on BD Agro, which was not even a party to the Privatization Agreement. Since the Ministry of Agriculture's order to perform the slaughter was received and carried out BD Agro, the value of slaughtered cows cannot be counted towards the total value of assets alienated by the buyer himself.

107. 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.[118] The Privatization Agency did not explain why it believed that, due to the partial use of the loan for the

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112 Milošević ER, ¶ 100.

113 *Ibid.*

114 *Ibid.*, ¶ 101.

115 *Ibid.*

116 W. Rand WS, ¶ 29.

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

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

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.*" [119]

108. 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.

109. Furthermore, similarly to the obligation of Article 5.3.3, Article 5.3.4 applied only to the actions of the buyer, not BD Agro. No encumbrances concluded by BD Agro itself could thus violate the Privatization Agreement.

110. Nonetheless, the Privatization Agency requested specific remedial actions to cure these purported breaches, including preparation of an audit report by an auditor acceptable to 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 required[120]–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

111. 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.[121] On their own terms, the restrictions under Articles 5.3.3 and 5.3.4 ceased to apply because they were agreed

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

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

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

to last only "*until payment of the entire sale and purchase price*" and "*during the term of the [Privatization] Agreement*," respectively.[122]

112. 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*.[123]

113. Furthermore, under Serbian law, a "*pledge is an accessory right which exists until the secured obligation is fulfilled*."[124] The pledge over BD Agro's shares was established to secure the buyer's obligation to pay the entire purchase price.[125] This is evident from Article 3.1.2 of the Privatization Agreement, which explains that the BD Agro shares were pledged until the purchase price was paid in full:

> 3.1.2 The Buyer and the Agency conclude the share pledge agreement (confirmation of the shares) based on which the Buyer submits the confirmation of the shares to the Agency, *which is kept by the Agency until payment of sale and purchase price.*[126]

114. This is in line with Article 2.1 of the Privatization Agreement, which provided that the buyer would acquire full right to dispose of shares proportionally to the paid purchase price:[127]

> 2.1 With conclusion of this agreement, which has the effect of the articles of incorporation of the subject, the buyer acquires the right of management, participation in profit and the right to a part of the liquidation mass, proportionately to the amount of purchased capital. *The right to free disposal of purchased capital is acquired by the buyer* pursuant to the provisions of Article 456 of the Company Law and provisions of the agreement, and *in proportion to paid value of sale and purchase price*.[128]

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

123 Privatization Agreement, Schedule 1: Share Pledge Agreement, Article 2 (emphasis added), **CE-17**.

124 Milošević ER, ¶ 125.

125 *Ibid.*, ¶ 126.

126 Article 3.1.2 of the Privatization Agreement (emphasis added), **CE-17**.

127 Milošević ER, ¶ 126.

128 Article 2.1 of the Privatization Agreement (emphasis added), **CE-17**.

115. Article 2.1 of the Privatization Agreement thus made clear that the buyer would be able to freely dispose of all of its shares after the purchase price was paid in full.

116. As a result, the effects of the pledge were supposed to cease upon the full payment of the purchase price, *i.e.* on 8 April 2011 at the latest, both because that was the agreed term for which the pledge was established and, due to the pledge being an accessory right, because that was the day when the secured payment was satisfied.[129]

117. The pledge over the Beneficially Owned Shares, however, did not cease to exist automatically.[130] Under Serbian law, a confirmation issued by the Privatization Agency was required in order for the pledge to be deleted.[131] Mr. Obradović unsuccessfully attempted to obtain such a confirmation from the Privatization Agency on multiple occasions.[132]

118. 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.[133]

119. 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

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129 Milošević ER, ¶¶ 128-129 and 132; the five-year term stipulated by the Article 2 of the Share Pledge Agreement lapsed even earlier on 4 October 2010.

130 Milošević ER, ¶ 130.

131 *Ibid*.

132 *See e.g.* Letter from Dj. Obradović to the Privatization Agency dated 10 January 2012, **CE-207**; and letter from Dj. Obradović to the Privatization Agency dated 13 February 2012, **CE-208**.

133 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**.

Privatization Agency to insist, more than eight months later, in December 2011, that these transactions be reversed.

120. 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.[134] 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

121. The Privatization Agency's insistence that BD Agro cure inexistent breaches of inapplicable obligations under the Privatization Agreement caused a deadlock.

122. 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.

123. 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 "*the stated disposal of [BD Agro's] property did not threaten the continuity of [BD Agro's] business activities.*"[135]

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134 Letter from Dj. Obradović to the Ministry of Economy dated 2 April 2012, **CE-77**.

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

124. 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.*"[136]

125. 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*"[137]—even though the invoked provisions of the Privatization Agreement no longer applied.

126. 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. Changes in BD Agro's management

127. 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%[138] and the overall milk production dropped by 9%.[139] This forced BD Agro to take additional bank loans and sell certain of its properties to finance its further modernization and development.

128. 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:

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136 *Ibid.*

137 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**.

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

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

Mr. Igor Markićević, an experienced Serbian investment manager, and Mr. David Wood, a UK national with extensive experience with large herd management.[140]

129. 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.[141]

130. The new management quickly improved BD Agro's operations. For example, by January 2014, the milk production per cow increased by more than 70 per cent and the quality of milk also improved. This was a significant achievement recognized among BD Agro's competitors and customers.[142]

I. 2013 Legal Opinion by the Privatization Agency's outside counsel that there was no legal basis to terminate Privatization Agreement

131. 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.

132. 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.[143] 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 Serbian courts. The 2013 Legal Opinion unequivocally concluded that such termination would, for a number of reasons, be unlawful.

133. *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*

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140 Markićević Second WS, ¶¶ 6-7, 21; Broshko Second WS, ¶¶ 6-12.

141 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, **CE-72**; Igor Markićević Witness Statement dated 5 February 2018, ¶ 15.

142 *See* Markićević Second WS, ¶¶ 22 - 24.

143 The 2013 Legal Opinion, **CE-34**.

contractual and legal control authorities of the Privatization Agency ended."[144] 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.[145]

134. 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.*[146]

135. *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 been fully executed.[147] 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;

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144 *Ibid.*, p. 4.

145 *Ibid.*, p. 4 .

146 *Ibid.*(emphasis added), p. 4.

147 *Ibid.*, p. 2.

> 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.[148]

136. 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.[149] Such calculation was obviously legally impossible because the forced slaughter "*was the consequence of objective circumstances which appeared to the buyer as force majeure*".[150]

137. 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.*"[151]

138. 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 (even though he was not obliged to) acted in line with the Privatization Agency's warning*

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148 *Ibid.*, p. 2.

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

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

151 *Ibid.*, p. 5.

letters even after the full payment of the purchase price, that is, after the end of control-related authorities of the [Privatization] Agency."[152]

139. *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]according 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*."[153]

140. 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]*."[154]

141. 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]*"[155], 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.[156]

J. Privatization Agency's arbitrary refusal to allow for transfer of nominal ownership of Beneficially Owned Shares

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

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152 *Ibid*., p. 5.

153 *Ibid*., p. 3 (emphasis in the original).

154 *Ibid.*, p. 6 (emphasis in the original).

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

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

143. Despite the achievements of BD Agro's new management, the company still needed additional capital to improve its liquidity, repay certain of its bank loans and decrease its 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.

144. It appeared that such transfer could be obtained through an assignment of the Privatization Agreement with the approval of the Privatization Agency. The Privatization Agency confirmed to Mr. Markićević at a meeting held on 11 June 2013 that such option was feasible.[157] Mr. Markićević's impression from the meeting was that the Privatization Agency's approval would be a mere technicality.[158]

145. As such, in August 2013, Mr. Rand directed Mr. Obradović[159] 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 company solely owned by Mr. Robert Jennings as the Trustee on behalf of the Ahola Family Trust.[160]

146. 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.[161]

147. The Privatization Agency, however, refused to grant the approval. Messrs. Markićević and Broshko describe in their witness statements the numerous meetings that they held with the Privatization Agency and the Ministry of Economy over the following two years. Despite numerous promises to address the request, the Privatization Agency and the Ministry of Economy were simply unwilling to act.[162]

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157 Markićević Second WS, ¶¶ 27-29.

158 Markićević Second WS, ¶ 32.

159 W. Rand WS, ¶ 45; Obradović WS, ¶ 27.

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

161 *Ibid,* Article 8.

162 Markićević Second WS, ¶¶ 57-86 and 93-122; Broshko Second WS, ¶¶ 29-61.

K. Attempts to find strategic partners for BD Agro

148. Besides improvements in BD Agro's operations, Messrs. Rand, Markićević and Broshko focused also on finding potential strategic partners, who could help to further improve and expand BD Agro's business.[163]

149. One of such potential strategic partners was La Bovarina, an Italian company involved in production and processing of milk, as well as production of pasta and olive oil.[164] BD Agro and La Bovarina eventually agreed to cooperate through a milk-processing joint venture that was to be established by both companies in Serbia. However, La Bovarina ultimately refused to sign any agreement because it was very concerned that the Privatization Agency was unlawfully refusing to release the pledge even though the pledge had expired.[165] The project thus did not materialize, which was another serious blow to BD Agro's business caused by Serbia's unlawful conduct.

L. Plan to reorganize BD Agro's debt

150. The new management thus proposed that the company adopt a so-called pre-pack reorganization plan.[166] The pre-pack reorganization plan represents a form of reorganization under Serbian bankruptcy law, under which a debtor proposes a set of measures that aim to improve the financial situation of a company, while the company continues to conduct its business. These measures typically include a partial write-off of debtor's obligations, a sale of property or a capital increase by owners of a debtor. The pre-pack reorganization plan needs to be approved by a majority of creditors, voting in classes depending on the nature of their receivables, and then by a bankruptcy court.

151. Mr. Markićević—together with Mr. Broshko and Mr. Rand—therefore endeavored to identify key creditors whose approval would be needed for the pre-pack reorganization plan, and approached them to see whether they would be open to the idea of BD Agro reorganizing its operations. As it turned out, the majority of the approached creditors

163 Markićević Second WS, ¶¶ 33-45; Broshko Second WS, ¶¶ 22-27.

164 Markićević Second WS, ¶ 37.

165 Markićević Second WS, ¶ 42; Broshko Second WS, ¶¶ 25-26.

166 Markićević Second WS, ¶¶ 46 *et seq.*; Broshko Second WS, ¶ 28.

strongly supported the reorganization of BD Agro over potential bankruptcy proceedings.[167]

152. The biggest creditor of BD Agro at that time was Nova Agrobanka, a bank in bankruptcy 100% controlled by the Serbian State and managed by the Deposit Insurance Agency. Nova Agrobanka's receivables were secured by pledges over BD Agro's land and buildings.[168]

153. Mr. Markićević was in continuous contact with Nova Agrobanka's representatives and exchanged with them several drafts of the pre-pack reorganization plan. Nova Agrobanka reviewed these drafts and provided comments and edits based on their internal regulations.[169]

154. From the very beginning, both Nova Agrobanka and the Deposit Insurance Agency made it clear that they supported the reorganization. However, they also believed that the pre-pack reorganization plan would only succeed if the issues with transfer of the Beneficially Owned Shares were resolved and Mr. Rand provided additional financing to BD Agro.[170] The state-controlled Nova Agrobanka thus required essentially the same thing that Mr. Rand had been seeking to implement, but which the Privatization Agency was unlawfully preventing.

155. BD Agro's second biggest creditor was Banca Intesa. Its receivables were also secured by pledges over BD Agro's property.[171] Mr. Markićević met with the head of Risk Management Division of Banka Intesa, Ms. Jelić, immediately after he was appointed as the General Manager of BD Agro in March 2013 and continued to meet with her and her associates over the following months.[172] During these meetings, Banca Intesa also

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167 Markićević Second WS, ¶¶ 46-56, 87-92.

168 Amendment to the Pre-pack Reorganization Plan of BD Agro, 6 March 2015, p. 33, Exhibits 15.1-15.3, **CE-101**. *See also* Markićević Second WS, ¶ 47.

169 Markićević Second WS, ¶ 48.

170 Markićević Second WS, ¶ 49.

171 Markićević Second WS, ¶ 50.

172 Markićević Second WS, ¶ 51.

expressed its support for the pre-pack reorganization plan. BD Agro therefore also coordinated the preparation of the pre-pack reorganization plan with Banca Intesa.[173]

156. While Banca Intesa supported the pre-pack reorganization plan at first, it changed its mind shortly before the plan was submitted to the court. The bank suddenly started to make requests that BD Agro simply could not fulfill and later voted against the plan.[174]

157. BD Agro's unsecured creditors were comprised mainly of milk processing companies, such as Imlek—the biggest producer of dairy products in region—Mlekara Šabac and Somboled,[175] and BD Agro's suppliers, such as Almex, Galenika Fitofarmacija and Mivaka. All these creditors were "*very supportive*" of the idea to reorganize BD Agro through the pre-pack reorganization plan.[176]

M. Ministry of Economy's initiation of supervision procedure over Privatization Agency and Privatization Agency's unwillingness to make any decisions until its conclusion

158. On 23 December 2013, the Ministry of Economy initiated a "*procedure for supervision of the work of the Privatization Agency*" with respect to privatization of BD Agro.[177] According to the Ministry, the reason for the initiation of the supervision procedure were twofold: (*i*) as of the day of the full payment of the purchase price, Mr. Obradović allegedly failed to comply with Article 5.3.4. of the Privatization Agreement; and (*ii*) there were alleged problems suggesting "*the difficult situation*" in BD Agro. The Ministry of Economy, however, failed to specify any concrete example of these alleged problems.[178]

159. The Ministry's decision to initiate supervision procedure was also in a stark contrast with the instructions it gave to the Privatization Agency in May 2012. As explained above, in the letter to the Privatization Agency dated 30 May 2012, the Ministry stated

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173 Markićević Second WS, ¶ 52.

174 Court hearing minutes dated 25 June 2015, p. 5, **CE-39**. *See also* Markićević Second WS, ¶¶ 140 and 164.

175 Amendment to the Pre-pack Reorganization Plan of BD Agro, 6 March 2015, p. 40, **CE-101**; M. Škrbić, *Largest dairy producers will continue to raise their price until year end*, Blic, 15 December 2011, **CE-299**. *See also* Markićević Second WS, ¶ 53.

176 Markićević Second WS, ¶¶ 53-54.

177 Decision of the Ministry of Economy, 23 December 2013, **CE-206**.

178 *Ibid*, pp. 1-2.

in no uncertain terms that there were no reasons for termination of the Privatization Agreement. The Ministry had also expressly referred to the fact that Mr. Obradović "*paid the entire amount of the sale and purchase price*" and praised him for achieving "*the highest possible level of organization of this type of primary agriculture production with the application of the latest methods in the field of primary production.*"[179]

160. Although the initiation of the supervision procedure came as a surprise, Mr. Rand and BD Agro believed that it would not hinder the completion of the privatization process and the deletion of the pledge—mainly because of the previous favorable approach of the Ministry. Unfortunately, this was not the case. The Ministry's interference soon proved to be a major obstacle because the Privatization Agency simply refused to make any decisions while the supervision procedure was underway.[180] BD Agro's future, which depended on the assignment of the Privatization Agreement and further investment from Mr. Rand, was therefore entirely in hands of the Ministry of Economy.

161. The Ministry of Economy's supervision was moving very slowly, if at all. When Mr. Rand's representatives attempted to speed up the process, they were met with only empty promises.

162. For example, on 1 July 2014, Mr. Markićević met with Mr. Stevanović (the then State Secretary to the Minister of Economy), Ms. Galić (the then Advisor to the Minister of Economy) and some of the Privatization Agency's representatives. When Mr. Markićević explained the problems associated with receiving the approval of the assignment of the Privatization Agreement, Mr. Stevanović apologized and promised to make sure that the Ministry of Economy and Privatization Agency would try to resolve this issue in the shortest time possible.[181] On 3 July 2014, Ms. Galić sent an e-mail to Mr. Markićević confirming that the Ministry of Economy will act in accordance with the agreement reached during the meeting.[182] Despite these assurances, no action followed.

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179 Letter from the Ministry of Economy to the Privatization Agency, 30 may 2012, **CE-33**.

180 Markićević Second WS, ¶¶ 69, 83,147.

181 Markićević Second WS, ¶ 72.

182 Markićević Second WS, ¶ 74.

163. On 3 November 2014, Messrs. Broshko and Markićević had another meeting with Mr. Stevanović and Ms. Galić, during which Mr. Stevanović promised that the supervision procedure will "*be completed soon.*" On 9 November 2014, Ms. Galić confirmed that the Ministry was allegedly "*working on a daily basis to find a proper solution for BD Agro issue.*"[183] However, no action followed.

164. Another round of meetings were held in December 2014. Again, the Serbian authorities promised prompt action. On 19 December 2014, Ms. Galić sent an e-mail to Mr. Broshko commending him for his effort "*to find the solution that is in compliance with Serbian legislative, and for the benefit of all parties involved, but mostly, as I am sure we all agree, for the benefit of the company itself and its employees.*" Ms. Galić also added that "*[o]ur common goal is to make BD Agro a success story, and I hope you don't have any doubts on that.*" [184] Again, their promises did not materialize.

165. On 11 February 2015, Mr. Markićević organized a meeting with Mr. Redžović, the new Chairman of the Privatization Agency, with the aim to expedite the approval of the assignment agreement. When Mr. Markićević explained the problems faced by BD Agro, Mr. Redžović noted that the Privatization Agency's previous approach was putting into jeopardy the very survival of BD Agro and was therefore unacceptable. Mr. Redžović thus promised to do everything in his power to find a solution to this problem.[185]

166. On 19 February 2015, Messrs. Broshko and Markićević had another meeting with Mr. Redžović, during which he reiterated the criticism of the Privatization Agency's previous conduct and reaffirmed his willingness to help in any way possible.[186]

167. Once again, these promises went unfulfilled. After the two initial meetings, Mr. Redžović did not even reply to Mr. Markićević's follow up e-mails.[187]

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183 E-mail from N. Galić to E. Broshko, 9 November 2014, **CE-070**.

184 E-mail from N. Galić to E. Broshko, 19 December 2014, **CE-036**.

185 Markićević Second WS, ¶ 110

186 Markićević Second WS, ¶ 112; Broshko Second WS, ¶ 49.

187 Markićević Second WS, ¶ 188.

N. The pre-pack reorganization plan

168. BD Agro could not wait until the Ministry of Economy concluded its endless supervision of the Privatization Agency's handling of the BD Agro privatization. On 25 November 2014, BD Agro submitted the pre-pack reorganization plan to the Commercial Court in Belgrade.[188] The plan envisaged a repayment of the debt over 10 years, with a grace period of 2 years, allowing BD Agro to start an investment cycle and increase the size of the herd to the farm's full capacity.

169. 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.[189]

170. On 6 March 2015, BD Agro submitted an amended pre-pack reorganization plan. The amended plan was prepared "*taking into account some of the remarks submitted to the court by the creditors … and … new facts and data obtained by [BD Agro] … after the submission of the initial version of the Plan.*"[190]

171. One of the main amendments was a new valuation of BD Agro's real estate. BD Agro owned almost 900 hectares of land, with the "*total estimated value of approximately EUR 93,4 million.*"[191] The original pre-pack reorganization plan submitted on 25 November 2014 relied on a valuation that undervalued a part of this land—approximately 290 hectares of construction land owned by BD Agro in Dobanovci[192]—because it incorrectly categorized it as agriculture land.

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

189 Markićević Second WS, ¶¶ 49, 120.

190 BD Agro's submission to Commercial Court accompanying the Pre-pack Reorganization Plan of 6 March 2015, p. 1, **CE-116**.

191 Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, p. 16, **CE-101**.

192 Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, p. 16, **CE-101**; BD Agro's submission to Commercial Court accompanying the Pre-pack Reorganization Plan of 6 March 2015, pp. 1-2, **CE-116**.

172. The amended reorganization plan explained that according to the General Regulation Plan of the Surcin municipality, this land was supposed to be used as an "*industrial and commercial zone*"—making it far more valuable than ordinary agriculture land:

> It should be noted that through the General Regulation Plan for the complex of BD Agro, zones "A", "B" and "C" city municipality Surcin of December 31, 2008 (The Official Gazette of the City of Belgrade, no. 59 of December 31, 2008), about 290ha of land owned by the Company has been envisaged to be an industrial and commercial zone, which is why the estimated value of the land in Dobanovci is much higher than the estimated value of other agricultural land, as shown in Table 15.4 in this Plan.[193]

173. The amended reorganization plan also explained that the reorganization would be more beneficial for BD Agro's creditors than potential bankruptcy proceedings because the costs of the bankruptcy proceedings would be substantially higher than the costs of restructuring,[194] Under a bankruptcy scenario, BD Agro's property could legally be sold for only 50% of its estimated value, causing a drop in the value of the company's assets from approximately EUR 120 million to EUR 60 million,[195] and resulting in the creditors receiving significantly less and within an uncertain deadline.[196]

174. Given the delays associated with the assignment of the Privatization Agreement caused by the Ministry of Economy and the Privatization Agency, Nova Agrobanka and certain other creditors agreed to withdraw their condition that the ownership issues be resolved and approve the updated reorganization plan even without the assignment of the Privatization Agreement.[197]

175. On 25 June 2015, the Commercial Court in Belgrade held a hearing where the required majority of creditors, including Nova Agrobanka, voted in favor of the pre-pack

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193 Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, p. 16, **CE-101**.

194 Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, pp. 22, 78-79, **CE-101**.

195 Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, pp. 22, 78, **CE-101**.

196 Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, p. 79, **CE-101**.

197 Markićević Second WS, ¶ 161.

reorganization plan.[198] The minority of creditors, including the Serbian Tax Authority and Banca Intesa, voted against the plan and appealed its approval.[199]

O. Ministry of Economy's unlawful instructions to Privatization Agency

176. On 7 April 2015, the Ministry of Economy had finally completed the supervision procedure, which lasted almost 16 months.[200] In its report, the Ministry instructed the Privatization Agency to send a notice to Mr. Obradović granting him additional 90 day to deliver "*evidence on actions in accordance with the provisions of the [Privatization Agreement], that is in accordance with the Notice on additionally granted term of November 9, 2012.*"[201]

177. According to the Ministry of Economy, Mr. Obradović should have demonstrated his fulfillment of this condition as of 8 April 2011, *i.e.* as of the moment when the full purchase price was paid.[202] As shown below, this instruction was wrong and had no basis under Serbian law.[203]

178. Finally, the Ministry also noted that if Mr. Obradović fails "*to deliver evidence on fulfillment of the obligations within additionally granted term, the Privatization Agency shall undertake the measures within its legal authorizations.*"[204]

179. On 27 April 2015, Messrs. Broshko and Markićević had another meeting with the Privatization Agency. The representatives of the Privatization Agency explained that they followed the Ministry of Economy's instructions and rendered a decision granting additional time to Mr. Obradović to show that he had complied with the Privatization Agreement. Messrs. Broshko and Markićević understood from the meeting that Mr.

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198 Court hearing minutes dated 25 June 2015, **CE-39**. *See also* Markićević Second WS, ¶ 163.

199 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**. *See also* Markićević Second WS, ¶ 164.

200 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 1, **CE-98**.

201 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-98**.

202 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-98**.

203 *See* Milošević ER, ¶¶ 87-91.

204 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-98**.

Obradović should provide an auditor's report confirming that he had fulfilled his obligations under the Privatization Agreement and an updated request for assignment.[205]

180. The Privatization Agency sent its written decision on the same day, requesting that Mr. Obradović provide evidence that he had fulfilled obligations under Articles 5.3.3 and 5.3.4 of the Privatization Agreement "*not later than [on] April 8 2011*", as well as obligations under Article 5.2.1 of the Privatization Agreement. The letter also made a number of other demands, such as that "*the subject of fulfillment of the buyer's total investment obligation is not subject of pledge-mortgage*." The Privatization Agency made no reference to any provisions of the Privatization Agreement justifying such demands.

181. On 30 April 2015, Mr. Obradović responded and sent all the required documents to the Privatization Agency.

182. On 7 May 2015, Mr. Rand signed a letter of intent on behalf of Rand Investments, in which he confirmed its willingness to invest further funds into BD Agro, provided that: (*i*) the pre-packed reorganization plan is adopted; and (*ii*) the Privatization Agency completes the privatization process.

P. Ombudsman's unlawful intervention and "*recommendation*" to terminate Privatization Agreement

183. 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.

184. 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.

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205 Markićević Second WS, ¶ 149; Broshko Second WS, 58.

185. 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.

186. Under Serbian law, the Ombudsman is primarily entrusted with the protection of the rights of citizens, i.e. physical and legal persons, both domestic and foreign.[206] Solely within this scope, the Ombudsman controls the work of state administrative bodies, bodies responsible for legal protection of property rights and interests of the Republic of Serbia, as well as, bodies which have been conferred public authority.[207] 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.[208]

187. 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.[209] The Ombudsman would typically opine on issues 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.[210]

188. 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

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206 Milošević ER, ¶ 119.

207 *Ibid.*, ¶ 120.

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

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

210 Milošević ER, ¶¶ 121-124.

and the Ministry of Economy's alleged failure to properly address the purported violations of the Privatization Agreement identified in 2011.[211] The Ombudsman started an investigation even though he clearly lacked any authority to do so.

189. 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.[212] 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.

190. The Ombudsman started his unlawful investigation by requesting the Privatization Agency to explain why it had not terminated the Privatization Agreement.[213] 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.

191. 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:

a. the Ministry of Economy had opined that there was no economic justification for termination of the Privatization Agreement;[214]

b. the Privatization Agency had doubts whether the Privatization Agreement was still in force, given the "*expiration of terms for fulfillment of Buyer's obligations at the moment of full payment of the purchase price, **as stipulated by the Agreement***;"[215]

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

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

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

214 *Ibid.*, p. 1.

215 *Ibid.*, p. 3.

c. 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*;"[216] and

d. 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*."[217]

192. 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 the purported breaches of the Privatization Agreement.

193. 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 term 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*."[218]

194. 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 omissions 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

216 *Ibid.*, p. 3.

217 *Ibid.*, p. 3.

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

> 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* […].[219]

195. 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.[220]

196. The Ombudsman's public calls for termination of the Privatization Agreement were shockingly unlawful for several reasons.

197. *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.

198. *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.

199. *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

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

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

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.

200. *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:

a. 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*;[221]

b. the Ministry of Economy's opinion that Article 5.3.4 no longer applied after 8 April 2011; and[222]

c. 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*).[223]

201. 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.

202. The impact that the Ombudsman's intervention had on the Privatization Agency is best illustrated by the fact that on the day when the Ombudsman made his findings publicly available, *i.e.* on 23 June 2015, the Privatization Agency wrote to Mr. Obradović requesting additional evidence of his compliance with the Privatization Agreement. While the Privatization Agency accepted some of the documents previously submitted

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

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

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

by Mr. Obradović, it again requested evidence—in the form of an auditor report—confirming that:

a. Mr. Obradović performed his obligations under Article 5.3.3 of the Privatization Agreement "*concluding with April 8, 2011*";

b. Mr. Obradović performed his obligations under Article 5.3.4 of the Privatization Agreement "*concluding with April 8, 2011*";

c. "*all burdens were deleted and all security instruments for the obligations of third persons were returned, burdens registered without basis were deleted, as well as that all the loans given by [BD Agro] to third persons from the loan assets secured by the burden on the property of [BD Agro]*";

d. "*all capital assets sold until April 8, 2011 were paid for and the proceeds were used for the needs of the [BD Agro]*";

e. Mr. Obradović complied with Article 5.2.1 of the Privatization Agreement;

f. "*the subject of performance of the total investment obligation is not the subject of pledge —mortgage*."

203. The Privatization Agency again did not bother to explain why and how the facts under (c), (d) and (f) were relevant to Mr. Obradović compliance with the Privatization Agreement.

Q. Privatization Agency's unjustified about-face

204. 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.

205. 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.[224]

206. 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]*."[225]

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

208. 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.[226] 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

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

225 The 2013 Legal Opinion, p. 6 (emphasis in the original), **CE-34**.

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

Agro in satisfaction of Article 5.2.1 of the Privatization Agreement; and (*ii*) subsequently released the bank guarantees securing such investment obligation.[227]

209. 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.[228] 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.

210. 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 and the underlying evidence, but, instead, may only rely on the information provided in the auditor reports.[229]

211. 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.[230]

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

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

229 Markićević WS, ¶ 28.

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

R. Serbian Government's continuing false promises

212. On 8 September 2015, the Canadian Embassy initiated a meeting attended by Mr. Philip Pinnington, the Canadian Ambassador to Serbia, Ms. Djurdjevka Ćeramilac, 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.[231]

213. 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, which had been granted on 7 September 2018. 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.[232]

S. Ombudsman's insistence that the Privatization Agreement be terminated

214. 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.

215. 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]*."[233] The Ombudsman then ordered the Ministry of Economy and the

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231 W. Rand WS, ¶ 51; Markićević WS, ¶ 29.

232 Letter from Dj. Obradović to Privatization Agency dated 8 September 2015, **CE-48**.

233 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**.

Privatization Agency to account for whether they complied with his earlier "*recommendation*" and submit a new report on their actions.[234]

T. Meeting of the Privatization Agency deciding to terminate the agreement

216. 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 for Control**") was convened to decide on the termination of the Privatization Agreement.

217. This Commission for Control was established directly by the Serbian Minister of Economy.[235] It comprised two employees of the Privatization Agency, one representative of the Ministry of Economy, one representative of the Ministry of Finance and one representative of the Ministry of Labor.[236] On 28 September 2015, when deciding on the termination of the Privatization Agreement, only three of those members were present at the meeting: Saša Novaković from the Ministry of Finance, Zoran Tadić from the Ministry of Economy and Slavica Tanasijević from the Privatization Agency.[237]

218. The Commission for Control 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.*"[238]

219. For reasons unknown, the Commission for Control reached the opposite conclusion regarding the restrictions on pledging BD Agro's property under Article 5.3.4.[239] 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

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234 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**.

235 Milošević ER, ¶ 47.

236 *Ibid.*

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

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

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

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 for Control.

220. Worse yet, the Commission for Control 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 attention of the Commission for Control, but the Commission for Control ignored them.[240]

221. The Commission for Control admitted that "*the Agreement does not stipulate the possibility for its termination due to violation of Article 5.3.4 of the Agreement.*"[241] However, without further elaboration and undisturbed by the principle of *pacta sunt servanda*, the Commission for Control 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.*"[242]

222. The Commission for Control thus concluded that the Privatization Agreement was to be declared terminated for the alleged breach of Article 5.3.4. The Commission for Control 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.

223. In this context, and given the glaring omissions and inconsistencies in the reasoning of the Commission for Control, it is undeniable that the Commission for Control resolved to terminate the Privatization Agreement without any valid reason and only because of the very public pressure and influence of the Ombudsman.

224. 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

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

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

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

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.*"[243]

225. Mr. Janković took the advice. In December 2016, he announced his candidacy for the President of the Republic of Serbia.[244] 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.[245]

U. Unlawful declaration of termination of Privatization Agreement

226. On 28 September 2015, the Privatization Agency issued a decision to declare the Privatization Agreement terminated *ex lege* due to the alleged non-remedied violation of Article 5.3.4 of the Privatization Agreement. In the Notice on Termination of the Privatization Agreement, dated 28 September 2015 (the "**Notice on Termination**"), the Privatization Agency stated that the buyer "*failed to provide evidence in the additionally granted term that he had complied with the obligation referred to in item 5.3.4 of the Agreement […]*".[246]

227. For a number of reasons, the Privatization Agency's termination was clearly illegal and contrary to the plain language of the Privatization Agreement.

228. *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.

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243 News Article "*Human rights situation "unsatisfactory" – ombudsman*" published on 15 April 2015, **CE-99**.

244 News Article "*Ombudsman Jankovic announces presidential bid*" published on 26 December 2016, **CE-100**.

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

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

229. Article 7.1 of the Privatization Agreement and Article 41a of the Law on Privatization allow for a declaration of termination only if the buyer does not remedy a breach within an additional deadline for compliance or fulfillment:

> Article 41a
>
> The agreement on sale of the capital or property shall be deemed terminated due to non-fulfillment, if the buyer, even within an additionally granted term for fulfillment [...].[247]

230. Even assuming, *arguendo*, that the pledges on a very small part of BD Agro's land constituted a violation of Article 5.3.4 in 2011, it is undisputed that the same situation did not constitute a violation of Article 5.3.4 in 2015 because the limitations under Article 5.3.4 no longer applied. The encumbrances identified by the Privatization Agency could be lawfully established or maintained after 8 April 2011.[248] A situation that does not constitute a violation of the Privatization Agreement obviously does not need to be remedied. The Privatization Agreement cannot be declared terminated for the failure to adopt an unnecessary remedy or, in other words, for the continuation of a situation that no longer violates the Privatization Agreement.

231. *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.[249] The impossibility to terminate the Privatization Agreement after the full payment of purchase price stems from the fact that, by the payment of the purchase price and expiry of all other obligations, the agreement has been consummated by its fulfillment.[250]

232. This was 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

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

248 Milošević ER, ¶ 77.

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

250 Milošević ER, ¶¶ 73-78.

> 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.[251]

233. The Privatization Agreement was thus consummated on 8 April 2011 after which the Privatization Agency could no longer exercise control over the fulfillment of obligations from the Privatization Agreement or declare the Privatization Agreement terminated.[252]

234. The termination of the Privatization Agreement after the full payment of the purchase price was also contrary to the purpose of Article 5.3.4 of the Privatization Agreement. The primary purpose of Article 5.3.4 was to prevent buyers from reselling or encumbering company's assets without subsequent payment of the purchase price. After the buyer has paid the purchase price, the purpose of the Privatization Agreement has been achieved and there was no legal interest to be protected by the restrictions under Article 5.3.4.[253]

235. *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 the removal of the allegedly non-compliant pledge were met and the pledge was ultimately deleted from the Land Register on 7 September 2015.

236. *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.[254]

237. Article 7.1 contains a detailed and exhaustive list of possible grounds for termination of the Privatization Agreement and intentionally omits violation of Article 5.3.4 from those grounds:

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251 Excerpt from the Judgment of the Commercial Appellate Court Pz. 11202/2010 of 21 September 2011, **CE-49**; Milošević ER, ¶ 74.

252 Milošević ER, ¶ 75.

253 Milošević ER, ¶ 76.

254 Milošević ER, ¶¶ 79-86.

> 7. TERMINATION OF THE AGREEMENT
>
> 7.1 The Agreement shall be considered terminated *ex lege* due to non-compliance if, even after additionally granted term for compliance, the Buyer:
>
> 7.1.1 fails to pay the sale and purchase price in the amount, in a way and within the deadline defined by paragraphs 1.3, 1.4 and 3.1 and item 3.1.1 of the Agreement;
>
> 7.1.2 fails to deliver the Agency the guarantee for investment, pursuant to paragraph 3.3 of the Agreement;
>
> 7.1.3 fails to invest in the subject in a way and within the deadline stipulated by item 5.2.1 of the Agreement;
>
> 7.1.4 disposes of the property of the subject contrary to item 5.3.3 of the Agreement;
>
> 7.1.5 fails to secure continuity of business activities of the subject pursuant to item 5.3.2 of the Agreement;
>
> 7.1.6 fails to comply with the provisions of Annex 1 of the Agreement, that is solves the issues of the employees contrary to the provisions of Annex 1 of the Agreement;
>
> 7.1.7 does not vote based on his shares in favor of the decisions at the session of the assembly, pursuant to paragraph 3.2 of the Agreement;
>
> 7.1.8 fails to sign pledge agreement with the Agency in accordance with item 3.1.2 of the Agreement.[255]

238. It is thus clear that, pursuant to its Article 7, the Privatization Agreement could not be declared terminated for violation of Article 5.3.4.[256]

239. Being aware of the fact that violation of Article 5.3.4 is not among the grounds for termination of the Privatization Agreement, the Privatization Agency invoked Article 41a(1)(3) of the 2001 Law on Privatization as the only ground for termination.[257] The Privatization Agreement, however, could not be terminated on that basis either.[258]

240. Article 41a(1)(3) of the 2001 Law on Privatization, as amended in 2014, stated:

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

256 Milošević ER, ¶¶ 79-86.

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

258 Milošević ER, ¶ 83.

> The agreement on sale of the capital or property shall be deemed terminated due to non-fulfillment, if the buyer, even within an additionally granted term for fulfillment:
>
> […]
>
> 3) disposes of the property of the subject of privatization contrary to provisions of the agreement […].[259]

241. The very general grounds for termination under Article 41a(1)(3) of the Law on Privatization could not be invoked directly, but only to the extent further specified in the Privatization Agreement. This is because Article 41a(1)(3) is "*a generic provision which may have a concrete meaning only in connection with the specific provisions of a particular privatization agreement. Therefore, it must be interpreted and applied in accordance with such contractual provisions.*"[260] The provisions of the Privatization Agreement that further specify Article 41a(1)(3) are Articles 5 and 7 of the Privatization Agreement.[261] This means that the only disposal of property that could have justified the termination was the alleged violation of Article 5.3.3.[262]

242. Accordingly, the Privatization Agreement could not be declared terminated due to violation of its Article 5.3.4, because this provision was not listed among the grounds for termination of the Privatization Agreement.

243. *Fifth*, as explained above, Article 5.3.4 of the Privatization Agreement could not be violated as it imposed an obligation solely upon the buyer, not the subject of privatization. Therefore, since none of the encumbrances were established by Mr. Obradović, as the buyer, but by BD Agro instead, the obligations contained in Article 5.3.4 could not have been violated by this conduct.

244. *Sixth*, the Privatization Agency's vague reference to alleged violations of other provisions of the Privatization Agreement misrepresented the reasoning of the Commission for Control and was, in any event, unjustified. The Privatization Agency stated:

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

260 Milošević ER, ¶ 83.

261 *Ibid.*, ¶ 84.

262 *Ibid.*, ¶ 85.

> 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 encumbering of fixed assets which are the subject of performance of the investment obligation of the Buyer and investment in the value of sold fixed assets which are the subject of performance of investment obligation of the Buyer (202,245 EUR).[263]

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

246. The Privatization Agency failed to cite the provisions of the Privatization Agreement that were allegedly violated, 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.[264]

247. The accusation of non-compliance with the investment duties stated in Article 5.2.1 contradicts 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 made 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.[265]

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

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

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

248. Mr. Obradović's fulfillment of his investment duties was also confirmed in BD Agro's audit reports.[266] 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 justification.

249. The Privatization Agency's allegations with respect to the Buyer's purported breach of Article 5.3.3 are equally unfounded. Article 5.3.3 cited above prohibits the buyer to sell, assign or otherwise alienate any of the fixed assets of BD Agro above 30% of their total value.[267]

250. 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.[268] Without the forced slaughter, the figure would have been less than 25%.

251. Alienation inherently entails a transfer of ownership rights to a third person. Destruction of a property cannot thus be considered as alienation as there is no third person to whom the ownership rights are transferred.[269] Moreover, the slaughter also cannot be considered as an act of disposition as it was only an act of compliance with an order of the Ministry of Agriculture.[270] In such a case, the expression of free will, which is an essential element of a disposition, was missing.[271] Therefore, the cows' slaughter ordered by the Ministry of Agriculture in 2007 cannot be counted towards the value of alienated assets.[272]

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

267 Privatization Agreement, Article 5.3.3, **CE-17**.

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

269 Milošević ER, ¶ 100.

270 *Ibid.*, ¶ 101.

271 *Ibid.*, ¶ 101.

272 *Ibid.*, ¶ 98.

252. Additionally, just like the obligations of Article 5.3.4, provisions of Article 5.3.3 also applied solely to the buyer and not BD Agro as the subject of privatization. Slaughter of cows carried out by BD Agro itself thus cannot influence the fulfillment of Article 5.3.3 of the Privatization Agreement to which BD Agro was not even a party.

253. Furthermore, government-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.

254. *Seventh*, the declaration of termination of the Privatization Agreement for alleged violation of Article 5.3.4 after the full payment of purchase price was also completely disproportionate.

255. Assuming, *arguendo*, that there were grounds for terminating the Privatization Agreement, the principle of proportionality stemming from the Serbian constitution required the Privatization Agency, as a holder of public power, to consider whether the termination of the Privatization Agreement is a proportionate and necessary measure.[273] Unsurprisingly, the Privatization Agency made no such analysis.

256. Had the Privatization Agency engaged in the proportionality analysis, the only possible outcome would have been the impossibility of termination of the Privatization Agreement. The proportionality analysis requires balancing of a private right to a peaceful enjoyment of property, as one of the fundamental freedoms, against the public interest.[274] Here, however, there was no public interest pursued by the complete negation of the right to enjoyment of property, as the alleged encumbrances on the property could not possibly have any negative effect on public interest.[275]

257. The termination also lacked any legitimate purpose. Article 5.3.4 of the Privatization Agreement served as a security for the full payment of the purchase price. Therefore, after its full payment on 8 April 2011, there was simply no legitimate purpose in enforcing obligations introduced in the Privatization Agreement to secure such a

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273 *Ibid.*, ¶ 92-94.

274 *Ibid.*, ¶ 95.

275 *Ibid.*

payment and especially not after more than four years had lapsed since that payment had been made in full.[276]

258. The Ministry of Economy recognized this lack of proportionality and legitimate purpose when it admitted in 2012 that there was no justification for termination the Privatization Agreement taking into consideration, *inter alia*, that the buyer already paid the full purchase price and the stated encumbrances did not threatened the continuity of BD Agro's business.[277] It was no different in 2015.

259. However, even if there had been a public interest to be protected, it would still be disproportionate to dispossess the buyer of his entire property, investments in that property and the full purchase price which had been paid.[278] Had the Privatization Agency considered that there was a public interest at stake, it was obliged to take the least restrictive means to protect it.[279] In the present case, such an approach would be to make a claim for damages, rather than expropriation without any compensation.[280]

260. For all of the above reasons, the Privatization Agency's decision to declare the Privatization Agreement terminated *ex lege* was unlawful.

V. Direct expropriation of Beneficially Owned Shares

261. After its unlawful declaration of 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 (the "**Decision on Transfer of Capital**").[281] The Decision on Transfer of Capital transferred not only the Privatized Shares, but also the New Shares.[282]

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276 *Ibid*., ¶ 96.

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

278 Milošević ER, ¶ 95.

279 *Ibid*., ¶ 97.

280 *Ibid*.

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

282 Milošević ER, ¶ 102.

262. The Decision on Transfer of Capital was sent to the Central Securities Depository and Clearing House, a joint stock company wholly-owned by the Republic of Serbia,[283] which registered the Privatization Agency as the new owner of the Beneficially Owned Shares on 21 October 2015. In 2016, upon the dissolution of the Privatization Agency, the Beneficially Owned Shares were transferred to the Register of Stocks and Shares maintained by the Ministry of Economy.[284]

263. Under Serbian law, the Central Securities Depository was obliged to transfer the Beneficially Owned Shares to the Privatization Agency upon its receipt of the Decision on Transfer.[285] The registration in the Central Securities Depository effectuated the transfer of ownership title from Mr. Obradović to the Privatization Agency.[286]

264. No action was required from Mr. Obradović or BD Agro for this transfer to take place.[287] In fact, the Decision on Transfer of Capital was not even sent to Mr. Obradović as the buyer. As confirmed by Mr. Markićević, none of BD Agro's employees assisted in causing the change in registration.[288]

265. 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. Moreover, under Serbian law, upon the termination of the Privatization Agreement the buyer was deemed as a dishonest party.[289] This irrebuttable presumption of dishonestly prevents the buyer from claiming the return of the purchase price paid to the Privatization Agency.[290]

266. The Privatization Agency's statutory power to unilaterally seize the Beneficially Owned Shares and the statutory irrebuttable presumption of dishonesty both very significantly

283 *Ibid*., ¶ 56.

284 *Ibid*., ¶ 103.

285 *Ibid*.

286 *Ibid*., ¶ 104.

287 *Ibid*.

288 Markićević Second WS, ¶ 190.

289 Milošević ER, ¶ 105.

290 *Ibid*.

depart from a termination of any private law contractual relationship.[291] As explained by the Claimants' Serbian law expert, they meet all the characteristics of an administrative act under Serbian law.[292]

W. Revocation of the reorganization plan

267. On 30 September 2015, the Commercial Court of Appeal revoked for procedural reasons the pre-pack reorganization plan and remanded the case to the first instance court to repeat the proceeding.[293]

268. On 22 October 2015, BD Agro received a notice from the first instance court ordering BD Agro to amend the reorganization plan in accordance with the decision of the Appellate Court. The deadline set by the court was 15 days.[294]

269. At that time, the Privatization Agency had already terminated the Privatization Agreement. As explained by Mr. Markićević, the Law on Privatization obliged BD Agro's management to request from the Privatization Agency its approval of any action with respect to a bankruptcy procedure, including the procedure for the approval of the reorganization plan.[295]

270. On 26 October 2015, Mr. Markićević therefore sent a letter to the Privatization Agency attaching the court's notice and requested their instructions. The Agency never responded.[296] Mr. Markićević could not act without the Privatization Agency's approval.

271. The 15 days deadline expired, and the first instance court rejected the reorganization plan on 8 December 2015.[297]

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291 *Ibid*., ¶¶ 106-110.

292 *Ibid*., ¶ 115.

293 Markićević Second WS, ¶ 188.

294 Markićević Second WS, ¶ 191.

295 Law on Privatization, Official Gazette of the Republic of Serbia no, 83/2014 and 46/2015, Art. 47, **CE-223**. *See also* Markićević Second WS, ¶ 195.

296 Markićević Second WS, ¶ 196.

297 Markićević Second WS, ¶ 197.

X. Bankruptcy of BD Agro

272. The Privatization Agency's unlawful termination of the Privatization Agreement and the 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.[298] Less than a year later, on 30 August 2016, BD Agro was declared bankrupt.[299]

273. 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.

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298 Markićević WS, ¶ 31.

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

IV. JURISDICTION

274. 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

275. 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.*"[300]

276. The term "*national*" means "*for Canada, a natural person who is a citizen or permanent resident of Canada*".[301] 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.*"[302]

277. 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.

278. 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.

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300 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**.

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

302 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.

279. Under Article 1(3)(b) 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.*"[303]

280. Sembi qualifies as investor, because it is a legal entity incorporated in accordance with Cyprus law[304] having its seat in Cyprus.[305]

281. The requirement of "*seat*" under Article 1(3)(b) of the Serbia-Cyprus BIT has recently been applied by the tribunals in *CEAC v. Montenegro*[306] and *Mera v. Serbia*.[307]

282. In the earlier case *CEAC v. Montenegro,* the respondent demonstrated with evidence that CEAC's office was registered at a vacant house, apparently only equipped with an "*old couch (with some pillows and a walking stick lying on it), [and] a folded rug.*"[308] The premises were inaccessible to the public, showed no sign of activity or indication of being used for business purposes.[309] CEAC did not adduce evidence to the contrary.

283. The majority of the *CEAC* tribunal considered that although "*in the vast majority of cases, a company's registered office will be at the address indicated in the certificate of registered office,*"[310] the extreme circumstances of that case compelled them not to consider a certificate of registered office as dispositive proof of the existence of

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303 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**.

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

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

306 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, **CLA-21**. Montenegro acceded to the Cyprus-Serbia BIT after the dissolution of is Serbia and Montenegro in 2006.

307 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, **CLA-22**.

308 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 186, ¶ 188, **CLA-21**.

309 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 135, ¶ 190, **CLA-21**.

310 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 166, (see also ¶ 152), **CLA-21**.

company's registered office.[311] Because CEAC was unable to produce evidence of any activity ever taking place at the address of its alleged registered office, the majority of the tribunal, without determining the precise meaning of the term "*seat*" under Article 1(3)(b) of the Serbia-Cyprus BIT, concluded that it lacked jurisdiction *ratione personae* because the claimant failed to show that it had its seat in Cyprus.[312]

284. The majority decision was subject to the dissenting opinion of Professor William Park, who explained that the test for "*seat*" applicable under the 1(3)(b) of the Serbia-Cyprus BIT is whether the investor has its office registered in the host State:

> 18. International law as it currently stands provides no uniformly accepted "ordinary meaning" of corporate seat. The term "seat" remains essentially a municipal law concept derived from Continental systems, whereas Claimant's incorporation occurred in a common law country lacking such notions as such.
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> 19. Apart from tax residency, the Parties advanced three tests of "seat" for consideration. One looks to a relatively deep level of economic penetration implicating management and control in Cyprus. The second imposes multiple criteria in determining registered office, and presupposes that an office ceases to be registered in the event of defective compliance with corporate formalities. *The final test rests on a registered office in the plain meaning of that terms: an office that is registered.*
>
> […]
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> 22. The third test, looking to the plain meaning of registered office, best matches the meaning of "seat" in Cyprus as used in this particular Treaty. Although international law does not currently permit a uniform definition of seat for treaty purposes, the last test commends itself in the configuration of this dispute. Under that standard, Claimant appears to possess a seat, precluding dismissal of the arbitration on this ground alone.[313]

285. In the subsequent ICSID case *Mera v. Serbia*, the tribunal agreed with Professor Park's dissenting opinion and considered Mera's certificate of registered office to be conclusive evidence of its seat in Cyprus:

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311 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 152, **CLA-21**.

312 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶¶ 148, 200-202, **CLA-21.**

313 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, ¶ 19, ¶ 22 (emphasis added), **CLA-23**.

> Professor William W. Park in CEAC, also understood the term "seat" as set out in Article 1(3)(b) of the BIT to mean a "registered office" and thereby established that "the plain meaning of registered office, best matches the meaning of 'seat' in Cyprus as used in this particular Treaty.
>
> […]
>
> The Arbitral Tribunal finds the statements made by the Claimant's witness, Mr. Georgios Iacovou, to be relevant. The former Minister of Foreign Affairs, and signatory of the BIT for Cyprus, stated that "[i]n this sense, 'seat' means the seat of the legal person, the registered office, the physical location of a company where it can be visited, where service can be made." The Arbitral Tribunal therefore accepts that the meaning of the term "seat" must be understood to have been a reference to an actual location, place or address. Thus, in the Arbitral Tribunal's view the equivalent of this condition under Cypriot law is the registered office of an entity.
>
> […]
>
> The Arbitral Tribunal finds the Claimant's certificates issued by the relevant authorities in Cyprus confirming its registered office located at Arch. Makariou III 66, Kronos Court, 1st floor, Office 12, 1770 Nicosia, Cyprus, to be conclusive evidence for the existence of its registered office.[314]

286. The interpretation of the term "*seat*" advanced by Professor Park and adopted by the *Mera* tribunal is the correct reading of Article 1(3)(b) of the Serbia-Cyprus BIT. It is consistent with the text of the Serbia-Cyprus BIT and the intentions of the Contracting Parties, reflects the Cyprus corporate law and produces foreseeable results.

287. Sembi has its "*seat*" in Cyprus because it has a registered office there, as conclusively evidenced by the Certificate of Registered Office issued by the Cyprus Registry of Companies.[315]

288. The Claimants' Cyprus law expert, Mr. Agis Georgiades, confirms that under Cyprus law, it is "*obvious that the term 'seat' is used interchangeably with, and has the same meaning as, 'registered office'.*"[316] As Mr. Georgiades explains, the foregoing

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314 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, ¶ 93 (emphasis added), **CLA-22**.

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

316 Agis Georgiades Expert Report dated 16 January 2019, ¶ 2.3.

conclusion does not only follow from the Cyprus Companies Law, but also from ample case law of Cyprus' courts confirming the same.[317]

289. Mr. Georgiades further concludes that under Cyprus law, the only requirement for a registered office is that "*the place designated as such must exist*."[318] A registered office may be maintained at any place, "*irrespective of the existence or type of physical premises at that place, or the nature and extent of the company's rights to use the place*."[319] Additionally, a registered office "*does not have to be a head office or a place of business of the company*."[320]

290. One of the most important functions of a registered office is to receive correspondence sent to the company.[321] A company is further required to maintain its books and registries at the place of its registered office. However, as Mr. Georgiades explains, such obligations are "*not pre-conditions for a place to be designated as a registered office*."[322] While a failure to meet such duties may, under certain circumstances, be sanctioned with a fine, it "*does not invalidate the designation of a particular place as the registered office of the company*."[323]

291. Moreover, the highly unusual factual circumstances that prompted the *CEAC* majority to extend its inquiry beyond the examination of the certificate of the registered office are simply not present here.

292. Sembi's registered office is located at a modern office building that is fully accessible to the public. Sembi is fully amenable to service by both regular mail and courier at its registered office.

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317 Georgiades ER, ¶ 2.1-2.5. *See e.g. Albatros* [1994] 4B A.A.D. 756, **CE-121**; *Bank of Cyprus* [1999] 1B A.A.Δ. 1010, **CE-122**; *Karakannas v. Republic* [2002] 3 A.A.D. 456, **CE-123**; *Sartas v. Maroulli* [2003] 1C A.A.D. 1446, **CE-124**; *Lapertas v. Zarvou* [2004] 1B A.A.D. 1261, **CE-125**; *Omas (Cyprus) v. Republic*, Judicial Review Application No.906/03, Judgment of 09/09/05, **CE-126**; *Thoma v. Eliadi* [2006] 1B A.A.D. 1263, **CE-127**; and *Investylia v. Tampouri* [2006] 1B A.A.D. 1325, **CE-128.**

318 Georgiades ER, ¶ 2.5.

319 Georgiades ER, ¶ 2.5.

320 Georgiades ER, ¶ 2.6.

321 Georgiades ER, ¶ 2.8.

322 Georgiades ER, ¶ 2.9.

323 Georgiades ER, ¶ 2.9.

293. Mr. Georgiades paid on 11 January 2019 an unannounced visit to the place of Sembi's registered office. Upon arriving to the office building–which is accessible to the public and has Sembi's name visibly affixed near the entrance–Mr. Georgiades was able to inspect Sembi's company books and registers which are duly kept there.[324]

294. As Mr. Georgiades concludes, under Cyprus law, "*Sembi has had, since its incorporation, and continues to have until today, a 'seat' in Cyprus*". [325]

295. For the reasons explained above, the same conclusion applies under public international law. Because Sembi has its seat on Cyprus, it qualifies as "*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

296. 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*."[326]

297. The term "investment," also laid down in Article 1 of the Canada-Serbia BIT, includes, among others:

a. shares, stock or other form of equity participation in an enterprise;

b. loan to an enterprise;

c. interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

d. interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory; and

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324 Georgiades ER, ¶ 2.14-2.16.

325 Georgiades ER, ¶ 2.20.

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

e. 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.[327]

298. 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.[328]

299. The investment operation of the Canadian Claimants consisted of the following assets:

a. the Beneficially Owned Shares (comprised of the Privatized Shares and the New Shares);

b. the Canadian Claimants' indirect interest in Sembi's rights under the agreement between Sembi and Mr. Obradović;

c. the 3.9% shareholding in BD Agro held by Mr. Rand indirectly through MDH Serbia; and

d. 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.

300. These assets squarely meet the definition of "*investment*" as set forth by Article 1 of the Canada-Serbia BIT.

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

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

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

302. 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 above.

303. 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.[329] 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*.[330]

304. 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'

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329 *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**.

330 *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**.

invitation to participate in the public auction for the Privatized Shares in 2005, he informed them that he would do so through Mr. Obradović—and the Serbian officials did not express any reservations.[331]

305. 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.[332]

306. 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.[333] 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.[334] The Ministry of Economy also expressly requested proof that Coropi was *"a company within Rand Investment."*[335]

307. 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 on behalf of 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.

308. Moreover, the entirety of the investment was *controlled* by Mr. Rand. The Canada-Serbia BIT expressly applies also to investments directly or indirectly controlled by

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331 Obradović WS, ¶ 11; W. Rand WS, ¶ 20.

332 Erinn Broshko Witness Statement dated 5 February 2018, ¶¶ 26-29; Markićević WS, ¶¶ 22-27.

333 Broshko WS, ¶ 26; Markićević WS, ¶ 24.

334 Broshko WS, ¶ 28; Markićević WS, ¶¶ 25-26.

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

Canadian nationals. Mr. Rand's control over the Beneficially Owned Shares thus satisfies the jurisdictional requirements of the Canada-Serbia BIT independently of his and his children's beneficial ownership thereof.

309. 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.*"[336] 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.[337]

310. 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 Mr. Rand's directions.[338] 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.[339]

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

337 *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**.

338 Obradović WS, ¶¶ 7, 17-18, 22-30; W. Rand WS, ¶ 17.

339 Obradović WS, ¶¶ 16, 24-26; W. Rand WS, ¶¶ 39 and 43.

311. 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.[340] The Serbian officials repeatedly acknowledged Mr. Obradović's purely formal status and Mr. Rand's actual full control over BD Agro at their meetings with Messrs. Rand, Broshko and Markićević in 2013 to 2015.[341]

312. 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.

313. Pursuant to Article 9 of the Serbia-Cyprus BIT, this 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 other things, shares and "*claims to money or to any performance under contract having economic value.*"[342]

314. Sembi invested in Serbia on 22 February 2008 when it agreed with Mr. Obradović, a Serbian national and permanent resident, to pay or assume his EUR 9 million loan to the Lundin family, EUR 4,800,000 in other debts associated with the acquisition and operation of BD Agro and approximately EUR 2,055,000 then still owing to the Privatization Agency. Mr. Obradović agreed to transfer to Sembi "*all his right, title and interest in and to [the Privatization Agreement]*" as well as the Beneficially Owned Shares, his shareholder loans to BD Agro and any other assets held by Mr. Obradović and related to the business of BD Agro.[343]

315. Sembi's rights under that agreement are "*investments*" within the meaning of Article 1(1) of the Serbia-Cyprus BIT because they constitute "*claims to […] other*

340 W. Rand WS, ¶ 45.

341 W. Rand WS, ¶¶ 50-51; Broshko WS, ¶¶ 26-29; Markićević WS, ¶¶ 21, 24-27.

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

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

performance under contract having economic value." They have been invested in Serbia because Mr. Obradović is and was at that time a Serbian national and permanent resident and all of the Privatization Agreement, the Beneficially Owned Shares, the shareholder loans, as well as any other assets held by Mr. Obradović and related to BD Agro were located in Serbia.

316. Furthermore, in accordance with Cyprus law, which governs the agreement between Sembi and Mr. Obradović, Sembi became the beneficial (equitable) owner of the Beneficially Owned Shares, even though their nominal ownership remained with Mr. Obradović. That was also the intention of both Sembi and Mr. Obradović when entering into the agreement.[344]

317. The Serbia-Cyprus BIT also follows the general principle of public international law affording protection to beneficial owners as identified above. The Beneficially Owned Shares are "*shares*" and thus an "*investment*" within the meaning of Article 1(1) of the Cyprus-Serbia BIT. Accordingly, Sembi's beneficial ownership of the Beneficially Owned Shares enjoys protection under the Serbia-Cyprus BIT.

3. Jurisdiction *ratione temporis*

318. The Canada-Serbia BIT entered into force on 27 April 2015 and provides that it shall apply to all investments "*existing on the date of entry into force of this Agreement, as well as an investment made or acquired thereafter*."[345]

319. 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*."[346]

320. The Privatization Agency's unjustified decision to terminate the Privatization Agreement and seize the Beneficially Owned Shares took place after the entry into force

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344 Obradović WS, ¶¶ 18-19; W. Rand WS, ¶ 31.

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

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

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

321. In accordance with Article 24(1)(a) of the Canada-Serbia BIT[347] and Article 9(2) of the Serbia-Cyprus BIT[348], the Claimants have elected to resolve the present investment dispute in arbitration under the ICSID Convention.

322. 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.[349]

323. 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**.**

324. The present investment dispute meets all of these jurisdictional requirements.

1. *"Legal dispute"*

325. 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.

326. 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*

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

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

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

or interests between two persons."[350] A number of investment tribunals have subsequently upheld this definition.[351] *Legal disputes* have in turn been defined as "*controversies in which the Parties are in disagreement over a right*".[352]

327. 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"*

328. 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.

329. 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.[353]

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

a. the purchase price of approximately EUR 5,549,000EUR;[354]

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

351 *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**.

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

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

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

b. the additional investment of approximately EUR 2 million;[355]

c. the cost of approximately EUR 2.2 million for the replacement of BD Agro's herd financed in part directly by Mr. Rand[356] and other payments and loans for the benefit of BD Agro.[357]

331. 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.

332. 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.*"[358] 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.

3. *"Between a Contracting State and a national of another Contracting State"*

333. This investment dispute has arisen as between the Canadian Claimants, nationals of Canada, and Sembi, a national of Cyprus, on the one hand,[359] and Serbia, on the other hand. Because Serbia, Canada and Cyprus are all Contracting States to the ICSID

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

356 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**.

357 Overview of Payments to Mr. David Wood, **CE-62**; Overview of Payments to Mr. Gligor Calin, **CE-68**. W. Rand WS, ¶¶ 40, 44.

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

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

Convention,[360] 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"*

334. 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.

335. 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 […].[361]

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

337. *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 the Request for Arbitration, the Canadian Claimants consented to arbitration in accordance with the Canada-Serbia BIT.

338. *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.

339. *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 a notice shall specify:

a. the name and address of the investor;

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

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

b. the allegedly breached provision of the Canada-Serbia BIT;

c. the legal and the factual basis for the claim; and

d. the relief sought and the approximate amount of damages claimed.

340. 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*".

341. 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.

342. *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.*"[362] As shown above, Serbia breached the Canada-Serbia BIT in September and October 2015. The Request for Arbitration was filed on 12 February 2018. Accordingly, the requirements of Article 22(2)(e)(i) of the Canada-Serbia BIT are satisfied.

343. *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 Article 21.*"[363] The Canadian Claimants attached their waivers in accordance with Article 22(2)(e)(ii) of the Canada-Serbia BIT to the Request for Arbitration.[364]

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

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

364 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**.

344. As demonstrated above, the Canadian Claimants have satisfied all conditions precedent required under Article 22 of the Canada-Serbia BIT and may thus submit their claim to arbitration under the ICSID Convention arbitration as envisaged by Article 24(1)(a) of the Canada-Serbia BIT.

345. 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.[365]

346. 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. By filing the Request for Arbitration, Sembi has accepted Serbia's standing offer of ICSID jurisdiction and thus consented in writing to submit the dispute to ICSID arbitration.

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

V. ACTIONS OF THE MINISTRY OF ECONOMY, THE PRIVATIZATION AGENCY, AND THE OMBUDSMAN ARE ATTRIBUTABLE TO THE REPUBLIC OF SERBIA

A. The Ministry of Economy's actions are attributable to Serbia because it is a State organ

347. The Ministry of Economy is an executive (administrative) organ of the Republic of Serbia.[366] It is responsible, among other things, for privatization affairs[367] and supervision of the privatization process and implementation of privatization laws.[368]

348. Until 2001, the Ministry of Economy had been responsible for the whole privatization process.[369] In 2001, some of its powers relating to the privatization process were conferred to the then newly established Privatization Agency.[370] The Ministry of Economy closely cooperated with the Privatization Agency and supervised and directed its actions.[371] After the dissolution of the Privatization Agency in 2016, the bulk of the Privatization Agency's competences were transferred back to the Ministry of Economy.[372]

349. The actions of the Ministry of Economy are attributable to Serbia under Article 4 of the International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"), which provides that:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[373]

366 Miloševič ER, ¶ 33.

367 *Ibid.*, ¶ 34.

368 *Ibid.*, ¶¶ 35-38.

369 *Ibid.*, ¶ 35.

370 *Ibid.*, ¶ 35.

371 *Ibid.*, ¶ 36.

372 *Ibid.*, ¶¶ 35, 50, and 51.

373 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Article 4, **CLA-24**.

B. The Privatization Agency's actions are attributable to Serbia

a. The Privatization Agency and its tasks and powers in the privatization process

350. The Privatization Agency existed between 2001 and 2016. It was established by the Law on Privatization Agency[374] as a public agency holding public authority.[375] It operated in accordance the Law on the Privatization Agency[376], the Law on Privatization,[377] the regulations on public services[378] and other Serbian public law provisions.[379] As a holder of public authority, the Privatization Agency had the same rights and obligations as state administrative organs.[380]

351. The Law on Privatization Agency and the Law on Privatization, adopted also in 2001, conferred to the Privatization Agency a part of the Ministry of Economy's public administration tasks and the corresponding authorities relating to privatization.[381] These tasks focused on the privatization of state-owned and socially-owned equity (capital) and on the promotion, implementation and control over the privatization process.[382]

352. The Privatization Agency had a separate legal personality and budget,[383] but the funds for its establishment were provided from the budget of the Republic of Serbia.[384] The revenues from the privatization process were used in accordance with the Budget System Law and the Law on Privatization.[385]

353. The Privatization Agency described itself as an "*agent who, in the name and on behalf of the State, sells social and State capital.*"[386] The Privatization Agency was not the owner of the privatized property, but instead it entered into privatization agreements and

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374 1991 Public Service Act, as in 2001, Article 1, **CE-239**.

375 Miloševič ER, ¶ 40, ¶ 42.

376 2001 Law on the Privatization Agency, as in 2001, **CE-238**.

377 2001 Law on Privatization, **CE-220**.

378 1991 Public Service Act, as in 2001, **CE-239**.

379 Miloševič ER, ¶ 40.

380 *Ibid.*, ¶ 35, ¶ 42.

381 *Ibid.*, ¶ 35, ¶ 41.

382 *Ibid.*, ¶ 41.

383 *Ibid.*, ¶ 43.

384 *Ibid.*, ¶ 43.

385 *Ibid.*, ¶ 43.

386 *Ibid.*, ¶ 41.

performed other tasks in the course of the privatization process pursuant to its statutory empowerments under the Law on Privatization Agency and the Law on Privatization.[387]

354. The Privatization Agency's main bodies were the Director, the Managing Board, and the Supervisory Board.[388] The members of these bodies were appointed by the Government of Serbia.[389]

355. In 2014, two types of commissions were created within the Privatization Agency, both of which consisted of, *inter alia*, members of Serbian Government: first commissions in charge of issuing the Privatization Agency's consents; and second, commissions for control that supervised the performance of privatization agreements by their respective buyers and decided on the issuance of authoritative declarations that privatization agreements had terminated *ex lege*:[390]

> Commissions of the first type were in charge of issuing the Privatization Agency's consents under, among other things, the 2001 Law on Privatization, such as consent to the sale of the privatized company's property or consent to the assignment of a privatization agreement. These commissions were established by the Director of the Privatization Agency, and they had five members: one representative of the Ministry of Economy and four employees of the Privatization Agency. The President of the commission was appointed by the Director of the Privatization Agency.
>
> Commissions of the second type were entrusted with supervision over particular privatization agreements and were also entitled to decide on their termination. These commissions were established by the Minister of Economy. They also had five members: two employees of the Privatization Agency, one representative of the Ministry of Economy, one representative of the ministry responsible for finance (the "**Ministry of Finance**"), and one representative of the ministry responsible for labor, employment, veterans and social issues (the "**Ministry of Labor**").[391]

356. When a commission for control declared that a privatization agreement had terminated *ex lege*, the Privatization Agency issued a formal notice to the buyer. The Privatization

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387 Miloševič ER, ¶ 48.

388 Article 12(1) of the 2001 Law on Privatization Agency, **CE-238**. The Supervisory Board existed as one of the organs of the Privatization Agency until 2010 when it was dissolved in accordance with 2010 amendments to the 2001 Law on Privatization Agency.

389 Miloševič ER, ¶ 44.

390 *Ibid.*, ¶ 39, ¶¶ 47-48.

391 *Ibid.*, ¶¶ 46-47(emphasis in the original).

Agency then also issued a decision on transfer of capital (equity) in the privatized company to the Privatization Agency. In the case of joint stock companies, such as BD Agro, the decision on transfer of capital was the sole basis for the Central Securities Depository registering the Privatization Agency as the new owner of the terminated buyer's shareholding in the privatized company.[392]

357. Serbia's close control over the privatization process was confirmed upon the dissolution of the Privatization Agency on 1 February 2016 when its most important tasks were transferred back to the Ministry of Economy.[393]

b. The Privatization Agency was an organ of the Republic of Serbia within the meaning of Article 4 of the ILC Articles

358. The Privatization Agency was an organ of the State from the functional perspective even though it has a separate legal personality under Serbian law. This is because it was a public agency holding public authority, established by law and operating in accordance with the regulation of public services.

359. The Privatization Agency was an organ of the State also from a structural perspective because it operated under the direct control of the Ministry of Economy. The Serbian Government also directly appointed and recalled the members of the Privatization Agency's Managing Board, the Supervisory Board and its Director.[394]

360. The fact that the Privatization Agency was a State body—and thus an organ of the Serbian State—within the meaning of public international law was confirmed by the European Court of Human Rights ("**ECHR**"). In *Kačapor v. Serbia*, the ECHR determined that the Privatization Agency was an organ of Serbian State when it stated that:

> companies whose capital is predominantly socially-owned […], but which are not formally being privatised, cannot, without prior approval by the *Privatisation Agency (Agencija za privatizaciju), itself a State body*, adopt their own decisions concerning their: capital, reorganisation, restructuring and investment, the partial sale or mortgage of their assets, the settlement of their outstanding claims and

392 Miloševič ER, ¶¶102-104, ¶ 109.

393 *Ibid.*, ¶¶ 50-51.

394 Article 12(1) of the 2001 Law on Privatization Agency, **CE-238**.

> the taking or giving of loans and guarantees outside the scope of their "regular business operations" […].[395]

361. This conclusion is consistent with the findings of investment tribunals with respect to similar state bodies involved in the privatization process.

362. For example, in *Awdi v. Romania*, the tribunal determined that the Authority for Privatization and Management of State's Shares ("**AVAS**") was an organ of the Romanian State, because it concluded a Privatization Contract with the investor in pursuance of the State's privatization policy, rather than in a private capacity:

> In the Tribunal's view, AVAS' conduct is attributable to Respondent. The Privatization Contract was concluded in the frame of the State's privatization policy by a state organ, the "Authority for Privatization and Management of State's Shares" – AVAS. The pursuance by AVAS of the public interest in concluding and implementing the Privatization Contract is underlined by a certain number of contractual provisions. Even if the Purpose of the Contract under Article 2 is the sale by AVAS to Magnar of 100% of the shares in Rodipet, both parties undertook additional obligations which may only be explained by the underlying public interest. Among these obligations are the extinction by conversion into shares of liabilities due by Rodipet to the State for taxes, fees, contributions, and the like (as provided in one of the Suspension Conditions), the assumption by Magnar of technological and upgrading investments for five years for a total of EUR 3.750.000 (under Article 14) as well as the "Other commitments" listed in Article 17 and in the Appendices to the Privatization Contract, including the maintenance for a given period of the current number of employees (Appendix No. 4).
>
> When signing the Privatization Contract, AVAS acted therefore as a State organ for the pursuance of the State's interest in view of the implementation of the Romanian privatization plan, therefore not merely in a private law capacity. As such, AVAS' acts under the Contract are attributable to the State under international law based on Article 4 of ILC Articles.[396]

363. The foregoing considerations apply with full force here. The Privatization Agency concluded the Privatization Agreement in pursuance of Serbia's privatization policy to advance a public purpose of transformation of Serbia's economy, rather than in a private law capacity.

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395 *R. Kačapor and others v. Serbia*, Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ¶ 75, ECtHR 2008 (emphasis added), **CLA-25**.

396 *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶¶ 322-323, **CLA-26**.

364. Based on the above, the Privatization Agency was an organ of the Serbian State, and all of its actions are thus attributable to Serbia under Article 4 of the ILC Articles.

c. Alternatively, the Privatization Agency was an entity exercising elements of governmental authority within the meaning of Article 5 of ILC Articles

365. Even assuming, *arguendo*, that the Privatization Agency would not qualify as an organ of Serbian State—and it does—its conduct would still be attributable to Serbia under Article 5 of the ILC Articles. This provision reads as follows:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[397]

366. The authoritative commentary to the ILC Articles explains that whether a conduct qualifies as an exercise of governmental powers, depends on: (*i*) the content of the powers; (*ii*) the way they are conferred on an entity; (*iii*) the purposes for which they are to be exercised; and (i*v*) the extent to which the entity is accountable to the Government for their exercise.[398]

367. The Privatization Agency's conduct meets all of the foregoing elements of exercise of governmental powers.

368. *First*, in discharging the wide range of governmental authorities associated with the privatization process, the Privatization Agency acted as a holder of public authority having the same rights and obligations as State administration organs.[399] One of such authorities was to act as an "*agent*" of the Serbian State in administering the sale of socially and State-owned companies and assets.

369. Specifically with respect to the termination of privatization agreements, the Privatization Agency was authorized to issue authoritative decisions declaring privatization agreements terminated *ex lege* and decisions on the transfer of capital.

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397 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Article 5, **CLA-24**.

398 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Commentary to Article 5, ¶ 6, p. 43, **CLA-24**.

399 Article 51 of the 2005 Law on State Administration, **CE-238**.

Such prerogatives are unavailable to any commercial party and clearly demonstrate the governmental nature of the powers exercised by the Privatization Agency.[400]

370. The governmental nature of the Privatization Agency's functions is further confirmed by the fact that, upon its dissolution on 1 February 2016, its competences were transferred to the Ministry of Economy.[401]

371. *Second*, all of the foregoing governmental powers were conferred on the Privatization Agency by statutes, most importantly the Law on Privatization and the Law on Privatization Agency. This statutory foundation of the Privatization Agency's powers confirms their governmental character.

372. *Third*, the purpose of granting to the Privatization Agency its governmental powers was to effectively advance Serbia's sovereign objectives of achieving economic transformation through privatization of socially and State-owned enterprises[402] and attracting foreign investors to invest in Serbian economy.[403]

373. *Fourth*, as shown above, the Privatization Agency was fully accountable for the exercise of its powers to Serbian Government, because: (*i*) the members of Privatization Agency's main bodies were appointed and recalled by the Serbian Government; (*ii*) the Privatization Agency was acting under the direction and supervision of the Ministry of Economy; and (*iii*) it was ultimately controlled by the National Assembly of the Republic of Serbia to which the Ministry of Economy submitted its reports on the privatization process.

374. Accordingly, the Privatization Agency was acting in a governmental capacity when signing, performing and–most importantly–terminating the Privatization Agreement.

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400 Miloševič ER, ¶¶ 106-110.

401 *Ibid.*, ¶¶ 50-51.

402 Article 86 of the 2006 Constitution of the Republic Serbia, **CE-222**.

403 Miloševič ER, ¶¶ 28-32.

d. In any event, the actions of the Privatization Agency were directed and controlled by Serbia within the meaning of Article 8 of ILC Articles

375. Even if the conduct of the Privatization Agency would not be attributable to Serbia under Article 4 or 5 of the ILC Articles, it would nevertheless qualify as an act of Serbia under Article 8 of the ILC Article. This provision stipulates that:

> [T]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[404]

376. The Privatization Agency's conduct is attributable to Serbia under Article 8 of the ILC Articles for at least three independent reasons.

377. *First*, the Privatization Agency was acting under direct supervision of the Ministry of Economy and the members of its bodies were appointed and recalled by the Serbian Government.

378. *Second*, the decision to declare the Privatization Agreement terminated *ex lege* was made by a commission for control established by the Minister of Economy and comprised of a majority of the Ministry of Finance's and the Ministry of Labor's representatives. Specifically, the decision to declare the Privatization Agreement terminated *ex lege* was made by Saša Novaković from the Ministry of Finance, Zoran Tadić from the Ministry of Economy and Slavica Tanasijević from the Privatization Agency.[405]

379. *Third*, the purported reasoning of the decision to declare the Privatization Agreement terminated *ex lege* had been imposed on the Privatization Agency by the Ministry of Economy in its instruction dated 7 April 2015.

380. *Fourth*, as shown above, in terminating the Privatization Agreement, the Privatization Agency was acting also upon the instructions of the Ombudsman. The Ombudsman is an organ of the Serbian State, as shown below.

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404 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Article 8, **CLA-24**.

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

381. Accordingly, the impugned measures of the Privatization Agency, including, without limitation, its issuance of the Notice on Termination and the Decision on Transfer of Capital, are attributable to Serbia under Article 8 of the ILC Articles.

C. The Ombudsman's actions are attributable to Serbia because the Ombudsman is a State organ

382. Under Serbian law, the Ombudsman is an organ of the State.[406] He is independent and autonomous in performing his competences, but answers to the National Assembly of the Republic of Serbia, by which he is also elected.[407]

383. The Ombudsman's primary task to protect the rights of the citizens, which are broadly defined as both domestic and foreign physical persons and legal entities.[408] Within this scope, the Ombudsman controls the work of state administrative bodies, bodies responsible for legal protection of property rights and interests of the Republic of Serbia, as well as other bodies and organizations, enterprises and institutions entrusted with public authority.[409]

384. The Ombudsman is not an entity active in the privatization process nor does he have any role related to the privatization process. The Ombudsman exceeded his powers when he issued his "*recommendations*". This was mainly because the Ministry of Economy and the Privatization Agency did not have the task of protecting the rights of BD Agro's employees; instead, their task was to supervise the fulfillment of the buyer's obligations arising from the Privatization Agreement.[410] Since the Ombudsman did not have jurisdiction to opine on the fulfillment of obligations under the Privatization Agreement, he exceeded his competences when he issued his "*recommendations*".[411]

385. Because the Ombudsman is an organ of Serbian State, his actions are attributable to Serbia under Article 4 of the ILC Articles.

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406 Miloševič ER, ¶ 119.

407 *Ibid.*, ¶ 119.

408 *Ibid.*, ¶ 120.

409 *Ibid.*, ¶ 120.

410 Miloševič ER, ¶ 121.

411 *Ibid.*, ¶¶ 122-124.

VI. SERBIA VIOLATED ITS OBLIGATIONS UNDER THE TREATIES

386. As shown *seriatim* below, Serbia violated the Treaties by: (*i*) unlawfully expropriating Claimants' investment; (*ii*) subjecting Claimants' investment to unreasonable and arbitrary treatment; and (*iii*) violating the fair and equitable treatment standard. Additionally, (*iv*) Serbia breached the Serbia-Cyprus BIT by violating the umbrella clause.

A. Serbia unlawfully expropriated the Claimants' investments

387. The Claimants demonstrate below that Serbia *directly* expropriated the Beneficially Owned Shares and also *indirectly* expropriated Sembi's rights under its agreement with Mr. Obradović dated 22 February 2015 and the 3.9% shareholding in BD Agro held by Mr. Rand indirectly through MDH Serbia. Both the direct and the indirect expropriations were unlawful.

388. The Canada-Serbia BIT and the Serbia-Cyprus BIT both protect covered investors from unlawful expropriation of their investment.

389. Article 10 of the Canada-Serbia BIT provides as follows:

> 1. 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.
>
> […]
>
> 4. The affected investor shall have a right under the law of the expropriating Party to prompt review of its case and of the valuation of its investment by a judicial or other independent authority of that Party in accordance with the principles set out in this Article.[412]

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

> 1. 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

412 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 10(1), Article 10(4), **CLA-1**.

> 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.
>
> […]
>
> 2. The investor affected shall, under the laws and regulations of the Contracting Party making the expropriation, have the right to prompt review of its case and valuation of its investment by a judicial or other independent authority of that Contracting Party, in accordance with the principles set out in this Article.[413]

391. Investment tribunals unanimously recognize that expropriation encompasses both:

a. direct expropriation, where the host state takes legal title of the investment/expropriated asset or right; and

b. 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.[414]

392. An UNCTAD study defines direct expropriation as the:

> mandatory legal transfer of the title to the property or its outright physical seizure. Normally, the expropriation benefits the State itself or a State-mandated third party.[415]

393. In *Caratube v. Kazakhstan*, the tribunal similarly defined direct expropriation as a "*transfer of the title to the property or its outright physical seizure, usually to the benefit of the state itself or a state-mandated third party*." [416]

394. Indirect expropriation achieves the same result without formal taking of legal title. In *Starret Housing*, the Iran-United States Claims Tribunals held that:

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

414 *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**.

415 UNCTAD Series on Issues in International Investment Agreements II: Expropriation, United Nations, 2012, p.6, **CLA-27**.

416 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 822, **CLA-28**.

> [I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[417]

395. Numerous investment arbitration cases confirmed that expropriation may occur not only with respect to property, but also when the host state interferes with the investor's contractual rights.

396. 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.[418]

397. 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 investment treaty.

398. In *Eureko v. Poland*, the investor concluded a Share Purchase Agreement ("**SPA**") with the Polish Treasury for the transfer of a minority shareholding in Poland's leading insurance company, PZU.[419] The First Addendum to the SPA contemplated that Poland would complete the privatization of PZU in an initial public offering ("**IPO**").[420] The IPO, however, never materialized and Eureko was thus unable to acquire a majority stake in PZU. [421]

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417 *Starret Housing Corp. v. Iran*, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983), cited in: *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007, ¶ 261, **CLA-29**.

418 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶ 18-36, **CLA-9**.

419 *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 41, **CLA-30**.

420 *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 53, **CLA-30**.

421 *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 73, **CLA-30**.

399. The tribunal concluded that although Eureko's existing shareholding in PZU remained intact, Poland's violation of its contractual duty to offer the remaining shares in an IPO constituted an expropriation of Eureko's contractual rights under the First Addendum to the SPA:

> The Tribunal has found in an earlier section of the present Award that Eureko, under the terms of the First Addendum, acquired rights in respect of the holding of the IPO and that these rights are "assets". Since the [Republic of Poland] deprived Claimant of those assets by conduct which the Tribunal has found to be inadmissible, it must follow that Eureko has a claim against the [Republic of Poland] under Article 5 of the Treaty.
>
> There is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the type of provision contained in Article 5 of the Treaty.[422]

400. Accordingly, the State's repudiation of the investor's contractual rights–where they qualify as an investment under the respective BIT–engages the State's liability for expropriation under international law.

401. This conclusion was recently endorsed in *Ampal v. Egypt*. There, the dispute arose out of a termination of a Gas Sale Purchase Agreement ("**GSPA**") by the State-owned Egyptian General Petroleum Company ("**EGPC**"), due to alleged failures of the claimants-owned East Mediterranean Gas Company ("**EMG**") to pay outstanding invoices for the supplied gas.[423]

402. The *Ampal* tribunal upheld the investors' claim that the termination of the GSPA amounted to an unlawful expropriation, based on the following findings:

a. EMG's rights under the GSPA, as "*rights conferred by contract*", constitute a covered investment within the meaning of the applicable US-Egypt BIT;[424]

b. the "*termination of the GSPA destroyed the Claimants' investment activity*." The tribunal made this finding despite the fact that the termination of the GSPA did

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422 *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶¶ 240-241, **CLA-30**.

423 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, **CLA-31**.

424 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 339, **CLA-31**.

not involve any interference with claimants' shareholding in EMG and despite the fact that EMG had the right to recover damages under the GSPA;[425]

c. the termination of the GSPA was wrongful. EMG indeed failed to pay invoices due for January, February and April 2011. However, because the GSPA only allowed for a termination in case of non-payment of invoices for four consecutive months – and EMG did not owe any money to EGPC for March 2011–the termination was not made in accordance with the GSPA;[426] and

d. the termination of the GSPA failed to satisfy any condition for lawful expropriation set forth in the US-Egypt BIT.[427]

403. Additionally, the *Ampal* tribunal found that the termination of the GSPA was *disproportionate*, because the USD 37 million allegedly owed by EMG was a relatively small amount when compared to the potential economic benefit of the GSPA for Egypt and the claimants.

404. All of the foregoing elements of expropriation identified by the *Ampal* tribunal are also present here.

405. *First*, the Beneficially Owned Shares, Sembi's rights under the agreement with Mr. Obradović dated 22 February 2008 and Mr. Rand's 3.9% shareholding in BD Agro held through MDH Serbia all constitute covered investments under the applicable Treaties.

406. *Second*, it is obvious that the Privatization Agency's declaration of termination of the Privatization Agreement and its decision on the transfer of the Beneficially Owned Shares to the Privatization Agency "*destroyed the Claimants' investment activity*." This conclusion applies even stronger here. Unlike in *Ampal*, where the termination of the contract did not involve any interference with EMG's rights *in rem*, or the investors'

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425 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 345, **CLA-31**.

426 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 329, ¶ 333, **CLA-31**.

427 Article 3(1) of the US-Egypt BIT provides that an expropriation is unlawful, unless it is "*done for a public purpose; (b) is accomplished under due process of law;(c) Is not discriminatory; (d) Is accompanied by prompt and adequate compensation, freely realizable; and (e) Does not violate any specific contractual engagement.*" *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 341, **CLA-31**.

shareholding in EMG, Serbia not only deprived the Claimants' of their economic *enjoyment* of the Beneficially Owned Shares, but ultimately outright seized them, thus putting an end to the Claimants' beneficial ownership thereof.

407. Sembi's contractual rights to obtain transfer of the Beneficially Owned Shares from Mr. Obradović became worthless because Mr. Obradović is no longer the nominal owner of the Beneficially Owned Shares and cannot effectuate their transfer. Sembi's contractual right to obtain assignment of the Privatization Agreement from Mr. Obradović also became worthless because the Privatization Agreement has been unlawfully declared terminated *ex lege*.

408. Mr. Rand's indirect 3.9% shareholding in BD Agro, held through MDH Serbia, is worthless because the expropriation of the Beneficially Owned Shares and the Privatization Agency's subsequent failure to allow BD Agro to comply with the court order and pursue the Amended pre-pack reorganization plan thwarted the adoption of that plan and ultimately forced BD Agro into bankruptcy. Due to the inefficiency of the bankruptcy process in Serbia, there is no hope that Mr. Rand will ever obtain any proceeds from BD Agro's bankruptcy.

409. *Third*, the Privatization Agency's declaration of *ex lege* termination of the Privatization Agreement, and therefore also the Decision on Transfer of Capital issued on its basis, were wrongful under Serbian law. As explained in detail above, this is because:

a. the Privatization Agreement could not be declared terminated after Mr. Obradović's payment of the purchase price on 8 April 2011,

b. Article 5.3.4 of the Privatization Agreement only imposed obligations on the buyer, not on the subject of privatization. Since none of the encumbrances were established by Mr. Obradović, as the buyer, but by BD Agro instead, the obligations contained in Article 5.3.4 could not have been violated by this conduct;

c. the Privatization Agency failed to provide Mr. Obradović with an opportunity to remedy his alleged breach of Article 5.3.4 of the Privatization Agreement.

Under Article 41a of the Law on Privatization,[428] the termination does not arise due to non-fulfillment of the obligations listed in Article 41a(1), but only due to their non-fulfillment within "*an additionally granted term for fulfilment.*"[429] Instead of granting Mr. Obradović an additional term for fulfilment, *i.e.* remedy of the alleged violation of Article 5.3.4 of the Privatization Agreement, the Privatization Agency only requested him to demonstrate his compliance with the same in the period before 8 April 2011. In fact, Mr. Obradović remedied the purported breach of Article 5.3.4 when all the requirements for the removal of the allegedly non-compliant pledge were met and the pledge was ultimately deleted from the Land Register on 7 September 2015[430];

d. even if the alleged breach of Article 5.3.4 went unremedied (*quod non*), it would not constitute a cause for termination of the Privatization Agreement. This is because the violation of Article 5.3.4 is not included in the exhaustive list of grounds for termination contained in Article 7.1 of the Privatization Agreement;[431] and

e. even if the Commission for Control's decision to declare the Privatization Agreement terminated was also based on reasons other than the alleged violation of Article 5.3.3, such as the alleged violation of Article 5.2.1 and 5.3.3–as the Privatization Agency falsely insinuates in its Notice on Termination without any support[432]–it would still fail to justify the termination. *First*, The Privatization Agency itself expressly confirmed in October 2006 that Mr. Obradović complied with his investment obligations under Article 5.2.1 of the Privatization Agreement.[433] *Second*, Mr. Obradović equally did not violate the 30% limit on disposition of BD Agro's fixed assets set forth in Article 5.3.3 of the Privatization Agreement. As the Privatization Agency itself acknowledged in the 2011 control report, BD Agro only exceeded the 30% limit due to the forced

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

429 Miloševič ER, ¶ 89.

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

431 Miloševič ER, ¶¶ 79-86.

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

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

slaughter of cows, as ordered by the Ministry of Agriculture.[434] The forced slaughter was not an act of disposition with BD Agro's fixed assets, but only an act of compliance with the order of the Ministry of Agriculture and was thus not a violation of Article 5.3.3.[435] Moreover, it was a clear example of *force majeure* for which Mr. Obradović cannot be held responsible.

410. Furthermore, even assuming, arguendo, that the Privatization Agency had had the right to declare the Privatization Agreement terminated *ex lege*—and it did not—the exercise of such right in the present circumstances was disproportionate, and thus expropriatory. As stated by the *Ampal* tribunal, "*[i]t is well settled that the 'irreparable cessation' of an investment activity caused by the disproportionate act of a State is tantamount to an expropriation.*"[436]

411. *Finally*, the expropriation was unlawful. Under the Treaties, an expropriation is only lawful if it is made:

a. in a public interest;

b. in accordance with due process of law; and

c. against a prompt and adequate compensation.

412. As is explained below, Serbia, however, failed to satisfy any of the above conditions for lawful expropriation.

413. *First*, the expropriation was not taken in the public interest. In *Vestey v. Venezuela*, the tribunal explained that the public purpose element requires not only that the State identify a public policy goal, but also demonstrate that the expropriatory measure was indeed adopted to pursue such a goal. This inquiry should involve the examination of whether the State's post-expropriation conduct is consistent with the declared purpose:

> *The Tribunal must thus first assess whether there existed a public purpose.* It concurs with the Respondent that for purposes of this assessment states deserve broad deference. In the words of the

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

435 Miloševič ER, ¶¶ 99-101.

436 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 346, **CLA-31**.

> LIAMCO tribunal, the state is "free to judge for itself what it considers useful or necessary for the public good". International tribunals should thus accept the policies determined by the state for the common good, except in situations of blatant misuse of the power to set public policies.
>
> […]
>
> This finding, however, does not end the inquiry. The Tribunal must also assess whether the impugned expropriatory measure was "for" the public purpose as Article 5(1) of the BIT requires. In doing so, it must consider all the relevant circumstances, including the government's post-expropriation conduct. While the objective is not to review the effectiveness of the measures, the government's failure to advance a declared purpose may serve as evidence that the measure was not taken in furtherance of such purpose. Thus, the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose.[437]

414. 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. There plainly was no connection at all between the purported breaches of the Privatization Agreement and the human rights of BD Agro's employees. Moreover, the termination of the Privatization Agreement had a devastating impact on the BD Agro's employees who all lost their jobs and livelihoods as a result of BD Agro's bankruptcy.

415. *Second*, the expropriation lacked due process. The Ombudsman did not have jurisdiction and issued his "*recommendation*" that the Privatization Agreement be terminated without affording Mr. Obradović or the Claimants any right to be heard or even notifying them of his investigations. Similarly, the Ministry of Economy and the Privatization Agency never gave Mr. Obradović or the Claimants any chance to join issue with their erroneous interpretation of applicable law. Both the declaration of ex lege termination of the Privatization Agreement and the seizure of the Beneficially Owned Shares were the Privatization Agency's unilateral acts involving no legal process at all.

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437 *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 294, ¶ 296 (references omitted), **CLA-32**.

416. Third, the expropriation also was not compensated. Serbia did not make any compensation offer, whether before or after the Investors filed their Notice of Dispute. This fact alone suffices to qualify the expropriation as unlawful.

B. Serbia impaired Sembi's investment by arbitrary, unreasonable and discriminatory measures

417. The most favoured nation clause (the "**MFN clause**") contained in Article 3(1) of the Serbia-Cyprus BIT states that "*[e]ach 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.*"[438]

418. Investment tribunals unanimously recognize that MFN clauses allow the investor to attract the more favorable standards of treatment contained in an investment treaty concluded between the host State and a third state.[439]

419. 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 or disposal of investments of investors in the territory of the other Contracting Party.*"[440]

420. Sembi also invokes Article 2(3) of the Germany-Serbia BIT, which states that "*[n]either Contracting Party shall in its territory prejudice in any way by means of*

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

439 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 5 October 2007, ¶ 131, **CLA-33**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575, **CLA-10**; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 396, **CLA-34**; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶¶ 932-934, **CLA-35**.

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

arbitrary or discriminatory measures *the management or use of investments by investors of the other Contracting Party*."[441]

421. 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.[442]

422. 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 effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments. Certainly a State that fails to base its actions on reasoned judgment, and uses abusive arguments instead, would not "stimulate the flow of private capital.[443]

423. Serbia's conduct was unreasonable, arbitrary and in breach of the non-impairment standard for a number of reasons.

424. *First*, the Privatization Agency's 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. If the pledge had been released, the nominal ownership of the Beneficially Owned Shares would have been immediately transferred to Sembi's nominee, Coropi, and Serbia would not have been able to seize the shares.

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441 Treaty between the Federal Republic of Germany and the Socialist Federal Republic of Yugoslavia concerning Reciprocal Promotion and Encouragement of Investments, Article 2(3) (emphasis added), **CLA-36.**

442 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**.

443 *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**.

425. In the terms of Professor Schreuer's explanation, Serbia's conduct was arbitrary because it inflicted damage on the investor without serving any legitimate purpose. It was also based not on a legal standard but on discretion—because the pledge had expired and Serbia had no right whatsoever to refuse its release.

426. By refusing to release the pledge, Serbia impaired Sembi's management, use and enjoyment of its investment in Serbia because it prevented the transfer of nominal ownership of the Beneficially Owned Shares, to which Sembi had a legal right under its contract with Mr. Obradović dated 22 February 2008.

427. *Second*, 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*."

428. *Third,* the declaration of *ex lege* termination of the Privatization Agreement was not only entirely disproportionate to the alleged breaches of the Privatization Agreement, but also meets all of the facets of unreasonable treatment identified by Professor Scheuer and the *LG&E* tribunal. This is because the declaration of termination of the Privatization Agreement was a measure:

a. "*taken for reasons that are different from those put forward by the decision maker*." *First*, the Privatization Agency purported to declare the Privatization Agreement terminated *ex lege* due to the alleged breaches of the same by Mr. Obradović.[444] However, as shown above, the real reason for the termination was to follow the Ombudsman's "*recommendations*." *Second*, the Privatization Agency insinuated in the termination letter sent to Mr. Obradović that apart from the alleged violation of Article 5.3.4, the Commission also declared the Privatization Agreement terminated due to the alleged violation of Article 5.3.3. This is not true. In reality, the Commission found no breach of Article 5.3.3 and declared the Privatization Agreement terminated solely on the basis of the purported violation of Article 5.3.4.[445] The Claimants would have never learned

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

445 Materials for the Session of the Commission held on 28 September 2015, p. 28, p. 38, **CE-89**.

the real legal basis for the declaration of termination had they not requested the Commission's decision under the Law on Free Access to Information of Public Importance. The lack of transparency in the Privatization Agency's decision-making and its fabrication of additional legal grounds for termination is simply shocking;

b. "*that inflicts damage on the investor without serving any apparent legitimate purpose*." The Ombudsman justified his investigation of BD Agro and his "*recommendations*" by his concern over the well-being of BD Agro's employees "*who, for a long period of time, have lacked any certainty regarding the manner of exercising of their labor rights*."[446] This is patently absurd. There is simply no connection between the purported breaches of the Privatization Agreement and the rights of BD Agro's employees. The Ombudsman, or any other Serbian organ, did not take any steps capable of advancing the rights of BD Agro's employees. The only "*certainty*" resulting from the actions of the Ombudsman and the Privatization Agency is the termination of employment of all 161 employees of BD Agro;

c. "*that is not based on legal standards but on discretion, prejudice or personal preference*." The Ombudsman conducted an investigation of BD Agro and issued the "*recommendations*" without any authority to do so under Serbian law; and

d. "*taken in willful disregard of due process and proper procedure*." 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.

429. Serbia thus subjected the Claimant's investment to unreasonable treatment and violated the MFN clause under Article 3(1) of the Serbia-Cyprus BIT, incorporating the non-impairment standard contained in Article 2(3) of the Morocco-Serbia BIT.

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

C. Serbia failed to provide fair and equitable treatment to the Claimants' investment

430. Under Article 6(1) of the Canada-Serbia BIT "*[e]ach 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.*"[447]

431. The fair and equitable treatment standard (the "**FET standard**") is also provided for in Article 2(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.*"[448]

432. Unlike the Serbia-Cyprus BIT, the Canada-Serbia BIT ties the FET standard to the minimum standard of treatment under customary international law. However, given the ever-evolving minimum standard of customary international law, the contents of the FET standard connected to customary international law and the autonomous FET standard are, as confirmed in *Duke Energy*, "*essentially the same*".[449] The same conclusion was reached by numerous other tribunals.[450]

433. 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 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.[451]

434. The Privatization Agency's termination of the Privatization Agreement and expropriation of the Beneficially Owned Shares was taken in bad faith and was grossly

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

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

449 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 337, **CLA-37**.

450 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 284, **CLA-38**; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 361, **CLA-39**.

451 *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**.

unfair, disproportionate and lacking in due process and, therefore, violative of the FET standard.

435. Indeed, as observed by Schreuer, "*it is difficult to envisage an uncompensated expropriation that would not also involve violation the FET standard*."[452]

436. However, Serbia's violations of the FET standard do not stop there.

437. *First*, the Privatization Agency's refusal to release the pledge over the Privatized Shares despite the 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.

438. *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.

439. *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 also 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.

D. Serbia violated the umbrella clause

440. 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 Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*."[453]

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

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

441. 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 […].*"[454]

442. In *Noble Ventures v Romania*, the tribunal confirmed that the breach of an obligation entered into by an entity whose actions are attributable to the State is capable of violating the umbrella clause:

> [W]here the acts of a governmental agency are to be attributed to the State for the purposes of applying an umbrella clause, such as Art. II(2)(c) of the BIT, breaches of a contract into which the State has entered are capable of constituting a breach of international law by virtue of the breach of the umbrella clause.
>
> In the judgment of the Tribunal, that is the position here. Both SOF and APAPS were responsible, as a matter of Romanian law, for the transfer of publicly owned assets to private investors. Both entities were clearly charged with representing the Respondent in the process of privatizing State-owned companies and, for that purpose, entering into privatization agreements and related contracts on behalf of the Respondent. Therefore, this Tribunal cannot do otherwise than conclude that the respective contracts, in particular the SPA, were concluded on behalf of the Respondent and are therefore attributable to the Respondent for the purposes of Art. II(2)(c)BIT.[455]

443. The Privatization Agency–whose conduct is attributable to Serbia, as shown above–violated its contractual commitments on at least two occasions.

444. *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.

445. *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.

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454 *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**.

455 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶¶ 85-86, **CLA-40**.

446. The actions of the Privatization Agency thus violated the umbrella clause.

E. Serbia acted in a sovereign capacity

447. Serbia always acted in a sovereign capacity, rather than as an ordinary commercial party. As apparent from the approach of the *Eureko* and *Ampal* tribunals, and expressly held by the *SGS v. Paraguay* tribunal,[456] the involvement of the State's sovereign powers is not a necessary condition for holding the State liable under an investment treaty. However, even if such condition existed, it was clearly satisfied here.

448. *First*, the privatization in Serbia has been an inherently governmental process pursuing sovereign goals. As Mr. Miloševič confirms, the primary purpose of the privatization was to achieve a "*radical change in the socio-political and economic order*" by "*gradually shifting from the socialist model dominated by social and State ownership into a market model of economy dominated by private ownership.*"[457]

449. The explanatory note to the 2005 amendments of the Law on Privatization confirms the crucial importance of the privatization process for the development of Serbian economy:

> The adoption of the Law on Privatization enables the privatization of socially-owned and state-owned property, which is a precondition for creating an efficient economic environment, attracting foreign capital, restructuring of the economy and of the financial markets, and a faster inclusion in European and global integration flows. Hence, this law is the key stage in the concept of economic reforms.[458]

450. Serbia's privatization of the socially owned companies, including BD Agro, was therefore not akin to a sale of shares in a company by an ordinary commercial party merely seeking to maximize it profits. On the contrary, it was a key step in pursuance

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456 In *SGS v. Paraguay*, the tribunal held that: [t]he Tribunal notes here the challenge of drawing a line between an ordinary commercial breach of contract and acts of sovereign interference or jure imperii, particularly in the context of a contract entered into directly with a State organ (here, the Ministry of Finance). *Logically, one can characterize every act by a sovereign State as a "sovereign act"—including the State's acts to breach or terminate contracts to which the State is a party*. It is thus difficult to articulate a basis on which the State's actions, solely because they occur in the context of a contract or a commercial transaction, are somehow no longer acts of the State, for which the State may be held internationally responsible. *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶135 (emphasis added), **CLA-41**.

457 Miloševič ER, ¶ 28.

458 Explanatory note to the 2005 amendments to the Law on Privatization 2001, p. 12, **CE-224**.

of Serbia's policy to transform its socialist economy into a market economy and in furtherance of Serbia's inclusion to the "*European and global integration flows.*"

451. The Court of Cassation of the Republic Serbia confirmed that:

> [t]he primary objective of privatization is not the sale of the subject of privatization in and of itself, but the investment in the development of the entity in order to promote the overall economic development of the society, and the creation of stable business and social security conditions.[459]

452. The public policy goals underlying the privatization process transpire from the text of the Privatization Agreement. For example, to achieve the privatization's primary purpose of stimulating "*investment in the development of the entity*", the Privatization Agreement required Mr. Obradović to invest 168,638,000 dinars into BD Agro.[460]

453. Similarly, in furtherance of Serbia's employment policy, the Privatization Agreement provided in its Annex 1 for a comprehensive social program. The social program required Mr. Obradović to guarantee that BD Agro will not terminate "*the employees whose work is no longer needed*" for two years after the Privatization Agreement's conclusion, except upon the payment of a severance.[461]

454. This protection period was extended to three years with respect to:

> 1. Employees who lack five years in order to fulfill one of the conditions for retirement.
>
> 2. Both employees, if they are spouses, where employment may be terminated for one of the spouses, as they chose,
>
> 3. Disabled worker,
>
> 4. Single parent.[462]

455. The conferral of the broader scope of protection to such vulnerable classes of BD Agro's employees clearly implemented Serbia's broader employment policy and would be of little concern to an ordinary commercial seller.

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459 The Supreme Court of Cassation of the Republic Serbia, Prev 104/2013, **CE-253**.

460 Privatization Agreement, Article 5.2.1, **CE-17**.

461 Privatization Agreement, Annex 1: Social Program, **CE-17**.

462 Privatization Agreement, Annex 1: Social Program, **CE-17**.

456. It is thus evident that the Privatization Agreement faithfully implemented Serbia's policy goals of transforming Serbia's economy, of improving the efficiency of Serbia's agricultural sector through inflow of foreign capital and know-how and of fostering the stability of "*social security conditions*." The Privatization Agency thus acted in a sovereign capacity when signing the Privatization Agreement.

457. This conclusion is consistent with the findings of the tribunal in *Awdi v. Romania*. As explained above, the *Awdi* tribunal held that the State's signing of a privatization agreement containing buyers' obligations underlying the public interest inherent in the privatization process, such as an obligation to maintain for a given period the current number of employees or to further invest in the privatized company, is an exercise of State's sovereign powers.

458. *Third*, a privatization agreement is not an ordinary commercial contract, but rather a "*sui generis*" contract with distinctively public law elements. The Law on Obligations, which governs private law contractual relationships, clearly provides in Article 11 that "*[p]arties in an obligation relationship are equal.*"[463] This fundamental principle of Serbian private law does not apply to privatization agreements.

459. The Privatization Agency explained in arbitration proceedings *Uniworld v. Privatization Agency and Srbija-Turist A.D.*, that:

> [The] nature of privatization contract, as well as the nature of legal affair of social capital sale, necessarily causes that the contract parties in the privatization contract are not and cannot be completely equal, in the sense as envisaged by the Law on Obligations. The Privatization Agency, in fact, has (at least double capacity – it is a contract party, which sells social capital (although disputable whether it is a seller in the classical contractual terms), but at the same time the holder of precisely defined public powers, based on the Privatization Law and Law on Privatization Agency […][464]

460. The Supreme Court of Cassation of the Republic of Serbia confirmed that privatization agreements indeed do not qualify as ordinary commercial contracts, because their legal regime is governed by both private law and public law statutes:

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463 1978 Law on Obligations, Article 11, **CE-251**. Miloševič ER, ¶ 60.

464 *Uniworld v. Privatization Agency and Srbija-Turist A.D.*, ICC Case No. 14361/AVH/CCO/JRF/GZ, Award, 2011, ¶ 295 (emphasis added), **CE-252**.

> [The privatization contract] is a "*sui generis*" contract. This is because the legal nature of this contract is determined not only by the Law on Obligations, but by other systemic laws as well: Law on Enterprises, Law on Privatization, Law on Registration in the Court Register. [465]

461. The fact that certain aspects of privatization agreements are governed by private law statutes–such as the Law on Obligations or the Law on Contracts and Torts–does not detract from the conclusion that the Privatization Agency acts towards a buyer as a holder of sovereign powers, rather than as an ordinary commercial party.

462. This was confirmed in *Bosca v. Lithuania*. There, the respondent argued that the Lithuanian State Property Fund ("**SPF**") was not acting in the privatization process in a sovereign capacity, because the privatization of property is a civil transaction governed by the Civil Code. The tribunal rejected such argument, holding that:

> [T]he question before the Tribunal is whether the SPF was acting in a sovereign capacity in the privatization process. While the privatization process is governed in part by the Lithuanian Civil Code, as argued by Respondent, it is also controlled through the Law on Privatization, the Regulations under it and even the Lithuanian Constitution. The evidence presented by both Parties confirms that *the privatization process is a governmental process, highly regulated by a series of governmental decrees and rules, culminating in a multi-step State-approval process. The applicability of the Civil Code to certain aspects of the SPF's work does not change the governmental nature of the acts adopted in the process of privatization.*[466]

463. As in Lithuania, the privatization in Serbia is an inherently governmental process, governed by the combination of private law and public law statutes. It equally involves the participation of Serbia's highest organs, including the Ministry of Economy and the National Assembly. The actions of Serbia's organs tasked with carrying out the privatization process–including the Privatization Agency's execution, performance and termination of privatization agreements–are thus sovereign acts.

464. *Fourth*, unlike any ordinary commercial party, the Privatization Agency is *legally required* under Serbian law to perform regular controls of the buyer's performance of his duties under a privatization agreement:

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465 The Supreme Court of Cassation of the Republic Serbia, Prev 104/2013 (emphasis added), **CE-253**; Milošević ER, ¶ 63.

466 *Luigiterzo Bosca v. Lithuania*, UNCITRAL, Award, 17 May 2013, ¶ 127 (emphasis added) (references omitted), **CLA-42**.

> The Privatization Agency (hereinafter: the Agency) is a legal entity that sells the capital or property and promotes, initiates, implements and controls the privatization procedure, in accordance with the law.
>
> […]
>
> During the performance of activities of control of the privatization procedure pursuant to the regulations on privatization, the Agency shall check: the assessed value of the capital or property of the subject of privatization; the compliance of the privatization program or the restructuring program with the regulations; the congruence of the inflow of funds from the effected sale with the sale agreement; and performance of the sale agreement where the Agency is a contracting party, as well as the transfer of shares issued free of charge to the employees.[467]

465. Private contract parties may agree to empower one of them to control the other's performance of the contract. However, in performing its control over the privatized companies, the Privatization Agency does not act as a private party exercising its contractual rights. It is, rather, a holder of public powers discharging its statutory duty. As the Privatization Agency explained in *Uniworld*:

> The Privatization Agency further claims that UHL's view that it has acted negligently (mala fide) is inacceptable, since during execution of control of compliance with investor's obligations, the Privatization Agency actually performs its lawful duty – not [acting] as a contract party but as the holder of public powers.[468]

466. As confirmed by Mr. Milošević, the public character of the Privatization Agency's control powers is further demonstrated by Ministry of Economy's supervision over the Privatization Agency's controls of buyers:

> The Ministry of Economy's task was to supervise, direct and instruct the Privatization Agency in its exercise of the public powers conferred to it by law. The Ministry of Economy would not have been authorized to do so if the Privatization Agency had not acted as a holder of public powers in its controls and other actions vis-à-vis the buyer.[469]

467. *Fifth*, the Ombudsman's investigation of Mr. Obradović's compliance with the Privatization Agreement and the issuance of his "*recommendations*" to the Privatization Agency were obviously sovereign acts. Indeed, it is difficult to conjure a scenario where

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467 2001 Law on Privatization, Article 5(1) and (3), **CE-220**.

468 *Uniworld v. Privatization Agency and Srbja-Turist A.D.*, ICC Case No. 14361/AVH/CCO/JRF/GZ, Award, 2011, ¶ 295 (emphasis added), **CE-252.**

469 Miloševič ER, ¶ 69.

the Ombudsman would act in a commercial capacity, in particular when acting vis-à-vis other organ of the Serbian state.

468. Moreover, as shown above, the Ombudsman had no authority to opine on, much less make any "*recommendations*" with respect to, the execution or termination of the Privatization Agreement. In fact, the only body authorized to decide on the Mr. Obradović's compliance with the Privatization Agreement was the Commission for Control. The Commission for Control was required to reach its conclusion independently, unless following the Ministry of Economy's direct instructions. The Commission for Control abdicated on this mandate when it obediently executed the unauthorized Ombudsman's request to terminate the Privatization Agreement.

469. Even if the Privatization Agency's termination of the Privatization Agreement could otherwise be considered an ordinary exercise of its contractual rights–which it cannot, for all of the other reasons explained in this section–the Privatization Agency clearly stepped outside such contractual framework by rubber-stamping the Ombudsman's "*recommendations*."

470. In fact, this is not the first investment dispute where "*recommendations*" issued by an unauthorized organ ignited the process of termination of a contract in a State's sovereign capacity.

471. In *Caratube*, the dispute arose out of termination of a Contract for the Exploration and Production of Hydrocarbons ("**Contract**") entered into by Caratube and Kazakhstan, represented by the Ministry of Energy and Mineral Resources of the Republic of Kazakhstan ("**MMER**"). The MMER was the sole body authorized to conclude, perform and terminate the Contract.[470]

472. The process of termination was instigated by the Prosecutor Office of the Aktobe Oblast who issued a "*Recommendation on elimination for disregard of the rule of law*." In his recommendation, the Prosecutor requested MMER to "*settle an issue of unilateral*

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470 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 60, **CLA-28**.

termination of the Contract" and to notify Caratube of the necessity to remedy its alleged breaches of the Contract. [471]

473. Although the MMER had no intention to terminate the Contract prior to the Prosecutor Office's recommendations, and although the Prosecutor Office was not authorized under Kazakh law to opine on the issue of termination of the Contract, MMER nevertheless followed the Prosecutor's "*recommendations*" and terminated the Contract.

474. The majority of the tribunal first held that the "*Aktobe Prosecutor's 'Recommendation' was received by the MEMR as an order to terminate the Contract and marked the beginning of the termination process.*"[472]

475. Kazakhstan, nevertheless, insisted that even if resulting from the Prosecutor Office's "*recommendation*", the termination of the Contract would still fail to qualify as an expropriation. This is because, Kazakhstan argued, the termination was not a "*sovereign act but […] the Respondent's legitimate and lawful exercise of its termination rights under the Contract.*"[473]

476. The *Caratube* tribunal, however, explained that the issuance of the "*recommendation*" by an organ not authorized to do so, and the acceptance thereof by the competent authority (the MMER) implicated Kazakhstan's sovereign powers and constituted an unlawful expropriation:

> For a majority of the Tribunal, the MEMR thus did not merely breach its contractual obligations under the Contract by not respecting the substantive and procedural requirements under the Contract and the Subsoil Law for the termination of the Contract. *Acting through the regional and General Prosecutor's Offices, i.e. organs of the Respondent other than the Competent Authority, the Respondent did not act like a mere private party to the Contract, but rather in its sovereign capacity.* For a majority of the Tribunal, the Claimants have convincingly established that it was this intervention by the Prosecutor's Offices that, in concrete terms, ignited the process that was intended to and actually resulted in the termination of the Contract. For a majority of the Tribunal, *the Claimants thus have established that the*

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471 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 60, **CLA-28**.

472 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 916, **CLA-28**.

473 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 801, **CLA-28**.

Respondent terminated the Contract using its sovereign powers rather than acting in a private manner as a party to the Contract.[474]

477. Like the Prosecutor Office in *Caratube*, the Ombudsman lacked any authority to issue his "*recommendations*." Nonetheless, as in *Caratube*, the Ombudsman's "*recommendations*" also "*ignited the process that was intended to and actually resulted in the termination*" of the Privatization Agreement. The Privatization Agency thus clearly terminated the Privatization Agreement in its sovereign capacity.

478. *Sixth*, both the Notice on Termination and the Decision on Transfer of Capital have the character of administrative acts.[475] To state the obvious, ordinary commercial parties, or governmental entities acting in a commercial capacity, are not authorized to undertake any administrative acts. The Privatization Agency thus clearly adopted the Notice on Termination and the Decision on Transfer of Capital in exercise of its sovereign authority.

479. *Seventh*, the legal consequences of the Privatization Agreement's termination radically depart from the rules governing the termination of private contracts and are the most striking manifestation of the public character of the Privatization Agreement. The Privatization Agency issued the Decision on Transfer of Capital pursuant to Article 41(2) and 15(2) of the 2014 Law on Privatization.[476] Upon its receipt of such decision, the Central Securities Depository was legally required under Article 56 of the Operating Rules of Central Securities Depository to register the transfer of the Beneficially Owned Shares from Mr. Obradović to the Privatization Agency.[477] Such a registration did not involve any review of the validity of termination either by the Central Securities Depository, Serbian courts or any other organ. Moreover, neither Mr. Obradović nor BD Agro were given any opportunity to challenge the immediate effect of the transfer of the Beneficially Owned Shares by the Central Securities Depository.[478]

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474 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 935 (emphasis added), **CLA-28**.

475 Miloševič ER, ¶¶ 111-118.

476 Miloševič ER, ¶ 103.

477 Miloševič ER, ¶ 103; 2015 Business Rules of Central Securities Depository, Article 56, **CE-254.**

478 Miloševič ER, ¶ 105-106.

480. Conversely, under private law regulation of the termination of a contract, the seller terminating a share purchase agreement is not empowered to unilaterally cause the transfer of the shares from the buyer.[479] Without the buyer's express consent, the seller may achieve the change in ownership to such shares only if a court of competent jurisdiction so orders in an enforceable decision upholding the validity of the termination.[480]

481. Moreover, Article 41a(3) of the 2001 Law on Privatization provides for an irrebuttable presumption that upon the termination of the privatization agreement, the buyer is deemed to be a "*dishonest party*". As such the buyer does not have any right to the restitution of the paid purchase price:

> In case of termination of the agreement on sale of the capital or property due to the failure of the buyer of the capital to fulfill the contractual obligations, *the buyer of the capital, as a dishonest party, shall have no right to the refund of the amount paid as the purchase price, in order to protect the public interest*.[481]

482. Serbian contract law, on the contrary, does not provide for any presumption of the buyer's dishonesty and requires the seller terminating a share purchase agreement to return the purchase price to the buyer.[482]

483. Both the power of the Privatization Agency to appropriate the buyer's shares and its exemption from the general restitutionary duty–expressly justified by the Serbian legislator by the need to "*protect the general interest*"– clearly confer on the Privatization Agency sovereign prerogatives unavailable to any commercial party.[483]

484. For all of the foregoing reasons, Serbia always acted in a sovereign capacity, rather than as an ordinary contracting party.

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479 Miloševič ER, ¶ 107.

480 Miloševič ER, ¶ 107.

481 2001 Law on Privatization, Article 41a(3) (emphasis added), **CE-220**.

482 1978 Law on Obligations, Article 132(2), **CE-251**; Miloševič ER, ¶ 103.

483 Miloševič ER, ¶¶ 106-107.

VII. CLAIMANTS ARE ENTITLED TO COMPENSATION FOR THEIR LOSSES

A. Serbia must provide full reparation for breaches of its obligations under the Treaties

485. Serbia must provide reparation for its breaches of the Treaties under the full reparation standard. This standard was formulated by the Permanent Court of Justice in the *Chórzow Factory* case as follows:

> The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*.[484]

486. The full reparation standard is also reflected in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (the "**ILC Articles**"). According to Article 31 of the ILC Articles:

> 1. The responsible State is under an obligation to make *full reparation* for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[485]

487. Investment tribunals have consistently confirmed that the standard of full reparation shall be applied in investor-state arbitrations, including in cases of unlawful expropriation.[486]

488. Both Treaties also contain rules governing a standard of compensation payable in cases of *lawful* expropriation.[487] These rules, however, are inapplicable in the present case.

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484 *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ, Ser A, No 17, p. 47 (emphasis added), **CLA-43**.

485 *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001), Art. 31 (emphasis added), **CLA-43**.

486 *E.g. ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶¶ 481-485, **CLA-45**; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 775, **CLA-46**; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 201, **CLA-47**; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, ¶¶ 511-512, **CLA-48**.

487 Agreement between Canada and the Republic of Serbia for the Promotion of Investments, Art. 10(2), **CLA-1**; Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 5(1), **CLA-2**.

This is because these rules apply solely to calculation of *mandatory compensation* in cases of *lawful* expropriation. They thus cannot be used to determine potential *damages* arising from *unlawful* expropriation.[488]

489. The full reparation standard, as formulated in the *Chorzow Factory* case, is also the applicable standard of compensation for Serbia's other breaches of the Treaties.[489]

B. The full reparation standard requires payment of fair market value plus interest

1. The full reparation standard requires payment of fair market value

490. In cases of unlawful expropriation, the full reparation entitles investor to restitutionary damages including the fair market value of the unlawfully expropriated investment, as well as consequential losses suffered by the investor:

> Expropriation: The standard of compensation for unlawful expropriation (being the relevant claim here), includes full reparation for, and consequential losses suffered as a result of, the unlawful expropriation. *Full reparation entitles the unlawfully expropriated investor to restitutionary damages which include, but are not limited to, the fair market value of the unlawfully expropriated investment* as determined by the application of an appropriate valuation methodology. In addition, the unlawfully expropriated investor is entitled to damages for the consequential losses suffered as a result of the unlawful expropriation. Such losses ordinarily include an entitlement to loss of profits suffered by the investor between the date of the expropriation and the award.[490]

491. As noted by the tribunal in *Enron v. Argentina*, the fair market value is a price at which the transaction would realize between a hypothetical willing buyer and a hypothetical willing seller, both having reasonable knowledge of facts and no compulsion to buy or sell, on an unrestricted market:

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488 *E.g. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 8.2.3, **CLA-49**; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 201, **CLA-47**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 481, **CLA-45**; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, ¶ 511, **CLA-48**.

489 *E.g. Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 359, **CLA-50**; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 21 May 2004, ¶ 238, **CLA-51**; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 776, **CLA-46**.

490 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 775 (emphasis added), **CLA-46**.

> The present Tribunal finds that the appropriate approach in the instant case is that of compensation for the difference in the 'fair market value' of the investment resulting from the Treaty breaches. The notion of 'fair market value' is generally understood as the price at which property would change hands between a hypothetical willing and able buyer and an hypothetical willing and able seller, absent compulsion to buy or sell, and having the parties reasonable knowledge of the facts, all of it in an open and unrestricted market.[491]

492. Therefore, an award of damages based on the fair market value of the unlawfully expropriated investment puts the investor into the position in which it would have been, if its investment had not been unlawfully expropriated and the investor would have been able to benefit from the sale of the investment under the market conditions. The award of such damages "*reestablish[es] the situation which would, in all probability, have existed if [an unlawful] act had not been committed*", as required under the *Chórzow Factory* standard.[492]

493. In case that an investor suffered losses to the value of its investment as a result of other treaty breaches (*i.e.* other than unlawful expropriation), the full reparation entitles it to compensation equal to the reduction in the fair market value of the investment and historical losses otherwise caused by the breaches.[493] As note by the tribunal in *Sempra v. Argentina*:

> Fair market value is thus a commonly accepted standard of valuation and compensation. In the present case, the Claimant made its investment in Argentina in 1996 and increased it over the years. The Tribunal is of the view that fair market value would be the most appropriate standard to apply in this case to establish the value of the losses, if any, suffered by the Claimant as a result of the Treaty breaches which occurred, by comparing the fair market value of the companies concerned with and without the measures adopted by Argentina in January 2002.[494]

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491 *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 361, **CLA-50**.

492 *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ, Ser A, No 17, p. 47, **CLA-43**.

493 *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 363, 445-448, **CLA-50**; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶¶ 403-404, 411-412, 467-469, **CLA-52**.

494 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 404 (emphasis added), **CLA-52**.

494. Award of damages equal to a difference between the fair market value of an investment with and without measures adopted in breach of a treaty allows investors to recover part of their investment's value lost due to unlawful conduct of a state. It therefore puts them into the same position in which they would have been but-for breaches of the treaty. This approach thus also "*reestablish[es] the situation which would, in all probability, have existed if [an unlawful] act had not been committed*", as required under the *Chórzow Factory* standard.[495]

2. The full reparation standard requires payment of interest

495. Under the standard of full reparation, the compensation awarded to the Claimants must include interest due on the principal amount due. This principle is codified in Article 38 of the ILC Articles, which states that:

> 1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
>
> 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.[496]

496. The Claimants quantify damages they incurred as a result of Serbia's breaches of the Treaties as of 21 October 2015—the date on which Serbia unlawfully expropriated their shareholding in BD Agro.[497] In order to reflect the present value of damages suffered by the Claimants, the damages calculated as of 21 October 2015 must be uplifted to their present value using an appropriate interest rate.

3. The interest shall be calculated pursuant to Serbian law

497. The interest shall be calculated pursuant to Serbian law because the interest due under Serbian law is more advantageous than the interest usually awarded under public international law. Thus, the respective provisions of Serbian law prevail in accordance with the preservation of rights clauses in Article 10 of the Serbia-Cyprus BIT and in

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495 *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ, Ser A, No 17, p. 47, **CLA-43**.

496 *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001), Art. 38 (emphasis added), **CLA-43**.

497 *Supra* ¶ 7.B.3.

Article 13(1) of the Qatar-Serbia BIT, which the Canadian Claimants invoke under the most-favored nation clause in Article 5 of the Canada-Serbia BIT.

498. Serbian law provides for simple interest calculated at a default interest rate, which Article 4 of the Law on Default Interest defines for debts denominated in euros as "*an annual rate […] equal [to] the key interest rate of the European Central Bank for main refinancing operations plus eight percentage points.*"[498] The Law on Default Interest also sets out a formula for calculation of the default interest.[499] The interest rate applicable in the period since 21 October 2015 is set out in the following table:[500]

Start date	**End date**	**Applicable interest rate**
21 October 2015	15 March 2016	8.05%
16 March 2016	16 January 2019	8%

499. The calculation of interest under Serbian law is more favorable to the Claimants than the calculation of interest usually awarded under public international law. As the Claimants explain in Section VII.B.4 below, the interest due under public international law is 6-month average EURIBOR + 2%, compounded semi-annually. Despite the semi-annual compounding, the interest due under public international law is less than the interest due under Serbian law because the 2% increase over the base rate under the former is much lower than the 8% increase under the latter.

500. The preservation of rights clauses in Article 10 of the Serbia-Cyprus BIT and Article 13(1) of the Qatar-Serbia BIT, which the Canadian Claimants invoke under the most-favored nation clause in Article 5 of the Canada-Serbia BIT, provide that more favorable provisions of Serbian law prevail over the provisions of the Treaties.

501. The preservation of rights clause in Article 10 of the Serbia-Cyprus BIT states the following:

> *If the laws of the Contracting Parties*, or existing or future international agreements between the Contracting Parties, or other international

498 Law on Default Interest, Art. 4, **CE-192**.

499 Law on Default Interest, Art. 6, **CE-192**.

500 Hern ER, ¶ 172.

> agreements to which the Contracting Parties are parties, *contain provisions entitling investments of investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such laws and agreements shall, to the extent that they are more favourable, prevail over this Agreement.*[501]

502. The Canada-Serbia BIT does not contain a preservation of rights clause. However, the Canadian Claimants invoke Article 5 of the Canada-Serbia BIT (the most-favored nation treatment) to rely on the preservation of rights clause contained in Article 13(1) of the Qatar-Serbia BIT.

503. Article 5 of the Canada-Serbia BIT states that:

> 1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.
>
> 2. Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.[502]

504. The most-favored nation clause in Article 5 of the Canada-Serbia BIT allows the Canadian Claimants to invoke Article 13 of the Qatar-Serbia BIT, which provides for the following preservation of rights clause:

> 1.If the domestic law of either Contracting Party, or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contains a provision, whether general or specific, entitling investments by investor of the other Contracting Party to a treatment more favorable than is provided for by this Agreement, such provision shall, to the extent that it is more favorable to an investor, prevail over this Agreement.
>
> 2. Whenever the treatment accorded by one Contracting Party to the investors of the other Contracting Party, according to its laws and regulations or other provisions of specific contract or investment

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501 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 10 (emphasis added), **CLA-2**

502 Agreement between Canada and the Republic of Serbia for the Promotion of Investments, Art. 5, **CLA-1**.

> authorization or agreement, is more favorable than that provided under this agreement, the most favorable treatment shall apply.[503]

505. As explained by *Newcombe and Paradell*, investors may rely on preservation of rights clauses to use more favorable domestic law provisions governing calculation of compensation:

> The clause, in its usual wording, simply says that in applying or enforcing the existing protections offered by the IIA, attention should be paid to any more favourable, but not unfavourable, provisions contained in domestic law or specific agreements. Thus, for example, a contractual clause providing for a mechanism to calculate compensation and resulting in a higher amount than that under the treaty's expropriation clause would need to be applied.[504]

506. This is exactly the case here. The Serbian interest rate leads to higher overall compensation and is therefore more favorable to the Claimants than the interest rate commonly awarded by tribunals in the absence of treaty provisions regulating quantification of interest.

507. The application of the Serbian interest rate is also reasonable—and in fact conservative—when compared to BD Agro's WACC. The Claimants' quantum expert, Dr. Richard Hern, calculates BD Agro's pre-tax nominal WACC to be 13.4%.[505] The default interest rate under Serbian law is more than 5% lower than the WACC calculated by Dr. Hern.[506]

4. Alternatively, the Claimants are entitled to interest equal to 6-month average EURIBOR + 2%, compounded semi-annually

508. In case the Tribunal finds that the Claimants cannot rely on the preservation of rights clauses to claim interest calculated pursuant to Serbian law, the Claimants alternatively claim interest calculated at an interest rate equal to 6-month average EURIBOR + 2%, compounded semi-annually.

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503 Agreement between the Government of the Republic of Serbia and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments, Art. 13, **CLA-**53.

504 A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), p. 478 (emphasis added), **CLA-54**.

505 Hern ER, ¶ 140.

506 Hern ER, ¶ 172.

509. Tying the interest rate to a benchmark rate—such as EURIBOR—is a common practice in ICSID investment arbitration. According to a study published by the Global Arbitration Review, between January 2000 and March 2016, the majority of tribunals that awarded pre-award interest, tied the interest rate to a benchmark created by LIBOR.

510. When damages are claimed in euros—such as in the present case—EURIBOR was found to be a more appropriate benchmark. This approach was expressly confirmed by the tribunal in *HEP v. Slovenia*:[507]

> [I]t is common in investment treaty cases to tie the interest rate to LIBOR – although in the present case, where the currency is euros, it is more appropriate to use EURIBOR. This represents an objective, market-orientated rate, well suited to ensuring that the consequences of the breach are indeed wiped out.[508]

511. The base interest rate used by arbitral tribunals is in most cases further increased by a certain premium to reflect commercial interest rates. According to the above-cited study published by the Global Arbitration Review, the majority of tribunals that tied the pre-award interest rate to LIBOR awarded interest equal to LIBOR plus a 2% premium.[509] While it is more appropriate to use EURIBOR in the present case, there is no reason to deviate from the application of the 2% premium.

512. It is also a common international practice to award compounded, rather than simple interest. As explained by the tribunal in *HEP v. Slovenia*, "*compound interest is appropriate, commercially sensible, and consistent with modern international practice.*"[510] Other tribunals awarding interest rate tied to EURIBOR also awarded EURIBOR increased by 2%, compounded semi-annually.[511]

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507 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶ 553, **CLA-55**.

508 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶ 553 (emphasis added), **CLA-55**.

509 T. Duarte-Silva and J. Mattamouros, *Prejudgment interest – a mere afterthought?*, 26 October 2016, https://globalarbitrationreview.com/article/1069898/prejudgment-interest-%E2%80%93-a-mere-afterthought (last accessed on 27 December 2018), **CLA-56**.

510 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶ 558, **CLA-55**.

511 *E.g. Walter Bau AG (in liquidation) v. The Kingdon of Thailand*, UNCITRAL, Award, 1 July 2009, ¶ 16.1, **CLA-57**.

C. Valuation of BD Agro and its assets

513. BD Agro and its assets were the object of three contemporaneous valuations carried out between December 2014 and February 2016. According to these valuations, the equity value of BD Agro was between **EUR 56 million** and **EUR 71 million**.

514. In December 2014, Mr. Pero Mrgud, a Serbian licensed expert witness in the area of valuation of construction facilities,[512] was commissioned to appraise the value of BD Agro's most valuable asset, the construction land in Dobanovci (the "**Mrgud Valuation**"). Taking the value of land calculated by Mr. Mrgud, the equity value of BD Agro was more than **EUR 71 million**.

515. In November 2015, only a few days after the expropriation, the Privatization Agency's representative administering the expropriated 75.87% shareholding in BD Agro, Ms. Radmila Knežević, directed BD Agro to commission another valuation, this time from Confineks d.o.o. Beograd ("**Confineks**"). According to Confineks's valuation received on 5 December 2015 (the "**First Confineks Valuation**"), which was again prepared by licensed Serbian expert witnesses,[513] BD Agro's fair market value, calculated as the total value of its assets less the total value of its liabilities as of 31 December 2014, was **EUR 57.2 million**.[514]

516. In January 2016, Confineks was tasked to prepare a valuation as of 31 December 2015. According to the valuation received on 4 February 2016 (the "**Second Confineks Valuation**"), BD Agro's fair market value, calculated as the total value of its assets less the total value of its liabilities as of 31 December 2015, was **EUR 56.3 million**.[515]

517. The two Confineks valuations were *accepted by Serbia* because their preparation was directed by the Privatization Agency and they were used in the preparation of BD Agro's financial statements for 2015 and the following years. The 2015 financial statements

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512 Report on the valuation of the market value of construction land in the BD Agro complex Zones A, B and C in the town of Dobanovci, December 2014, p. 4, **CE-175**.

513 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015, pp. 4-12, **CE-142**.

514 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015, p. 15 (emphasis added), **CE-142**.

515 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, January 2016, p. 5 (emphasis added), **CE-172**.

were approved by the BD Agro shareholders at a General Assembly held on 30 June 2016 with the Privatization Agency exercising voting control through its expropriated 75.87% shareholding in the company.[516] The financial statements in the following years, which maintained values calculated based on the Confineks valuations, were approved by the bankruptcy trustee of BD Agro, which was nominated by the Agency for Licensing of Bankruptcy Trustees.[517][518]

518. The Claimants' quantum expert, Dr. Richard Hern from NERA Consulting, prepared an expert report for the purposes of this arbitration and concluded that the equity value of BD Agro as of 21 October 2015 was **EUR 53.3 to EUR 81 million**.

1. The Mrgud Valuation implies equity value of over EUR 71 million

519. In December 2014, BD Agro commissioned Mr. Mrgud to prepare a new valuation of BD Agro's most valuable asset, that being approximately 290 hectares of construction land owned by BD Agro in Dobanovci, for the purposes of the Amended pre-pack reorganization plan.[519] Mr. Mrgud estimated the market value of the construction land to be **EUR 87 million**.[520]

520. Mr. Mrgud's valuation of the construction land implies an equity value of more than **EUR 71 million**. This value can be calculated by substituting the value of land estimated by Confineks in the Second Confineks Report by the value of the construction land estimated by Mr. Mrgud.[521] Mr. Mrgud's valuation of the construction land is EUR 14.4 million higher than the valuation of all land in the Second Confineks

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516 Minutes from the General Assembly of BD Agro Dobanovci dated 30 June 2016, p. 4, **CE-366**.

517 Notes to the Financial Statements for Year 2015, note 7 and note 19, pp.11, 15, **CE-171**. Minutes from the General Assembly of BD Agro Dobanovci dated 30 June 2016, p. 3, **CE-366**. Decision of the bankruptcy trustee dated 24 February 2017, **CE-367**; Decision of the bankruptcy trustee dated 26 February 2018, **CE-368**. It is not entirely clear from the 2015 annual accounts which of the two Confineks reports has been used as a basis of the 2015 asset revaluation. Hern ER, fn. 59.

518 Bankruptcy trustees are nominated by the internal commission of the Agency, consisting from the director of the Bankruptcy Centre of the Agency, two employees of the Bankruptcy Centre and two representatives of the Ministry of Economy, one being the president of the commission.

519 Report on the valuation of the market value of construction land in the BD Agro complex Zones A, B and C in the town of Dobanovci, December 2014, p. 5, **CE-175**.

520 Report on the valuation of the market value of construction land in the BD Agro complex Zones A, B and C in the town of Dobanovci, December 2014, p. 14, **CE-175**.

521 Mr. Mrgud valued only the construction land. He did not value remaining assets and liabilities.

Valuation.[522] Adding this difference to the fair market value of BD Agro calculated in the Second Confineks Valuation, other things held equal, results in the value of **EUR 71 million**.[523]

2. The First Confineks Valuation appraises BD Agro's fair market value at EUR 57.2 million

521. In November 2015, only a few days after the unlawful expropriation of the Claimants' investment in BD Agro, Serbia ordered a new valuation of BD Agro. On 9 November 2015, the Privatization Agency wrote to BD Agro and requested that it submit "*an inventory and valuation of fair market value of its entire assets and liabilities and capital […].*"[524]

522. On 6 November 2015, the Privatization Agency appointed Ms. Radmila Knežević as the administrator of Agency's shareholding in BD Agro. Ms. Knežević was appointed "*for the purpose of managing [BD Agro] until the privatization procedure for [BD Agro] is finalized*."[525] As explained by Mr. Markićević, Ms. Knežević was in fact approving all the important decisions made by BD Agro's management.[526]

523. On 18 November 2015, Ms. Knežević directed Mr. Markićević to engage Confineks.[527]

524. According to the First Confineks Valuation of 5 December 2015, BD Agro's fair market value, calculated as the total value of its assets less the total value of its liabilities as of 31 December 2014, was **EUR 57,232,236**:[528]

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522 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, January 2016, p. 38, **CE-172**. Using the exchange rate of 121.6261 RSD/EUR.

523 In reality, this value would be even bigger, because Mr. Mrgud calculates only the value of construction land in Dobanovci, while Confineks calculates value of all land owned by BD Agro.

524 Letter from the Privatization Agency to BD Agro, 9 November 2015, p. 1, **CE-169**. *See also* Markićević Second WS, ¶ 201.

525 Decision of the Privatization Agency on appointment of the administrator of Agency's shareholding in BD Agro, 6 November 2015, p. 2, **CE-362**. *See also* Markićević Second WS, ¶ 202.

526 Markićević Second WS, ¶ 202.

527 Email communication between I. Markićević and R. Knežević, 18 November 2015, **CE-364**. *See also* Markićević Second WS, ¶ 203.

528 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015, p. 14 (emphasis added), **CE-142**.

1. SUMMARY OF VALUATION

For the purpose of valuation of the fair market value of the totality of assets, liabilities and capital of BD AGRO AD Dobanovci as at December 31, 2014, according to Art. 20 of the Privatization Law (Official Gazette RS no. 83/2014), the appraisers applied the methods from the Ordinance on the methodology for appraisal of value of capital and assets (Official Gazette R Serbia number 45/2002), the Instructions on the method of valuation of capital and assets (Official Gazette R Sebia number 57/2001).

The measurement in the recognition of fair value was carried out in accordance with IAS-16 and IFRS-13. The expressed value is complied with the Law on Companies (Official Gazette RS number 36/2011 and 99/2011).

1.	Estimated value of assets:		
	– Fixed Assets	11,012,261,000 dinars	EUR 91,041,797
	– Current assets	612,858,000 dinars	EUR 5,066,688
	– Deferred tax assets	0 dinars	EUR 0
	Total operating assets	11,625,119,000 din	EUR 96,108,485
2.	Total estimated liabilities	4,702,405,000 din	EUR 38,876,249
3.	Estimated value of capital	6,922,714,000 din	EUR 57,232,236

The values denominated in EUR were converted at the average exchange rate as at December 31, 2014 (EUR 1 = 120.9583 dinars).

525. Serbia accepted the First Confineks Valuation because the new pre-pack reorganization plan, which BD Agro—under the control of the Privatization Agency—submitted on 11 January 2016, fully relied on the First Confineks Valuation for valuation of BD Agro's "*assets, liabilities and capital.*"[529] The pre-pack reorganization plan needed to be approved by BD Agro shareholders, which occurred at a General Assembly held on 27 February 2016 with the Privatization Agency exercising voting control through its 75.87% shareholding in the company.[530]

526. The valuation prepared by Confineks was also used to re-value BD Agro's assets in the 2015 annual financial statements,[531] which were approved by BD Agro shareholders at a General Assembly held on 30 June 2016 at which the Privatization Agency exercised

529 Second pre-pack reorganization plan, 11 January 2016, p. 24, **CE-369**.

530 Minutes from the General Assembly of BD Agro AD Dobanovci dated 27 February 2016, pp.1, 6-7 (pdf), **CE-370**.

531 Notes to the 2015 Financial Statements, note 7 and note 19, p.11 and p.16, **CE-171**. It is not entirely clear from the 2015 annual accounts which of the two Confineks reports has been used as a basis of the 2015 asset revaluation. Hern ER, fn. 59.

voting control through its expropriated 75.87% shareholding in the company.[532] Value calculated based on the Confineks valuations was maintained also in the 2016 and 2017 financial statements, which were prepared and submitted by the bankruptcy trustee nominated by the Agency for Licensing of Bankruptcy Trustees.[533]

3. The Second Confineks Valuation appraises BD Agro's fair market value at EUR 56.4 million

527. In January 2016, BD Agro—still under full control of the Privatization Agency—tasked Confineks to prepare an updated valuation as of 31 December 2015. This Second Confineks Valuation calculated the fair market value of BD Agro as of 31 December 2015 to be **EUR 56,358,939**:[534]

1. SUMMARY OF VALUATION

For the purpose of valuation of the fair market value of the totality of assets, liabilities and capital of BD AGRO AD Dobanovci as at December 31, 2015, according to Art. 20 of the Privatization Law (Official Gazette RS no. 83/2014), the appraisers applied the methods defined in the Decree on the method of valuation of capital and assets (Official Gazette RS no. 45/2002) and the Instruction on the application of the method of valuation of capital and assets (Official Gazette RS no. 57/2001).

The measurement in the recognition of fair value was carried out in accordance with IAS 16 and IFRS 13. The reported value is in compliance with the Companies Law (Official Gazette RS nos. 36/2011 and 99/2011).

	DIN	EUR
1. Estimated value of assets:		
– Fixed Assets	11,088,006,000	91,164,692
– Current assets	597,723,000	4,914,430
– Deferred tax assets	15,367,000	126,346
Total operating assets	***11,701,096,000***	***96,205,469***
2. Total estimated liabilities	4,846,378,000	39,846,530
3. Estimated value of capital	**6,854,718,000**	**56,358,939**

The values denominated in EUR were converted at the mid-market rate as at December 31, 2015 (EUR 1 = 121.6261 dinars).

532 Minutes from the General Assembly of BD Agro Dobanovci dated 30 June 2016, p. 3, **CE-366**.

533 Notes to the Financial Statements for Year 2016, pp. 9, 13, **CE-173**; Notes to the Financial Statements for Year 2017, pp. 9, 13, **CE-174**; Hern ER, ¶ 76; Decision of the bankruptcy trustee dated 24 February 2017, **CE-367**; Decision of the bankruptcy trustee dated 26 February 2018, **CE-368**.

534 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, 4 February 2016, p. 23 (emphasis added), **CE-172**.

528. Once again, there cannot be even a slightest doubt that Serbia accepted the values provided in the Second Confineks Valuation as correct.

529. On 17 February 2016, Ms. Knežević sent a letter to the Ministry of Economy, asking for a meeting and instructions regarding BD Agro's future activities. In this letter, Ms. Knežević referred to Second Confineks Valuation and noted that it was "*carried out in accordance with the orders of the Privatization Agency*":

> After termination of the privatization agreement and formation of new management bodies in December 2015, valuation of capital of this company was carried out in accordance with the orders of the Privatization Agency of the Republic of Serbia. Bearing in mind that it showed a significant positive value of capital (around 56 million euros) and that several potential investors have shown interest in investment in this company, a Pre-Pack Reorganization Plan was prepared and submitted to the Commercial Court in Belgrade on January 11, 2016.[535]

530. On the same date, being 17 February 2016, BD Agro wrote to the Commercial Court in Belgrade in response to Imlek's request for initiation of bankruptcy proceedings. BD Agro submitted to the court the Second Confineks Valuation and noted that it "*undoubtedly demonstrates that the appraised value of capital of the company is significantly positive and amounts to 56,358,939.00 euros.*"[536]

4. Dr. Hern estimates the fair market value of BD Agro between EUR 53.3 million and EUR 81 million

531. The Claimants instructed Dr. Hern from NERA Economic consulting to independently calculate the BD Agro's fair market value as of 21 October 2015.[537]

532. Dr. Hern's valuation relies on a combination of the market-based approach, relying on comparable transactions, with the income-based approach, represented by the discounted cash flow analysis ("**DCF**"), and the asset-based approach, specifically the adjusted book value method.[538]

533. For the purposes of his valuation, Dr. Hern divides BD Agro's assets into two categories: (*i*) core assets—being the assets required for BD Agro's dairy production business, such

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535 Letter from R. Knežević to the Ministry of Economy dated 17 February 2016, p. 1, **CE-371**.

536 Letter from BD Agro to the Commercial Court in Belgrade dated 17 February 2016, p. 2, **CE-372**.

537 Hern ER, ¶ 23.

538 Hern ER, ¶¶ 41-45.

as agricultural land, farm buildings, equipment, herd and other current assets; and (*ii*) non-core assets—being the assets that are not required for dairy production, such as construction land.[539]

534. Dr. Hern values the non-core assets using the adjusted book value valuation method, adjusting the value of BD Agro's assets reported in the accounts to their fair market value based on contemporaneous market evidence. Where available, Dr. Hern relies on comparable transactions and contemporaneous valuations to estimate the fair market value. Where such data is not available, Dr. Hern relies on BD Agro's 2015 annual accounts, as they represent the closest available information relative to the expropriation date 21 October 2015.[540]

535. Dr. Hern values BD Agro's core assets using a DCF valuation method and also the same adjusted book valuation method as for the non-core assets.[541]

536. Using the above methods, Dr. Hern estimates the fair market value of BD Agro between EUR 53.3 million and EUR 81 million.

b. BD Agro's land

537. Dr. Hern confirms that BD Agro's most valuable asset is its land, representing between 71% and 79% of BD Agro's total asset value under the adjusted book valuation method.[542] Dr. Hern identifies three categories of land owned by BD Agro:

a. Construction land in Dobanovci, regulated under the General Regulation Plan for BD Agro Complex Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin, which can be used for business and commercial activities and is located next to the farm complex (the "**Construction land in Zones A, B and C**");

b. Additional construction land in Dobanovci and Bečmen (the "**Other construction land**"); and

539 Hern ER, ¶ 43.

540 Hern ER, ¶ 44.

541 Hern ER, ¶ 45.

542 Hern ER, ¶ 51.

c. Agricultural land in Ašanja, Deč, Ugrinovci and Dobanovci (the "**Agricultural land**").[543]

ii. Construction land in Zones A, B and C

538. The Construction land in Zones A, B and C consists of approximately 290 hectares of land located in Dobanovci, which may be developed for the purposes of construction of business and commercial areas.[544]

539. These land plots have a strategic location near the Belgrade city center (approx. 20 km) and the Belgrade airport (approx. 5 km). Furthermore, these land plots are located on a planned road called "*Sremska gazela*", which will connect these land plots to the E70 highway. The E70 highway is one of the most important highways in Europe and connects Belgrade to Zagreb and Western Europe, and to the Obrenovac municipality.[545] The construction of the Sremska gazela will also connect municipalities of Obrenovac and Surčin, with a total population of approximately 115,000 people, to the center of Belgrade. Many people regularly commute from Surčin and the surrounding villages to Obrenovac and from Obrenovac to Belgrade.[546]

540. The below map shows the strategic location of the Construction land in Zones A, B and C:[547]

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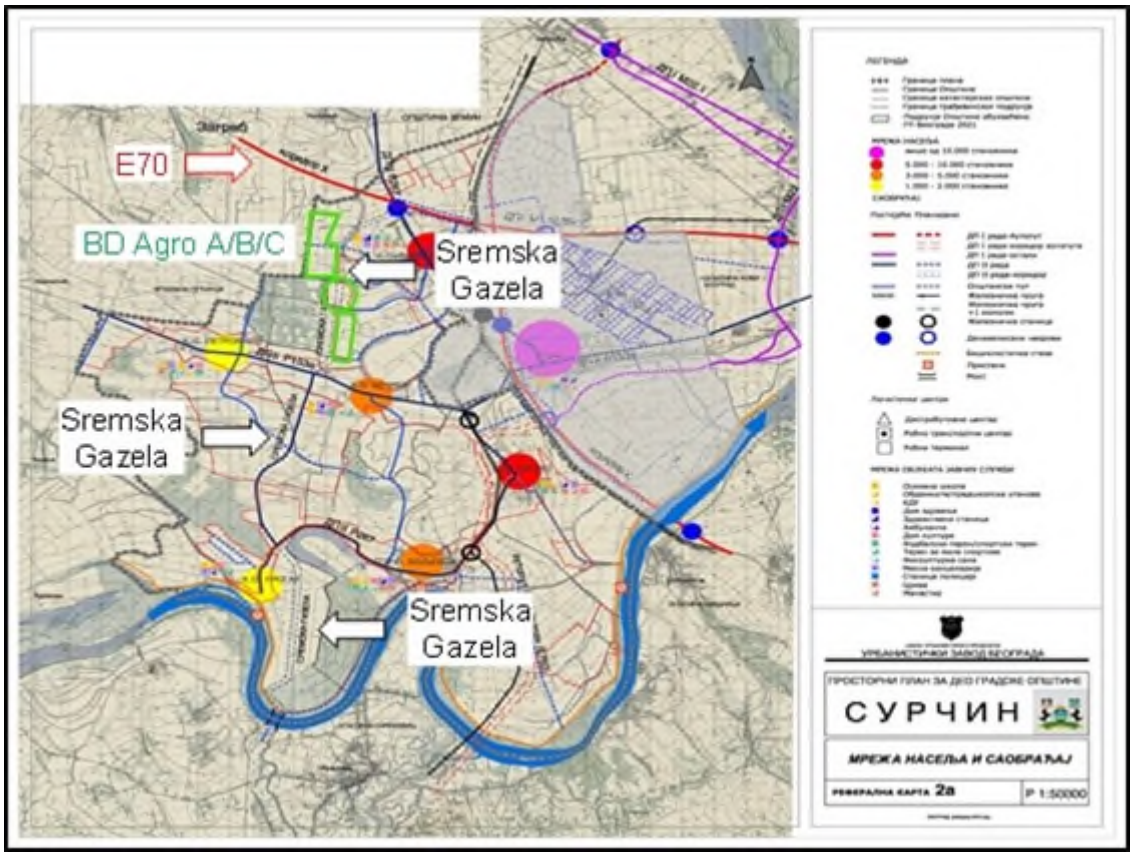
543 Dr. Hern values also land that is a part of the castle complex in Novi Bečej, which is however valued separately due to the cultural importance of the complex. Hern ER, ¶¶ 116-119.

544 Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, p. 16, **CE-101**; Markićević Second WS, ¶¶ 124-131; Hern ER, ¶ 57.

545 The E70 highway is one of the most important highways in Europe. It runs through ten European countries and connects cities such as Bilbao, San Sebastian, Bordeaux, Lyon, Turin, Venice, Ljubljana, Zagreb, Belgrade or Bucharest. *European route E70*, Wikipedia, accessed on 9 December 2018, **CE-150**.

546 Hern ER, ¶ 58-61; Markićević Second WS, ¶¶ 125-129.

547 Hern ER, ¶ 58.



541. As explained by Dr. Hern, the future development of the Construction land in Zones A, B and C for business and commercial purposes together with its connection to the existing road network via Sremska gazela support setting the price for the Construction land in Zones A, B and C significantly above the prices for the other types of BD Agro's land.[548]

542. To value the Construction land in Zones A, B and C, Dr. Hern analyzed:

a. evidence from comparable transactions;

b. property tax evidence;

c. the First and Second Confineks Valuation;

d. the Mrgud Valuation; and

548 Hern ER, ¶ 61.

e. other contemporaneous valuation reports.[549]

543. Based on this analysis, Dr. Hern values the Construction land in Zones A, B and C at between 22 and 30 EUR/m^2, which leads to a total value of this land between EUR 63.6 million and EUR 85.5 million.[550]

544. All land plots in Zones A, B and C are currently formally registered as agricultural land, which registration must be changed to construction land prior to development. While the conversion is a purely administrative task, it is subject to a conversion fee equal to 50% of the value of the land subject to conversion, assuming its use for agriculture. However, certain land plots are exempted from the payment of the fee.[551]

545. Dr. Hern estimates the total value of the Construction land in Zones A, B and C, after the payment of the conversion fee, to be between EUR 62.9 million and EUR 82.9 million.[552]

iii. Other construction land

546. In addition to the Construction land in Zones A, B and C, BD Agro owns other construction land in Dobanovci and Bečmen.[553]

547. Relying on evidence from comparable transactions and the First and Second Confineks Valuations, Dr. Hern estimates the value of this land to be between 3 to 10 EUR/m^2.[554] Using this range, Mr. Hern calculates the total value of the Other construction land to be between EUR 1.2 million and EUR 3.8 million.[555] Where applicable, Dr. Hern again subtracts the conversion fee, arriving at the final value between EUR 1.1 million and EUR 3.4 million.[556]

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549 Hern ER, ¶¶ 62-87.

550 Hern ER, ¶¶ 89-90.

551 Hern ER, ¶¶ 91-94. *See also* Markićević Second WS, ¶ 135.

552 Hern ER, ¶ 94.

553 Hern ER, ¶ 95.

554 Hern ER, ¶¶ 95-100.

555 Hern ER, ¶ 101.

556 Hern ER, ¶¶ 102-103.

iv. Agricultural land

548. BD Agro owns agricultural land in various locations in Serbia.[557] Relying on evidence from comparable transactions and the First and Second Confineks Valuations, Dr. Hern estimates the value of the Agricultural land between 0.7 and 2.9 EUR/m^2.[558] This leads to a value of the Agricultural land between EUR 4 million and 15.5 million.[559]

c. Other assets

549. Other assets owned by BD Agro include buildings, equipment and BD Agro's herd.[560] Using the adjusted book value method, Dr. Hern estimates the value of the buildings owned by BD Agro to be EUR 16.8 million, the value of BD Agro's equipment to be EUR 2.4 million and the value of BD Agro's herd to be EUR 0.4 million.[561] Dr. Hern also provides a separate value of EUR 0.8 million for the Dundjerski castle and the surrounding lands owned by BD Agro in Novi Bečej.[562] Finally, Dr. Hern calculates the total value of other current and non-current assets (*e.g.* receivable, inventories, etc.) to be EUR 7.4 million.[563]

d. Valuation of BD Agro's farm using the DCF analysis

550. Dr. Hern also values the core-assets owned by BD Agro (*i.e.* the assets necessary for dairy production on its farm) using a DCF valuation method.[564] This alternative analysis includes all assets owned by BD Agro, with the exception of: (*i*) the Construction land in Zones A, B and C; (*ii*) the Other construction land; and (*iii*) the Dundjerski castle and the surrounding lands owned by BD Agro in Novi Bečej. The reason for excluding these assets from the DCF analysis is that these non-core assets are not necessary for BD Agro's business to operate.[565]

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557 Hern ER, ¶ 104.

558 Hern ER, ¶¶ 105-108.

559 Hern ER, ¶ 109.

560 Hern ER, ¶ 111.

561 Hern ER, ¶ 115.

562 Hern ER, ¶¶ 116-119.

563 Hern ER, ¶¶ 120-121.

564 Hern ER, ¶¶ 124-140.

565 Hern ER, ¶ 124; Markićević Second WS, ¶ 133-137.

551. Under the DCF analysis, Dr. Hern assumes that BD Agro would continue to operate after the expropriation date of 21 October 2015 and estimates the value of the farm as the sum of the future cash-flows that it would be expected to generate, discounted back to the expropriation date.[566] To calculate the free-cash flows, Dr. Hern relies on projections set out in the Amended pre-pack reorganization plan.[567] Using the DCF valuation method, Dr. Hern estimates the value of BD Agro's core assets to be between EUR 31.5 million and EUR 36.9 million.[568]

e. Total value of BD Agro's assets

552. Dr. Hern's valuation of BD Agro's total assets combines the adjusted book value valuation for non-core assets and the DCF valuation for core assets. The reason for putting more weight on the DCF valuation of the core-assets (rather than their adjusted book value) is that the DCF valuation reflects the intention of BD Agro's management and shareholders prior to expropriation on 21 October 2015 to undertake investments in the dairy farm and continue to operate the business as opposed to selling the farm assets.[569]

553. The value calculated using the adjusted book value valuation method needs to be adjusted for taxes that BD Agro would have had to pay on the sale of such assets, which would have been needed to realize their value.[570]

554. Given that the Claimants no longer have control over BD Agro, they are currently unable to obtain all documents necessary for the calculation of all applicable taxes, such as the tax documentation showing deductible losses from previous years. Dr. Hern therefore uses the value of deferred tax liabilities reported in BD Agro's 2015 balance sheet as a proxy for the capital gains tax that BD Agro would pay if it were to sell its assets. The Claimants intend to request documents necessary for calculation of applicable taxes

566 Hern ER, ¶¶ 124, 127.

567 Hern ER, ¶ 127.

568 Hern ER, ¶ 140.

569 Hern ER, ¶¶ 154-156.

570 Hern ER, ¶¶ 150-151.

during the document production phase of the arbitration in order to calculate the exact amount of applicable taxes in their future submissions.

555. Applying this approach, Dr. Hern calculates the total value of BD Agro's assets to be between EUR 93.3 million and EUR 121 million.[571]

f. Value of BD Agro's equity

556. To calculate the value of BD Agro's equity, Dr. Hern subtracts the value of BD Agro's liabilities from the value of BD Agro's assets.[572]

557. Dr. Hern calculates BD Agro's current and non-current liabilities in line with their net book value, as reported in the 2015 financial accounts. This is consistent with the approach taken in the First Confineks Valuation.[573]

558. Dr. Hern calculates the total value of BD Agro's liabilities to be EUR 40 million.[574] Using this value of liabilities and the value of assets as between EUR 93.3 million and EUR 121 million, Dr. Hern estimates the value of BD Agro's equity to be between **EUR 53.3 million and EUR 81 million**.[575]

D. Value of Claimants' interest in BD Agro's equity

559. To calculate the value of interest of individual Claimants in BD Agro's equity, the Claimants use the upper bound of the valuation provided by Dr. Hern, *i.e.* the equity value of EUR 81 million.

1. Value of Sembi's interest in BD Agro's equity

560. Upon the unlawful expropriation of the Beneficially Owned Shares on 21 October 2015, Sembi was the direct beneficial owner of the Beneficially Owned Shares, representing 75.87% of BD Agro's equity. Mr. Obradović, the nominal owner, had an obligation to

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571 Hern ER, ¶ 153.

572 Hern ER, ¶ 158.

573 Hern ER, ¶¶ 159-160.

574 Hern ER, ¶ 162.

575 Hern ER, ¶ 163.

transfer the Beneficially Owned Shares, or any proceeds from their potential sale, to Sembi or its nominee, free of charge.

561. The value of Sembi's interest in BD Agro's equity is therefore equal to 75.87% of the total equity value of BD Agro. With BD Agro's total equity value amounting to EUR 81 million, the value of Sembi's interest was EUR 61.5 million as of 21 October 2015.[576] This is also the value of Sembi's loss as of that date.

562. The value of Sembi's loss needs to be uplifted to its present value using the Serbian default interest rate. According to Dr. Hern's calculations, the loss suffered by Sembi uplifted to 16 January 2019 amounts to EUR 77.5 million.[577]

2. Value of the Canadian Claimants' interest in BD Agro's equity

563. The Canadian Claimant's interest in BD Agro's equity is twofold and includes (*i*) Mr. Rand's Indirect Shareholding of 3.9% in BD Agro, held through MDH Serbia; and (*ii*) the interest of Rand Investments, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand in Sembi and thus, indirectly, the Beneficially Owned Shares.

564. The claims for damages brought by Rand Investments, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand on the basis of the above paragraph are brought in the alternative to Sembi's claim. They need not be considered by the Tribunal if it grants Sembi's claim.

b. Value of Mr. Rand's Indirect Shareholding

565. Unlike the Beneficially Owned Shares, Mr. Rand's Indirect Shareholding was expropriated indirectly rather than directly. It is still owned by MDH Serbia, but it lost all value because Serbia's unlawful termination of the Privatization Agreement and seizure of the Beneficially Owned Shares thwarted realization of the Amended pre-pack reorganization plan and forced BD Agro into bankruptcy—thus rendering the shares of BD Agro worthless.

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576 Hern ER, ¶ 166.

577 Hern ER, ¶ 177.

566. Mr. Rand's Indirect Shareholding was 3.9%, and it was held through MDH Serbia. With the equity value of BD Agro equal to EUR 81 million, the value of a 3.9% shareholding in BD Agro was EUR 3.2 million as of 21 October 2015.[578]

567. This, however, was not the value of the Indirect Shareholding for Mr. Rand because MDH Serbia would need to pay 15% corporate income tax on the difference between the selling price and the original purchase price of the shares owned by MDH Serbia. This tax would amount to EUR 0.4 million.

568. The value of Mr. Rand's Indirect Shareholding, less corporate income tax payable, was, therefore, EUR 2.7 million as of 21 October 2015.[579]

569. Uplifted to 16 January, the value of Mr. Rand's Indirect Shareholding equals EUR 3.4 million.[580]

c. Value of Rand Investments' indirect interest in BD Agro's equity

570. The Canadian Claimants' interest in the Beneficially Owned Shares was indirect, deriving from their shareholding in Sembi. Therefore, each Canadian Claimant's share in the value of the Beneficially Owned Shares is equal to his or her share in the value of Sembi.

571. As explained above, Rand Investments is Sembi's shareholder, owning 38,110 redeemable preference shares in Sembi with the nominal value of EUR 1.[581] Rand Investments was entitled to an annual dividend equal to 6% of the amount paid-up for the shares and, most importantly, to redeem its shares at EUR 199 per share (in case of shares subscribed in 2008) and EUR 1,999 per share (in case of shares subscribed in 2010).[582]

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578 Hern ER, ¶ 169.

579 Hern ER, ¶ 169.

580 Hern ER, ¶ 177.

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

582 Resolution of the sole shareholder dated 25 June 2008, Arts. 2(1)(a), 2(1)(c) **CE-189**; Minutes of a meeting of the Board of Directors of Sembi dated 5 June 2008, p. 2, **CE-190**; Minutes of a meeting of the Board of Directors of Sembi dated 12 October 2010, p. 2, **CE-191**.

572. Since the maximum annual dividend was relatively low, EUR 337,200, the value of Rand Investments' interest in Sembi, and thus the value of its indirect interest in BD Agro's equity, was limited to the redemption price, which was EUR 11,201,890 as of 21 October 2015.

573. Uplifted to 16 January 2019, the value of Rand Investments' indirect interest in BD Agro's equity equals to EUR 14.1 million.[583]

574. Mr. William Rand is a 100% owner of Rand Investments. Therefore, the value of Rand Investments' indirect interest in BD Agro's equity is claimed by both Mr. William Rand and Rand Investments. The amount is claimed only once, and it should be paid to Rand Investments even if it were granted only to Mr. William Rand.

d. Value of the indirect interests of Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand in BD Agro's equity

575. Sembi's second owner is the Ahola Family Trust, which owns 1000 ordinary shares with a nominal value of EUR 1.[584] Under Sembi's distribution rules, there is no restriction on payment of dividends or other form of distribution on the ordinary shares.[585]

576. Therefore, as of 21 October 2015, the Ahola Family Trust was entitled to the entire value of Sembi less the EUR 11,201,890 redemption price that Sembi owed to Rand Investments.

577. As of 21 October 2015, the interest in BD Agro's equity was Sembi's only asset and Sembi did not have any debt. Thus, the value of the Ahola Family Trust's interest in Sembi was equal to the value of Sembi's interest in BD Agro's equity less the EUR 11,201,890 redemption price owed to Rand Investments.

578. With the value of Sembi's interest in BD Agro's equity equal to approximately EUR 61.5 million, the value of the Ahola Family Trust's interest in Sembi, and thus BD

583 Hern ER, ¶ 177.

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

585 Resolution of the sole shareholder, 25 June 2008, Art. 2.2, **CE-189**.

Agro's equity, was approximately EUR 50.3 million. Distribution from Sembi to the Ahola Family Trust is not subject to any taxes.

579. Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand are the sole beneficiaries of the Ahola Family Trust, at equal shares. Therefore, the value of their respective indirect interests in Sembi, and BD Agro's equity, is equal to one third of the value of the Ahola Family Trust's interest. This is approximately EUR 16.8 million for each of Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand.[586]

580. This amount, however, again needs to be uplifted to its present value. Dr. Hern calculates the present value at EUR 21.1 million.[587]

e. Tax gross-up for Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand

581. Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand also claim for a tax gross-up for the Canadian tax they will have to pay on any amounts received as compensation for damages that may be awarded by this Tribunal. This is because no Canadian tax would have been due if they had received distribution of capital from the Ahola Family Trust.

582. From the Canadian tax perspective, any amounts received as compensation for damages that may be awarded by this Tribunal will be considered as capital gains and subject to income tax. The applicable tax rate for each of Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand is 24.9%. The 24.9% tax rate results from the fact that (*i*) only 50% of capital gain is subject to tax;[588] (*ii*) the highest federal tax rate is 33%;[589] and (*iii*) the highest state tax rate in British Columbia is 16.8%.[590] The 24.9% tax rate is 50% of the sum of 33% and 16.8%.

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586 Hern ER, ¶ 168.

587 Hern ER, ¶ 177.

588 Canadian Income Tax Act, Art. 38, **CE-373**.

589 Canadian Income Tax Act, Art. 117(2), **CE-373**.

590 British Columbia Income Tax Act, Part I Division 2 Section 4.1, **CE-259**.

583. The Ahola Family Trust is a non-resident trust from a Canadian income tax perspective because it is a trust that is settled outside of Canada and its trustee, Mr. Robert Jennings, is not resident in Canada.[591]

584. Subsection 104(13) of the Canadian Income Tax Act provides that a beneficiary of a trust is to include in the beneficiary's income such part of the trust's income that was paid or payable to the beneficiary in the trust's year that ended in the year end of the beneficiary.

> 104(13) Income of beneficiary
>
> There shall be included in computing the income for a particular taxation year of a beneficiary under a trust such of the following amounts as are applicable:
>
> (a) in the case of a trust (other than a trust referred to in paragraph (a) of the definition "trust" in subsection 108(1)), such part of the amount that, but for subsections (6) and (12), would be the trust's income for the trust's taxation year that ended in the particular year as became payable in the trust's year to the beneficiary; and
>
> (b) in the case of a trust governed by an employee benefit plan to which the beneficiary has contributed as an employer, such part of the amount that, but for subsections (6) and (12), would be the trust's income for the trust's taxation year that ended in the particular year as was paid in the trust's year to the beneficiary.[592]

585. There are no specific provisions that tax a Canadian beneficiary on the receipt of past incomes of a trust. Also, there are no specific provisions that tax a Canadian beneficiary on the distribution of capital from a trust.

586. Subsection 107(2) of the Canadian Income Tax Act provides a tax deferred rollover where property is distributed from a trust to a beneficiary in satisfaction of all or part of a beneficiary's capital interest:

> 107(2) Distribution by personal trust
>
> Subject to subsections (2.001), (2.002) and (4) to (5), if at any time a property of a personal trust or a prescribed trust is distributed (otherwise than as a SIFT trust wind-up event) by the trust to a taxpayer who was

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591 Canadian Income Tax Act, Art. 94, **CE-373**; Certificate of Shareholders of Sembi dated 8 June 2017, **CE-6**.

592 Canadian Income Tax Act, Art. 104(13), **CE-373**.

> a beneficiary under the trust and there is a resulting disposition of all or any part of the taxpayer's capital interest in the trust,
>
> (a) the trust shall be deemed to have disposed of the property for proceeds of disposition equal to its cost amount to the trust immediately before that time;
>
> (b) subject to subsection (2.2), the taxpayer is deemed to have acquired the property at a cost equal to the total of its cost amount to the trust immediately before that time and the specified percentage of the amount, if any, by which
>
> (i) the adjusted cost base to the taxpayer of the capital interest or part of it, as the case may be, immediately before that time (determined without reference to paragraph (1)(a)) exceeds
>
> (ii) the cost amount to the taxpayer of the capital interest or part of it, as the case may be, immediately before that time […].[593]

587. The operation of subsection 103(13) and 107(2) are consistent with trust law that allows accumulated income in a trust to become trust capital. This is also provided for in Article 2.1(i) of the Ahola Family Trust Indenture:

> 2.1(i) The "Trust Fund" means:
>
> […]
>
> (iii) all income which shall in accordance with the provisions of the Settlement be accumulated by the Trustee and added to the capital thereof [...].[594]

588. As a result, if the Ahola Family Trust's income is added to the capital of the Trust and distributed to the beneficiaries in that form after the end of the year when it was received by the Trust, such capital distribution is not subject to tax in Canada.

589. The standard of full reparation requires that "*reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*"[595] Therefore, Serbia must compensate Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert

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593 Canadian Income Tax Act, Art. 107(2), **CE-373**.

594 The Ahola Family Trust Identure dated 6 March 1995, Art. 2.1(i), **CE-008**.

595 *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ, Ser A, No 17, p. 47, **CLA-43**.

Harry Leander Rand also for the extra income tax they will have to pay in Canada for receiving compensation under the Award.

590. The additional income tax of Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand will be calculated at a rate of 24.9%. The gross-up rate is equal to:

Gross-up rate = 1 / (1 – 24.9%) – 1 = 33.2%

591. Therefore, each of Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand claims a 33.2% gross-up on any amounts awarded to her or him.

3. Loss resulting from Mr. Rand's receivables against BD Agro being rendered worthless

592. As explained above, a part of Mr. Rand's investment in BD Agro is represented by direct payments from Mr. Rand to BD Agro's Canadian suppliers for the purchase and transport of heifers in the amount of EUR 2,177,903. Despite the fact that these payments were originally not recognized in BD Agro's annual accounts, they were acknowledged as unsecured claims in the BD Agro bankruptcy proceedings.[596] Besides payments for the purchase and transport of heifers, Mr. Rand also provided a short-term loan to BD Agro in the amount of EUR 219,000.[597]

593. Due to the well-known problems with bankruptcy proceedings in Serbia,[598] the BD Agro bankruptcy proceedings appear to be stalled, with no realistic chance that Mr. Rand's claims would ever be satisfied in BD Agro's bankruptcy. Mr. Rand's receivables against BD Agro have been rendered worthless.

594. BD Agro's bankruptcy was caused by the unlawful termination of the Privatization Agreement and expropriation of the Beneficially Owned Shares, which prevented the adoption of the Amended pre-pack reorganization plan.[599]

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596 Hern ER, ¶¶ 17.

597 Notes to the Financial Statements for Year 2016, p. 14, **CE-173**.

598 Markićević Second WS, ¶ 55.

599 Markićević Second WS, ¶¶ 191-197.

595. Therefore, Mr. Rand also claims damages in the amount equal to the EUR 2,396,903 value of these receivables registered in the BD Agro bankruptcy proceedings. Uplifted to 16 January 2019, this amount equals approximately EUR 3 million.

596. To avoid any possibility of double recovery, Mr. Rand will assign its receivables to the Republic of Serbia or its nominee upon receipt of the corresponding damages.

VIII. REQUEST FOR RELIEF

597. The Claimants request that the Tribunal issue an award:

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

b. Ordering Serbia to pay compensation to Sembi of no less than EUR 77.5 million;

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

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

(i) Rand Investments of no less than EUR 14.1 million;

(ii) Ms. Kathleen Elizabeth Rand of no less than EUR 21.1 million, plus a gross-up of 33.2% on that amount;

(iii) Ms. Allison Ruth Rand of no less than EUR 21.1 million, plus a gross-up of 33.2% on that amount; and

(iv) Mr. Robert Harry Leander Rand of no less than EUR 21.1 million, plus a gross-up of 33.2% on that amount;

e. Ordering Serbia to pay compensation to Mr. William Rand:

(i) no less than EUR 3.4 ,million for loss of value of Mr. Rand's Indirect Shareholding; and

(ii) no less than EUR 3 million for loss of value of Mr. Rand's receivables against BD Agro;

f. ordering Serbia to pay interest on any amounts awarded at the rate of Serbian statutory default interest rate (currently 8%) from 16 January 2019 until payment in full;

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

h. ordering such other relief as the Tribunal may deem appropriate in the circumstances.

598. The Claimants reserve the right to supplement or otherwise amend their claims and the relief sought.

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
Stephen Anway
David Seidl
Nicole Jančová
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SQUIRE PATTON BOGGS

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Sara Pendjer
STANKOVIC & PARTNERS