**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*

# REPLY

4 October 2019

SQUIRE PATTON BOGGS

nstlaw/Stankovic & Partners

# I. INTRODUCTION

## A. Preliminary statement

1. On 3 January 2007, Mr. Vojislav Koštunica, the then Prime Minister of Serbia, Mr. Predrag Bubalo, the then Minister of Economy, and Mr. Velimir Ilić, the then Minister of Capital Investments, paid an official visit to BD Agro AD, Dobanovci ("**BD Agro**") a dairy farm located on the outskirts of Belgrade, close to the international airport.

2. The first thing they would have noticed are the flags at the entrance, proudly displaying the colors of Serbia, Canada, Sweden, Switzerland and BD Agro. The dignitaries were met warmly by Mr. Djura (George) Obradović. This was a good day for Serbia. In the picture below Mr. Obradović is greeting Ministers Bubalo and Ilić right in front of the flags.

Mr. Obradović greeting Minister Bubalo

3. The smile on Minister Bubalo's face tells it all. He was the Minister responsible for privatization, and he was happy to showcase to his colleagues, the Prime Minister and Minister of Capital Investment, one of only a small number of companies that had flourished out of the privatization process. The ministerial delegation toured BD Agro's stables and barns, watched the milking of the company's herd of cattle and chatted with

BD Agro's proud employees. The Ministers had nothing but the praise for BD Agro and the improvement in its operations achieved since its privatization in October 2005.[1]

4. Minister Bubalo was not surprised to see the foreign flags at the entrance. He knew that Mr. Obradović was only the nominal owner. He also knew that the farm was beneficially owned by Mr. William A. Rand from Canada and that the investments, so praised by the Ministers, had been funded by the Lundin Family, one of the richest entrepreneurial families in the world, who are of Swedish descent and live in Geneva.

5. Minister Bubalo had good reason to be proud of the success of BD Agro. Back in 2005, he had personally approached Mr. Rand and encouraged him to invest in the privatization of 70% of the shares in BD Agro (the "**Privatized Shares**"), which were then being put up for sale in a public auction organized by the Privatization Agency of the Republic of Serbia and Montenegro (the "**Privatization Agency**").[2]

6. That was just the beginning. Significantly greater investments continued in the following years. All buildings were renovated. The farm acquired new, state-of-the-art equipment. EUR 12 million was invested into the renovation and overhaul.[3] Another EUR 8 million was spent on a new herd of 2,000 heifers of the Holstein Friesian breed. The heifers were bought and flown to Serbia all the way from Canada on chartered Boeing 747 aircraft because of the presence of blue tongue disease prevented purchases in Europe.[4] Over the years, Mr. Rand personally attended to the management of the farm and enjoyed the company's success.

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1 Obradović Second WS, ¶ 37.

2 Rand First WS, ¶¶ 14-15.

3 Rand First WS, ¶ 26.

4 Rand Second WS, ¶ 36; Rand First WS, ¶ 29.


William Rand standing on BD Agro's new BiG X 500 Combine

7. Those happy days are gone.

8. Ten years after the privatization, in September and October 2015, the Privatization Agency unlawfully terminated the agreement on the sale of 70% of the socially owned capital in BD Agro (the "**Privatization Agreement**")[5] and seized the Claimants' shares. Ten months after doing so, in August 2016, BD Agro was declared bankrupt.

9. Today, BD Agro is but a shadow of itself. All the cows are gone. Crops are not grown. And 70% of BD Agro's valuable construction land was sold to the second richest Serbian tycoon for a fraction of its market price in a "public auction" with only one participant.

10. Sadly, Serbia pretends that it first heard of Mr. Rand in 2013, and invites the Tribunal not to believe him or any other of the Claimants' witnesses. Hence the pictures in this introduction.

11. Why?

[5] Privatization Agreement, 4 October 2005, **CE-017**.

12. According to Serbia, this is justice served. In December 2010, says Serbia, BD Agro pledged a part of its land to secure a EUR 2 million loan (the "**Pledge**") and used less than half that amount for the benefit of two related companies. The Pledge—and only the Pledge—according to the Serbia, was a breach of the Privatization Agreement, which needed to be remedied and was not. The Privatization Agency thus had no choice but to terminate the Privatization Agreement and seize the shares without compensation—almost five years after the alleged breach, but still. This what happened, according to Serbia.

13. But this does not hold water.

14. All of the objectives of the privatization of BD Agro were more than fulfilled. The social program for BD Agro's employees was complied with. BD Agro maintained and developed its business activities. BD Agro retained its assets—and acquired many new ones. The Privatization Agency received the full purchase price for the Privatized Shares on 8 April 2011.

15. Even if Serbia were right that the Pledge was a breach of Article 5.3.4 of the Privatization Agreement, that would be the only breach.

16. Obviously, the Pledge did no harm to anyone, and Serbia does not claim otherwise. The "problem" is purely and only that the Pledge was there between December 2010 and 8 April 2011.

17. But, the Privatization Agency insisted that this "violation," which had ceased more than four years earlier, still needed to be remedied in 2015 by obtaining deletion of the Pledge and the return of the funds from the related companies. This was simply nonsensical because the existence of the Pledge was no longer a violation at that time.

18. The Claimants respectfully submit, and show in this Reply, that the mere existence of the Pledge for a period of four months at the beginning of 2011, and the alleged failure to "remedy" that Pledge in 2015, cannot justify termination of the Privatization Agreement and seizure of the Claimants' beneficially owned shares in BD Agro (the "**Beneficially Owned Shares**").

19. Serbia's defenses under public international law are just smoke and mirrors.

20. For example, Serbia claims that the Privatization Agency's conduct is not attributable to Serbia and not sovereign in nature. However, Serbian courts held that the Privatization Agency's notice on termination is an act that "*represents the state's will to terminate the contract*" and constitutes the Privatization Agency's use of "*its legal power, obtained by the transfer of authority under public law from the state, to terminate the agreement that did not achieve the legal goal and the social purpose of privatization*."[6]

21. This shows that the termination is both attributable to Serbia, because it represents *the state's will*, and sovereign in nature, because it is an exercise of *authority under public law*.

22. Thus, the termination of the Privatization Agreement and the subsequent seizure of the Beneficially Owned Shares violated 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 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 Serbia-Cyprus BIT, the "**Treaties**").

23. Serbia's Treaty violations did not stop there, though. Serbia also violated the Treaties when it refused to release a pledge it held over the Privatized Shares, which prevented Mr. Obradović from transferring legal title to the Privatized Shares to the ultimate owners, the Claimants.

24. An audio recording of a meeting of the Privatization Agency's Commission for Control (the "**Commission for Control**") held on 23 April 2015 reveals that the Commission for Control *intentionally violated its obligation to release the pledge*. The members of the Commission knew that the Privatization Agency was obliged to release the pledge, but wanted to prevent Mr. Obradović from transferring the Privatized Shares so that the Privatization Agency could ultimately seize them.[7] *This is shocking*.

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6 Judgment of the Higher Commercial Court, Pž. 6463/2007, 8 December 2008, p. 4 (pdf), **RE-164**.

7 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, **CE-768**.

25. There is no excuse for what Serbia did to the Claimants.

## B. Organization and evidence

26. This Reply is submitted in accordance with the procedural timetable established by the Tribunal on 29 November 2018, as amended on 19 December 2018, and it is structured as follows:

    a. Section I is this Introduction;

    b. Section II describes the Factual Background to the dispute;

    c. Section III explains Jurisdiction;

    d. Section IV addresses Attribution;

    e. Section V sets out Serbia's Violations of the Treaties;

    f. Section VI addresses Damages; and

    g. Section VII sets out the Claimants' Request for Relief.

27. This Reply is accompanied by the following witness statements:

    a. Witness Statement of Mr. Robert Albert Jennings;

    b. Second Witness Statement of Mr. William Archibald Rand;

    c. Second Witness Statement of Mr. Djura Obradović;

    d. Third Witness Statement of Mr. Erinn Bernard Broshko; and

    e. Third Witness Statement of Mr. Igor Markićević.

28. This reply is accompanied by the following expert reports:

    a. Expert Report of Ms. Bojana Tomić Brkušanin;

    b. Expert Report of Mr. Krzysztof Grzesik;

    c. Expert Report of Robert J.C. Deane;

d. Expert Report of Uglješa Grušić;

e. Second Expert Report of Dr. Richard Hern;

f. Second Expert Report of Mr. Miloš Milošević; and

g. Second Expert Report of Mr. Agis Georgiades.

29. This Reply annexes a number of exhibits (*e.g.*, **CE-[x]**) and legal authorities (*e.g.*, **CLA-[x]**) numbered consecutively following those submitted with the Claimants' previous submissions, Claimants' Notice of Dispute dated 4 August 2017 ("**Notice of Dispute**"), Claimants' Request for Arbitration dated 9 February 2018 ("**Request for Arbitration**"), Claimants' Memorial dated 16 January 2019 ("**Memorial**"), Claimants' letter of 11 July 2019, Claimants' Request for Production of Documents and Replies to Respondent's Objections dated 26 July 2019 and Claimants' letter of 30 September 2019.

## II. FACTUAL BACKGROUND

### A. Mr. Rand acquires BD Agro in privatization

#### 1. In 2005, Serbia decided to privatize BD Agro

30. BD Agro is a dairy farm located at the outskirts of Belgrade, close to the international airport in Surčin. In 2005, Serbia decided to privatize a 70% majority shareholding in BD Agro by putting the Privatized Shares up for sale in a public auction.[8] Mr. Obradović learned about the opportunity to privatize BD Agro and brought it to the attention of Mr. Rand.[9]

31. Mr. Rand visited BD Agro and met with various Serbian Government officials to discuss the potential investment. These officials included Mr. Predrag Bubalo, the then Minister of Economy, Mr. Ljubiša Jovanović, the Assistant (Deputy) Minister of Economy, Mr. Mladjan Dinkić, the then Minister of Finance and Mr. Danilo Golubović, the then Deputy Minister of Agriculture, Forestry and Water Management.[10] They warmly welcomed Mr. Rand's interest in the potential investment.

32. BD Agro was in a dire condition in 2005. It used to be a model farm in the communist times, but ran into serious difficulties in the 1990's and early 2000's. As a result of the continuous decline, it was heavily underinvested: its equipment was outdated and the buildings needed a major overhaul. The farm's operating modes were outdated and ineffective. BD Agro also had significant past-due debts that it did not seem to be able to repay from its operating revenues.

33. On the positive side, BD Agro owned 1690 hectares of land[11] and leased another 3,247 hectares from the Government.[12] BD Agro's potential was underlined by its superb location—just 20 km from Belgrade, 5 km from the Belgrade international airport, next to E70 highway which runs through the so-called Pan-European Corridor X and close to the Danube river.[13] It is therefore not surprising that when Mr. Jovanović described

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8 Memorial, ¶ 65.

9 Obradović First WS, ¶¶ 8-10.

10 *E.g.* Email from L. Jovanović to W. Rand, 16 May 2005, **CE-013**; Email from W. Rand to P. Bubalo, 4 June 2005, **CE-014**. *See also* Rand Second WS, ¶¶ 8-9.

11 Email from K. Lutz to W. Rand, 26 July 2005, **CE-381**.

12 Rand First WS, ¶ 13.

13 E-mail from L. Jovanović to W. Rand, 16 May 2005, p. 1, **CE-013**.

the land owned by BD Agro to Mr. Rand, he expressly pointed out that as a result of its location, the value of BD Agro's land would be "*permanently increasing*."[14]

34. Relying on the unequivocal support of the Government, Mr. Rand decided to proceed. The investment would follow the usual arrangement: Mr. Obradović would attend the auction of the Privatized Shares and submit the bid in the auction on Mr. Rand's behalf. If successful, Mr. Obradović would acquire the Privatized Shares into his nominal ownership while Mr. Rand would become the beneficial owner.[15] Messrs. Rand and Obradović had used the same arrangement in their earlier acquisition of another privatized Serbian company, Inex Nova Varoš ("**Inex**"), in a public auction held in November 2004.[16]

35. Messrs. Rand and Obradović disclosed their personal arrangement to numerous Serbian officials, including Minister Bubalo and Deputy Minister Jovanović. None of the officials expressed any concerns or reservations.[17]

36. In fact, Minister Bubalo personally lent support to Mr. Rand when the Privatization Agency wanted to postpone the auction for the Privatized Shares. A few weeks before the auction, Mr. Rand learned that the Privatization Agency was proposing a postponement of the auction. When Mr. Rand complained about the potential postponement, Minister Bubalo ordered the Privatization Agency not to postpone the auction. The Privatization Agency followed the Minister's instruction, and the auction took place as scheduled.[18]

### 2. Mr. Rand drafted the MDH Agreement to formalize his agreement with Mr. Obradović regarding BD Agro

37. Prior to the auction, Messrs. Rand and Obradović formalized their agreement regarding Mr. Rand's investment in BD Agro in a written contract dated 19 September 2005 between Mr. Obradović and Marine Drive Holding Inc. ("**MDH**"), a company

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14 E-mail from L. Jovanović to W. Rand, 16 May 2005, p. 1, **CE-013**.

15 Rand First WS, ¶ 20; Rand Second WS, ¶ 14; Obradović First WS, ¶¶ 10-11; Obradović Second WS, ¶ 12.

16 Rand First WS, ¶ 20; Rand Second WS, ¶ 15; Obradović First WS, ¶¶ 10-11; Obradović Second WS, ¶ 12.

17 Rand First WS, ¶¶ 15, 20; Second Rand WS, ¶ 20; Obradović First WS, ¶ 11; Obradović Second WS, ¶ 17.

18 *E.g.* Excerpt from Mr. Rand's diary, 23 March 2006, **CE-582**. *See also* Rand Second WS, ¶ 23.

incorporated in British Virgin Islands, of which Mr. Rand was the president and majority owner ("**MDH Agreement**").[19] The agreement was drafted by Mr. Rand, who is a retired British Columbia lawyer.

38. The MDH Agreement specified that MDH had secured and would secure the funds for the acquisition of the Privatized Shares and BD Agro's debt and for subsequent investments to develop BD Agro and increase the shareholding if possible.[20] Mr. Rand had secured the funds from the Lundin family, residing in Geneva. The Lundins are one of the wealthiest entrepreneurial families in the world and Mr. Rand's long-time friends and business associates.[21]

39. The reference to BD Agro's debt related to BD Agro's outstanding debt in the amount of approximately EUR 3 million (EUR 1.5 million of principal debt and EUR 1.5 million of interest) that Mr. Rand had bought from BD Agro's creditors to protect BD Agro against a potential creditor bankruptcy application, and also to improve his chances of success in the auction. This move was welcomed by BD Agro's management, which got relief from creditors insisting on BD Agro's immediate repayment of its past-due debts.[22]

40. The MDH Agreement further provided that if Mr. Obradović acquired the Privatized Shares in the upcoming public auction, he would hold the shares at the risk of MDH.[23] Mr. Obradović agreed to vote his shares in BD Agro in accordance with MDH's instructions, to appoint MDH's nominees to the board of directors of BD Agro and to follow MDH's instructions with regard to the management of BD Agro.[24]

41. The effect of these rights was that MDH would acquire beneficial ownership of the Privatized Shares and any shares in BD Agro subsequently acquired by Mr. Obradović as soon as those shares were acquired by Mr. Obradović.[25]

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19 Register of Shareholders of Marine Drive Holdings Inc., 3 June 2009, **CE-004**; Register of Members of Rand Edgar Investment Corp., 31 July 2017, **CE-005**.

20 MDH Agreement, 19 September 2005, Clause D, **CE-015**.

21 Rand Second WS, ¶ 59.

22 Excerpt from Mr. Rand's diary, 23 March 2006, **CE-582**. *See also* Rand Second WS, ¶ 22.

23 MDH Agreement, 19 September 2005, Art. 4, **CE-015**

24 MDH Agreement, 19 September 2005, Art. 5, **CE-015**

25 Deane ER, ¶ 15.

42. The MDH Agreement also gave MDH a call option to acquire the legal title (nominal ownership) to the Privatized Shares, as well as any shares in BD Agro subsequently acquired by Mr. Obradović, for a nominal price of EUR 1,000.[26]

### 3. On 29 September 2005, Mr. Obradović submitted the winning bid at a public auction for the Privatized Shares

43. On 29 September 2005, the public auction of the Privatized Shares took place and Mr. Obradović was the successful bidder.

44. Deputy Minister Jovanović immediately reported the outcome of the auction directly 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.*"[27] This email makes it clear that Mr. Jovanović was aware of Mr. Rand's beneficial ownership. Mr. Jovanović obviously would not have had any other reason to write to Mr. Rand to congratulate him for his successful acquisition of BD Agro.

45. After Mr. Rand had learned about his success in the auction, he informed some of his business associates and acquaintances. One of them, Mr. Wells from the company CanEd International Inc., wrote a follow up email to Mr. Rand noting that he was delighted to learn about Mr. Rand's success: "*Thank you for your telephone call this morning informing us of your successful acquisition of the farm in Serbia. We were delighted to receive the good news.*"[28]

### 4. On 4 October 2005, Mr. Obradović concluded an agreement with the Privatization Agency

46. On 4 October 2005, following the public auction Mr. Obradović and the Privatization Agency entered into Privatization Agreement.[29]

47. 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

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26 MDH Agreement, 19 September 2005, Art. 1, **CE-015**.

27 E-mail from L. Jovanović to W. Rand, 29 September 2005, **CE-016**. *See also* Rand Second WS, ¶ 24.

28 Email from G. Wells to W. Rand, 29 September 2005, **CE-583**. *See also* Rand Second WS, ¶ 24.

29 Privatization Agreement, 4 October 2005, **CE-017**.

a period of five years.[30] The buyer committed to invest further RSD 168,683,000 (approximately EUR 1,982,000)[31] in BD Agro within one year from the sale.[32]

48. The content of the Privatization Agreement was non-negotiable and most of its provisions were prescribed by mandatory provisions of Serbian law.[33]

49. The provisions of the Privatization Agreement established, among other things, certain restrictions on the buyer. For example, the provisions of Article 5.3.1 prohibited the buyer from selling, assigning or otherwise alienating the Privatized Shares in the period of two years following the date of the Privatization Agreement:

> 5.3 Further obligations of the Buyer
> The Buyer undertakes that he will not perform or allow performance of the following actions, without previous written approval by the Agency:
>
> 5.3.1 he will not sell, assign or otherwise alienate shares in the period of 2 years as of the day of conclusion of the agreement;[34]

50. The Privatization Agreement also restricted transactions with BD Agro's assets in the time period until full payment of the purchase price. The purpose of those provisions was 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.[35] Thus, Article 5.3.4 of the Privatization Agreement provided:

> The Buyer will not encumber with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards the subject accrued based on regular business activities of the subject, that is, except for the purpose of acquiring of the funds to be used by the subject.[36]

51. The Privatization Agency was required by law to conduct periodic controls of BD Agro to monitor compliance with the restrictions under the Privatization Agreement. The

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30 Privatization Agreement, 4 October 2005, Arts. 1.2-1.3, **CE-017**.

31 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**.

32 Privatization Agreement, 4 October 2005, Art. 5.2, **CE-017**.

33 Milošević First ER, ¶ 48.

34 Privatization Agreement, 4 October 2005, Art. 5.3.1, **CE-017.**

35 Memorial, ¶ 96; Milošević First ER, ¶ 76; Milošević Second ER, ¶ 66.

36 Privatization Agreement, 4 October 2005, Art. 5.3.4, **CE-017**.

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.[37]

52. Article 7.1 of the Privatization Agreement provided that the Privatization Agreement would be terminated *ex lege* if the buyer failed to remedy certain violations. The grounds for termination did not include violations of Article 5.3.4.[38]

### 5. On the same date, Mr. Obradović and the Privatization Agency also entered into an agreement on pledge of the Privatized Shares

53. On the same day, *i.e.* 4 October 2005, Mr. Obradović and the Privatization Agency entered into a share pledge agreement, according to which Mr. Obradović pledged the Privatized Shares to the Privatization Agency (the "**Share Pledge Agreement**").[39]

54. The pledge was agreed for the time period until the "*final payment of sale and purchase price*:"

> **Article 2**
>
> Confirmation of the shares referred to in Article 1 of this Agreement is pledged with the Agency by the Pledgor for the period of 5 years as of the day of conclusion of the sale and purchase agreement, that is, until final payment of sale and purchase price.[40]

55. The statutory consequence of the pledge was that, as long as the pledge was in place, Mr. Obradović was not able to effectuate any transfer of legal title to the Privatized Shares without the consent of the Privatization Agency.[41]

## B. The MDH Agreement was valid and consistent with Serbian law and the Privatization Agreement

56. Serbia claims that the MDH Agreement was not valid because any sale of the Privatized Shares would allegedly violate Serbian rules on trading of shares in privatized companies listed on the Belgrade Stock Exchange ("**BSE**").[42] Serbia also points out that the MDH Agreement was allegedly inconsistent with the contractual prohibition on

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37 Milošević First ER, ¶ 66.

38 Privatization Agreement, 4 October 2005, Art. 7(1), **CE-017**.

39 Privatization Agreement, 4 October 2005, Schedule 1: Share Pledge Agreement, **CE-017**.

40 Privatization Agreement, 4 October 2005, Schedule 1: Share Pledge Agreement, Art. 2, **CE-017**.

41 Milošević First ER, ¶ 127; Memorial, ¶ 75.

42 Counter-Memorial, ¶¶ 233-245.

alienation of the Privatized Shares in Article 5.3.1 of the Privatization Agreement[43] and that the Privatized Shares could not be transferred by endorsement of share certificates,[44] as contemplated in Article 2 of the MDH Agreement.[45]

57. The Claimants address Serbia's arguments *seriatim* below and show that each of them is erroneous.

### 1. The MDH Agreement did not violate Serbian rules on trading of shares in listed privatized companies

58. The MDH Agreement was in compliance with Serbian rules on trading of shares in listed privatized companies, such as BD Agro. Serbia's argument to the contrary is based on a misinterpretation of the applicable rules and completely ignores both the common sense and the well-established practice on the Serbian capital markets, including the BSE.

59. Serbia's erroneous argument is based on its misinterpretation of two provisions: (*i*) Article 59 of the 2001 Law on Privatization, which required, until 3 January 2008 when the requirement was repealed, that sales of shares in privatized companies be executed on a financial stock exchange; and (*ii*) Article 52(1) of the 2002 Law on Capital Markets and its equivalent Article 52(2) of the 2006 Law on Capital Markets, which required that shares in listed companies be traded exclusively on an organized market in the Republic of Serbia.

60. Serbia relies on its legal expert, Professor Mirjana Radović, to interpret these provisions as effectively precluding any trades of shares in listed privatized companies, such as BD Agro, that would be agreed outside of the BSE.[46] This is an absurd interpretation, which completely ignores the actual operation of capital markets, including the BSE.

61. According to Serbia's erroneous interpretation, the owners of shares in such companies would never be able to sell their shares to a predetermined buyer at negotiated terms. Thus, the owners of shares in listed privatized companies would only be able to put their shares up for sale on the BSE and then patiently wait and see whether the public at large

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43 Counter-Memorial, ¶¶ 247-248.

44 Counter-Memorial, ¶¶ 225 *et seq.*

45 MDH Agreement, 19 September 2005, Art. 2, **CE-015**.

46 Counter-Memorial, ¶¶ 233-238.

would be interested in buying them. The owners would never be able to agree on any ancillary terms commonly found in share purchase transactions, such as earn-outs, repurchase rights or option arrangements.

62. The Claimants' Serbian capital market expert, Ms. Bojana Tomić Brkušanin, a former senior official at the Serbian Securities Commission ("**SEC**"), explains in her expert report that sales of listed shares in privatized companies to a predetermined buyer and at negotiated terms are allowed under Serbian law.

63. Such sales agreed outside of the BSE are executed on the BSE in the form of the so-called block trades.[47] Another widely used practice, allowed by the SEC, is for the owner to contribute the shares as an in-kind contribution into the capital of a special purpose limited liability company and then freely transfer the shares in the limited liability company to the buyer.[48]

64. Both of these widely used methods to transfer shares in accordance with the requirements of the 2001 Law on Privatization and the Laws on Capital Markets were available at the time when the MDH Agreement was concluded, and they remain available until today, with only Laws on Capital Markets continuing to apply.[49]

65. After the requirement for executing transfers of shares in privatized companies solely on the BSE was repealed on 3 January 2008, the shares in privatized companies could also be delisted and freely transferred thereafter.[50]

66. In fact, Serbia's argument that the agreement on the call option in Article 1 of the MDH Agreement violated Serbian capital market rules is nothing short of disingenuous. In 2009, the Serbian government concluded shareholders agreements with a put option with several foreign financial institutions—including the German company DEG and Swedfund International—relating to their shares in Komercijalna banka, a Serbian bank publicly traded on the BSE. The shareholder agreements gave the international financial institutions a put option, allowing them to sell the shares of Komercijalna banka to Serbia for a predetermined price. When DEG and Swedfund exercised their put options

47 Tomić Brkušanin ER, ¶ 26.

48 Tomić Brkušanin ER, ¶ 35.

49 Tomić Brkušanin ER, ¶¶ 26, 36.

50 Tomić Brkušanin ER, ¶ 40.

in March 2019, the transfer of the put shares to Serbia was executed by a block trade on the BSE.[51] Serbia cannot seriously claim that the call option under the MDH Agreement was illegal or could not be performed while Serbia's own option with DEG and Swedfund was agreed to and performed without any difficulties.

67. Therefore, MDH and Mr. Obradović were perfectly free to agree on the call option in the MDH Agreement and, if MDH had exercised its call option, Mr. Obradović would have been able to perform and transfer to MDH the legal title to the BD Agro shares using any of the methods set out above—all in full compliance with Serbian law and practice.

### 2. The MDH Agreement was consistent with Article 5.3.1 of the Privatization Agreement

68. Article 5.3.1 of the Privatization Agreement prohibited Mr. Obradović to "*sell, assign or otherwise alienate [the Privatized Shares] in the period of 2 years as of the day of conclusion of the [Privatization Agreement]*."[52]

69. The Claimants' Serbian law expert, Mr. Miloš Milošević, explains that under Serbian law, sale, assignment and alienation all require transfer of legal title. An agreement on call option rights does not transfer legal title to the underlying shares. Therefore, the call option arrangement in Article 1 of the MDH Agreement did not come within the purview of the restrictions set out in Article 5.3.1 of the Privatization Agreement.[53]

70. Article 5.3.1 of the Privatization Agreement would have been violated only if Mr. Obradović had purported to transfer the Privatized Shares to MDH prior to 4 October 2007. He never did so.

### 3. The non-existence of BD Agro share certificates capable of endorsement does not render the MDH Agreement invalid or unenforceable

71. Serbia makes much of the fact that Article 2 of the MDH Agreement contemplated that after the exercise of the call option, Mr. Obradović would transfer legal title to the shares

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51 Ministry of Finances for Insajder: By the end of November we will purchase shares of Komercijalna Banka both from EBRD and the IFC, dated 28 June 2019, **CE-533**. *See also* Tomić Brkušanin ER, ¶ 34.

52 Privatization Agreement, 4 October 2005, Art. 5.3.1, **CE-017**.

53 Milošević Second ER, ¶ 190.

in BD Agro to MDH by endorsement of share certificates.[54] Such transfer could not be performed simply because under Serbian law, joint stock companies, such as BD Agro, only issue shares in a dematerialized form—BD Agro therefore could not issue any share certificates to be endorsed.[55]

72. The MDH Agreement is governed by the law of British Columbia. While the MDH Agreement did not contain an express provision on governing law, Messrs. Rand and Mr. Obradović always intended—and still intend—for the MDH Agreement to be governed by the law of British Columbia.[56]

73. Dr. Uglješa Grušić, the Claimants' expert on Serbian private international law, confirms that, under the Serbian provisions on conflicts of law, the MDH Agreement is governed by the law of British Columbia as the law chosen by the parties.[57] Mr. Robert Deane, the Claimants' expert on British Columbia law, confirms that the law of British Columbia is the proper law of the MDH Agreement also under the conflict of laws rules of that jurisdiction.[58]

74. Mr. Deane unequivocally concludes that, under the law of British Columbia, the MDH Agreement is not invalid as a whole just because the parties would not have been able to effectuate the share transfer following a hypothetical exercise of the call option exactly in the manner spelled out in Article 2 of the MDH Agreement.[59] Ms. Tomić Brkušanin confirms that the MDH Agreement would not have been invalid as a whole even if it had been governed by Serbian law.[60]

75. The only consequence of the non-existence of BD Agro share certificates capable of endorsement is that Mr. Obradović would have had to transfer legal title to the shares in BD Agro in another manner.[61] As explained above, alternative methods of transfer

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54 Counter-Memorial, ¶¶ 228-230.

55 Tomić Brkušanin ER, ¶ 52.

56 Rand Second WS, ¶ 19; Obradović Second WS, ¶ 15.

57 Grušić ER, ¶¶ 10-17.

58 Deane ER, ¶¶ 51-76.

59 Deane ER, ¶ 98.

60 Tomić Brkušanin ER, ¶¶ 57-62.

61 Deane ER, ¶¶ 16-19; Tomić Brkušanin ER, ¶¶ 61-62.

existed at the time and still exist.[62] Obviously, both Mr. Rand and Mr. Obradović confirm that the exact method of transfer of legal title to the shares was of no importance and they would have performed it in any other manner, if necessary, as long as it would have allowed MDH to be registered with legal title to the Privatized Shares.[63]

76. Again, Serbia's own practice best demonstrates that an incorrect reference to share certificates in an agreement is a non-issue. The Share Pledge Agreement also incorrectly referred to the deposit of a share certificate with the Privatization Agency as the means to effectuate the pledge of the Privatized Shares. Yet, the Privatization Agency and Mr. Obradović did not claim that the Share Pledge Agreement was invalid; instead, they simply performed the pledge in another manner. This is exactly what would have happened under the MDH Agreement if the call option had been exercised.

## C. BD Agro flourished under Mr. Rand's control

### 1. Mr. Rand took control over BD Agro immediately after the conclusion of the Privatization Agreement

77. Once the Privatization Agreement was concluded, Mr. Rand immediately replaced BD Agro's management. Mr. Rand, Mr. Obradović and Mr. Lukas Lundin became new members of the Board of Directors. Mr. Jovanović resigned from his position as Deputy Minister of Economy and became BD Agro's general manager.

78. Mr. Jovanović informed several Serbian governmental officials, OECD officials and other businesspersons within his contacts about this change. In an email he sent to announce this news, Mr. Jovanović copied Mr. Rand and stated that BD Agro seemed to be "*the biggest Canadian investment in Serbia so far*".[64]

79. Mr. Rand's appointment to the Board of Directors was no symbolic gesture. To the contrary, Mr. Rand immediately became involved in the management of BD Agro. He was in continuous contact with BD Agro management and employees, who reported to him about a great variety of issues, including items such as conclusion of agreements on sales of BD Agro's products such as milk, crops and eggs, sales of property, cooperation with consultants, preparation of seeding plans and investment into

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62 Tomić Brkušanin ER, ¶¶ 26-44.

63 Rand Second WS, ¶ 17.

64 Email from L. Jovanović to W. Rand et al., 9 February 2006, **CE-597**. *See also* Rand Second WS, ¶ 38.

mechanization and machinery. Mr. Rand also assisted with getting visas for the employees of BD Agro who were visiting Canada.[65]

80. Mr. Rand was also regularly provided with financial reports and discussed BD Agro's financing needs with the senior management.[66]

81. Finally, Mr. Rand regularly visited BD Agro to personally control its operations and meet BD Agro employees.[67] The below photographs show one such visit, which took place in July 2008, when Mr. Rand visited BD Agro together with his wife:[68]

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65 *E.g.* Email from BD Agro to W. Rand, 10 January 2008, **CE-598**; Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, **CE-608**; Email from Marine Drive Holdings Inc. to W. Rand, 10 January 2008, **CE-609**; Email from W. Rand to Marine Drive Holdings Inc, 15 February 2006, **CE-610**; Email communication between W. Rand and BD Agro, 26 July 2006, **CE-611**; Email communication between W. Rand and A. Jorga, 10 August 2006, **CE-605**; Email from Marine Drive Holdings Inc. to W. Rand re Sokolac, 10 January 2008, **CE-612**; Email from L. Jovanović to W. Rand, 27 February 2006, **CE-613**; Email from L. Jovanović to W. Rand, 1 June 2006, **CE-601**; Email from A. Jorga to W. Rand, 1 August 2006, **CE-614**; Email from A. Jorga to W. Rand, 30 June 2006, **CE-620**; Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, **CE-608**; Email communication between W. Rand and D. Ceramilać, 5 February 2007, **CE-621**. *See also* Rand Second WS, ¶¶ 39-41; Obradović Second WS, ¶¶ 31-32.

66 *E.g.* Email from Marine Drive Holdings Inc. to W. Rand, 23 March 2007, **CE-622**; Email from A. Jorga (BD Agro) to W. Rand et al., 2 November 2006, **CE-623**; Email from A. Jorga (BD Agro) to W. Rand et al., 26 July 2006, **CE-624**; Email from Marine Drive Holdings Inc. to W. Rand, 24 October 2007, **CE-625**; Email from A. Jorga (BD Agro) to W. Rand, 20 October 2006, **CE-626**; Email from Marine Drive Holdings Inc. to W. Rand, 6 July 2007, **CE-627**; Email from Marine Drive Holdings Inc. to W. Rand, 26 November 2007, **CE-628**; Email from Marine Drive Holdings Inc. to W. Rand and P. Bagnara, 29 December 2006, **CE-443**; Email communication between W. Rand and BD Agro, 26 July 2006, **CE-611**; Email from W. Rand to A. Jorga, 2 May 2006, **CE-629**; Email from W. Rand to A. Jorga, 7 July 2006, **CE-630**; Email from W. Rand to L. Jovanović, 13 April 2006, **CE-631**; Email from K. Lutz to D. Obradović, 16 November 2006, **CE-413**; Email communication between W. Rand and S. Marčetić, 5 July 2006, **CE-632**; Email from W. Rand to BD Agro, 3 May 2006, **CE-633**; Email from W. Rand to L. Jovanović, 7 February 2006, **CE-634**; Email communication between W. Rand and Marine Drive Holdings Inc., 29 July 2006, **CE-635**; Email from K. Lutz to L. Jovanović, 4 December 2008, **CE-636**; Email from L. Jovanović to W. Rand, 17 August 2006, **CE-637**. *See also* Rand Second WS, ¶ 42.

67 *E.g.* Email communication between W. Rand and L. Jovanović, 31 March 2006, **CE-638**; Email from W. Rand to D. Obradović et al., 1 September 2006, **CE-414**; Email communication between K. Lutz and A. Janičić, 29 August 2006, **CE-639**; Photographs from Mr. Rand's visit of BD Agro in July 2008, **CE-415**. *See also* Rand Second WS, ¶ 43; Obradović Second WS, ¶ 32.

68 Photographs from Mr. Rand's visit of BD Agro in July 2008, **CE-415**.

82. Due to his deep on-site involvement, BD Agro employees sometimes approached Mr. Rand with purely personal problems. One example, that speaks for it all, is that of Mr. Misailović. Mr. Misailović was BD Agro's employee and his son needed heart transplant surgery. Unfortunately, Mr. Misailović could not afford to pay for the

operation. Mr. Rand did not hesitate and paid EUR 90,000 for the operation from his personal funds.[69]

83. Mr. Rand's efforts, however, were not restricted to control of internal processes in the company and communication with BD Agro's management and employees. Mr. Rand also communicated with a number of external consultants and business partners of BD Agro, including PricewaterhouseCoopers and the European Bank for Reconstruction and Development ("**EBRD**").[70] All these business partners were also aware that Mr. Rand was the beneficial owner of BD Agro.[71]

84. Mr. Jovanović also made no secret of Mr. Rand's beneficial ownership. For example, when Mr. Jovanović discussed potential cooperation in a greenhouse farming project with Mr. Miloš Marković from the Mitsubishi group, Mr. Jovanović copied Mr. Rand on the emails he sent and expressly stated that he copies the "*mayor (sic: major) share holder, Mr. William Rand in Vancouver*."[72] Similarly, when Mr. Jovanović copied Mr. Rand on an email communication with Mr. Terry Smith from the consulting firm Dairy Strategies, he explained that he copies the "*major share holder, Mr. William Rand in Canada*".[73]

85. Finally, Mr. Rand's ownership of BD Agro was also known to the Serbian media. For example, in its article "*BD AGRO from Dobanovci is building a modern cow farm*," an on-line newspaper called "ekapija" reported that the farm was being built using "*Canadian capital*".[74]

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69 Email from K. Lutz to A. Janičić, 5 March 2008, **CE-640**. *See also* Rand Second WS, ¶ 44.

70 *E.g.* Email from B. Bogovac to D. Groves, 19 January 2006, **CE-641**; Email from W. Rand to B. Bogovac (PWC), 26 January 2006, **CE-642**; Email from B. Bogovac to W. Rand, 23 February 2006, **CE-604**; Email communication between L. Jovanović and S. Ferguson (EBRD), 7 March 2007, **CE-643**; Email communication between W. Rand and S. Ferguson (EBRD), 9 March 2007, **CE-644**; Email from Z. Karaklajic to W. Rand, 31 January 2007, **CE-645**; Email from A. Pearle (Specialty Feeds) to W. Rand re cashflows, 27 July 2006, **CE-646**; Email from A. Pearle (Specialty Feeds) to W. Rand, 27 July 2006, **CE-647**.

71 Rand Second WS, ¶ 45.

72 Email from L. Jovanović to M. Marković, 3 December 2007, **CE-650**.

73 Email communication between L. Jovanović and T. Smith, 23 October 2007, **CE-651**.

74 *E.g. "BD AGRO" from Dobanovci is building a modern cow farm*, ekapija, 8 November 2007, **CE-757**.

86. Finally, the following picture was published on BD Agro's website.[75] It showed flags installed at BD Agro flying in the following order, from left to right: (*i*) BD Agro's flag; (*ii*) Canadian flag; (*iii*) Serbian flag; (*iv*) Swiss flag; and (*iv*) Swedish flag. The Canadian flag represented Mr. Rand and the Swiss and Swedish flags represented the Lundin family.


### 2. Mr. Rand implemented an aggressive investment plan to completely overhaul and modernize BD Agro

87. In March 2006, Mr. Rand had the senior management of BD Agro adopt a new business plan contemplating a complete overhaul of the dairy farm ("**2006 Business Plan**").[76] The plan was to modernize 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 strictest international hygienic standards.[77]

88. Based on the 2006 Business Plan, BD Agro invested more than EUR 12 million over the next three years. These funds were used to purchase state-of-the-art equipment, such as an automated milking parlor and equipment to increase the production of crops used

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75 The original website is no longer directly accessible and can only be accessed through a web archive available at the following address: https://web.archive.org/web/20090524234011/http:/www.bdagro.com/site/index.php?option=com_content&task=view&id=16&Itemid=25. *See also* Screenshot of BD Agro's website accessible through webarchive, 22 September 2019 (accessed), **CE-758**.

76 BD Agro's Business Plan for the years 2006-2011, 10 March 2006, **CE-020**.

77 BD Agro's Business Plan for the years 2006-2011, 10 March 2006, pp. 6, 27-30, **CE-020**. *See also* Rand Second WS, ¶¶ 28-30.

to feed the cows, to completely overhaul BD Agro's buildings, stables and barns and to put in place a new system of connections between stables and pastures.[78]

89. BD Agro also purchased approximately 2,000 Canadian heifers of the Holstein Friesian breed that were delivered to Serbia on a chartered Boeing 747 aircraft.[79] The total cost was approximately EUR 7.9 million. Mr. Rand was not only involved in negotiations with the suppliers, he also directly 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.[80]

90. Finally, BD Agro invested another EUR 8.5 million to purchase a large agricultural estate in Novi Bečej, located approximately 120 kilometers north from Dobanovci, which included 2,124 hectares of high quality arable land.[81]

91. The below photographs taken during Mr. Rand's visit of BD Agro in July 2008 show just a few examples of the tremendous improvements under Mr. Rand's ownership:[82]

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78 Rand First WS, ¶¶ 26-29; Rand Second WS, ¶ 29.

79 Rand First WS, ¶ 29; Rand Second WS, ¶ 36.

80 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-021**; 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-022**; Confirmation of wire transfer from W. Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-023**; Confirmation of wire transfer from W. Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-024**. *See also* Rand Second WS, ¶ 36.

81 Rand First WS, ¶ 27; Rand Second WS, ¶ 29; Obradović Second WS, ¶ 59.

82 Photographs from Mr. Rand's visit of BD Agro in July 2008, **CE-415**.


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92. Mr. Rand's efforts and the continuous investments indeed bore their fruits. BD Agro became one of the biggest dairy farms in the Balkans and was recognized as "*the most modern cow farm not only in Serbia, but also in Europe*."[83] The Serbian newspaper Plave strane even published pictures showing the new milking parlor purchased by BD Agro:

83 K. Zvanovic, *Where cows listen to Beethoven*, Plave strane, 27 November 2010, **CE-026**.

93. BD Agro developed a strong position in Serbia's dairy market and was several times recognized by Imlek—the largest milk processing company in Serbia and the entire Balkans region—as one of its most important suppliers of raw milk.[84]

94. Unsurprisingly, BD Agro's modernized facilities became a popular destination of official delegations. On 3 January 2007, Mr. Vojislav Koštunica, the then Prime Minister of Serbia, Mr. Predrag Bubalo, the then Minister of Economy, and Mr. Velimir Ilić, the then Minister of Capital Investments, visited BD Agro.[85]

95. The delegation was welcomed by the five flags installed at the entrance to BD Agro. The below picture shows the flags in the following order, from left to right: (*i*) BD Agro's flag; (*ii*) Swiss flag; (*iii*) Swedish flag; (*iv*) Canadian flag; and (*iv*) Serbian flag. As noted above, the Canadian flag represented Mr. Rand and the Swiss and Swedish flags represented the Lundin family.[86]

84 *Record Holding Farmer's day*, Privredni pregled, 5 March 2012, **CE-027**.

85 Obradović Second WS, ¶ 35.

86 Obradović Second WS, ¶ 36.

96. The Prime Minister and the Ministers had nothing but the praise for BD Agro and the improvement of its operations that had been achieved in the short time since the privatization. Mr. Bubalo stressed the importance of the investments that Mr. Rand made.[87]

### 3. The additional investments in BD Agro were made as required under the Privatization Agreement

97. 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**").[88] 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%.

98. 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 full satisfaction of Article 5.2.1 of the Privatization Agreement.[89]

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87 Obradović Second WS, ¶ 37.

88 The Beneficially Owned Shares consist of the Privatized Shares and the New Shares.

89 Confirmation of the Privatization Agency of the Completion of Investment, 10 October 2006, **CE-018**.

## D. In February 2008, Mr. Rand restructured his beneficial ownership by involving his children and Sembi

### 1. At the end of 2007, the Lundins requested repayment of their funds

99. Most of the funding that Mr. Rand had arranged for the purchase and subsequent investments in BD Agro came from the Lundin family and their investment bank, 1875 Finance S.A.[90] At the end of 2007, the Lundin family decided to exit the project and requested repayment of the funds loaned to Mr. Obradović.[91] Mr. Rand agreed to replace the Lundins' funds with his own.

### 2. Mr. Rand acquired Sembi as the new holding company for his beneficial ownership of the Beneficially Owned Shares and shared the beneficial ownership with his children

100. Mr. Rand used the buy-out of the Lundins as an opportunity to change the holding structure for his beneficial ownership of the BD Agro shares and to share his beneficial ownership with his three children, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand.

101. Mr. Rand purchased a Cyprus shelf company called Sembi Investment Limited ("**Sembi**") to serve as the new holding company for his beneficial ownership of the Beneficially Owned Shares. Sembi is a limited liability company organized under the laws of Cyprus.[92]

102. All of the preferred shares issued by Sembi are owned by Rand Investments Ltd.[93]

103. All of the ordinary shares issued by Sembi are owned by The Ahola Family Trust,[94] a trust domiciled in Guernsey whose beneficiaries are, and have always been, Mr. Rand's three children.[95] The trustee of The Ahola Family Trust is, and has always been, Mr. Robert Albert Jennings.[96]

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90 Rand First WS, ¶¶ 16, 23; Obradović First WS, ¶ 15; Aksel Azrac Witness Statement dated 16 January 2019, ¶¶ 12-13; Rand Second WS, ¶¶ 27; Obradović Second WS, ¶ 19.

91 Azrac WS, ¶ 15.

92 Memorial, ¶¶ 46-50.

93 Corporate register of Sembi, 27 June 2019, pp. 7-8 (pdf), **CE-417**.

94 Corporate register of Sembi, 27 June 2019, pp. 7-8 (pdf), **CE-417**.

95 The Ahola Family Trust Indenture, 6 March 2015, Schedule B, **CE-008**.

96 The Ahola Family Trust Indenture, 6 March 1995, p. 1, **CE-008**; Jennings Witness Statement dated 3 October 2019, ¶ 6.

104. Mr. Jennings explains in his witness statement that his appointment as trustee was conditioned upon an agreement that he had with Mr. Rand. According to this agreement, Mr. Jennings would, so long as he was trustee, seek and follow instructions from Mr. Rand in respect of all matters involving The Ahola Family Trust.[97] In light of this agreement with Mr. Rand, Mr. Jennings has left the management of, and control over, Sembi to Mr. Rand.[98]

105. Therefore, Sembi is, and at all relevant times was, controlled by Mr. Rand. Mr. Rand is, and always was, a director of Sembi.[99] Mr. Rand controlled the conduct of all other directors of Sembi. Mr. Markićević, who has been a director of Sembi since June 2013,[100] and Mr. Obradović, who was a director of Sembi between December 2007 and June 2013,[101] became directors based on Mr. Rand's instructions and agreed to always follow Mr. Rand's orders.[102] The other two directors of Sembi have been supplied by HLB Axfentiou Limited ("**HLB**")—a Cypriot company providing domiciliary and fiduciary services to Sembi, including providing remaining directors of Sembi. As is customary with offshore holding companies, Mr. Rand has an agreement with HLB that gives him full control over Sembi.[103]

### 3. In February 2008, Mr. Rand instructed Mr. Obradović to enter into two agreements with Sembi and the Lundins

#### a. The agreement between Mr. Obradović, the Lundin Family, Mr. Rand and Sembi

106. On 22 February 2008, Mr. Obradović, the Lundin Family, Mr. Rand and Sembi entered into an agreement on the repayment of the Lundins' funds by Sembi, whereby Sembi agreed to repay EUR 9 million to the Lundin Family (the "**Lundins Agreement**").[104] The Lundin Family in turn extinguished any claims it had to the Privatization Agreement

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97 Jennings WS, ¶ 7.

98 Jennings WS, ¶ 15.

99 Corporate register of Sembi, 27 June 2019, p. 3 (pdf), **CE-417**.

100 Corporate register of Sembi, 27 June 2019, p. 3 (pdf), **CE-417**.

101 Corporate register of Sembi, 27 June 2019, p. 3 (pdf), **CE-417**.

102 Markićević Second WS, ¶ 12; Markićević Third WS, ¶ 8; Obradović Second WS, ¶ 39.

103 Sembi Investment Limited Standard Terms & Conditions, 31 December 2007, **CE-554**; Instructions Letter from Rand Investments to HLB Axfentiou Limited, 31 December 2007, **CE-007**.

104 Agreement between D. Obradović, the Lundin Family, W. Rand and Sembi, 22 February 2008, **CE-028**. *See also* Rand First WS, ¶ 30.

and BD Agro. Mr. Rand personally guaranteed all of Sembi's and Mr. Obradović's obligations to the Lundins.[105]

107. The Lundins Agreement was negotiated between Mr. Rand and the Lundins, without any involvement of Mr. Obradović, who just signed the agreement pursuant to Mr. Rand's instructions.[106]

108. As explained in the Memorial, by October 2010, Sembi had repaid to the Lundins EUR 5.6 million.[107] 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.[108]

### b. The Sembi Agreement between Mr. Obradović and Sembi

109. On the same date, *i.e.* 22 February 2008, Mr. Obradović entered into an agreement with Sembi (the "**Sembi Agreement**", together with the Lundins Agreement, the "**2008 Agreements**").[109]

110. Under the Sembi Agreement, Sembi assumed all of Mr. Obradović's obligations, including any payments owing to the Privatization Agency and the repayment of loans provided by the Lundins.[110] In consideration thereof, Mr. Obradović agreed to transfer to Sembi "*all of his right, title and interest in and to [the Privatization Agreement]*" and to "*sign any such documents and do all such things as may be necessary to effect the transfer to [Sembi] of the [Privatization Agreement] together with any other assets whatsoever held by Mr. Obradović which are related to BD Agro*."[111]

111. The assets held by Mr. Obradović and related to the business of BD Agro included the Beneficially Owned Shares and receivables against BD Agro in the amount of

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105 Agreement between D. Obradović, the Lundin Family, W. Rand and Sembi, 22 February 2008, **CE-028**.

106 Rand Second WS, ¶ 57; Obradović Second WS, ¶ 43.

107 Confirmation of wire transfer from Sembi to I. Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-057**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-058**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-059**. *See also* Rand First WS, ¶ 33; Azrac WS, ¶ 16.

108 Rand First WS, ¶ 33; Azrac WS, ¶ 16.

109 Agreement between D. Obradović and Sembi, 22 February 2008, **CE-029**.

110 Agreement between D. Obradović and Sembi, 22 February 2008, **CE-029**.

111 Agreement between D. Obradović and Sembi, 22 February 2008, Art. 4, **CE-029**.

approximately EUR 4.7 million arising under loans that Mr. Obradović had provided to BD Agro from the funds loaned to him by the Lundins.[112]

112. Article 9 of the Sembi Agreement expressly states that it is governed by Cyprus law.[113] Mr. Georgiades, the Claimants' expert on Cyprus law, confirms that Cyprus law gives effect to the parties' express choice of law, and the mutual obligations of Mr. Obradović and Sembi under the Sembi Agreement, as well as the validity of the Sembi Agreement, are therefore governed by Cyprus law.[114] Dr. Uglješa Grušić confirms that the choice of law is valid also from the perspective of Serbian private international law.[115]

113. Mr. Georgiades further explains that the Sembi Agreement transferred to Sembi the legal title of the rights and assets held by Mr. Obradović that could be transferred to Sembi on the date of the said agreement. In respect of the rights and assets for which additional documents had to be signed or other things had to be done, or a third-party consent had to be obtained to effect the transfer of legal title, the Sembi Agreement transferred to Sembi Mr. Obradović's equitable rights therein and Sembi thus became their beneficial owner.[116]

114. The Sembi Agreement replaced the MDH Agreement that Mr. Obradović concluded with MDH in 2005. As Messrs. Rand and Obradović confirm in their witness statements, it was their mutual understanding that upon the conclusion of the Sembi Agreement, the MDH Agreement was terminated.[117] Mr. Geogiardes confirms in his expert report that under such circumstances, the previous existence of the MDH Agreement did not preclude Mr. Obradović from concluding the Sembi Agreement.[118]

115. Based on the Sembi Agreement, Sembi registered its beneficial ownership of BD Agro in its books. Sembi's beneficial ownership of the Beneficially Owned Shares remained

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112 Agreement between D. Obradović and Sembi, 22 February 2008, Art. 4, **CE-029**.

113 Agreement between D. Obradović and Sembi, 22 February 2008, Art. 9, **CE-029**.

114 Georgiades Second ER, ¶¶ 3.5-3.6.

115 Grušić ER, ¶ 44.

116 Georgiades Second ER, ¶¶ 3.12-3.13.

117 Rand Second WS, ¶ 56; Obradović Second WS, ¶ 42.

118 Georgiades Second ER, ¶ 3.10.

registered in Sembi's books ever since, of course with a note that the shareholding was expropriated on 21 October 2015.[119]

## E. The Sembi Agreement is valid and consistent with Serbian law and the Privatization Agreement

### 1. The Sembi Agreement is consistent with Article 41ž of the Law on Privatization

116. The Sembi Agreement does not violate Article 41ž of the Law on Privatization, as erroneously claimed by Serbia, because it is not an assignment agreement as defined in Serbian law.

117. Article 41ž requires the Privatization Agency's approval for the assignment of privatization agreements. Under Serbian law, assignment is defined essentially as a transfer to the assignee of a contractual relationship that the assignor has with a third party. The effect of the assignment is that the assignee replaces the assignor in the contractual relationship with the third party.[120]

118. The Sembi Agreement is a complex agreement. Dr. Grušić explains that from all the transfers contemplated under the Sembi Agreement, only the contemplated transfers of legal title to the Privatization Agreement and to Mr. Obradović's receivables against BD Agro could be qualified as an assignment within the meaning of Serbian law.[121]

119. The transfer of legal title to shares, including the Beneficially Owned Shares, does not constitute an assignment within the meaning of Serbian law. Similarly, the transfer of

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119 Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, p. 13, **CE-420**; Report and financial statements of Sembi Investment Limited as of 31 December 2009, p. 15, **CE-656**; Report and financial statements of Sembi Investment Limited as of 31 December 2010, p. 14, **CE-657**; Report and financial statements of Sembi Investment Limited as of 31 December 2011, p. 14, **CE-658**; Report and financial statements of Sembi Investment Limited as of 31 December 2012, p. 14, **CE-659**; Report and financial statements of Sembi Investment Limited as of 31 December 2013, p. 14, **CE-660**; Report and financial statements of Sembi Investment Limited as of 31 December 2014, p. 14, **CE-661**; Report and financial statements of Sembi Investment Limited as of 31 December 2015, p. 14, **CE-662**; Report and financial statements of Sembi Investment Limited as of 31 December 2016, p. 14, **CE-663**; Report and financial statements of Sembi Investment Limited as of 31 December 2017, p. 14, **CE-664**. *See also* Rand Second WS, ¶ 60.

120 Grušić ER, ¶ 106; Milošević Second ER, ¶ 203.

121 Grušić ER, ¶ 107.

beneficial ownership to any rights and/or assets does not constitute an assignment under Serbian law.[122]

120. The assignment of legal title to Mr. Obradović's receivables against BD Agro does not come within the purview of Article 41ž because that provision only relates to assignment of privatization agreements—and not to assignment of receivables pursuant to private law contracts.

121. The contemplated assignment of legal title to the Privatization Agreement is also consistent with Article 41ž because the parties to the Sembi Agreement did not intend to effectuate it on the basis of the Sembi Agreement alone, but under a subsequent assignment agreement that would be subject to the Privatization Agency's approval. This is why they agreed to "*sign any such documents and do all such things as may be necessary to effect the transfer to [Sembi] of the [Privatisation Agreement.]*"[123]

122. Dr. Grušić confirms that the conclusion of a contract that contemplates the conclusion of a subsequent assignment agreement does not fall within the scope of Article 41ž.[124]

### 2. The Sembi Agreement is consistent with Article 52(2) of the 2006 Law on Capital Markets

123. The Sembi Agreement was also consistent with the Serbian capital market regulations. At the time of the Sembi Agreement, Article 59 of the 2001 Law on Privatization was no longer applicable. However, the provisions of Article 52(2) of the 2006 Law on Capital Markets were still in place.

124. As explained above with respect to the MDH Agreement, the Beneficially Owned Shares could be transferred through a block trade transaction on the stock exchange, by an in-kind contribution to the capital of a special purpose limited liability company or after delisting BD Agro from the BSE.[125]

125. In fact, Messrs. Rand and Obradović used the in-kind contribution of shares to a limited liability company to transfer shares in other listed Serbian companies beneficially

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122 Milošević Second ER, ¶¶ 188, 203.

123 Agreement between Mr. Obradović and Sembi, 22 February 2008, Art. 4, **CE-029**. *See also* Rand Second WS, ¶ 55; Obradović Second WS, ¶ 44.

124 Grušić ER, ¶ 109.

125 Tomić Brkušanin ER, ¶ 25.

owned by Mr. Rand. The shares in these companies were contributed to the capital of the Cyprus company Kalemegdan Investments Limited, which thus became the owner of the shares and a shareholder in these companies. Serbia had no objections and Kalemegdan Investments Limited was registered as the owner of the transferred shares.[126] Thus, the Beneficially Owned Shares of BD Agro could be transferred in exactly the same way.

### 3. The Sembi Agreement is consistent with the Privatization Agreement

126. As explained above, Article 5.3.1 of the Privatization Agreement prohibited for a period of two years from the day of conclusion of the agreement, being 4 October 2005, the sale, assignment or alienation of the Privatized Shares. As a result, this prohibition expired on 4 October 2007, and no longer applied when the Sembi Agreement was entered into on 22 February 2008. As such, the Sembi Agreement is consistent with the Privatization Agreement.

## F. Mr. Rand continued to control BD Agro through Sembi

### 1. Sembi was actively involved in the management of BD Agro

127. As the beneficial owner of the Beneficially Owned Shares under the Sembi Agreement, Sembi had the legal right to direct Mr. Obradović's exercise of his shareholder rights in BD Agro and, as a result, to control BD Agro.[127]

128. Sembi used that right and BD Agro was regularly discussed at the meetings of Sembi's directors.[128] For example, the Sembi's directors were informed about purchases of

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126 *E.g.* List of shareholders of Crveni Signal, 20 June 2014, **CE-759**; List of shareholders of Obnova ad Beograd, 11 June 2012, **CE-760**; List of shareholders of Beotrans Beograd, 10 June 2012, **CE-761**.

127 Georgiades Second ER, ¶ 3.17.

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

land,[129] renovation of the farm,[130] imports of heifers,[131] crop production[132] and the financial status of the company.[133]

129. In 2011, Mr. Rand started to act more informally and no longer summoned formal meetings of Sembi's directors. Instead, he discussed BD Agro matters directly with Mr. Obradović, who was a director of Sembi until June 2013, and then with Mr. Markićević, who has been a director of Sembi since that time.

130. Serbia is therefore wrong when it claims, obviously without offering any evidence, that "*Sembi has never been used as a vehicle for the direction and management of BD Agro's business*" or that "*[t]here is no evidence that would even suggest any involvement of Sembi in the business activities of BD Agro.*"[134]

### 2. Mr. Rand continued to be personally involved in BD Agro's management

131. Same as before the entering into the Sembi Agreement in February 2008, Mr. Rand continued to receive periodic reports on various aspects of BD Agro's business, as well as financial reports.[135]

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129 Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, pp. 1-2, **CE-422**.

130 Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, p. 2, **CE-422**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 28 November 2008, p. 1, **CE-423**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 11 May 2009, p. 1, **CE-425**.

131 Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 28 November 2008, p. 1, **CE-423**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 11 May 2009, p. 1, **CE-425**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 7 May 2010, p. 1, **CE-427**.

132 Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 28 November 2008, pp. 1-2, **CE-423**.

133 Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 28 November 2008, p. 2, **CE-423**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 11 May 2009, p. 1, **CE-425**.

134 Counter-Memorial, ¶¶ 316, 350.

135 *E.g.* Email from M. Leposavić (BD Agro) to W. Rand, 9 October 2008, **CE-673**; Email from M. Leposavić (BD Agro) to W. Rand, 28 July 2008, **CE-674**; Email from W. Rand to M. Leposavić (BD Agro), 1 August 2008, **CE-676**; Email from W. Rand to L. Jovanović et al., 10 April 2013, **CE-428**; Email from L. Jovanović to I. Markićević and D. Wood, 21 April 2013, **CE-677**; Email communication between L. Jovanović and W. Rand, 1 November 2012, **CE-678**; Email from W. Rand to BD Agro, 29 March 2013, **CE-429**; Email from W. Rand to E. Brosko et. al, 19 July 2012, **CE-679**. *See also* Rand Second WS, ¶ 65; Obradović Second WS, ¶ 53.

132. Mr. Rand also remained involved in communication with various consultants and business partners[136]—including the Canadian exporters of Holstein Friesian heifers that BD Agro intended to purchase.[137] To make sure that BD Agro would only purchase the top quality animals, BD Agro employees flew to Canada to personally select the animals that were to be shipped to BD Agro.[138] To get their visa, these employees needed so-called "*guarantee letters*". These letters were provided by Mr. Rand. They were written on BD Agro's letterhead and signed by Mr. Rand in the name of BD Agro:[139]

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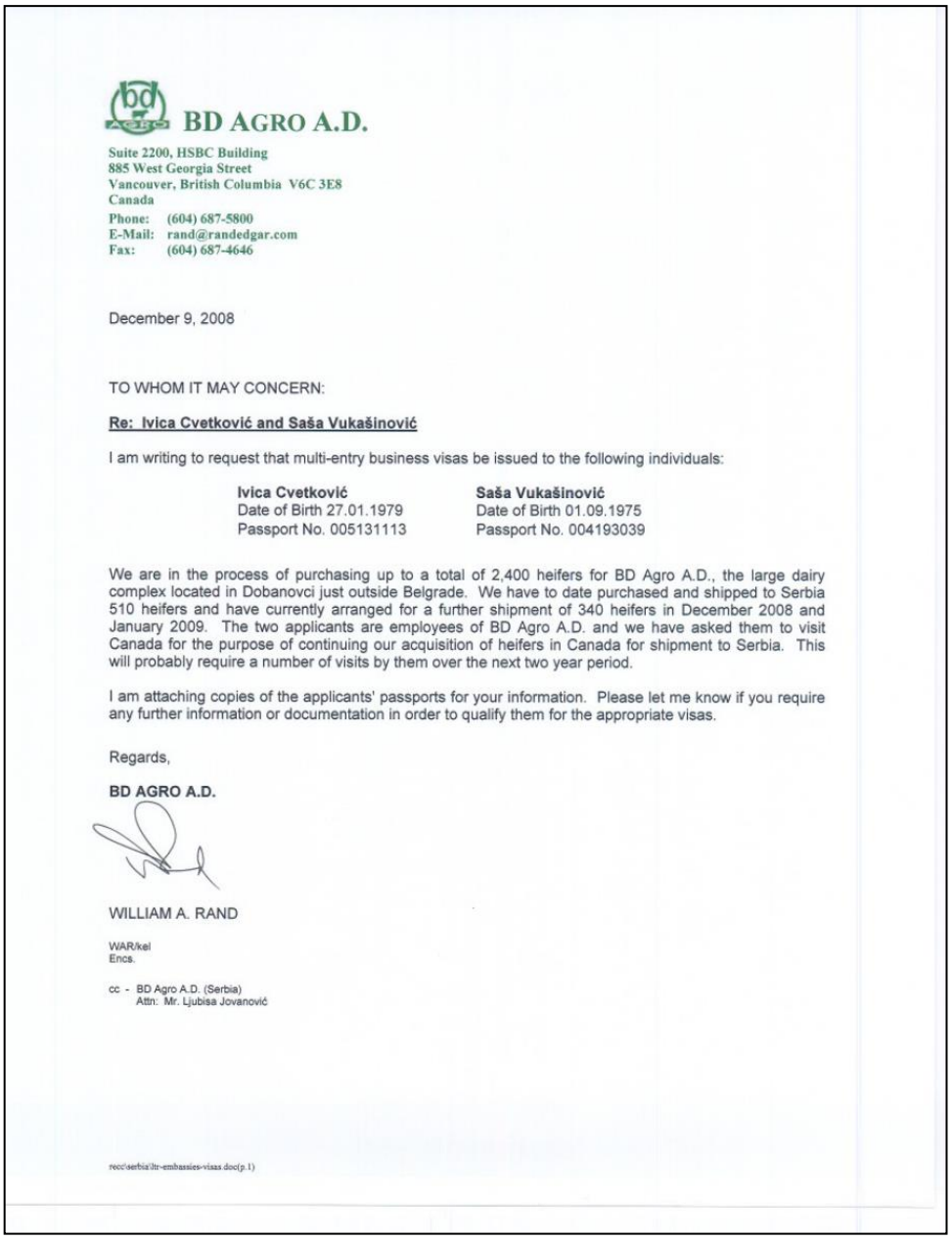
136 Email communication between W. Rand and PWC, 27 November 2008, **CE-695**; Email communication between W. Rand and A. King (EBRD), 10 June 2008, **CE-696**; Email from W. Rand to M. Bogićević and I. Markićević dated 27 September 2013, **CE-278**; Email communication between W. Rand and Bigadan, 13 December 2013, **CE-697**; Email communication between W. Rand and T. Smith (Dairy Strategies), 28 July 2008, **CE-698**; Email from E. Broshko to W. Rand and I. Markićević, 13 May 2014, **CE-699**; Email from V. Nedeljković to W. Rand, 22 August 2010, **CE-700**; Email communication between W. Rand and L. Rougeau, 16 September 2008, **CE-701**.

137 Email from J. Shore (Willjill Farms), 30 December 2008, **CE-683**; Email form L. Jovanović to W. Rand, 2 April 2008, **CE-684**; Email communication between P. Trudeau, L. Jovanović et al., 23 December 2008, **CE-685**; Email from L. Jovanović to W. Rand, 4 December 2008, **CE-686**; Email from K. Lutz to A. Janičić, 28 February 2008, **CE-687**; Email from P. Trudeau to W. Rand, 19 December 2008, **CE-688**; Email communication between W. Rand and I. Cvetković, 28 February 2008, **CE-689**; 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-021**; 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-022**; Confirmation of wire transfer from William Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-023**; Confirmation of wire transfer from William Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-024**.

138 *E.g.* Email from I. Cvetković (BD Agro) to W. Rand, 5 June 2008, **CE-690**.

139 Email from K. Lutz to A. Janičić, 30 September 2008, **CE-691**; Email from K. Lutz to A. Janičić, 9 December 2008, **CE-692**; Email from W. Rand to Canadian Embassy, 6 February 2008, **CE-693**.



BD AGRO A.D.

Suite 2200, HSBC Building
885 West Georgia Street
Vancouver, British Columbia V6C 3E8
Canada
Phone: (604) 687-5800
E-Mail: rand@randedgar.com
Fax: (604) 687-4646

December 9, 2008

TO WHOM IT MAY CONCERN:

**Re: Ivica Cvetković and Saša Vukašinović**

I am writing to request that multi-entry business visas be issued to the following individuals:

| **Ivica Cvetković** | **Saša Vukašinović** |
|---|---|
| Date of Birth 27.01.1979 | Date of Birth 01.09.1975 |
| Passport No. 005131113 | Passport No. 004193039 |

We are in the process of purchasing up to a total of 2,400 heifers for BD Agro A.D., the large dairy complex located in Dobanovci just outside Belgrade. We have to date purchased and shipped to Serbia 510 heifers and have currently arranged for a further shipment of 340 heifers in December 2008 and January 2009. The two applicants are employees of BD Agro A.D. and we have asked them to visit Canada for the purpose of continuing our acquisition of heifers in Canada for shipment to Serbia. This will probably require a number of visits by them over the next two year period.

I am attaching copies of the applicants' passports for your information. Please let me know if you require any further information or documentation in order to qualify them for the appropriate visas.

Regards,

**BD AGRO A.D.**

WILLIAM A. RAND

WAR/kel
Encs.

cc - BD Agro A.D. (Serbia)
Attn: Mr. Ljubisa Jovanović

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133. Mr. Rand made it clear to BD Agro's business partners that he owned BD Agro. For example, when he discussed potential consulting services with EBRD, he stated in his email: "*I currently operate a large dairy farm called BD Agro in the town of Dobanovci just outside Belgrade*" and "*I recently acquired a farm in Nova Becej.*" Mr. Rand also stated that he owned several other businesses in Serbia.[140]

134. When Mr. Rand wrote to Mr. Smith from Dairy Strategies, he expressly stated that "*I am the owner of a large dairy farm just outside Belgrade in Serbia*" and that if Mr. Smith

140 Email communication between W. Rand and A. King (EBRD), 10 June 2008, p. 1, **CE-696**. *See also* Rand Second WS, ¶ 68.

wanted "*to find out more about my operation in Serbia, [he could] go to BD Agro's website at www.bdagro.com.*"[141]

135. Another example is Mr. Rand's email to Robinson Helicopter Company, which he started by calling BD Agro his company: "*company I own in Serbia, BD Agro, recently purchased an R44 helicopter […].*"[142]

136. Yet another example is Mr. Jovanović writing to a company that was offering to cooperate with BD Agro in the construction of a bio gas power plant and asking them to "*send full spec and project proposal for BD AGRO bio plant directly to our owner, Mr. William Rand […].*"[143]

137. Mr. Rand explains that his ownership of BD Agro was such a well-known fact that even his business partners commonly disclosed it to third parties.[144] For example, when Mr. David Roberts, a principal of Pender Financial Group with whom Mr. Rand set up a Serbian company, BD Geothermal Energy, wrote to the representatives of Greenworx, a company interested in geothermal development in southern Serbia, he introduced Mr. Rand as "*the principal investor in a number of businesses in Serbia including BD Agro at Dobanovci near Belgrade, which operates the largest dairy operation in Europe.*"[145]

138. Mr. Rand also remained in contact with Serbian politicians—often through events organized by the Canadian Embassy, which was well aware of Mr. Rand's ownership of BD Agro and his contribution to the good reputation of Canadian investors in Serbia. For example, when Mr. Morrison, the then Canadian Ambassador in Serbia, wrote to Mr. Rand in June 2010, he noted that Mr. Rand "*obviously [has] a winning team down on the farm*" and that it was "*a great credit to [his] business skills and the partnerships [he has] established here*." Finally, he noted that the successes of BD Agro's management "*heighten enormously the respect that Serbians have for Canadian investments generally.*"[146]

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141 Email communication between W. Rand and T. Smith (Dairy Strategies), 28 July 2008, **CE-698**.

142 Email communication between W. Rand and L. Rougeau, 16 September 2008, **CE-701**.

143 Email from V. Nedeljković to W. Rand, 22 August 2010, **CE-700**.

144 Rand Second WS, ¶¶ 45-51.

145 Email from D. Roberts to S. Ameye and T. Hanson, 16 December 2011, **CE-702**.

146 Email communication between W. Rand and J. Morrison, 9 June 2010, **CE-705**. *See also* Second Rand WS, ¶ 78.

139. At a reception organized by the Canadian Embassy on 14 May 2010, Mr. Rand met with Mr. Damjan Krnjević Mišković, the then advisor to the Minister of Foreign Affairs, and discussed with him his ownership of BD Agro and various matters related to the company. Mr. Rand followed up on the conversation with Mr. Mišković in a letter from 17 May 2010. In this letter, Mr. Rand reiterated that he owned BD Agro and explained to Mr. Mišković some of the challenges faced by the company.[147]

140. On 17 July 2010, the Canadian Embassy also organized a visit of BD Agro by members of a Canadian parliamentary delegation that was touring Serbia. The visitors included Mr. Andrew Scheer, the current leader of the Conservative Party of Canada. The Canadian election will be held on 21 October 2019 and either Mr. Scheer or Justin Trudeau will be Prime Minister of Canada.[148]

141. The visit of BD Agro was coordinated with the representatives of the Serbian parliament, and it was very successful.[149] After the visit, Mr. John Morrison, the then Ambassador of Canada in Serbia, wrote an email to Messrs. Obradović and Jovanović, thanking them for the organization of the visit and noting that the "*parliamentarians found the tour fascinating*" and that "*the BD Agro visit was the unexpected highlight*" of the Canadian delegation's visit in Serbia.[150]

142. While Mr. Rand was not personally present during the visit, his adult son, Mr. Robert Rand, was at the farm and he met with the members of the delegation and Ambassador Morrison on behalf of his father.[151]

### 3. BD Agro was not mismanaged

143. As explained above, after Mr. Rand took control over BD Agro, he transformed the company into a state-of-the-art agriculture business that was visited and praised by the

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147 Email from L. Jovanović to D. Misković, 21 May 2010, **CE-706**. *See also* Second Rand WS, ¶ 79.

148 *E.g. Visit of the Honourable Peter Milliken, M.P., Speaker of the House of Commons, and a Parliamentary Delegation, United Kingdom and Serbia*, Parliament of Canada, 25 September 2019 (accessed), **CE-438**. *See also* Rand Second WS, ¶ 80.

149 Email from K. Lutz to R. Rand, 16 July 2010, **CE-439**; Emails from J. Morrision and D. Ceramilac, 20 July 2010, **CE-440**. *See also* Rand Second WS, ¶ 81; Obradović Second WS, ¶ 62.

150 Emails from J. Morrision and D. Ceramilac, 20 July 2010, **CE-440**. *See also* Obradović Second WS, ¶ 63.

151 Emails from J. Morrision and D. Ceramilac, 20 July 2010, **CE-440**. *See also* Obradović Second WS, ¶ 64.

highest representatives of the Serbian government—including its Prime Minister—and that the Canadian Ambassador showed with pride to the Canadian parliamentary delegation, including the current leader of the Conservative Party of Canada.

144. Serbia completely ignores this fact and, instead, tries to picture BD Agro as a mismanaged company that was ruined after the privatization.[152] Serbia therefore dedicates a significant part of its Counter-Memorial Serbia to description of various issues that, according to Serbia, demonstrate that BD Agro was mismanaged after the privatization. For example, Serbia claims that Mr. Obradović performed "*suspicious transactions from BD Agro's accounts*" or "*various payments to himself or to his other companies*" or even "*simulated payment of installments of Purchase Price [under the Privatization Agreement]*" and "*machinations with land*."[153] Serbia argues that it was this "*bad management of BD Agro*" that allegedly caused BD Agro's bankruptcy.[154]

145. Even a cursory review of Serbia's claims shows that they are both unsupported and incorrect.

146. First of all, Serbia's allegations are predominantly based on several letters sent by an obscure group, self-styled as the "*Center for Education and Representation of Shareholders and Workers*", to the Privatization Agency and the Council of Ministers.[155] The allegations set out in these letters are clearly without any merit.

147. For example, one of the letters accuses Mr. Obradović of embezzling BD Agro money because he allegedly claimed to have acquired 32,000 egg-producing hens, but "*BD Agro's employees stated that these hens never ended up in BD Agro.*"[156] This allegation is nothing short of nonsense. Not only were the hens purchased, but Mr. Rand himself

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152 Counter-Memorial, ¶ 503.

153 Counter-Memorial, ¶¶ 178-190.

154 Counter-Memorial, ¶ 177.

155 Letter from Center for Education and Representation of Shareholders and Workers to the Privatization Agency, 26 January 2009, **RE-114**; Letter from Center for Education and Representation of Shareholders and Workers to the Privatization Agency, 16 March 2009, **RE-115**; Letter from Center for Education and Representation of Shareholders and Workers to the Government of Republic of Serbia, 26 April 2010, **RE-116**; Letter from Center for Education and Representation of Shareholders and Workers to the Privatization Agency, 11 February 2010, **RE-118**; Letter from Center for Education and Representation of Shareholders and Workers to the Government of the Republic of Serbia, 20 December 2010, **RE-125**; Letter from Center for Education and Representation of Shareholders and Workers to the Privatization Agency, 21 March 2012, **RE-147**.

156 Counter-Memorial, ¶ 179.

had repeatedly communicated with BD Agro employees about the sale of eggs from these allegedly non-existent hens.[157]

148. The above example clearly demonstrates how "reliable" the allegations made by the Center for Education and Representation of Shareholders and Workers actually were. It therefore comes as no surprise that neither the Privatization Agency nor the Ministry of Economy ever brought any of these issues to the attention of the Claimants' representatives, Mr. Obradović and BD Agro.

149. Serbia also seems to rely on a number of other allegations, made in certain newspaper articles[158] or by BD Agro's employee unions,[159] which are equally meritless.

150. For example, Serbia refers to a newspaper article published in the Serbian newspaper Blic! for the proposition that "*Mr. Obradovic had BD Agro conclude agreements with the Ministry of Agriculture by which BD Agro exchanged 46 hectares of its land for new plots granted by the Ministry of Agriculture. However, this disposition was unlawful since the land disposed of by BD Agro had to be returned to its previous owners, pursuant to the legislation on restitution.*" Serbia then adds in paragraph 188 of the Counter-Memorial that the "*[d]isposal of this land was expressly prohibited by Article 6.3.1. of the Privatization Agreement.*"[160]

151. The truth is that there was nothing illegal about the land swap with the Ministry of Agriculture. BD Agro approached the Ministry of Agriculture with a request for the swap and the Ministry agreed and approved the swap.[161] Serbia cannot seriously claim that the Privatization Agreement was violated by a transaction that was expressly approved by the Ministry of Agriculture.

152. To avoid unnecessary discussion, it should be noted that BD Agro was a major company listed on the BSE and its financial reports had been subject to regular audits by

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157 *E.g.* Email from W. Rand to Marine Drive Holdings Inc, 15 February 2006, **CE-610**; Email communication between W. Rand and BD Agro, 26 July 2006, **CE-611**; Email communication between W. Rand and A. Jorga, 10 August 2006, **CE-605**.

158 Counter-Memorial, ¶¶ 180, 185; Z. Uskoković, *They caused financial harm to the state in the amount of billion dinars!*, Blic, 29 December 2015, **RE-124**.

159 Counter-Memorial, ¶¶ 181, 189; Requests of unions of BD Agro's employees, 24 May 2013, **RE-104**.

160 Counter-Memorial, ¶ 188.

161 Decision of Ministry of Agriculture, 4 January 2010, **CE-762**.

independent auditors, including PricewaterhouseCoopers.[162] Given the seriousness of the allegations raised by Serbia, if even a small part of these allegations had been correct, the auditors would have certainly reported that there was an issue. They never did so.

153. Finally, as for the alleged breach of Article 6.3.1 of the Privatization Agreement, Serbia only mentions it in paragraph 188 of its Counter-Memorial. Serbia does not refer to any documents authored either by the Privatization Agency or the Ministry of Economy that mentioned Article 6.3.1, let alone its alleged breach. This silence speaks volumes.

## G. The Privatization Agency alleged that Mr. Obradović violated the Privatization Agreement

### 1. In December 2010, BD Agro and Agrobanka concluded a loan agreement for EUR 2 million

154. On 22 December 2010, BD Agro and Agrobanka concluded a loan agreement for RSD 221 million (approximately EUR 2 million) (the "**2010 Loan Agreement**").[163] According to Article 1 of this agreement, the loan was taken "*for the purposes of consolidation of the company and related entities from the funds of Agrobanka […].*"[164]

155. BD Agro indeed used a part of the loan for financial restructuring of Crveni Signal and Inex, two companies nominally owned by Mr. Obradović and beneficially owned by Mr. Rand.[165]

156. The restructuring process is explained in detail in the witness statement of Mr. Obradović. Mr. Obradović explains that BD Agro had guaranteed a loan from

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162 *E.g.* Auditor's report on BD Agro's financial statements, 27 May 2010, **CE-430**; Auditor's report on BD Agro's financial statements, 27 September 2010, **CE-431**; Auditor's report on BD Agro's financial statements, 31 May 2011, **CE-432**; Auditor's report on BD Agro's consolidated financial statements, 29 September 2011, **CE-433**; Auditor's report on BD Agro's financial statements, 29 June 2012, **CE-434**; Auditor's report on BD Agro's consolidated financial statements, 29 June 2012, **CE-435**. *See also* Obradović Second WS, ¶ 57.

163 Loan agreement between BD Agro and Agrobanka, 22 December 2010, **RE-006**.

164 Loan agreement between BD Agro and Agrobanka, 22 December 2010, Art. 1, **RE-006**.

165 Obradović Second WS, ¶ 65; Rand Second WS, ¶ 6.

Agrobanka to Crveni Signal and the total amount owing under that loan was RSD 70.9 million (approximately EUR 670,000) in December 2010.[166]

157. Due to the exposure under the guarantee agreement, it made perfect sense for BD Agro to assume Crveni Signal's debt to Agrobanka.[167] BD Agro then paid this debt from the funds obtained under the 2010 Loan Agreement. As explained in detail below, Crveni Signal "*returned the favor*" in 2012, when it guaranteed another, EUR 9.5 million loan taken by BD Agro from Nova Agrobanka and even repaid a part of that loan in BD Agro's stead.

158. Inex had provided very significant financial help to BD Agro. In 2005, Inex had bought BD Agro's debt in the principal amount of RSD 114 (approximately EUR 1.4 million) and interest of RSD 146 million (approximately EUR 1.7 million). Inex completely waived the interest.[168] BD Agro used RSD 32,000,000 (approximately EUR 300,000) from the 2010 Loan Agreement to give a loan to Inex as compensation for Inex having waived the EUR 1.7 million interest.[169]

### 2. In March 2011, the Privatization Agency alleged that the Pledge securing the 2010 Loan Agreement violated the Privatization Agreement

159. On 17 January 2011, the Privatization Agency performed its last control of Mr. Obradović's compliance with the Privatization Agreement. The report from the final control was delivered to Mr. Obradović on 1 March 2011.[170] The Privatization Agency also sent a notice to Mr. Obradović, which stated that he allegedly violated Articles 5.3.3 and 5.3.4 of the Privatization Agreement ("**First Notice**").[171] Neither of these accusations had any merits.

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166 Agreement on assumption of debt between BD Agro and Crveni Signal, 28 December 2010, Art. 1, **RE-011**; Guarantee agreement between BD Agro and Agrobanka, 2 June 2010, **RE-005**. *See also* Obradović Second WS, ¶¶ 66-67.

167 Loan agreement between Crveni Signal and Agrobanka, 2 June 2010, **RE-004**; Agreement on assumption of debt between BD Agro and Crveni Signal, 28 December 2010, Art. 2, **RE-011**.

168 Email from Marine Drive Holdings Inc. to W. Rand and P. Bagnara, 29 December 2006, pp. 6, 16, 39 (pdf), **CE-443**; Letter from D. Obradović to Auditor doo Belgrade, 5 November 2012, pp. 1-2, **RE-020**; Agreements on assignment of debt to Inex, **CE-444**. *See also* Obradović Second WS, ¶ 70.

169 Loan Agreement between BD Agro and Inex, 29 December 2010, **RE-010**.

170 Report of the Privatization Agency on Control of BD Agro, 25 February 2011, **CE-030**.

171 Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-031**.

### 3. Mr. Obradović did not violate Article 5.3.3 of the Privatization Agreement

160. In its report, the Privatization Agency asserted that 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.[172]

161. As the Claimants explained in the Memorial, the Privatization Agency's allegation was incorrect.[173]

162. While Serbia does not openly dispute the Claimants' explanation, it also does not seem to expressly admit that Article 5.3.3 had not been violated. Whatever the real position of Serbia might be, the Claimants note that Serbia expressly confirms that the alleged violation of Article 5.3.3 of the Privatization Agreement was not a reason for termination of the Privatization Agreement in 2015.[174]

163. Therefore, the Claimants consider that the issue is moot.

### 4. Mr. Obradović did not violate Article 5.3.4 of the Privatization Agreement

164. According to the Privatization Agency, Article 5.3.4 had been violated because "*it was noted that on the fixed assets of the Subject of privatization, inter alia, pledge rights were registered to secure the obligations of third parties, pledge rights to secure the funds (loans) whose beneficiaries are third parties (partially or fully)*."[175] Even if the notice did not make it entirely clear, the Privatization Agency obviously referred to the financial restructuring of Mr. Rand's companies in 2010, *i.e.* to BD Agro's assumption and repayment of Crveni Signal's EUR 670,000 debt to Agrobanka and BD Agro's provision of the EUR 300,000 loan to Inex.[176]

165. The Privatization Agency's allegations were incorrect because the transactions between BD Agro, Crveni Signal and Inex represented regular business activity which is

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172 Report of the Privatization Agency on Control of BD Agro, 25 February 2011, p. 21, **CE-030**.

173 Memorial, ¶¶ 99-106.

174 Counter-Memorial, ¶ 131 ("*as is evident from the Proposal of the Center for Control prepared on 23 September 2015 for the Commission for Control's Session, only the breach of Article 5.3.4. was the reason for termination […].*")

175 Notice of the Privatization Agency on Additional Time Period, 25 February 2011, p. 2, **CE-031**.

176 *E.g.* Minutes of the Session of the Commission, 28 September 2015, p. 4, **CE-117**.

common in groups of companies that share the same ultimate owner. Tellingly, the Privatization Agency never properly explained why it believed that the use of a part of the EUR 2 million loan provided under the 2010 Loan Agreement for the repayment of the debt assumed from Crveni Signal and the provision of the loan to Inex should be a problem.

166. Indeed, it was not. Article 5.3.4 did not apply to the assumption of debt from Crveni Signal or the provision of the loan to Inex. Both the assumption of debt and the provision of the loan were consistent with the Privatization Agreement.

167. As the Claimants explained in their Memorial, Article 5.3.4 of the Privatization Agreement imposed obligations solely upon the buyer, *i.e.* on Mr. Obradović, not on BD Agro.[177] Since the Pledge securing the 2010 Loan Agreement was not established by Mr. Obradović, as the buyer, but by BD Agro, its conclusion could not violate the obligations contained in Article 5.3.4.

168. Furthermore, even if Article 5.3.4 had applied to the actions of BD Agro (*quod non*), Article 5.3.4 only precluded BD Agro from pledging its assets as a security for loans *taken by third parties.*

169. Indeed, Article 5.3.4 clearly states that BD Agro can pledge its assets "*for the purpose of acquiring of the funds to be used*" by BD Agro:

> The Buyer will not encumber with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards the subject accrued based on regular business activities of the subject, that is, except for the purpose of acquiring of the funds to be used by the subject.[178]

170. It is undisputed that the funds acquired under the 2010 Loan Agreement were used by BD Agro. *BD Agro used* one part of these funds to finance its primary business activities, *BD Agro used* another part of these fund to repay the debt it had assumed from Crveni Signal—and which was BD Agro's debt at that time—and *BD Agro used* another part of these funds to provide a loan to Inex.[179]

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177 Memorial, ¶ 243.

178 Privatization Agreement, 4 October 2005, Art. 5.3.4, **CE-017**.

179 Milošević Second ER, ¶ 52.

171. This interpretation is further supported by the analysis of other provisions of the Privatization Agreement. Most importantly, the Privatization Agreement did not preclude BD Agro from providing loans to third parties. Similarly, the Privatization Agreement did not preclude BD Agro from selling its assets within the 10% and 30% limits under Article 5.3.3. The consequence of these rules is that assuming the 10% and 30% limits would not have been reached, BD Agro was free to *sell* its land plots for EUR 2 million in December 2010 and loan—or even *donate*, for the sake of argument—the proceeds from the sale to other entities.[180]

172. BD Agro pledging assets to secure a bank loan and then using a part of the funds for a loan to other entities would certainly not have been more disruptive to BD Agro's business and its value than BD Agro selling its land and loaning or donating the proceeds from the sale—quite the opposite. The more disruptive option (sale and donation or loan) is clearly allowed by the Privatization Agreement–while under Serbia's interpretation, the less disruptive option (pledge and loan) would have been prohibited.[181] This is nonsensical and Serbia's interpretation cannot be correct.

## H. The Privatization Agency received the last installment of the purchase price for the Privatized Shares on 8 April 2011

173. The alleged violations of the Privatization Agreement should have become moot upon the full payment of the purchase price and the consequent consummation of the Privatization Agreement.[182] The full purchase price was paid on 8 April 2011, when the Privatization Agency received the last installment of the aggregate EUR 5.5 million purchase price for the Privatized Shares.[183]

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180 Milošević Second ER, ¶ 49.

181 Milošević Second ER, ¶ 50.

182 Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price, 6 January 2012, **CE-019**.

183 On 30 December 2011, the Privatization Agency also received full payment of the interest due for late payment of certain installments. Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price, 6 January 2012, **CE-019**.

174. 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*."[184]

175. 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.[185] Furthermore, the restrictions under Articles 5.3.3 and 5.3.4, on their own terms, ceased to apply because they were agreed to last only "*until payment of the entire sale and purchase price*" and "*during the term of the [Privatization] Agreement*," respectively.[186]

176. The payment of the full purchase price also triggered the expiry of the Privatization Agency's rights of pledge on the Privatized Shares, as set forth in Article 2 of the Share Pledge Agreement.[187]

177. This is in line with Serbian law, according to which a "*pledge is an accessory right which exists until the secured obligation is fulfilled*."[188] The secured obligation was the obligation to pay the entire purchase price, which was fulfilled on 8 April 2011.[189] Thus, the effects of the pledge were supposed to cease to exist on the same date.

178. The Privatization Agency's own guidelines, applicable at that time, confirm this conclusion.[190]

179. However, as a practical matter, the effects of the pledge would cease only after the pledge is de-registered by the Central Securities Depository, and the Central Securities Depository would de-register the pledge only upon receipt of a written confirmation issued by the Privatization Agency.[191]

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184 Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price, 6 January 2012, **CE-019**.

185 Milošević First ER, ¶¶ 73 *et seq.*

186 Privatization Agreement, 4 October 2005, Arts. 5.3.3 and 5.3.4, **CE-017**.

187 Privatization Agreement, 4 October 2005, Schedule 1: Share Pledge Agreement, **CE-017**.

188 Milošević First ER, ¶ 125.

189 Memorial, ¶¶ 113-116.

190 Privatization Agency's Rulebook on Procedure for Control, 20 May 2010, ¶ 9.5, **CE-763**. *See also* Privatization Agency's Rulebook on Procedure for Control, 29 November 2011, ¶ 9.5, **CE-764**.

191 Milošević First ER, ¶ 130.

## I. The Privatization Agency's unlawful refusal to release the pledge on the Privatized Shares

180. Mr. Obradović repeatedly attempted to obtain the Privatization Agency's confirmation necessary for the release of the pledge—but the Privatization Agency simply refused to issue it.

181. Serbia tries to justify the unlawful conduct of the Privatization Agency by arguing that, despite the clear wording of the Share Pledge Agreement, the Privatization Agency was not obliged to release the pledge over BD Agro shares until Mr. Obradović fulfilled his obligations under Article 5.3.4 of the Privatization Agreement.[192]

182. Serbia invokes Article 122 of the Serbian Law on Obligations, which states that "*[i]n case of bilateral contracts, neither party shall be obliged to fulfill its obligation if the other party does not fulfill, or is not ready to simultaneously fulfill, its obligation […].*"[193] As explained by Mr. Milošević, the Claimants' expert on Serbian law, Article 122 of the Serbian Law on Obligations is of no help to Serbia.[194]

183. The rule under Article 122 only applies to reciprocal obligations. Mr. Obradović's allegedly violated obligation under Article 5.3.4 of the Privatization Agreement was not reciprocal to the Privatization Agency's obligation, both statutory and contractual under the Share Pledge Agreement, to release the pledge.[195]

184. Further, under Serbian law, a pledge can only secure monetary claims. Serbia's claimed application of Article 122 of the Law on Obligation would violate Serbian law because the pledge would effectively secure also the Privatization Agency's non-monetary claims from the Privatization Agreement.[196]

185. Finally, the principle of accessority of the pledge requires that the pledge secure only the obligations that it was agreed to secure. Serbia's claimed application of Article 122

192 Counter-Memorial, ¶ 149.

193 Law on Obligations, Art. 122 (1), **RE-032**.

194 Milošević Second ER, ¶¶ 167-171.

195 *See* 1978 Law on Obligation, Arts. 987 and 996, **CE-462**.

196 Milošević Second ER, ¶ 170.

would violate that principle because the pledge would secure all of Mr. Obradović's obligations. This is clearly impermissible.[197]

186. By refusing to release the pledge, the Privatization Agency prevented Mr. Obradović from transferring legal title to the Privatized Shares without the Privatization Agency's consent. Thus, the Privatization Agency unilaterally reimposed the restriction on the buyer's ability to transfer the shares, which had been agreed in Article 5.3.1 of the Privatization Agreement and had lapsed on *4 October 2007* with the expiry of the two year prohibition on the sale, assignment or alienation of the Privatized Shares. The Privatization Agency obviously had no right to do so.[198]

187. In any event, as the Claimants explain in more detail in Section P, the Privatization Agency was very well aware that its refusal to release the pledge was unlawful. Yet it kept the pledge in place, with the sole purpose of preventing Mr. Obradović from transferring the Privatized Shares—and making sure that the Privatization Agency would be able to expropriate them.

## J. The Ministry of Economy's instruction to the Privatization Agency that there was no economic justification for terminating the Privatization Agreement

188. Even though the Privatization Agency accepted the last installment of the purchase price and the Privatization Agreement was consummated, the Privatization Agency continued to claim the purported violations of Articles 5.3.3 and 5.3.4 and insisted on remedial actions.[199]

189. 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.[200]

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197 Milošević Second ER, ¶ 169.

198 Milošević Second ER, ¶ 166.

199 *E.g.* Notice of the Privatization Agency on Additional Time Period, 22 June 2012, **RE-015**; Notice of the Privatization Agency on Additional Time Period, 31 July 2012, **CE-078**; Notice of the Privatization Agency on Additional Time Period, 8 November 2012, **CE-079**; Notice of the Privatization Agency on Additional Time Period, 27 April 2015, **CE-348**.

200 Letter from D. Obradović to the Ministry of Economy, 2 April 2012, **CE-077**.

190. On 10 May 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.[201]

191. On 30 May 2012, the Ministry of Economy replied to the Privatization Agency that "*after reviewing all delivered exhibits, as well as the website of [BD Agro]*", the Ministry concluded that "*there [was] no economic justification to terminate the [Privatization Agreement]*."[202]

192. The Ministry of Economy justified its conclusion by referring to the following facts:

a. Mr. Obradović "*paid the entire amount of the sale and purchase price*";

b. Mr. Obradović "*used the funds received from disposal of the property to comply with the obligations of the subject of privatization towards the employees, state creditors and commercial banks […]*";

c. "*the stated disposal of [BD Agro's] property did not threaten the continuity of [BD Agro's] business activities*";[203] and

d. Mr. Obradović was 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*."[204]

193. In its Counter-Memorial, Serbia tries to downplay the importance of the Ministry's instructions by stating that the Ministry "*said nothing about the issue of whether Article 5.3.4. had been breached or whether the legal conditions for termination of the Privatization Agreement were met.*"[205] In reality, the Ministry's letter clearly demonstrates that, in May 2012, the Ministry of Economy believed that alleged breaches

201 Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012, **CE-033**.

202 Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012, **CE-033**.

203 Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012, **CE-033**.

204 Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012, **CE-033**.

205 Counter-Memorial, ¶ 46.

of the Privatization Agreement, if existing at all, were mere technicalities that did not warrant termination of the Privatization Agreement.

194. Furthermore, while Serbia claims that it was "*left for the [Privatization] Agency to decide*" whether "*legal conditions for termination of the Privatization Agreement were met*",[206] it is clear that the Privatization Agency actually followed the Ministry's instructions. As Serbia stresses in its Counter-Memorial,[207] the Center for Control of Performance of Agreements in the Privatization Agency (the "**Center for Control**") was, at that time, proposing termination of the Privatization Agreement.[208] However, the Privatization Agency decided against this proposal, followed the instructions of the Ministry and did not terminate the Privatization Agreement.

195. The Privatization Agency nevertheless continued to insist that there was a breach of the Privatization Agreement. On 31 July 2012, the Privatization Agency therefore gave Mr. Obradović additional "*extensions*" to comply with the terms of the Privatization Agreement[209]—even though the invoked provisions of the Privatization Agreement no longer applied.

## K. BD Agro repaid the loan under the 2010 Loan Agreement

196. In June 2012, BD Agro and Nova Agrobanka, a bridge bank owned and controlled by Serbia that was assigned Agrobanka's loan portfolio, concluded another loan agreement with BD Agro. The loan amount was EUR 9.5 million ("**2012 Loan Agreement**"),[210] and a part of it was used to fully repay the loan that BD Agro had taken under the 2010 Loan Agreement.[211]

197. Crveni Signal helped BD Agro secure the 2012 Loan Agreement because it acted as a guarantor for BD Agro's obligations thereunder.[212] Crveni Signal's guarantee was not

206 Counter-Memorial, ¶ 46.

207 Counter-Memorial, ¶ 43.

208 Proposal of the Center for Control for the session of the Commission for Control of 27 March 2012, **RE-084**.

209 Notice of the Privatization Agency on Additional Time Period, 31 July 2012, **CE-078**.

210 Loan agreement between BD Agro and Nova Agrobanka, 22 June 2012, **CE-441**.

211 Report on Factual Findings from Prva Revizija, 12 January 2015, p. 5 (pdf), **CE-327**.

212 Loan agreement between BD Agro and Nova Agrobanka, 22 June 2012, Art. 8, **CE-441**; Guarantee agreement between Crveni Signal and Nova Agrobanka, 22 June 2012, **CE-442**.

a mere formality. In 2017, Crveni Signal repaid a part of the loan in the amount of RSD 22,057,356 (approximately EUR 200,000).[213]

198. After the repayment of the 2010 Loan Agreement, the Pledge on BD Agro's real estate securing that loan lost its purpose and should have been deleted from the Real Estate Register. Again, BD Agro needed the creditor's consent with the deletion—and again, the creditor, Nova Agrobanka, managed and controlled by Serbia, was legally obliged to issue it,[214] but would not do so.[215]

199. In any event, the deletion of the Pledge remained a mere formality because Nova Agrobanka in any case could not exercise the Pledge.[216]

200. The Privatization Agency, however, decided to completely ignore the repayment of the loan under the 2010 Loan Agreement and its effect on the Pledge. On 8 November 2012, the Privatization Agency sent yet another notice to Mr. Obradović, in which it concluded that Mr. Obradović did not act in line with the notice from 31 July 2012 and granted him another 30 day period to "*act entirely in compliance with the Decision of the Agency of July 31, 2012, along with delivery of auditor's report on the actions of the Buyer during additional term.*"[217]

201. The Privatization Agency then did not send another notice for *two and a half years*, until April 2015.

## L. The 2013 Legal Opinion stated that there was no legal basis to terminate the Privatization Agreement

202. After the Privatization Agency sent the notice to Mr. Obradović, it decided to again seek instructions of the Ministry of Economy. On 22 January 2013, the Privatization Agency sent a letter to the Ministry of Economy attaching several documents related to BD Agro, including the audit report submitted by Mr. Obradović in December 2012.[218] The

213 Decision of the Commercial Court in Belgrade on Crveni Signal's receivables, 30 March 2018, p. 2, **CE-547**.

214 Milošević Second ER, ¶¶ 62, 64.

215 Markićević Second WS, ¶ 168.

216 Milošević Second ER, ¶ 64.

217 Notice of the Privatization Agency on Additional Time Period, 8 November 2012, **CE-079**.

218 Letter from the Privatization Agency to the Ministry of Economy, 22 January 2013, **RE-090**.

letter was signed by Mr. Vladislav Cvetković, the then Director of the Privatization Agency and Serbia's witness in this arbitration.

203. Besides seeking instructions from the Ministry of Economy, the Privatization Agency also sought outside advice on the alleged violations of the Privatization Agreement. The Privatization Agency therefore decided to approach the Radović & Ratković law firm of Belgrade and asked them to prepare a legal opinion regarding this matter. As the Claimants explained in their Memorial, that law firm had been the Privatization Agency's trusted advisors for several years, representing it in dozens of cases before Serbian courts.[219]

204. On 12 June 2013, the Privatization Agency received the requested legal opinion ("**2013 Legal Opinion**").[220] As the Claimants explained in the Memorial, the 2013 Legal Opinion unequivocally concluded that such termination would, for a number of reasons, be unlawful.[221] The 2013 Legal Opinion:

a. explained that it was impossible for the Privatization Agency to rescind the Privatization Agreement after it was "*completely fulfilled*" upon the payment of the last instalment of the purchase price on 8 April 2011 when "*all contractual and legal control authorities of the Privatization Agency ended*";[222]

b. 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;[223]

c. 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;[224]

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219 Memorial, ¶ 132.

220 The 2013 Legal Opinion, 11 June 2013, p. 1, **CE-034**.

221 Memorial, ¶¶ 133-140.

222 The 2013 Legal Opinion, 11 June 2013, p. 4, **CE-034**.

223 The 2013 Legal Opinion, 11 June 2013, p. 4, **CE-034**.

224 The 2013 Legal Opinion, 11 June 2013, p. 2, **CE-034**.

d. confirmed that Mr. Obradović did not violate Article 5.3.3 of the Privatization Agreement;[225]

e. rejected any suggestion that Mr. Obradović had violated Article 5.3.4 of the Privatization Agreement;[226]

f. stressed that the potential violation of Article 5.3.4 of the Privatization Agreement in any case did not represent a ground for termination of the Privatization Agreement;[227] and

g. confirmed that the privatization ended upon the payment of the purchase price and the Privatization Agency no longer had any contractual or legal authority over BD Agro: "*[a]fter the payment of the sale and purchase price, socially owned capital of the subject of privatization was finally privatized and thus all contractual and legal control authorities of the Privatization Agency ended […].*"[228]

205. The 2013 Legal Opinion thus concluded that "*besides the fact that there is no economic justification, there is also no legal basis for termination of the [Privatization Agreement]*."[229]

206. For reasons unknown, the Privatization Agency decided to ignore the advice. At an internal meeting of the Center for Control on 13 June 2013, the Privatization Agency simply noted, without any explanation, that it does not agree with the opinion.[230]

207. Worse yet, the Privatization Agency decided to conceal the 2013 Legal Opinion and its findings. As explained by Mr. Markićević, during one of the meetings with the Privatization Agency, Ms. Julijana Vučković, the then head of the Center for Control,

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225 The 2013 Legal Opinion, 11 June 2013, p. 5, **CE-034**.

226 The 2013 Legal Opinion, 11 June 2013, p. 5 ("*Regarding violation of the obligation of the buyer stipulated by Article 5.3.4, […] it may be undoubtedly concluded that the buyer of capital (even though he was not obliged to) acted in line with the notices of the Privatization Agency even after the full payment of the sale and purchase price, that is, after the end of control-related authorizations of the Agency.*"), **CE-034**.

227 The 2013 Legal Opinion, 11 June 2013, p. 3 ("*[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*."), **CE-034**.

228 The 2013 Legal Opinion, 11 June 2013, p. 4, **CE-034**.

229 The 2013 Legal Opinion, 11 June 2013, p. 6 (emphasis in the original), **CE-034**.

230 Note from the Center for Control, 13 June 2013, p. 6, **CE-765**.

told Mr. Markićević that the Agency had received a legal opinion on the alleged violations of the Privatization Agreement, but the officials were told to "*put the legal opinion into a drawer*" and forget about it.[231]

208. In fact, the Privatization Agency withheld the 2013 Legal Opinion not only from the Claimants, Mr. Obradović and BD Agro, but also from other decision-making bodies of the Serbian Government.

## M. The Serbian Government kept BD Agro in limbo

### 1. Mr. Rand replaced the top management of BD Agro

209. In 2012, Mr. Rand tasked Mr. Erinn Broshko, the Managing Director of Rand Investments, to go to Serbia to oversee his investments there.[232] In the first half of 2013, following Mr. Broshko's recommendations, Mr. Rand completely changed BD Agro's top management. Mr. Rand had Mr. Igor Markićević, an experienced Serbian investment manager, appointed as an executive member of the Board of Directors and the General Manager of BD Agro.[233] Also, Mr. David Wood, a UK national with extensive experience with large herd management, became the Chairman of the Board of Directors.[234]

210. Mr. Rand also decided that it was time for Mr. Obradović to transfer the nominal ownership of the Beneficially Owned Shares to Sembi or its nominee. However, the transfer of legal title was not possible because the Privatization Agency had unlawfully refused to release the expired pledge, which prevented any transfers.

### 2. Mr. Rand sought assignment of the Privatization Agreement to Coropi

211. Messrs. Broshko and Markićević started to explore whether the Privatization Agency would agree to an assignment of the Privatization Agreement; that is, to replace Mr. Obradović as a party to the Privatization Agreement with one of Mr. Rand's companies.

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231 Markićević Third WS, ¶ 83.

232 Broshko First WS, ¶¶ 7-8.

233 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, **CE-072**; Igor Markićević Witness Statement dated 5 February 2018, ¶ 15.

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

212. The Privatization Agency confirmed to Mr. Markićević at a meeting held on 11 June 2013 that such option was feasible, and Ms. Jelena Jelić from the Privatization Agency provided a list of documents that needed to be submitted with the request.[235] She explained that the list had been created for Serbian assignees and, if some of the required documents were impossible to obtain for foreign entities, an adequate foreign equivalent document or an affidavit would do.[236]

213. As it later turned out, this was a misrepresentation. The Privatization Agency never intended to approve the assignment of the Privatization Agreement and/or release the pledge over the BD Agro shares.

214. Unaware of this fact, Mr. Rand believed, based on the representations of the Privatization Agency during the meeting on 11 June 2013, that the assignment would be quickly approved. He therefore directed Mr. Obradović[237] to conclude an agreement (the "**Coropi Agreement**") regarding assignment of the Privatization Agreement to Coropi Holdings Limited ("**Coropi**"), a Cypriot company nominally owned by Mr. Robert Jennings as the Trustee on behalf of the Ahola Family Trust.[238] Mr. Rand also directed Mr. Jennings to prepare a statement as the nominal controlling shareholder of Coropi, as requested by the Privatization Agency. Messrs. Obradović and Jennings both followed these directions.

215. Mr. Obradović submitted the request for approval of the assignment on 1 August 2013,[239] and the documents from Ms. Jelić's list, including that from Mr. Jennings, were delivered to the Privatization Agency in August and September 2013.[240]

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235 List of documents requested by the Privatization Agency dated 11 June 2013, **CE-564**. *See also* Markićević Second WS, ¶ 28.

236 Markićević Second WS, ¶¶ 27-29.

237 Rand First WS, ¶ 45; Obradović First WS, ¶ 27.

238 Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited, 21 September 2013, **CE-274**; Certificate of Shareholders in Coropi Holdings Limited, 15 July 2013, **CE-083**.

239 Letter from D. Obradović to the Privatization Agency, 1 August 2013, **CE-273**; Markićević Second WS, ¶ 31; Markićević Third WS, ¶ 85.

240 Letter from D. Obradović to the Privatization Agency, 1 August 2013, **CE-273**; Letter from Coropi to the Privatization Agency, 26 August 2013, **RE-055**; Letter from DPB Lawyers a.o.d. to the Privatization Agency, 2 September 2013, **RE-056**; Statement of the controlling shareholder of Coropi, 19 August 2013, **RE-057**; Letter from Coropi to the Privatization Agency, 26 September 2013, **CE-275**; Agreement on Assignment of the Privatization Agreement between D. Obradović and Coropi, 21 September 2013, **CE-274**.

216. Also in August 2013, Mr. Obradović agreed with Mr. Rand that he would recuse himself from any further oversight of BD Agro and would instead focus on oversight of other Serbian companies beneficially owned by Mr. Rand.[241]

### 3. The Privatization Agency invented pretexts for not approving the assignment

217. The Privatization Agency was not minded to approve the assignment. Rather than state its opinion openly, it engaged in a strategy that is well known in Serbia under the acronym FTJP, which stands for "you are missing one document" (in Serbian: *fali ti jedan papir*) and started to pretend that the request for approval of the assignment was incomplete.[242] The Privatization Agency began their ruse in a meeting with Messrs. Broshko and Markićević held on 30 January 2014 where they stated that unspecified documents were not submitted as required.[243]

218. In fact, the allegation that documents were missing was just a pretext for the Privatization Agency not to approve the assignment.

#### a. No bank guarantee was needed

219. According to Serbia's submissions in this arbitration, the most important document that had not been provided with the request for assignment was a bank guarantee that would secure fulfillment of the Privatization Agreement by Coropi.[244] This is clearly incorrect because a bank guarantee was not needed.

220. The list of documents provided to Mr. Markićević by Ms. Jelić, which according to Serbia was a copy paste of legal provisions applicable at that time,[245] did *not* state that Mr. Obradović had to submit a *bank* guarantee. To the contrary, the list stated that an assignor could guarantee the assignee's fulfillment of a privatization agreement by submitting "*the guarantee […] in the form of a bank guarantee, solo promissory note,*

241 Broshko Second WS, ¶ 12; Markićević Second WS, ¶ 8.

242 Markićević Third WS, ¶¶ 86, 95-97.

243 Counter-Memorial, ¶ 156.

244 Counter-Memorial, ¶ 169.

245 Counter-Memorial, ¶ 169.

*pledge or other means of security*" or "*by signing as the guarantor the Amendment to the Sale Agreement concluded by the Agency and the assignee.*"[246]

221. Mr. Obradović provided the required guarantee by expressly undertaking in the assignment agreement concluded with Coropi to guarantee fulfillment of Coropi's obligations under the Privatization Agreement:

> The Assignor [i.e. Mr. Obradović] guarantees to the Agency that the Assignee [i.e. Coropi] will fulfill all obligations from the assigned [Privatization Agreement], in a manner and within deadlines as determined in the [Privatization Agreement].[247]

222. As explained by Mr. Markićević, it was a common practice to guarantee performance of assigned privatization agreements in this way. Indeed, in 2007, Mr. Obradović was assigned the privatization agreement for Crveni Signal with such a guarantee by the assignor, and the assignment was approved by the Privatization Agency without submission of a bank guarantee.[248]

223. Furthermore, Mr. Obradović was ready to state his guarantee also in an amendment to the Privatization Agreement recording the assignment from Mr. Obradović to Coropi. Such guarantee—and not a bank guarantee—was also used when the privatization agreement for Crveni Signal was assigned to Mr. Obradović in 2007.[249] The requirements for the guarantee applicable at the time of assignment of the privatization agreement for Crveni Signal were not materially different from those applicable in 2013. Given that the Privatization Agency did not need a bank guarantee to approve the assignment of the Crveni Signal privatization agreement in 2007, it should have done the same with respect to the assignment of the Privatization Agreement in 2013.[250]

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246 List of documents requested by the Privatization Agency dated 11 June 2013, **CE-564**.

247 Agreement on Assignment of the Privatization Agreement between D. Obradović and Coropi, 21 September 2013, Art. 5, **CE-274**.

248 Assignment agreement between V. Vukelić and D. Obradović, 2 March 2007, Art. 5 ("*The Assignor guarantees to the Agency that the Assignee shall perform all the obligations from the assigned Agreement on Sale in a way and within the deadline precisely given in the Agreement on Sale.*"), **CE-565**. *See also* Markićević Third WS, ¶¶ 87-89.

249 Annex to the Agreement on sale and purchase of socially owned capital through the method of public auction, 14 March 2007, **CE-566**.

250 Instructions laying down the procedures for monitoring compliance with contracts for the sale of socially-owned and state-owned capital, October 2006, Art. 9.3, **CE-766**.

224. The firm requirement for a *bank* guarantee, with no alternative, was introduced only in 2014, *i.e.* after Mr. Obradović submitted his request—as Serbia in fact confirms in its Counter-Memorial[251]—only to be again abandoned in April 2015.[252]

### b. Mr. Jennings submitted a statement confirming his clean criminal record and the absence of criminal proceedings pending against him

225. Serbia also claims that Mr. Obradović failed to submit a "*certificate issued by the competent authority that the natural person who is the controlling shareholder of the receiver (i.e. Coropi) was not convicted for criminal acts from Article 12 of the Law on Privatization and that criminal proceedings are not being conducted against that person for these criminal acts*."[253]

226. This argument ignores the fact that, as described above, on 19 August 2013, Mr. Robert Jennings, the nominal shareholder of Coropi acting in his capacity as trustee of the Ahola Family Trust, provided a statement confirming that he had not been convicted for any crimes and no proceedings were conducted against him:

> In particular, the Controlling Shareholder:
>
> […]
>
> Has never been convicted for any criminal offenses, including those listed in Article 12 of the Privatization Law of the Republic of Serbia, and there are no criminal proceedings pending against the Controlling Shareholder in relation to any criminal offense whatsoever, including those listed in Article 12 of the Privatization Law of the Republic of Serbia.[254]

227. While this statement was not a confirmation issued by "*the competent authority*," it was common practice in Serbia that foreign entities could submit such statements if it was impossible to obtain the required document in their home jurisdiction. This was also confirmed by Ms. Jelić in the meeting held on 11 June 2013.[255]

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251 Counter-Memorial, fn. 238.

252 Counter-Memorial, ¶ 173.

253 Counter-Memorial, ¶ 170 (footnotes omitted).

254 Statement of the controlling shareholder of Coropi, 19 August 2013, **RE-057**.

255 Markićević Second WS, ¶¶ 27-29.

### c. The Privatization Agency never requested any anti-money laundering approvals

228. Serbia also claims that, since the change of the Privatization Agency's internal regulation in April 2015, a request for an assignment of a privatization agreement should have been accompanied by an "*opinion of the competent organization for the prevention of money laundering that there were no obstacles on the receiver's part for the assignment of the agreement, in accordance with Article 13 of the Law on Privatization.*"[256]

229. That requirement is largely irrelevant because Serbia admits that it was introduced only in April 2015—and thus cannot explain why the Privatization Agency did not approve the assignment in September 2013.

230. In any event, the Privatization Agency never requested such a statement, and it was not on the list of required documents provided to Mr. Markićević by Ms. Jelić in June 2013. Therefore, even after April 2015, Messrs. Rand, Markićević and Broshko were unaware that this additional document should have allegedly been submitted to the Privatization Agency.

### d. The request for the submission of an updated request for assignment was vexatious

231. Serbia also claims in its Counter-Memorial that Mr. Obradović should have submitted an updated request for assignment of the Coropi Agreement in April 2015.[257] Again, the alleged need to submit an updated request does not explain why the Privatization Agency did not approve the assignment in September 2013.

232. In any event, this was a purely formalistic request because nothing had changed since Mr. Obradović's submission of his original request. The request was also utterly unclear, because, as with the previous requests for additional documents, the Privatization Agency did not specify what exactly should have been updated and how.

### e. The Commission for Control's internal documents show that the Privatization Agency never seriously considered the request for assignment

256 Counter-Memorial, ¶ 173.

257 Counter-Memorial, ¶ 161.

233. The bare truth is that the Privatization Agency never seriously considered the request for assignment of the Privatization Agreement to Coropi. This is evident from an audio recording of an internal meeting of the Privatization Agency's Commission for Control held on 23 April 2015, almost two years after Mr. Obradović submitted the request for approval of the assignment.

234. It is Serbia's case in this arbitration that the Privatization Agency could not decide upon the request for assignment because Mr. Obradović did not submit all required documents. Serbia also claims that the Privatization Agency provided to Mr. Markićević "*a list of documents that had been submitted with the Request for Assignment, along with the Privatization Agency's remarks on deficiencies of said documentation.*"[258]

235. The audio recordings from the meeting of the Privatization Agency's Commission for Control held on 23 April 2015, however, paint a different picture. It was clearly stated at the meeting that the Commission for Control had never asked for specific documents:

> Female voice 2: […] Now we do not know whether it would meet other conditions. In order for an agreement to be assigned certain conditions need to be met. *They did, at one point, deliver this documentation which we did not review officially. The Centre, of course, reviewed it and it was not complete, but we had never… (Julijana Vučković adds: put it to the agenda) reached that phase where we would ask them to supplement the documentation.*[259]

236. The Commission for Control thus admitted that it had never asked the Claimants to provide any specific additional documents.

237. This is a shocking admission, which puts the lie to Serbia's defenses that the request was not granted because of allegedly missing documents.

238. The reality is that the Privatization Agency failed to consider the request for assignment—for reasons that Serbia will yet have to explain.

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258 Counter-Memorial, ¶ 161.

259 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 9 (emphasis added), **CE-768**.

### 4. The Ministry of Economy and SIEPA refused to help

239. Facing the unexplained silence of the Privatization Agency, Mr. Rand decided to request help from the Ministry of Economy.

240. On 18 December 2013, Mr. Milan Kostić, the then chair of the economic counsel of the Serbian Progressive Party, wrote to Mr. Saša Radulović, the then Minister of Economy of Serbia, and asked him to assist with BD Agro matters. Mr. Kostić made it clear in his letter that Mr. Rand was the "*majority owner*" of BD Agro:

> Dear Mr. Minister,
>
> I hereby address you with the kind request, respecting the efforts of the Ministry to assist commercial entities which have realistic basis to maintain the production and working capacities, to schedule a short meeting of the representative of the owner of the company BD AGRO Dobanovci from Canada, the attorney Mr. Erinn Broshko, who would like to collect sufficient level of information for the purpose of furthering the development plan of the company and inform *Mr. William Rand from Canada who is a majority owner of PD BD AGRO*.[260]

241. Minister Radulović received the letter, read it and then forwarded it to Mr. Vladimir Milenković, the then director of the Serbian Investment Promotion Agency ("**SIEPA**"), with a note that it was for SIEPA to look into this issue.[261] Mr. Milenković in turn asked Mr. Goran Džafić, the then deputy director of SIEPA, to organize an "*urgent*" meeting with BD Agro representatives.[262]

242. On 19 December 2013, *i.e.* the very next day, the meeting between SIEPA and BD Ago representatives took place. The meeting was attended by Messrs. Broshko and Markićević, who described the meeting in detail in their second witness statements. Most importantly, Mr. Markićević explained the background of the privatization of BD Agro and that Mr. Obradović was only the nominal owner, because the beneficial owner was Mr. Rand.[263] After the meeting, Mr. Džafić reported back to Mr. Milenković.[264]

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260 Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, p. 3, **CE-769**.

261 Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, p. 1, **CE-769**.

262 Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, p. 1, **CE-769**.

263 Markićević Second WS, ¶¶ 65-66; Broshko Second WS, ¶ 32.

264 Email communication between G. Džafić and I. Markićević, 19 December 2013, **CE-311**. *See also* Markićević Second WS, ¶ 66.

243. Nobody followed up with Messrs. Broshko and Markićević. The Ministry of Economy, however, did follow up internally, and in a totally unexpected manner.

### 5. The Ministry of Economy launched a supervision procedure over the Privatization Agency based on an obscure third party's request for termination of the Privatization Agreement

244. On 23 December 2013, the Ministry of Economy initiated a "*procedure of supervision of the work of the Privatization Agency*" with respect to the privatization of BD Agro.[265]

245. In the decision on initiation of this procedure, the Ministry of Economy explained that on 27 May 2013, the Ministry of Agriculture, Forestry and Waterpower had forwarded to the Ministry of Economy "***request of the representatives of the unions and strike committee of AD BD Agro, Dobanovci*** *(reg. number. 07054688) to the Ministry of Economy* ***for termination of sale and purchase agreement for the stated subject of privatization****, reviewing of the business activities of the company, as well as payment of due salaries, taxes and contributions as of 2009 until today.*"[266]

246. The launch of the supervision procedure by the Ministry of Economy was used by the Privatization Agency as a pretext to immediately stop all work on BD Agro matters. The Privatization Agency simply refused to make any decisions regarding BD Agro until the conclusion of the supervision procedure.[267]

247. The supervision procedure lasted almost a *year and a half*. Serbia does not explain why the procedure took so long, or what the Ministry of Economy actually did during all that time.

### 6. The Serbian government was well aware that Mr. Rand was a beneficial owner of BD Agro

248. In its Counter-Memorial, Serbia claims that the Privatization Agency and the Ministry of Economy did not consider Messrs. Rand, Broshko and Markićević as the competent representatives for addressing and negotiating all matters regarding BD Agro and the

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

266 Decision of the Ministry of Economy, 23 December 2013, p. 1 (emphasis added), **CE-206**.

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

Privatized Shares.[268] This allegation is in a stark contrast to the contemporaneous position of the Privatization Agency and the Ministry of Economy.

249. As Mr. Broshko and Mr. Markićević both explain in their witness statements, Mr. Obradović did not attend any meetings with the Ministry of Economy and/or the Privatization Agency after the meeting with the Privatization Agency on 11 June 2013.[269]

250. Mr. Milan Kostić was expressly informed of Mr. Rand's beneficial ownership of BD Agro for the purposes of his intercession with the Ministry of Economy and, as described above, he passed that information on to Minister Radulović, who involved Messrs. Milenković and Džafić from SIEPA.[270] Mr. Markićević expressly explained the split between Obradović's nominal ownership and Mr. Rand's beneficial ownership at a meeting with Mr. Džafić.[271] After the meeting, Mr. Džafić reported back to Mr. Milenković.[272]

251. The Privatization Agency was also obviously aware of the fact that Mr. Rand was the beneficial owner of BD Agro. For example, Mr. Broshko expressly explained this fact to the Privatization Agency during a meeting on 30 January 2014.[273] The minutes of this meeting submitted by Serbia in this arbitration, as well as the subsequent letters from the Privatization Agency, clearly reflect this fact. The minutes state the following:

> Erinn Broshko stated that he represented the company which provided funds invested in the Entity, and that such practice is common in Canada. *He stated that William Rand was not satisfied with the work and management by the man to whom business of purchasing the company was entrusted*, and that he was interested to finish the assignment as soon as possible.[274]

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268 Counter-Memorial, ¶ 256.

269 Broshko Third WS, ¶ 12; Markićević Third WS, ¶ 57.

270 Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, p. 1, **CE-769**.

271 Markićević Second WS, ¶¶ 65-66; Broshko Second WS, ¶ 32.

272 Email communication between G. Džafić and I. Markićević, 19 December 2013, **CE-311**. *See also* Markićević Second WS, ¶ 66.

273 Broshko Third WS, ¶ 25.

274 Minutes of the meeting at the Privatization Agency, 30 January 2014 (emphasis added), **RE-028**. Agency repeated basically the same text also in its letter from August 2014. *See* Letter from the Privatization Agency to BD Agro, 21 August 2014, p. 2, **CE-317**.

252. While the minutes do not use the term "*beneficial ownership*", Mr. Broshko explained in his witness statement that he recalls using this term in the meeting to describe Mr. Rand's ownership and stating that the structures separating nominal and beneficial ownership were "*common in Canada*". Regardless, the minutes clearly show that the Privatization Agency understood that Mr. Obradović was "*entrusted*" to purchase BD Agro shares on behalf of Mr. Rand.

253. The Government's correct understanding of the reality of Mr. Rand's and Mr. Obradović's respective roles in the ownership of BD Agro was unequivocally demonstrated during a meeting held at the Ministry of Economy on 15 December 2014.

254. On that date, Messrs. Broshko, Markićević and Mr. Rand's lawyer, Mr. Doklestić, met with Mr. Dragan Stevanović, the then State Secretary at the Ministry of Economy, Ms. Neda Galić, the then Advisor to the Minister of Economy, and certain other representatives of the Ministry of Economy and the Privatization Agency. When Messrs. Broshko, Markićević and Doklestić came to the meeting, they realized that Mr. Obradović was also present. Mr. Broshko objected to Mr. Obradović's presence, explaining that Mr. Obradović no longer had any role at BD Agro other than mere nominal ownership and requested that Mr. Obradović be asked to leave. The Ministry apologized and asked Mr. Obradović to leave. The meeting commenced after Mr. Obradović left.[275] Needless to say, if the Ministry and the Agency had considered that Mr. Obradović was still entitled to act in the matters related to privatization of BD Agro—as Serbia argues in this arbitration—they would not have asked him to leave the meeting.

255. Importantly, the Claimants provided a detailed description of the 15 December 2014 meeting in the witness statements of Messrs. Broshko and Markićević.[276] Serbia chose to ignore it in its Counter-Memorial.[277] It did not address the fact that the Ministry asked Mr. Obradović to leave the meeting, and it did not submit a witness statement from

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275 Broshko Second WS, ¶ 39; Markićević Second WS, ¶ 93; Broshko Third WS, ¶ 11; Markićević Third WS, ¶ 55.

276 Broshko Second WS, ¶ 39; Second Markićević WS, ¶ 93.

277 Counter-Memorial, ¶ 56.

anyone who attended the meeting on behalf of the Ministry of Economy and the Privatization Agency.

## N. In the meantime, Mr. Rand's new managers addressed BD Agro's economic difficulties

### 1. BD Agro had discussions with several potential strategic partners

256. As explained in the Memorial, Mr. Rand's new managers immediately focused on improving BD Agro's operational standards and were successful. However, despite the achievements of BD Agro's new management,[278] 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.

257. While the Privatization Agency kept making promises it never intended to honor, Messrs. Rand, Markićević and Broshko focused on finding potential strategic partners, who could help to further improve and expand BD Agro's business.[279]

258. These potential partners included Serbian milk processing companies Farmakom, Meggle, Lactalis,[280] the Italian company La Bovarina,[281] and companies interested in the development of a biogas power plant, such as Bigadan, Biogest or ENSPAR Biogas.[282]

259. However, as the Claimants also explained in their Memorial, their efforts proved to be unsuccessful because all the companies approached by BD Agro were unwilling to enter

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278 Memorial, ¶ 130.

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

280 *E.g.* Email from I. Markićević to W. Rand dated 3 September 2013, **CE-276**; Email from I. Markićević to B. Bogdan dated 23 September 2013, **CE-277**; Email from W. Rand to M. Bogićević and I. Markićević dated 27 September 2013, **CE-278**; Email from I. Markićević to S. Živanović dated 6 October 2013, **CE-279**; Email from I. Markićević to E. Broshko dated 28 November 2013, **CE-280**.

281 Email from I. Markićević to W. Rand and E. Broshko dated 16 November 2013, **CE-266**; Email from I. Markićević to E. Broshko dated 18 November 2013, **CE-281**; Draft term sheet for joint venture for the establishment and management of dairy in Dobanovci dated January 2014, **CE-282**; Email from I. Markićević to Remax dated 6 March 2014, **CE-283**; Email from I. Markićević to Remax dated 23 January 2014, **CE-284**.

282 Email from Bigadan to I. Markićević dated 26 August 2013, **CE-285**; Email communication between Mr. Rand and Bigadan dated September-October 2013, **CE-286**; Email from I. Markićević to W. Rand dated 7 October 2013, **CE-265**; Email from I. Markićević to Bigadan dated 17 October 2013, **CE-287**.

into cooperation with BD Agro unless the Beneficially Owned Shares were transferred into the nominal ownership of Mr. Rand.[283]

### 2. BD Agro started to work on a reorganization plan

260. Besides looking for ways to increase its milk production, BD Agro also needed to reduce the financial costs of its debt service. To do so, Mr. Markićević proposed that the company adopt a reorganization plan.[284]

261. BD Agro commissioned the Serbian consulting company ID Consultants d.o.o. Beograd ("**ID Consultants**") to draft the reorganization plan. ID Consultants were assisted by BD Agro's employees, the law firm of Mr. Slobodan Doklestić and an independent auditor, the Serbian company Finodit d.o.o.[285]

### 3. BD Agro obtained the support of its key creditors for the reorganization

262. The pre-pack reorganization plan needed to be approved by a majority of BD Agro's creditors, voting in classes depending on the nature of their receivables, and then by a bankruptcy court.[286]

263. Mr. Markićević, supported by Messrs. Rand and Broshko, negotiated with BD Agro's key creditors and obtained their support for the reorganization plan.[287]

264. 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.[288] Mr. Markićević was in a continuous contact with Nova Agrobanka's representatives and had them comment on the drafts of the reorganization plan.[289]

265. Same as the Privatization Agency, Nova Agrobanka and the Deposit Insurance Agency were also aware that Mr. Obradović was only the nominal owner of the Beneficially

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283 *E.g.* Markićević Second WS, ¶¶ 42, 45; Broshko Second WS, ¶¶ 25-26.

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

285 Original pre-pack reorganization plan, November 2014, pp. 11, 80 (pdf), **CE-321**.

286 Memorial, ¶ 150.

287 Markićević Second WS, ¶¶ 46-56, 87-92; Markićević Third WS, ¶¶ 24-40.

288 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; Markićević Third WS, ¶ 25.

289 Markićević Second WS, ¶ 48; Markićević Third WS, ¶ 26.

Owned Shares.[290] For example, when Mr. Markićević invited Mr. Ristović, the then expert advisor at the Deposit Insurance Agency, to one of the meetings regarding the reorganization plan that was to be attended by Mr. Broshko, Mr. Markićević made it clear that Mr. Broshko was "*[r]epresentative of the owner from Canada*."[291]

266. 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.[292]

267. BD Agro's second biggest creditor was Banca Intesa. Its receivables were also secured by pledges over BD Agro's property, and these pledges were in priority to those of Nova Agrobanka.[293] Mr. Markićević met with the head of Risk Management Division of Banka Intesa, Ms. Sladjana Jelić, immediately after he was appointed as the General Manager of BD Agro, and continued to meet with her and her associates over the following months.[294] During these meetings, Banca Intesa also expressed its support for the pre-pack reorganization plan. BD Agro therefore also coordinated the preparation of the plan with Banca Intesa.[295]

268. 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.[296]

269. BD Agro's unsecured creditors comprised mainly of milk processing companies, such as Imlek—the biggest producer of dairy products in region—Mlekara Šabac and Somboled,[297] and BD Agro's suppliers, such as Almex, Galenika Fitofarmacija and

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290 Markićević Second WS, ¶ 49.

291 Email from I. Markićević to M. Ristović, 22 April 2014, **CE-289**. *See also* Markićević Third WS, ¶ 27.

292 Markićević Second WS, ¶ 49; Markićević Third WS, ¶ 28.

293 Markićević Second WS, ¶ 50; Markićević Third WS, ¶ 34.

294 Markićević Second WS, ¶ 51; Markićević Third WS, ¶ 35.

295 Markićević Second WS, ¶ 52; Markićević Third WS, ¶ 36.

296 Court hearing minutes, 25 June 2015, p. 5, **CE-039**. *See also* Markićević Second WS, ¶¶ 140, 164.

297 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; Markićević Third WS, ¶ 37.

Mivaka. All these creditors were very supportive of the idea to reorganize BD Agro through the pre-pack reorganization plan.[298]

### 4. BD Agro submitted the pre-pack reorganization plan to the Commercial Court

270. On 25 November 2014, BD Agro filed the pre-pack reorganization plan with the Commercial Court in Belgrade ("**Original pre-pack reorganization plan**").[299] The Original pre-pack reorganization plan was submitted with a valuation prepared by Serbian valuation company Adventis Real Estate Management d.o.o. ("**Adventis**").

271. As explained by Mr. Markićević, BD Agro commissioned Adventis based on a recommendation from Banca Intesa. The representatives of Banca Intesa explained to BD Agro that they were very familiar with Adventis's work because they had cooperated with them often in the past. Intesa also advised BD Agro that, if they hired Adventis, a valuator well known to Banca Intesa, it would be easier for their representatives to obtain the internal approval they would need to vote for the reorganization plan. Given that BD Agro wanted to maintain a good working relationship with Banca Intesa and did not—at that time—see any issues with hiring Adventis, BD Agro decided to follow the Banca Intesa's recommendation. Soon afterwards, BD Agro came to regret this decision.[300]

272. When BD Agro received Adventis's valuation, they immediately had doubts because the valuation of certain land plots in Dobanovci, which were zoned as industrial and commercial land, appeared to be far too low.[301] As pointed out by Mr. Markićević, between years 2008 and 2009, BD Agro had sold parts of this land for the price between EUR 15 and EUR 23 per $m^2$.[302] Adventis, however, valued this land between EUR 1.7 and EUR 1.9 per $m^2$.[303] Adventis's valuation was more than ten times lower than

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298 Markićević Second WS, ¶¶ 53-54; Markićević Third WS, ¶ 37-38.

299 BD Agro's submission accompanying the Pre-pack Reorganization Plan dated 25 November 2014, **CE-085**.

300 Markićević Third WS, ¶ 19.

301 Valuation Report, Adventis Real Estate Management d.o.o., September 2014, **CE-508**. *See also* Markićević Second WS, ¶ 88; Markićević Third WS, ¶ 21.

302 Purchase agreement between BD Agro and Hypo Park dated 11 June 2008, pp. 1-3, **CE-144**; Purchase agreement between BD Agro and Eko Elektrofrigo dated 27 October 2008, p. 1 (pdf), **CE-145**; Purchase agreement between BD Agro and Trajan dated 12 November 2009, pp. 1-2, **CE-146**. *See also* Markićević Third WS, ¶ 21.

303 Valuation Report, Adventis Real Estate Management d.o.o., September 2014, p. 86, **CE-508**.

the actual prices for which BD Agro had already managed to sell parts of the very same land.

273. BD Agro was, however, working under a tight schedule because the cut-off date envisaged by the reorganization plan was 31 August 2014.[304] According to the then applicable Bankruptcy Law, BD Agro had to file the pre-pack reorganization plan within 90 days from the cut-off date, *i.e.* on or before 29 November 2014. Otherwise, the documents underlying the plan (including the financial statements) would become stale dated and BD Agro would need to set a new cut-off date and submit new updated documentation.[305] This process would have taken another 90 days.[306]

274. Given that BD Agro would have been unable to supplement the plan with a proper valuation before 29 November 2014, it decided to submit the reorganization plan with the Adventis valuation and prepare a supplemental filing to include the new valuation of the industrial and commercial land prior to the creditors voting on the plan.[307]

### 5. On 6 March 2015, BD Agro filed the amended pre-pack reorganization plan

275. The amended reorganization plan was filed on 6 March 2015, together with a supplemental valuation that properly reflected the valuation of BD Agro's industrial and commercial land ("**Amended pre-pack reorganization plan**").[308]

276. The majority of creditors—including the biggest creditor, Nova Agrobanka—supported the Amended pre-pack reorganization plan.[309] However, Nova Agrobanka's approval was conditional upon approval of the Assignment Agreement. For example, when BD

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304 Pre-pack Reorganization Plan dated November 2014, p. 5, **CE-321**. *See also* Markićević Third WS, ¶ 22.

305 The pre-pack reorganization plan must contain the extraordinary auditor's report reflecting the status of business books determined not later than 90 days prior to the day of submission of the pre-packed reorganization plan to the court, with an overview of all claims and participation ratio of each creditor in the respective class in the plan. Bankruptcy Law (Official Gazette of the Republic of Serbia no. 04/2009, 99/2011 – other law, 71/2012 – decision of the CC and 83/2014), Art. 156(4)(5), **CE-322**. *See also* Markićević Third WS, ¶ 22.

306 Markićević Second WS, ¶ 89.

307 Markićević Third WS, ¶ 23.

308 BD Agro's submission to Commercial Court accompanying the Pre-pack Reorganization Plan, 6 March 2015, **CE-116**; Amendment to the Pre-pack Reorganization Plan of BD Agro, 6 March 2015, **CE-101**. *See also* Markićević Third WS, ¶ 41.

309 BD Agro's submission to Commercial Court accompanying the Pre-pack Reorganization Plan dated 6 March 2015, pp. 2-3, **CE-116**.

Agro sent the Amended pre-pack reorganization plan to the creditors,[310] Nova Agrobanka immediately asked whether BD Agro had received approval to transfer the nominal ownership from Mr. Obradović: "*We have received the Plan, thank you,* ***but we are interested to know if consent is obtained from the Ministry for the change of the majority owner***."[311]

277. 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.

278. On 26 March 2015, Nova Agrobanka made a submission to the Commercial Court, reiterating its position "***that it is not expedient to proceed with voting [on the pre-pack reorganization plan] before solution of the ownership matters.***"[312]

279. Both the Privatization Agency and the Ministry of Economy were aware of Nova Agrobanka's position[313]—but they could not care less. The Ministry of Economy's supervision was moving very slowly, if at all, and when Mr. Rand's representatives attempted to speed up the process, they were met with only empty promises.[314] Therefore, it was becoming increasingly clear that the Privatization Agency would not approve the assignment of the Privatization Agreement before the creditors were to vote on the Amended pre-pack reorganization plan.

280. In this arbitration, Serbia chose to deny the facts and argued that "*none of BD Agro's creditors conditioned their support of the pre-pack reorganization plan upon prior*

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310 *E.g.* Email from I. Markićević to P. Stojanović dated 10 March 2015, **CE-340**; Email from I. Markićević to B. Milojević dated 10 March 2015, **CE-341**; Email communication between I. Markićević and Nova Agrobanka dated 10-11 March 2015, **CE-342**.

311 Email communication between I. Markićević and Nova Agrobanka dated 10-11 March 2015 (emphasis added), **CE-342**. *See also* Markićević Third WS, ¶ 30.

312 Nova Agrobanka's submission to Commercial Court Belgrade dated 26 March 2015, p. 1 (emphasis in the original), **CE-294**.

313 Email from E. Broshko to N. Galić, W. Rand et al. attaching a letter to D. Stevanović, 26 January 2015, p. 2 (pdf) (emphasis in the original), **CE-328**; Email from E. Broshko to N. Galić, W. Rand et al., 4 February 2015, **CE-329**; Letter from BD Agro to the Privatization Agency, 26 February 2015, p. 4 (pdf), **CE-334**.

314 Memorial, ¶¶ 162-167. *See also* Markićević Second WS, ¶¶ 72, 74, 110, 112, 188; Broshko Second WS, ¶ 49; E-mail from N. Galić to E. Broshko, 9 November 2014, **CE-070**; E-mail from N. Galić to E. Broshko, 19 December 2014, **CE-036**.

*approval of the assignment of the Privatization Agreement.*"[315] This is disproved by all of the evidence cited above.

## O. The Privatization Agency executed the Ministry of Economy's order to again request remedies for the alleged violations of the Privatization Agreement

281. The Ministry of Economy had finally completed the supervision procedure on 7 April 2015—*i.e.* after almost 16 months.[316] In its report, the Ministry instructed the Privatization Agency to send a notice to Mr. Obradović granting him an additional 90-day deadline 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*."[317]

282. The Ministry also noted that if Mr. Obradović failed "*to deliver evidence on fulfillment of the obligations within additionally granted term, the Privatization Agency shall undertake the measures within its legal authorizations*."[318]

283. On 27 April 2015, Messrs. Broshko and Markićević had another meeting with the Privatization Agency. The representatives of the Privatization Agency casually explained that they had 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.[319]

284. The Privatization Agency sent its written decision on the same day, requesting that Mr. Obradović provide evidence that he had fulfilled his obligations under Articles 5.3.3 and 5.3.4 of the Privatization Agreement "*not later than [on] April 8 2011*," as well as his obligations under Article 5.2.1 of the Privatization Agreement.

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315 Counter-Memorial, ¶ 194.

316 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 1, **CE-098**.

317 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-098**.

318 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-098**.

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

285. The letter also made a number of other demands, including, among other things, that Mr. Obradović submit evidence that the Pledge on BD Agro land had been released and the receivables against Inex and Crveni Signal had been collected.[320]

## P. The audio recordings of the meetings of the Commission for Control show the shocking true motivations for the Serbian government's actions

286. Without document production, the Claimants would have needed to simply continue their description of the Serbian government's heavy administrative procedures and the Kafkaesque run up to the seizure of the Beneficially Owned Shares, as they did in the Memorial.

287. Thanks to the audio recordings of the two meetings of the Privatization Agency's Commission for Control held on 23 April 2015 and 19 June 2015, the Claimants now know more—although still not all—about the shocking true motivations for the Privatization Agency's actions.

288. During these internal meetings, members of the Commission for Control repeatedly and openly admitted that:

(*i*) the Privatization Agency was contractually obligated to release the share pledge;

(*ii*) there was no breach of Article 5.3.3 of the Privatization Agreement;

(*iii*) the Privatization Agency was *not* entitled to terminate the Privatization Agreement on the basis of an alleged breach of Article 5.3.4;

(*iv*) the Privatization Agency was requiring remedies to the alleged breaches of Article 5.3.4 that it knew the buyer was not able to perform;

(*v*) the Privatization Agency decided to act unlawfully by not releasing the pledge in order to be able to seize the Beneficially Owned Shares before Mr. Obradović could obtain legal protection from the Serbian courts; and

(*vii*) the Privatization Agency's conduct was motivated by outside pressure.

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320 Letter from the Privatization Agency to D. Obradović, 27 April 2015, p. 1, **CE-348**.

289. The recordings also show that:

(*vii*) in a blatant violation of their duties, the officials purposefully switched off the recording for the last part of their discussion about BD Agro;

(*viii*) the Privatization Agency was bound by the instructions from the Ministry of Economy, which it itself labelled as "*orders*"; and

(*ix*) the minutes prepared by Serbian authorities are entirely unreliable, if not fabricated.

290. The Claimants have learned about these facts only due to the document production process in this arbitration. Serbia did not disclose these facts to the Claimants during their discussions with the Privatization Agency and the Ministry of Economy in 2015, and it decided to keep silent about these facts also in its Counter-Memorial.

### 1. The Privatization Agency refused to release the pledge over BD Agro shares for the sole purpose of being able to seize the Beneficially Owned Shares

291. The audio recordings of the 23 April 2015 meeting reveal that the members of the Commission for Control had been well aware—at least since *2012*—that the pledge on the Beneficially Owned Shares should have been released when Mr. Obradović paid the last installment of the purchase price in April 2011:

> Julijana Vučković: […] On April 17, 2015, [Mr. Obradović] submitted to the Agency a request for issuance of the decision on deletion of the pledge against shares established to the benefit of the Agency. [He] submitted this request during the term of the agreement, and after payment of the purchase price, with reference to the provision of the agreement which prescribes that the buyer and the Agency shall conclude a share pledge agreement, on grounds of which the buyer provides the Agency with a confirmation of the shares which the Agency retains until payment of the purchase price. *This request was also submitted in 2012**. We did not act upon this request. We did not reply to this request because of the same reasons we are giving now in our, so to say, letter to the Commission***. Therein we say that ***if the Commission was to render a decision on deletion of pledge*** against shares, excuse me, if the Agency was to render a decision on deletion of pledge against shares to [Mr. Obradović] registered to his benefit, ***[Mr. Obradovic] would be free to dispose of them***, which would be certain bearing in mind the buyer's request for assignment of the agreement. If this disposal of shares is permitted, *and* ***[Mr. Obradovic] is, I repeat, entitled to this in accordance with the agreement***, generally the Agency would no longer be in a contractual relation with

> someone and ***you would no longer be able to take measures against the contracting party***, when the legal ground had generally ceased with it, and [Mr. Obradović] would be free to dispose of its shares.[321]

292. The above admission was not simply an isolated statement by one individual. The members of the Commission for Control repeatedly emphasized that, because the purchase price had been paid, *Mr. Obradović had a contractual right to the removal of the pledge and the right to dispose of the Beneficially Owned Shares as he deemed fit*:

> Julijana Vučković: […] So, currently, we have an *order* from the ministry to provide an additionally granted term and we have made, in accordance with this, a proposal for that term, actually we copied what was written in the report and we asked ourselves what to do with the request for deletion of the pledge. Simply, we brought this question in front of you since [Mr. Obradović] submitted the request back in 2012 and we had not issued the certificate, I mean ***we are, aware that [Mr. Obradovic] has this right in accordance with the agreement, and we are very aware that if this is permitted the buyer can further alienate these shares***.[322]
>
> […]
>
> Female voice 2: […] This is the first and the second is now the relation between the agreement and the proposal of a decision regarding these… pledge against shares, because, ***in accordance with the agreement, the pledge should be deleted, practically, when [Mr. Obradović] pays the purchase price which [he] did pay.*** On the other hand we have an uncertainty – what will [Mr. Obradović] do with the entire property since ***[Mr. Obradović] would then be free to dispose of [his] shares***. In that case there is no necessity in providing this term or anything, because [Mr. Obradović] will do as [he] wants.[323]
>
> […]
>
> Julijana Vučković: Well because … *So, the agreement prescribes that the pledge is deleted once [Mr. Obradović] pays the purchase price, and not when [he] fulfils its obligations.*
>
> Female voice 3: But the agreement also prescribes that it is prohibited from selling, like, selling these, that is…

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321 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4 (emphasis added), **CE-768**.

322 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 5-6 (emphasis added), **CE-768.**

323 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 6 (emphasis added), **CE-768**.

> Julijana Vučković: That is right, [Mr. Obradović] violated one of the provisions of the agreement; and ***the release of the pledge is not tied to the fulfilment of contractual obligations, rather it is tied only to the payment of the purchase price***, which was clearly done carelessly in the agreement. Now, the new law rectifies this somewhat and it prescribes that the certificate on deletion of the pledge and fulfilment of contractual obligations is issued once all obligations are fulfilled, and not only payment of the price. And that is it and *we are now between a rock and a hard place because on the one hand we have an obligation in accordance with the agreement, and on the other hand the consequences of this is clear to you*.[324]

293. It is simply disingenuous for Serbia to claim in this arbitration that the Privatization Agency was entitled to keep the pledge over the BD Agro shares following the payment of the last installment of the purchase price.[325]

294. The recordings show beyond any doubt that the Privatization Agency understood full well that the failure to release the pledge was unlawful.

### 2. The Privatization Agency understood that Article 5.3.3 of the Privatization Agency was not breached

295. At the meeting on 19 June 2015, the members of the Commission recognized that if the slaughter of the cows infected by leucosis was force majeure, Article 5.3.3 of the Privatization Agreement could not have been breached:

> Julijana Vučković: […] In some way it can be concluded, so to say, indirectly, that this percentage was not exceeded, under condition, of course, that we consider cows suffering from leucosis to be force majeure, since these cows needed to be disposed of because of their condition, which is completely understandable and is considered in general to be vis major.[326]
>
> […]
>
> Female voice 2: […] Concerning my position on the exceeding of disposal of property, personally I think that *the disposal was not in excess because it was a case of force majeure*. What will be our, final… or rather the Commission's final position. I may have prejudiced it a bit at this moment and presented my opinion, but *it really is not logical to*

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324 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 11 (emphasis added), **CE-768**.

325 Counter-Memorial, ¶¶ 146-152.

326 Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 4, **CE-770**; Audio recording from meeting of the Commission for Control, 19 June 2015, **CE-771**.

> *me for us to impose obligations on anyone or terminate the agreement for disposing of assets in excess, and in reality it was force majeure*.[327]

296. This clear understanding did not prevent the Commission for Control from requesting Mr. Obradović to show, once again, that Article 5.3.3 was not violated.

297. Again, it was disingenuous and simply arbitrary for the Privatization Agency to request that Mr. Obradović prove his compliance with Article 5.3.3 even though the Privatization Agency knew full well that that provision had not been violated.[328]

### 3. The Privatization Agency understood that the Privatization Agreement did not allow for termination based on the alleged breach of Article 5.3.4

298. The members of the Commission for Control were also well aware that the Privatization Agreement did not allow Serbia to terminate the agreement based on the alleged violation of Article 5.3.4:

> Julijana Vučković: […] First of these provisions, 5.3.3, was prescribed as basis for termination of the agreement, and *the other one [5.3.4], which refers to pledges, in accordance with the agreement, was not prescribed as basis for termination of the agreement […]*.[329]

299. However, this did not prevent the members of the Commission for Control from planning on terminating the Privatization Agreement.

300. The Commission for Control simply did not care, exactly as they had never cared about the 2013 Legal Opinion, which clearly advised them that the termination of the Privatization Agreement would be unlawful.[330]

### 4. The Privatization Agency purposefully required remedies to the alleged breaches of Article 5.3.4 that it knew the buyer was not able to perform

301. The members of the Commission for Control did not stop there. They openly admitted during the meeting that they knew that Mr. Obradović would *not* be able to fulfill the

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327 Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 6, **CE-770**; Audio recording from meeting of the Commission for Control, 19 June 2015, **CE-771**.

328 The 2013 Legal Opinion, 11 June 2013, **CE-034**.

329 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 2, **CE-768**.

330 As explained above, the 2013 Legal Opinion, among others: (*i*) explained that it was impossible to rescind the agreement after payment of the full purchase price; (*ii*) rejected any suggestion that Mr. Obradović had violated Article 5.3.4 of the Privatization Agreement; and (*iii*) stressed that the potential violation of Article 5.3.4 of the Privatization Agreement in any case did not represent a ground for termination of the Privatization Agreement. The 2013 Legal Opinion, 11 June 2013, pp. 3-5, **CE-034**.

allegedly remaining obligations under the Privatization Agreement in the additional period that was to be granted to him pursuant to the instructions from the Ministry of Economy. In other words, the members of the Commission knew that Mr. Obradović would be unable to fulfill what they requested and the Privatization Agency would then be able to terminate the Privatization Agreement:

> Female voice 2: […] Because otherwise, *after 90 days we would probably have to terminate* this, since Juliana already said that *there is no chance they will fulfil all of these contractual obligations*. That is, they have already stated publically that they… cannot fulfil some of these obligations […].[331]

302. As the Claimants have explained in the Memorial, and will again explain below, the specific remedies requested by the Privatization Agency were set in an arbitrary manner. They were not prescribed by any laws or regulations; the Privatization Agency simply invented them back in 2011. The Privatization Agency added insult to injury by insisting on such arbitrary remedies even though it knew that they could not be performed.

### 5. The Privatization Agency decided to intentionally violate the law by not releasing the pledge in order to be able to seize the Beneficially Owned Shares before Mr. Obradović could obtain legal protection from the Serbian courts

303. Worse yet, despite their unanimous understanding that Serbia was contractually obligated to lift the pledge and thus allow Mr. Obradović to transfer the Beneficially Owned Shares, the members of the Commission for Control decided to intentionally violate the law by not releasing the pledge:

> Saša Novaković: *And* ***the agreement on purchase of capital, it stated that [Mr. Obradović] can dispose of the shares, right? Freely?***
>
> Female voice 2: ***That it can once it had paid the purchase price. Which it did.*** But if we were to decide like this, at least in my opinion, I would not be inclined to; although I have a problem with the provision of the agreement such as it is, *if we were now to release this pledge [Mr. Obradović] would be free to dispose of the shares freely, but then it is a problem,* so ***I would rather advocate that we postpone deletion of pledge until execution, that is until expiry of this deadline until which [Mr. Obradović] had not fulfilled [his] contractual obligations we***

331 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 9 (emphasis added), **CE-768**.

> ***have ordered [him] to fulfil, that is, that is not us, but the minister ordered it. And we will confirm such decision [laugh].***[332]

304. The members of the Commission were so thorough that they even thought about whether Mr. Obradović would be able to obtain release of the pledge in Serbian court proceedings. However, they satisfied themselves that the 90-day period granted to Mr. Obradović for fulfillment of his allegedly outstanding obligations under the Privatization Agreement was too short for him to get legal protection:

> Female voice 2: […] Now, I just don't know, they can enter into certain dispute and we are in violation of contractual...
>
> Saša Novaković: True.
>
> Julijana Vučković: Well, certainly.
>
> Female voice 4: ***Ninety days will pass quickly and the dispute will not even get scheduled in 90 days. So we will resolve this before, I mean… dear God knows***.[333]

305. The unambiguous reference to the issue being resolved within 90 days clearly shows that the Commission for Control undoubtedly understood that the buyer would not be able to comply with the requested remedies and the Privatization Agency would then be able to terminate the Privatization Agreement.

306. Of course, as the members of the Commission themselves noted, the Privatization Agency would not be able to expropriate the shares if it voluntarily lifted the pledge before the termination of the Privatization Agreement. At a subsequent meeting on 19 June 2015, the members of the Commission therefore reiterated that they would not lift the pledge:

> Julijana Vučković: […] I also have to mention that we received, on Wednesday, a new request from [Mr. Obradović's] attorney in which he requests from the Agency, in accordance with its contractual obligations, to issue a confirmation of release of pledge against shares, because [he] completed the payment of the purchase price.
>
> Let me remind you, we have deliberated on this request the previous time we gave that additional deadline, *when it was said that, practically,*

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332 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 10 (emphasis added), **CE-768**.

333 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 10 (emphasis added), **CE-768**.

> *if we give this confirmation to release the pledge from shares, he will have absolute freedom to further sell [his] shares […].*[334]

307. Thus, the Commission for Control decided to arbitrarily delay removal of the pledge on the BD Agro shares in order to prevent Mr. Obradović from transferring them. The Commission did so with the knowledge that Mr. Obradović would not able to fulfill the allegedly outstanding obligations under the Privatization Agreement in the additional period provided by the Privatization Agency. The Privatization Agency did not fear that the buyer could obtain court protection against the failure to release the pledge because the Privatization Agency was planning to terminate the Privatization Agreement and seize the shares before a court would even schedule a hearing.[335]

308. This was an intentional violation of the Privatization Agency's contractual and statutory duties—and crystal-clear evidence of the Privatization Agency acting in bad faith overall.

### 6. The Privatization Agency's conduct was motivated by outside pressure

309. The members of the Committee noted that they were—same as the Ministry of Economy when it decided to initiate the supervision procedure—under pressure from alleged labor unions to take actions against the owners of BD Agro:

> Julijana Vučković: […] We have mentioned *daily communications we are receiving from the employees and trade unions, wherein they are requesting urgent measure to be taken* and stating that they generally have big problems concerning business operations, in particular maintaining production and keeping the cattle alive, which is the core business activity of the subject of privatization [BD Agro].[336]

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334 Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 4, **CE-770**; Audio recording from meeting of the Commission for Control, 19 June 2015, **CE-771**.

335 "*Julijana Vučković: […] What we received as information, and really in meetings, orally, from representatives of the subject of privatization […] is that they will, generally, have problems with repayment of certain funds from two or three legal persons; that part of their obligations could be fulfilled, so to say, immediately and for another part of obligations they would require a bit more time.*" Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 7, **CE-768**; Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**.

See also: "*Female voice 2: […] after 90 days, we would probably have to terminate this, since Juliana already said that there is no chance they will fulfil all of these contractual obligations*." Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 9, **CE-768**; Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**.

336 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 4-5, **CE-768**.

310. The members of the Commission for Control also made it clear that they could not release the pledge on shares because, were they to do so, the resulting backlash would mean that "*not even God could cleanse [them]*."[337]

311. Ms. Vučković, the president of the Commission for Control already had first-hand experience with the potential consequences of public pressure. In 2012, Ms. Vučković was arrested on allegations of abuse of office in a different privatization process that allegedly caused "*close to 1 billion dinars in damage to Serbia's state budget.*"[338] While the Claimants understand that she was subsequently released from custody and the charges were dismissed, such an experience must have impacted her—and all her colleagues.

312. The outside pressure may explain why the Committee preferred to "*forc[e] Mr. Obradović] to sue [them]*" rather than have the Privatization Agency honor its contractual obligations and release the pledge:

> Saša Novaković: All right then, we can decide to not give [the pledge release] to [Mr. Obradović] and then we are forcing him […] into suing us. This is…may the court rule.[339]

313. Simply put, the members of the Commission for Control preferred to act unlawfully rather than face the public backlash from which "*not even God could cleanse [them.]*"

### 7. In a blatant violation of their duties, the officials purposefully switched off the recording for the last part of their discussion about BD Agro

314. The audio recording from the meeting held on 23 April 2015 unequivocally shows that during the last part of the discussion about BD Agro, the officials purposefully switched off the recording. The last recorded words are clear:

> Female voice 2: You know why I think…well… would you… (audio turned off)[340]

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337 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 11, **CE-768**.

338 *Arrests because of "Azotara": Damage caused to state exceeds 1 billion dinars*, Novosti.rs, 23 April 2012, **CE-772**.

339 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 11, **CE-768**.

340 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 12, **CE-768**.

315. The recording then resumes, but only to record the formal decision of the Commission for Control.[341]

316. The officials committed a serious violation of their duties by purposefully interrupting the audio recording. Under the Rulebook on undertaking measures for conducting controls of the agreements on sale of capital,[342] all meetings of the Commission for Control were to be recorded at that time, and they obviously had to be recorded in their entirety.

317. The Claimants are left to wonder what the female officer had to say that could not be recorded. That question is even more burning given that the Commission members apparently had no problem with the recording of their deliberate decision to violate the law.

### 8. The Privatization Agency was bound by the instructions from the Ministry of Economy, which it itself labelled as "orders"

318. The audio recordings also make it clear that the Privatization Agency considered the Ministry of Economy's conclusions in its report dated 7 April 2015 as "*orders*," which have to be followed:

> Julijana Vučković: […] So, currently, we have an *order* from the ministry to provide an additionally granted term and we have made, in accordance with this, a proposal for that term, *actually we copied what was written in the report* and we asked ourselves what to do with the request for deletion of the pledge.[343]
>
> […]
>
> Female voice 2: […] there is nothing we can do but give that deadline and propose these measures for which were told in advance, that is as we *were ordered to do in the supervision*.[344]
>
> […]

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341 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 13, **CE-768**.

342 Rulebook on undertaking measures for conducting controls of the agreements on sale of capital, 7 April 2014, Art. 9, **CE-773**.

343 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 5, **CE-768**.

344 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 6, **CE-768**.

> Julijana Vučković: […] I think that *the order of the Ministry should be implemented as given, I am afraid that we do not have any maneuvering room.* I mean, the Ministry of Economy has had all of this in mind when it drafted the report on oversight. We have simply acted in accordance with this report, right?[345]

319. This is clear evidence of the fact that the Privatization Agency itself considered that it was bound by the instructions it had been receiving from the Ministry of Economy.

### 9. Minutes prepared by Serbian authorities are entirely unreliable

320. The audio recordings not only reveal Serbia's bad faith in its treatment of Mr. Obradović and the Claimants, but also show that the government's internal meeting minutes, on which Serbia relies heavily in this arbitration, are completely unreliable.

321. As explained above, the minutes from the sessions of the Commission for Control submitted by Serbia do not contain *any* references to the above-described discussions. They clearly do not reflect the content of the discussions held during those meetings, and instead offer sanitized and heavily edited summaries that are meant to conceal the real motives behind actions taken by the state.

322. This problem clearly is not confined to the minutes of meetings of the Commission for Control. As Messrs. Markićević and Broshko explained in their witness statements, the minutes from their meetings with the Privatization Agency and the Ministry of Economy—which were prepared by the government and relied upon heavily by Serbia in its Counter-Memorial—also provide descriptions of the meetings which are in stark contradiction to the recollection of Messrs. Markićević and Broshko.[346]

323. The Claimants respectfully submit that the Tribunal cannot rely on such minutes.

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345 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 7, **CE-768**.

346 Markićević Third WS, ¶¶ 64-67; Broshko Third WS, ¶¶ 19-21.

## Q. BD Agro's creditors and the Commercial Court approved the Amended pre-pack reorganization plan

324. 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 reorganization plan.[347]

325. 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.[348]

326. A minority of creditors, including Banca Intesa, however, filed appeals to the Appellate Court in Belgrade.[349]

## R. The Ombudsman's unlawful intervention and "*recommendation*" to terminate the Privatization Agreement

327. 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. This further increased the political pressure on the Privatization Agency.

### 1. The Ombudsman acted upon third party requests for termination of the Privatization Agreement

328. The Ombudsman's conduct—same as the Privatization Agency's decision to unlawfully retain the pledge over BD Agro shares—was clearly based on political motives. Specifically, the Ombudsman was responding, same as the Privatization Agency, to requests for termination of the Privatization Agreement allegedly coming from obscure labor unions.

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347 Court hearing minutes, 25 June 2015, **CE-039**. *See also* Markićević Second WS, ¶ 163.

348 Markićević Second WS, ¶ 161; Markićević Third WS, ¶¶ 108-109.

349 *E.g.* Appeal of the City Administration of the City of Belgrade, Secretariat for Finance dated 12 August 2015, **CE-040**; Appeal of the Tax Administration of the Republic of Serbia dated 29 July 2015, **CE-041**; Appeal of Banca Intesa dated 29 July 2015, **CE-354**.

329. The requests for termination seem to have first appeared in April when an alleged trade union of BD Agro's employees met with the Privatization Agency to complain about BD Agro. The employees were led and directed by Zoran Ristić, who styled himself as the director of an alleged Center for Education, Research and Privatization at a purported United Industry Unions "Independence."

330. The Claimants are not privy to the discussions that Mr. Ristić had with the Privatization Agency. The Privatization Agency clearly took them very seriously because on 16 May 2013, Ms. Vučković, the president of the Center for Control, wrote to Mr. Ristić that she had asked for a meeting with the Ministry of Finance and Economy to discuss "*the measures to be undertaken by the [Privatization] Agency for the purpose of overcoming of the existing problems and prevention of possible consequences in [BD Agro]*".[350]

331. On 24 May 2013, an individual purporting to represent "Union 'Independence'" and "Independent Union BD Agro" wrote to the Prime Minister and Minister of Interior requesting, among other things, termination of the Privatization Agreement.[351]

332. In November 2013, alleged employees of BD Agro petitioned the Ombudsman to review the Privatization Agency's and the Ministry of Economy's alleged failure to properly address the purported violations of the Privatization Agreement identified in 2011.[352]

333. The Ombudsman's investigation started with a review of the conduct of the Labor Office, which had investigated certain labor law related complaints and concluded that BD Agro had complied with all labor law requirements. The Ombudsman accepted the Labor Office's decisions as correct.[353]

334. This should have been the end of the Ombudsman's investigation because that conclusion alone meant that the rights of BD Agro's employees were not breached.

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350 Letter from J. Vučković to Z. Ristić, 16 May 2013, **CE-782**.

351 Letter from Union "Independence" and an Independent Union BD Agro to the Prime Minister and Minister of Interior, 24 May 2013, **CE-783**. *See also* Letter from Union "Independence" and an Independent Union BD Agro to the Privatization Agency, 24 May 2013, **RE-104**.

352 Opinion of the Ombudsman, 19 June 2015, **CE-042**.

353 Letter from the Ombudsman to the Ministry of Labor, 8 October 2014, **CE-774**; Letter from the Ombudsman to the Independent Union BD Agro AD Dobanovci, 8 October 2014, **CE-775**; Letter from the Labor Inspectorate to the Ministry of Labor, 7 July 2014, **CE-776**.

335. However, the Ombudsman did not hesitate to follow the will of the unions and went directly into the crux of the matter by requesting the Privatization Agency to explain why it had not terminated the Privatization Agreement.[354]

### 2. The Ombudsman ignored the explanations of the Ministry of Economy and the Privatization Agency

336. On 14 November 2014, the Privatization Agency responded to the Ombudsman 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;[355]

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**;*"[356]

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*;"[357] 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*."[358]

337. Half a year later, on 11 May 2015, the Ministry of Economy also wrote to the Ombudsman. 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*

354 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-043**.

355 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, p. 2, **CE-043**.

356 Letter from the Privatization Agency to the Ombudsman, 14 November 2014 p. 3 (emphasis added), **CE-043**.

357 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, p. 3 (emphasis added), **CE-043**.

358 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, p. 3, **CE-043**.

*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*."[359]

### 3. The Ombudsman concluded that the Privatization Agreement should have been terminated

338. On 19 June 2015, the Ombudsman concluded the review of the *"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][…]*."[360]

339. Without any justification as to why he disagreed with the explanations of the Ministry of Economy and the Privatization Agency, the Ombudsman stated that the Privatization Agency should have terminated the Privatization Agreement due to Mr. Obradović's purported violation of Articles 5.3.3 and 5.3.4 of the Privatization Agreement:

> During the control performed on January 17, 2011, at the seat of the subject of privatization, company "BD Agro AD" Dobanovci, the Privatization Agency determined that there was violation of the Agreement on sale of socially owned capital by the buyer of the subject of privatization who violated contractual obligation not to alienate assets over the agreed percentage, and encumbered the fixed assets of the privatization subject with pledge for a third party benefit. *The first circumstance constitutes a condition for termination as per the Agreement on sale, and the second one constitutes a condition for termination as per Article 41a of the Law on Privatization of 2001* […].[361]

340. 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

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359 Letter from the Ministry of Economy to the Ombudsman dated 11 May 2015, p. 2, **CE-044**.

360 The Opinion of the Ombudsman, 19 June 2015, p. 1, **CE-042**

361 The Opinion of the Ombudsman, 19 June 2015, p. 6 (emphasis added), **CE-042**.

have prolonged rendering of the final decision and thus breached the rights of employees of this company.[362]

### 4. The Claimants, Mr. Obradović and BD Agro were not informed of the Ombudsman's investigation

341. It was only at this moment that the Claimants, Mr. Obradović and BD Agro learned about the investigation. The Ombudsman did not inform them about initiation of his investigation, he did not inform them about the allegations made by the employee unions and he did not inform them about his communication with the Privatization Agency and the Ministry of Economy.

342. The Privatization Agency and the Ministry of Economy also did not deem it necessary to inform the Claimants, Mr. Obradović and BD Agro about the pending investigation, even though they met several times and exchanged a number of emails and letters while the Ombudsman's investigation was pending.[363]

343. In other words, the Ombudsman, the Privatization Agency and the Ministry of Economy all made sure that the Claimants, Mr. Obradović and BD Agro would not find out about the investigation and would not be able to defend themselves before the Ombudsman's final verdict was made public.

### 5. The Ombudsman's intervention was unlawful

344. As the Claimants explained in the Memorial, the Ombudsman's public calls for termination of the Privatization Agreement were shockingly unlawful for several reasons:

a. the Ombudsman clearly did not have the jurisdiction to investigate the issue;[364]

b. 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;[365]

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362 The Ombudsman's On-Line Statement, 23 June 2015, **CE-045**.

363 *E.g.* Markićević Second WS, ¶¶ 93-122, 143-157; Broshko Second WS, ¶¶ 39-60.

364 Memorial, ¶ 197.

365 Memorial, ¶ 198.

c. the Ombudsman issued his opinion without hearing the affected parties. The Ombudsman's intervention thus blatantly violated even the most rudimentary notion of due process;[366] and

d. the Ombudsman based his conclusion on the Privatization Agency's control report of 25 February 2011 and entirely ignored: (*i*) the Privatization Agency's subsequent determination that the alienation of BD Agro's fixed assets beyond the 30% threshold set forth in Article 5.3.3 had resulted from an event of *force majeure*;[367] (*ii*) the Ministry of Economy's opinion that Article 5.3.4 no longer applied after 8 April 2011; and[368] (*iii*) the Privatization Agency's reminder that the Privatization Agreement did not allow for termination even if Article 5.3.4 had still applied and been violated (*quod non*).[369]

345. Serbia, on the other hand, claims that the Ombudsman conducted his investigation in accordance with law.

346. First of all, Serbia claims that the Ombudsman did not overstep his authority because he did not opine on whether there was a breach of the Privatization Agreement justifying its termination, but merely "*considered whether the Ministry of Economy and the Privatization Agency acted lawfully and properly when postponing the final decision on the status of the Privatization Agreement by granting Mr. Obradović additional periods for compliance.*"[370] Serbia's argument, however, misses the point.

347. As Mr. Milošević explains in his second expert report, the Ombudsman was not entitled at all to investigate the Ministry of Economy's and the Privatization Agency's monitoring of Mr. Obradović's obligations under the Privatization Agreement. The Ombudsman can conduct its investigations only in order to protect citizens' rights.[371]

366 Memorial, ¶ 199.

367 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, p. 3, **CE-043**.

368 Letter from the Ministry of Economy to the Ombudsman, 11 May 2015, p. 2, **CE-044**.

369 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, p.3, **CE-043**.

370 Counter-Memorial, ¶ 144 (emphasis in the original).

371 Milošević Second ER, ¶ 144.

The supervision of fulfillment of Mr. Obradović's obligations under the Privatization Agreement is, however, completely unrelated to the protection of citizens' rights.[372]

348. Furthermore, the Ombudsman did opine on the interpretation of the Privatization Agreement and its termination. In his recommendation, the Ombudsman clearly stated that there was a violation of the Privatization Agreement that warranted its termination:

> During the control performed on January 17, 2011, at the seat of the subject of privatization, company "BD Agro AD" Dobanovci, the Privatization Agency determined that *there was a 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 subject of privatization 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*, that is, where existence of the agreement on sale of capital is to be deemed terminated if the buyer, even in the additionally granted terms for fulfilment, fails to remedy his omission.[373]

349. The Ombudsman also concluded that the Privatization Agency and the Ministry of Economy violated their obligations because they failed to determine that the Privatization Agreement should be terminated based on the alleged violation:

> *The Ministry of Economy and the Privatization Agency violated their obligations* stipulated by the Law on Privatization of 2001 and the principles of good administration, *since they failed to determine whether the required conditions were met for termination of the Agreement on sale of socially owned capital through the method of public auction for the subject of privatization "Buducnost" Dobanovci (now "BD Agro AD" Dobanovci) at the time when it was determined that there were violations of provisions of the agreement*.[374]

350. The statement published by the Ombudsman on his website was even clearer:

> ***The Ombudsman has determined*** that despite the fact that several years ago, it was ascertained ***that the buyer did not fulfil its contractual obligations 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.[375]

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372 Milošević Second ER, ¶¶ 146-157.

373 The Opinion of the Ombudsman, 19 June 2015, p. 6 (emphasis added), **CE-042**.

374 The Opinion of the Ombudsman, 19 June 2015, p. 6 (emphasis added), **CE-042**.

375 The Ombudsman's On-Line Statement, 23 June 2015 (emphasis added), **CE-045**.

351. Should there be any doubts about whether the Ombudsman opined that the Privatization Agreement should be terminated or not, one just need to look at his conduct after the issuance of his recommendations. As explained below, the Ombudsman informed the Privatization Agency that it complied with his recommendation only after the Privatization Agency terminated the Privatization Agreement.

352. As explained in the Memorial, the Ombudsman reached his conclusion without any independent investigation. Worse yet, the Ombudsman ignored: (*i*) the Privatization Agency's subsequent determination that the alienation of BD Agro's fixed assets beyond the 30% threshold set forth in Article 5.3.3 had resulted from an event of *force majeure*;[376] (*ii*) the Ministry of Economy's opinion that Article 5.3.4 no longer applied after 8 April 2011; and[377] (*iii*) the Privatization Agency's reminder that the Privatization Agreement did not allow for termination even if Article 5.3.4 had still applied and been violated (*quod non*).[378]

353. Serbia's only response is that the Ombudsman did not have the authority to conduct an independent review of whether there was a breach of the Privatization Agreement and that it "*was not [the Ombudsman's] job*" to consider the responses from the Ministry of Economy and the Privatization Agency—despite the fact that their responses were sent based on his own request.

354. In other words, Serbia claims that it was perfectly acceptable for the Ombudsman to reprimand the Ministry of Economy and the Privatization Agency for not having terminated the Privatization Agreement even though the Ombudsman was not allowed to conduct his own investigation of whether a breach occurred in the first place. This is simply nonsensical.

376 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, p. 3, **CE-043**.

377 Letter from the Ministry of Economy to the Ombudsman, 11 May 2015, p. 2, **CE-044**.

378 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, p. 3, **CE-043**.

## S. The Privatization Agency reacted to the Ombudsman's findings by demanding new audit reports on compliance with the Privatization Agreement

355. 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.

356. While the Privatization Agency accepted some of the documents previously submitted by Mr. Obradović, it again requested 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; and

f. "*the subject of performance of the total investment obligation is not the subject of pledge —mortgage*."[379]

357. It defies any reason that the Privatization Agency kept requesting evidence about compliance with Articles 5.2.1 and 5.3.3 of the Privatization Agreement even though the recordings of the meetings of the Commission for Control show that the Privatization Agency did not believe that these provisions were violated.

358. 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

379 Letter from the Privatization Agency to D. Obradović, 23 June 2015, pp. 1-2, **CE-351**.

disagreement with the Privatization Agency's demands, BD Agro 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.[380]

359. 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.

## T. The Chief of Staff to the Prime Minister of Serbia promised to resolve all problems to Mr. Rand's satisfaction

360. On 8 September 2015, the Canadian Embassy made one more attempt to remedy BD Agro's situation. It 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.

361. At the beginning of the meeting, Mr. Pinnington introduced Mr. Rand to Mr. Kojić. Mr. Pinnington explained that Mr. Rand had been active as an investor in Serbia for many years and that his activities were related to various companies, most notably BD Agro. Mr. Pinnington then noted that for Canada, it is important to see not only Serbia's efforts to attract new investors, but also Serbia's approach to investors who encounter certain issues in Serbia—such as Mr. Rand's problems with the Privatization Agency and the Ministry of Economy.

362. 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.[381]

363. Same as with respect to so many other facts that do not fit in its narrative, Serbia completely ignores in its Counter-Memorial that meeting and Mr. Kojić's empty promises.

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380 Memorial, ¶¶ 204-205.

381 Rand First WS, ¶ 51; Markićević First WS, ¶ 29; Rand Second WS, ¶ 100.

## U. The Ombudsman insisted that the Privatization Agreement be terminated

364. On 18 September 2015, the Ombudsman again wrote to the Privatization Agency and the Ministry of Economy. The Ombudsman clearly stated that the Privatization Agency's requests sent to BD Agro and Mr. Obradović after the publication of his "*recommendation*" were not enough to achieve "*the goal for which the Ombudsman issued the recommendation [of 19 June 2015]*."[382]

365. The Ombudsman then ordered the Ministry of Economy and the Privatization Agency to account for whether they complied with his earlier "*recommendation*" and submit a new report on their actions:[383]

> Since, pursuant to the recommendation of the Ombudsman, *the Ministry of Economy and the Privatization Agency were ordered to undertake all necessary measures in order to determine in the shortest possible period of time whether the conditions were met for termination of the Agreement* on sale of socially owned capital through the method of public auction of the subject of privatization "Buducnost" Dobanovci, in order to finally clarify the legal status of the subject of privatization, and since based on the statements *in your act no. 07-00-246/2014-05 does not arise that the goal for which the Ombudsman issued the recommendation has been achieved*, it is necessary that you submit to us a new notice on actions based on the recommendations and undertaken measures in which you will inform us whether the issue of validity of disputable Agreement on sale of socially owned capital was solved or not. Stated statement is necessary to the Ombudsman in order for us to make the final decision whether the Ministry of Economy and the Privatization Agency acted based on the given recommendations of June 19, 2015.[384]

366. While the Ombudsman might not have stated it expressly, his message was clear—the Privatization Agreement was to be terminated and the Privatization Agency was supposed to report on the termination to the Ombudsman.

367. Serbia tries to downplay the importance of the Ombudsman's conduct by stating that "*under the relevant law, the Ombudsman could not have demanded anything from the*

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382 Letter from the Ombudsman to the Privatization Agency, 18 September 2015, **CE-088**; Letter from the Ombudsman to the Ministry of Economy, 18 September 2015, **CE-115**.

383 Letter from the Ombudsman to the Privatization Agency, 18 September 2015, **CE-088**; Letter from the Ombudsman to the Ministry of Economy, 18 September 2015, **CE-115**.

384 Letter from the Ombudsman to the Privatization Agency, 18 September 2015 (emphasis added), **CE-088**. *See also* Letter from the Ombudsman to the Ministry of Economy, 18 September 2015, **CE-115**.

*Privatization Agency. He could only have recommended.*"[385] Serbia's legalistic argument ignores reality.

368. As explained by Mr. Milošević, while the recommendations of the Ombudsman indeed do not formally bind their addresses, Serbian law provides very strong incentives for the administrative bodies to follow the Ombudsman's recommendations.[386]

369. For example, any entity receiving a recommendation by the Ombudsman must inform the Ombudsman within 60 days whether it complied with the recommendation, or justify its failure to comply.[387] If the administrative body does not follow the recommendation, the Ombudsman may inform the public, the National Assembly and the Cabinet of Ministers of such refusal and may also recommend initiation of proceedings to determine personal accountability of the official in charge of the administrative body.

370. As explained above, even before the intervention of the Ombudsman, the members of the Commission for Control made it clear that they could not release the pledge on shares because, were they to do so, the resulting backlash would mean that "*not even God could cleanse [them]*."[388] Ms. Vučković's prior arrest for an alleged abuse of office gave her colleagues a very clear idea of what "*personal accountability*" means in Serbia.

## V. Serbia unlawfully terminated the Privatization Agreement and seized the Beneficially Owned Shares

### 1. The Commission for Control convened to terminate the Privatization Agreement

371. On 28 September 2015, only ten days after the Ombudsman's last dictum, the Commission for Control was convened to decide on the termination of the Privatization Agreement.

372. As the Claimants explained in their Memorial, the Commission for Control was established directly by the Serbian Minister of Economy.[389] It comprised two employees of the Privatization Agency, one representative of the Ministry of Economy,

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385 Counter-Memorial, ¶ 138.

386 Milošević Second ER, ¶¶ 149-151.

387 Milošević Second ER, ¶ 149.

388 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 11, **CE-768**.

389 Milošević First ER, ¶ 47.

one representative of the Ministry of Finance and one representative of the Ministry of Labor.[390]

373. On 28 September 2015, 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.[391]

374. The Commission for Control concluded that Article 5.3.4 of the Privatization Agreement was breached and, as a result, decided to terminate the agreement.[392] The Commission for Control did so despite the fact that its own materials compiled for the meeting stated that "*the Agreement does not stipulate the possibility for its termination due to violation of Article 5.3.4 of the Agreement*."[393]

375. The Commission also obviously ignored, as it had done for years, the 2013 Legal Opinion and the Ministry of Economy's 2012 instruction that the termination was not economically justified.

376. On 28 September 2015, the Privatization Agency issued the Notice on Termination of the Privatization Agreement, dated 28 September 2015 (the "**Notice on Termination**"), stating that the Privatization Agreement was terminated *ex lege* due to the alleged non-remedied violation of Article 5.3.4.

377. The Claimants understand that the meeting of the Commission was not recorded. None of the three members of the Commission for Control who attended the meeting is a witness in this arbitration.

378. Interestingly enough, one of the three members of the Commission, Mr. Novaković, was later questioned on the topic of BD Agro in Serbian court proceedings between BD Agro and Crveni Signal. During his examination, Mr. Novaković testified that he did not remember anything about BD Agro. In fact, Mr. Novaković could not even recall whether he signed the decision on termination.[394]

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390 Milošević First ER, ¶ 47.

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

392 Minutes of the Session of the Commission, 28 September 2015, p.4, **CE-117**.

393 Materials for the Session of the Commission held on 28 September 2015, p. 28, p. 17, **CE-089**.

394 Minutes from the examination of S. Novaković, 9 November 2018, **CE-777**.

### 2. The Ombudsman was finally satisfied

379. On 14 October 2015, the Privatization Agency wrote to the Ombudsman informing him about the termination of the Privatization Agreement.[395] The Ombudsman was finally satisfied. He responded on 21 October 2015, noting that the goal of his recommendation was finally achieved:

> In accordance with the legal authorizations, on 19 June 2015, the Ombudsman addressed Privatization Agency with the recommendation number 23823 on the need to remove observed insufficiencies. At the same time, it was recommended to notify this body on the actions based on it, within 60 days as of the day of receipt of the recommendation.
>
> On 15 October 2015, the Ombudsman received the response of the Privatization Agency on actions based on the recommendation, thus informing [that] ***the Commission for control*** of fulfillment of the obligations of the buyer and/or strategic investor from concluded agreements in the privatization procedure, at the 22nd session held on 28 September 2015, deliberated about the auditor's reports and ***rendered the decision that the Agreement on sale of socially owned capital*** through the method of public auction of the subject of privatization BD Agro Dobanovci of 04 October 2005 ***should be considered terminated*** due to non-fulfillment in accordance with Article 88 paragraph 3 of the Law on Privatization. ***In accordance with the stated decision, the Decision on transfer of shares acquired by the buyer based on the relevant agreement to the Privatization Agency shall be rendered.***
>
> Since it can be concluded based on the received statements that ***the Privatization Agency acted fully in accordance with the recommendation***, the conditions have been met for the work referenced in the complaint of the employees in the company BD Agro Dobanovci to be terminated and in accordance with Article 29, paragraph 1 of the Law on the Ombudsman we hereby inform the relevant body and the complainants.[396]

380. The Ombudsman sent virtually identical letters to the Ministry of Economy[397] and to the trade unions.[398]

381. The Ombudsman's own correspondence puts the lie to Serbia's argument that "*the Ombudsman did not even recommend termination of the Privatization Agreement, […]*

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395 Letter from the Privatization Agency to the Ombudsman, 15 October 2015, **CE-778**.

396 Letter from the Ombudsman to the Privatization Agency, 21 October 2015, **CE-727**.

397 Letter from the Ombudsman to the Ministry of Economy, 21 October 2015, **CE-779**.

398 Letter from the Ombudsman to the Independent Trade Union, 21 October 2015, **CE-780**.

*only recommended that steps be taken in order to finally clarify the status of BD Agro and the Privatization Agreement*."[399]

382. This clearly was not the case. The Ombudsman wanted to have the Privatization Agreement terminated and the publicity that came along with it—and he got what he wanted. As explained in the Memorial, in December 2016, the Ombudsman announced his candidacy for the President of the Republic of Serbia.[400] 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 Serbian political landscape.[401]

### 3. The termination was clearly unlawful and contrary to the plain language of the Privatization Agreement

383. In 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 […]*".[402]

384. As the Claimants explained in their Memorial, for a number of reasons, the Privatization Agency's termination was clearly illegal and contrary to the plain language of the Privatization Agreement because:

a. there was no violation of Article 5.3.4;[403]

b. the Privatization Agency did not have the right to terminate the Privatization Agreement for the alleged violation of Article 5.3.4 after it received the last instalment of the purchase price on 8 April 2011 because, by the payment of the purchase price and expiry of all other obligations, the Privatization Agreement had been consummated by its fulfillment;[404]

c. 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, the

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399 Counter-Memorial, ¶ 138.

400 *Ombudsman Jankovic announces presidential bid*, 244 News, 26 December 2016, **CE-100**.

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

402 Notice on Termination of the Privatization Agreement, 28 September 2015, p. 3, **CE-050**.

403 Memorial, ¶¶ 107-110, 228-245.

404 Memorial, ¶¶ 231-234.

alleged breach of Article 5.3.4 was not a valid cause for termination of the Privatization Agreement;[405]

d. the Privatization Agreement could not be terminated for the alleged breach of Article 5.3.4 also because Article 5.3.4 is not an essential term of the Privatization Agreement and because, in any event, the alleged violation was only minor;[406]

e. according to Article 7.1 of the Privatization Agreement and Article 41a of the Law on Privatization, a declaration of termination is possible only if the buyer *does not remedy a breach* within an additional deadline for compliance or fulfilment. However, since the obligations under Article 5.3.4 ceased to exist upon the payment of the purchase price on 8 April 2011, there was nothing to be remedied in 2015 and the remedies requested by the Privatization Agency were, in any event, unjustified and arbitrary;[407]

f. the declaration of termination of the Privatization Agreement for the alleged violation of Article 5.3.4 after the full payment of purchase price was completely disproportionate and done in bad faith;[408] and

g. 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.[409]

385. Serbia disagrees. It claims that the termination of the Privatization Agreement was lawful because: (*i*) Article 5.3.4 was breached;[410] (*ii*) Privatization Agency was entitled to terminate the Privatization Agreement also after the payment of the purchase price;[411] (*iii*) Article 5.3.4. of the Privatization Agreement is subsumed under grounds for

405 Memorial, ¶¶ 236-242.

406 Milošević Second ER, ¶¶ 93-100.

407 Memorial, ¶¶ 228-230.

408 Memorial, ¶¶ 254-259; Milošević Second ER, ¶¶ 101-105.

409 Memorial, ¶¶ 244-253.

410 Counter-Memorial, ¶¶ 85-96.

411 Counter-Memorial, ¶¶ 91-116.

termination contained in Article 41a 1 (3) of the Law on Privatization;[412] and (*iv*) reasons for termination were precisely and clearly stated in the Notice.[413]

386. The Claimants address all of the Parties' legal arguments *seriatim* below.

### a. Article 5.3.4 of the Privatization Agreement was not breached

387. As the Claimants explained above, it was not a violation of Article 5.3.4 of the Privatization Agreement that BD Agro used a part of the loan provided under the 2010 Loan Agreement to repay the debt to Agrobanka assumed from Crveni Signal and to provide a loan to Inex.

388. This is because on its plain wording, Article 5.3.4 only applies to the actions of the buyer, not to the actions of BD Agro. Therefore, no encumbrances agreed by BD Agro itself could therefore violate the Privatization Agreement.

389. Even if Article 5.3.4 applied to the actions of BD Agro (*quod non*), Article 5.3.4 would not have applied to the use of funds obtained under the 2010 Loan Agreement. The Claimants' Serbian law expert, Mr. Miloš Milošević explains that Article 5.3.4 precluded BD Agro from pledging its assets only if the pledge were to serve as a security for loans *taken by third parties.* The loan under the 2010 Loan Agreement was taken by BD Agro.

390. Furthermore, even if Article 5.3.4 applied to the use of the funds acquired under the 2010 Loan Agreement (*quod non*), BD Agro did not breach it by using a part of such funds to repay the debt it had assumed from Crveni Signal and provide a loan to Inex. The repayment and the provision of the loan are BD Agro's acts and thus, they constitute "*use of funds by BD Agro*," which is expressly permitted under Article 5.3.4.

391. In addition, the debt to Agrobanka was BD Agro's own debt at the moment when it was repaid, and its prior assumption from Crveni Signal did not violate the Privatization Agreement.

392. In any event, the use of funds for intra-group loans to related companies is "*regular business activity*," which is also expressly exempted under Article 5.3.4. Mr. Milošević

412 Counter-Memorial, ¶¶ 117-128.

413 Counter-Memorial, ¶¶ 129-134.

point out that if the Privatization Agency believed that the use of the funds obtained under the 2010 Loan Agreement made the Pledge non-compliant with Article 5.3.4, the Privatization Agency had an obligation to properly explain and justify its view—and it never did so.[414]

### b. The Privatization Agency did not have the right to terminate the Privatization Agreement for breach of Article 5.3.4 after it received the last instalment of the purchase price on 8 April 2011

393. As the Claimants explained in the Memorial, 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, because by the payment of the purchase price and the fulfilment and expiry of all other obligations, the Privatization Agreement was consummated.[415]

394. The consummation of the Privatization Agreement also meant that Article 5.3.4 lost its purpose—both prospectively and retrospectively.[416]

395. According to Serbia, because the alleged breach of the Privatization Agreement happened and an additional period for remedy of that breach was granted before the payment of the purchase price, the Privatization Agency could have declared the Privatization Agreement terminated also after the payment of the full purchase price.[417] To support this allegation, Serbia's relies on several decisions of Serbian Courts[418] and also claims that Mr. Obradović and the Claimants allegedly "*shared the same understanding.*"[419] Serbia is wrong on both accounts.

396. There was no common understanding between the Privatization Agency and Mr. Obradović and the Claimants that the Privatization Agreement could be terminated after the payment of the purchase price. Messrs. Rand, Obradović, Broshko and Markićević explain in their witness statements that it has always been their understanding that the

414 Milošević Second ER, ¶¶ 52-53.

415 Memorial, ¶¶ 231-234.

416 Milošević Second ER, ¶ 80.

417 Counter-Memorial, ¶ 99.

418 Counter-Memorial, ¶¶ 100-103.

419 Counter-Memorial, ¶¶ 106-116.

obligations under the Privatization Agreement ceased to exist upon the payment of the purchase price.[420]

397. To the contrary, there was a common understanding that the obligations under Article 5.3.4 of the Privatization Agreement had expired on 8 April 2011, more than four years before the termination. In the report issued at the end of its supervision over the Privatization Agency, the Ministry of Economy clearly stated that "*limitations from [Article 5.3.4] should be considered concluding with April 8, 2011*."[421] This was also recognized by the Privatization Agency when it stated in the Notice on Termination that the buyer had been required to present an "*opinion on performance of obligations referred to in Article 5.3.4 of the [Privatization] Agreement until April 8, 2011*."[422]

398. Serbia's argument that the obligations under Article 5.3.4 were somehow kept alive by the Privatization Agency's requests for remedies is not what the Privatization Agency and the Ministry of Economy thought at the time. In fact, the term of a privatization agreement cannot be extended by the Privatization Agency's requests for remedies, as explained by the Serbian courts as early as in December 2007:[423]

> [A]rticle 2 of the Law on Privatization prescribes the principles on which privatization is based and one of them is creating conditions for development of economy and social stability. However, the quoted provision does not indicate to the right of the buyer of social capital to perform control for the indefinite period of time and to take care about fulfillment of the proclaimed goals in privatization subject. *Deadlines and terms in which claimant has right to control fulfillment of the purpose and goal of privatization are determined by the mere agreement on sale of social capital. By expiration of these deadlines expire the obligations of claimant to take care of the sold social capital. Any other interpretation would be contrary to the very proclaimed goal of privatization – that social capital becomes private*.[424]

399. Fundamentally, the Privatization Agreement could not be terminated for the alleged violation of Article 5.3.4 after the consummation of the Privatization Agreement because of the special character of this provision, which is in fact a security for the buyer's performance of his obligations.

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420 Obradović Second WS, ¶ 74; Broshko Third WS, ¶ 18; Markićević Third WS, ¶ 59.

421 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, **CE-098**.

422 Notice on Termination, p. 2. **CE-50**.

423 Notice on Termination, p. 2. **CE-50**.

424 Judgement of the Higher Commercial Court, Pz. 5907/2007, 11 December 2007, **CE-721**.

400. Mr. Milošević explained in his first report that the purpose of Article 5.3.4 was to protect the value of BD Agro's assets as a security for the full payment of the purchase price:

> [T]he purpose of the limitation imposed in Article 5.3.4 of the Privatization Agreement was to protect the value of BD Agro's assets as security for the full payment of the purchase price.[425]

401. The Serbian courts also interpret the restriction on pledges as a security, even though they define it more broadly as securing all other contractual obligations of the buyer:

> The goal of the provision of Article 5.3.4 is to protect the property of the subject of privatization and to safeguard the material base of the business of the subject of privatization, without which the buyer, due to their nature and the nature of the contract, cannot fulfill other contractual obligations, cannot secure continuity of business operations of the enterprise and fulfillment of the agreed obligations.[426]

402. This means that upon the payment of the full purchase price and the fulfilment of all other obligations under the Privatization Agreement, Article 5.3.4 lost its purpose because there was no longer any outstanding contractual performance to be secured.

403. This consequence of the fulfilment of all other contractual obligations is relevant both prospectively and retrospectively. Any pledges of BD Agro's assets could do no harm to the Privatization Agency and the broader public interests pursued through the privatization of BD Agro regardless of when such pledges were agreed.[427] Simply put, the fulfilment of all other obligations under the contract renders any potential non-compliant pledges entirely moot.

404. In fact, Serbia and its legal expert were not able to point out to a single decision where a violation of the restrictions on pledges alone would lead to termination of the respective privatization agreement.

405. In the Betonjarka case, which Serbia relies on heavily, the privatization agreement was terminated long before the full payment of the purchase price and the fulfilment of the buyer's obligations under the social program for the employees of the privatized company. The privatization agreement was concluded on 10 January 2007. The buyer agreed to pay the purchase price in six annual installments and comply with a three-year

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425 Milošević First ER, ¶ 96.

426 Judgment of the Commercial Appellate Court No. Pž 8687/2011, 18 December 2012, **CE-722**.

427 Milošević Second ER, ¶ 80.

social program.[428] The privatization agreement was terminated on 30 December 2008, long before the payment of the full purchase price and the fulfilment of the social program.[429] Therefore, the Betonjarka case is completely inapposite.

406. In the Trayal case, the buyer had violated its obligations regarding limitations on disposal of assets, the agreed social program for the privatized company's employees and the restricted use of proceeds from certain sales.[430] In the Geodetski Biro case, the privatization agreement was terminated for violation of the limitations on disposal of assets and for the buyer's failure to ensure continuity of the privatized company's business activity.[431] In the Zastava PES case, the Privatization Agency terminated the privatization agreement for violations of the buyer's obligation to maintain continuity of business operations and to implement social program and solve certain employment issues.[432]

407. In this context, it is important to note that most of the case law relied upon by Serbia concerning termination of privatization agreements concluded before 8 June 2005[433] is irrelevant also because the text of Article 41a of the 2001 was substantially amended as of that date and the Serbian courts' interpretation of the pre-2005 wording of that provision is inapposite for the interpretation of the text of the same provision applicable to the termination of the Privatization Agreement.

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428 Privatization agreement for subject of privatization Betonjerka, 10 January 2007, Art. 1.3, Annex A, **RE-098**.

429 Notice on termination of privatization agreement for subject of privatization Betonjerka, 30 December 2008, **RE-097**.

430 Notice of termination due to failure to fulfil the Agreement on sale of capital of the privatization subject "TRAYAL KORPORACIJA" AD Krusevac, by public tender method, **RE-024**.

431 Notice of termination due to failure to fulfil the Agreement on sale of capital of the privatization subject Preduzece za geodetske i inzenjering poslove "GEODETSKI BIRO" Nis, **RE-031**.

432 Notice of termination due to failure to fulfil the Agreement on sale of socially-owned capital by public auction method of the privatization subject DP za proizvodnju i promet elektroproizvoda "ZASTAVA PES" Surdulica, **RE-059**.

433 Counter-Memorial, ¶¶ 102-103. As explained by Mr. Milošević, the irrelevant decisions relied upon by Serbia include: Judgment of the Supreme Court of Cassation no. Prev-54/2018, 12 July 2018, **RE-029**; Judgment of the Supreme Court of Cassation, 14 November 2013, **RE-062**; Decision of the Higher Commercial Court, Pž. 10529/2005, 28 November 2005, **RE-067**; Judgment of the Supreme Court of Cassation no. Prev-387/16, 18 May 2017, **RE-094**; Decision of the Constitutional court of Serbia, 6 October 2016, **RE-095**; Judgment of the Higher Commercial Court, Pž. 3206/2006(2), 28 December 2006, **RE-162**; Judgment of the Supreme Court of Serbia, Prev. 410/2005, 1 March 2006, **RE-166**; and Judgment of the Higher Commercial Court, Pž. 3544/2005, 16 May 2005, **RE-163**.

408. The key difference is that the 2005 amendments to the Law on Privatization introduced an exhaustive list of obligations, the violation of which can cause termination of a privatization agreement. The original wording of Article 41a of the 2001 Law on Privatization did not spell out all grounds for termination and the grounds for termination thus included also the grounds provided for in the provisions of the Law on Obligations. The application of these provisions required certain interpretations, which are not necessary and apposite under the amended wording of Article 41a of the Law on Privatization.[434]

409. In any event, the court decisions cited by Serbia are not relevant because none of them addresses the very specific case of termination of the Privatization Agreement: (*i*) after the payment of the full purchase price and fulfillment of all other obligations; and (*ii*) for an alleged violation of Article 5.3.4 alone.[435]

410. To be clear: the Claimants are not arguing that a privatization agreement cannot be terminated after the payment of the purchase price for violation of the buyer's other essential obligations relating, for example, to compliance with the agreed social program for the employees of the privatized company. They argue—and show—that the Privatization Agreement could not be terminated for the alleged violation of Article 5.3.4 *alone* after payment of the full purchase price and the fulfilment of all (other) contractual obligations.

### c. Violations of Article 5.3.4 were not a ground for termination of the Privatization Agreement

411. As the Claimants explained in their Memorial, 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 breach of Article 5.3.4, such a breach was not a valid ground for termination of the Privatization Agreement.[436]

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434 Milošević Second ER, ¶¶ 90-91.

435 Milošević Second ER, ¶¶ 77-86.

436 Memorial, ¶¶ 236-242.

412. According to Serbia, the Privatization Agency was able to terminate the Privatization Agreement "*both for the reasons set forth in an agreement and in the relevant laws.*"[437] Serbia therefore claims that the termination of the Privatization Agreement was lawful because a breach of Article 5.3.4 of the Privatization Agreement would have been a reason for termination under Article 41a(1)(3) of the Law on Privatization.[438]

413. Serbia is wrong. As explained by Mr. Milošević, Article 41a(1) of the 2001 Law on Privatization must be read in connection with the provisions in the Privatization Agreement. These provisions then give Article 41a(1) a specific meaning. That meaning must be determined in accordance with the provisions of Article 7.1 of the Privatization Agreement. It is evident from this Article that the parties intended not to allow for termination of the Privatization Agreement in case of violation of Article 5.3.4 of the Privatization Agreement.[439]

414. Serbia, on the other hand, argues that "*it is clear that Article 41a 1 (3) of the Law on Privatization, […] prohibits both encumbrance of property and use of cash (as a means of disposal of the property) contrary to the agreement. In this particular case Article 5.3.4. specifies in which case encumbrance of property and use of cash would be contrary to the provisions of the Privatization Agreement and forbids the loan that is secured by pledge on assets of BD Agro to be used for the benefit of third parties. Therefore, if Article 5.3.4. is breached, then Article 41a 1 (3) of the Law on Privatization can be applied […].*"[440]

415. Serbia's interpretation is clearly incorrect because it would make most of the provisions of Article 7.1 of the Privatization Agreement redundant. The plain wording of the provisions of Article 7.1(1)-(6) specifies the reasons for termination set out in Article 41a(1)(7) of the 2001 Law on Privatization. If such specification could not change or replace the statutory reasons for termination, there would be no reason to include them in the Privatization Agreement.[441]

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437 Counter-Memorial, ¶ 118.

438 Counter-Memorial, ¶ 119.

439 Milošević Second ER, ¶ 91.

440 Counter-Memorial, ¶ 122.

441 Milošević Second ER, ¶ 89.

416. In fact, the Privatization Agency was well aware that violations of Article 5.3.4 were not a valid ground for termination. As explained above, during the session of the Commission for Control that took place on 23 April 2015, the members of the Commission expressly admitted that the violation of Article 5.3.4 did not constitute a basis to terminate the Privatization Agreement: "*First of these provisions, 5.3.3, was prescribed as basis for termination of the agreement, and* ***the other one [5.3.4], which refers to pledges, in accordance with the agreement, was not prescribed as basis for termination of the agreement*** *[…]*."[442]

### d. Article 5.3.4 is not an essential term of the Privatization Agreement and, in any event, the alleged breach was minor

417. Mr. Milošević explains that another, independent reason why the Privatization Agency could not terminate the Privatization Agreement for the alleged violation of Article 5.3.4 is that under Article 131 of the Law on Obligations, an agreement can be terminated only for a violation of an essential obligation and only if such violation is not only minor.[443]

418. The obligation under Article 5.3.4 is not an essential obligation. It has an accessory character because it only secures the buyer's performance of his other obligations. This is also evident from the fact that it is not listed as a ground for termination in the Privatization Agreement in Article 7.[444]

419. Even if Article 5.3.4 imposed an essential obligation, the alleged violation would be only minor. The funds borrowed under the 2010 Loan Agreement and allegedly used in a manner that made the Pledge non-compliant with Article 5.3.4 represented an insignificant part of the value of BD Agro's assets.[445]

420. The minor character of the alleged violation can also be seen from the fact that the alleged violation did not threaten the achievement of the main goal and purpose of the

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442 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 2, **CE-768**.

443 Milošević Second ER, ¶ 94.

444 Milošević Second ER, ¶ 87.

445 Milošević Second ER, ¶¶ 52-53.

Privatization Agreement several months later, when the buyer paid the full purchase price and the Privatization Agreement was consummated.[446]

### e. The Privatization Agency's requests for remedies were unjustified, arbitrary and nonsensical

421. According to Article 7.1 of the Privatization Agreement and Article 41a of the Law on Privatization, a declaration of termination is possible only if the buyer *does not remedy a breach* within an additional deadline for compliance or fulfilment.

422. The simple fact is that because the obligations under Article 5.3.4 ceased to exist upon the payment of the purchase price on 8 April 2011, there was nothing to be remedied after that date, including in 2015.[447] It simply did not make any sense for the Privatization Agency to request that BD Agro obtain deletion of the Pledge and repayment of the funds from Crveni Signal and Inex—only to be perfectly free to give them the money back and reinstate the pledges on the following day.

423. The requested remedies were arbitrary also because the Privatization Agency requested much more than what would have been necessary to remedy the alleged violation even if the Privatization Agreement had not been consummated.

424. If the crux of the alleged violation was that BD Agro had pledged its assets *and* the borrowed funds were used for the benefit of third parties, then such violation would have been remedied by cancelling the Pledge *or* obtaining the return of the funds. There was no need to request both.

425. Another issue is that the Privatization Agency insisted on deletion of the Pledge from the Real Estate Register while it was sufficient that the pledgee, Nova Agrobanka, could not exercise any pledge rights after the repayment of the secured loan in 2012. Due to the accessory character of the Pledge, once the secured loan was repaid, the Pledge created to secure the loan lost any effect and should have been deleted.[448] It was not only because Nova Agrobanka would not issue the confirmation required by the Real

446 Milošević Second ER, ¶ 73.

447 Memorial, ¶¶ 228-230.

448 Milošević Second ER, ¶¶ 60-65.

Estate Register. The continuing formal existence of the Pledge, which Nova Agrobanka was not able to exercise, did not violate Article 5.3.4 of the Privatization Agreement.

426. The Privatization Agency was fully informed of the repayment of the secured loan. Serbia is plainly wrong when it states in the Memorial that the conclusion of Prva Revizija from January 2015 that "*[m]ortgages on the basis of security for obligations of third person have not been deleted, but those obligations have been settled and the conditions have been met for deletion of mortgage on this basis*"[449] does not relate to mortgages registered based on the 2010 Loan Agreement.[450]

427. Prva Revizija clearly stated in its report that the loan provided under the 2010 Loan Agreement was refinanced through the loan provided under the 2012 Loan Agreement and the conditions for deletion of the Pledge were therefore met:

> The means for payment of borrowings to companies "INEX-Nova Varos" and Crveni signal, were provided by BD Agro from the short term loan of Agrobanka no. K-571/10-00 of December 22, 2010 in the amount of 221,000,000.00 RSD. As security instrument for duly compliance of obligation on the basis of the stated loan, the mortgage was established on the land from land register folio 3003, CM Dobanovci on the following land parcels: 4670, 4673-4684, 4686-4687, 5516-5518, 5527-5528, 5544, 5546-5549, 5550/1, 5553, 5574-5584, 5587-5589, 5023/1, 5023/5, 5023/7 and on the land and facilities from the land register folio 3002 CM Dobanovci, parcel no. 5521 and 5522. *The stated loan on Agrobanka was refinanced together with other loans of Agrobanka from the loan of Nova Agrobanka a.d. Belgrade, in line with the Agreement on Long Term Loan no. D-07/12-NA-00 of June 22, 2012, in the amount of 9,500,000.00 EUR*.[451]
>
> […]
>
> **Conclusion about item 11/1: Until the day of issuing of the report, not all the borrowings given by BD Agro to third persons from loan asses secured by burdens on property of BD Agro have not been returned on April 8, 2011. Mortgages on the basis of security for obligations of third person have not been deleted, but those obligations have been settled and the conditions have been met for deletion of mortgage on this basis**.[452]

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449 Report on Factual Findings from Prva Revizija, 12 January 2015, p. 5 (pdf), **CE-327**.

450 Counter-Memorial, ¶ 75.

451 Report on Factual Findings from Prva Revizija, 12 January 2015, p. 5 (pdf) (emphasis added), **CE-327**.

452 Report on Factual Findings from Prva Revizija, 12 January 2015, p. 5 (pdf) (emphasis in the original), **CE-327**.

428. The Privatization Agency had no legitimate reason to conclude that the alleged violation of Article 5.3.4 still needed to be remedied.

### f. The termination was completely disproportionate and done in bad faith

429. The Claimants explained in the Memorial that the termination of the Privatization Agreement was illegal also because it was completely disproportionate.[453] *Serbia entirely ignores this argument in the Counter-Memorial.*

430. In fact, the disproportionality of the termination is obvious. The Pledge caused no damage and did no harm to anyone. Even if the Pledge had constituted a violation of the Privatization Agreement, it simply was not proportionate for the Privatization Agency to sanction such alleged violation by termination of the Privatization Agreement more than four years after the full payment of the purchase price and fulfilment of all other goals of the privatization—and by the subsequent expropriation of the Beneficially Owned Shares worth EUR 61.5 million.

431. Serbia's legal expert, Dr. Radović, does not even try to argue that the termination and seizure were proportionate. Instead, she claims that the Privatization Agency acts in a strictly private capacity and thus "*does not have a duty to worry about choosing the least severe means in case of another party's breach of contract*."[454] This is simply incorrect, for many reasons.

432. To begin with, Mr. Milošević explains that if the Privatization Agency's conduct were to be analyzed on a purely contractual basis (*quod non*), its acts would constitute a violation of Article 12 of the Law on Obligations, which requires the parties to obligational relations to adhere to the principles of good faith and honesty, and Article 13 of the same Law, which expressly prohibits an abuse of right.[455]

433. However, the Privatization Agency was not acting in a strictly private capacity. It acted as a holder of public powers and followed the orders of the Ministry of Economy, which was authorized to issue such orders precisely because the Privatization Agency was

453 Memorial, ¶¶ 254-259.

454 Radović ER, ¶ 35.

455 1978 Law on Obligations, Arts. 2-3, **RE-032**; Milošević Second ER, ¶ 105.

acting as a holder of public powers. The Ombudsman also issued his "recommendations" because the Privatization Agency was acting as a holder of public powers.

434. In fact, Dr. Radović herself acknowledges that the Privatization Agency was entrusted with public authority,[456] and claims that the Ombudsman had the authority to control the activity of the Privatization Agency regarding the termination of the Privatization Agreement because the Privatization Agency acted in the exercise of delegated public powers.[457]

435. Mr. Milošević reiterates that as a holder of public authority and powers, the Privatization Agency was required to act proportionately and to consider whether termination of the Privatization Agreement was a necessary and proportionate measure under the circumstances.[458]

436. Serbia does not deny that the Privatization Agency did not do so and the termination was grossly disproportionate and unlawful.[459]

**g. 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**

437. The Claimants explained in the Memorial that the Privatization Agency's vague reference in the Notice on Termination to alleged violations of other provisions of the Privatization Agreement misrepresented the reasoning of the Commission for Control and was, in any event, unjustified.[460] The Privatization Agency stated the following:

> 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

456 Radović ER, ¶ 58.

457 Radović ER, ¶¶ 57 – 59.

458 Milošević Second ER, ¶ 110.

459 Milošević Second ER, ¶ 111.

460 Memorial, ¶¶ 244-253.

> investment in the value of sold fixed assets which are the subject of performance of investment obligation of the Buyer (202,245 EUR).[461]

438. This statement was 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.

439. In its Counter-Memorial, Serbia states that "*only the breach of Article 5.3.4. was the reason for termination*"[462] and that the above paragraph did not state that the obligations listed therein were violated.[463] The issue thus seems to be moot, but, like with the internal minutes of meetings, it shows a purposeful misrepresentation of the facts by the Government.

## W. Serbia expropriated the Beneficially Owned Shares

440. After its unlawful declaration of termination of the Privatization Agreement, the Privatization Agency expropriated 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**").[464] The Decision on Transfer of Capital transferred not only the Privatized Shares, but also the New Shares.[465]

441. The Privatization Agency's statutory power to unilaterally seize the Beneficially Owned Shares and the statutory irrebuttable presumption of dishonesty both very significantly depart from any private law contractual relationship.[466] As explained by the Claimants' Serbian law expert, Mr. Miloš Milošević, these actions meet all the characteristics of an administrative act under Serbian law.[467]

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461 Notice on Termination of the Privatization Agreement, 28 September 2015, **CE-050**.

462 Counter-Memorial, ¶ 131.

463 Counter-Memorial, ¶ 134.

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

465 Milošević First ER, ¶ 102.

466 Milošević First ER, ¶¶ 106-110.

467 Milošević First ER, ¶ 115.

## X. The Privatization Agency managed BD Agro into bankruptcy

### 1. The Privatization Agency's intervention caused the rejection of the Amended pre-pack reorganization plan

442. On 30 September 2015, the Commercial Appellate Court quashed the approval of the pre-pack reorganization plan and returned the case to the first instance court to repeat the procedure.[468]

443. Mr. Markićević explains that under normal circumstances, BD Agro would have been able to address the Appellate Court's concerns by updating the Amended pre-pack reorganization plan and submitting a new extraordinary auditor's report.[469]

444. On 22 October 2015, BD Agro received a notice from the first instance court ordering it "*to act in accordance with the orders from the decision of the Commercial Appellate Court*." The deadline set by the court was 15 days.[470]

445. However, 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 the Privatization Agency's approval of any action with respect to a bankruptcy procedure, including the procedure for the approval of the reorganization plan.[471]

446. According to Serbia, Mr. Markićević, as the "*director of BD Agro, was neither obliged to request the Privatization Agency's approval, nor was the Privatization Agency authorized to give such approval*."[472] This is incorrect.

447. Indeed, as explained by Mr. Markićević, it was Mr. Doklestić, Mr. Rand's lawyer who advised in the preparation of the reorganization plan, who counselled him against taking any steps without first obtaining the Privatization Agency's approval.[473]

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468 Decision of the Appellate Court dated 30 September 2015, p. 1, **CE-358**.

469 Markićević Third WS, ¶¶ 113-114.

470 Notice from the Commercial Court in Belgrade dated 16 October 2015, **CE-359**.

471 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.

472 Counter-Memorial, ¶ 203.

473 Markićević Third WS, ¶ 84.

448. Mr. Doklestić's advice was fully in accordance with Article 47 of the 2014 Law on Privatization. Article 47 of the 2014 Law on Privatization provided that, after termination of a privatization agreement, the management of the privatized company cannot, prior to selection of new management bodies, render decisions on the following items:

> 1) decrease or increase of the capital of the company;
>
> 2) acquisition or disposal of real estate or the high value property;
>
> ***3) reorganization of the company;***
>
> 4) pledging assets, mortgaging, and applying other kinds of property encumbrance;
>
> 5) renting or leasing property;
>
> 6) settlement with creditors.[474]

449. Management decisions rendered in contradiction of Article 47 of the 2014 Law in Privatization would be null and void.[475]

450. Mr. Markićević's submission of an updated pre-pack reorganization plan would have violated Article 47(3) of the 2014 Law on Privatization because it would have been a decision on reorganization of the company.

451. Serbia's argument that Article 47(3) applies only to rendering "*decisions on reorganization of the company before new management bodies are selected and not that it cannot undertake any actions in the court proceedings initiated with regard to already rendered decision on reorganization*", and that it "*does not apply to activities concerning ongoing reorganization proceedings, which had already been initiated prior to termination of privatization agreements*", is divorced from reality.[476]

452. If Serbia is right, management could, following termination of a privatization agreement, freely alter the course of a pending reorganization by submitting a completely new reorganization plan. Such interpretation would go against the very

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474 Law on Privatization, Official Gazette of the Republic of Serbia no, 83/2014 and 46/2015, Art. 47, **CE-223**.

475 Law on Privatization, Official Gazette of the Republic of Serbia no, 83/2014 and 46/2015, Art. 47, **CE-223**.

476 Counter-Memorial, ¶ 202 (emphasis in the original).

purpose of Article 47, which is to prevent the management of a privatized company from making any material decisions before a new management is appointed after the termination of the privatization agreement.

453. Mr. Markićević's submission of an updated pre-pack reorganization plan would have also violated Article 47(2), which precludes the management from rendering a decision on "*acquisition or disposal of real estate or high value property.*" The submission would have been in violation of this restriction because the updated reorganization plan included provisions on both acquisition of high value property—the new heifers—and disposal of high value property—the sale of non-core assets.

454. Pursuant to Article 47(6), management cannot make decisions on "*settlement with creditors.*" Needless to say, a pre-pack reorganization plan is adopted for the very purpose of settling with the creditors. Therefore, it is obvious that the submission of an updated reorganization plan would have also breached Article 47(6).

455. Finally, Mr. Markićević was not able to proceed with filing an updated reorganization plan simply because the Amended pre-pack reorganization plan envisaged and was dependent upon additional financing to be provided by Mr. Rand.[477] After the termination of the Privatization Agreement, Mr. Rand was obviously no longer willing to provide any financial support to the company[478] and Mr. Markićević could not simply delete the name of Mr. Rand and state that the plan would rely on some unspecified source of external financing, because he was not aware of any other source of financing.[479]

456. Therefore, on 26 October 2015, Mr. Markićević wrote to the Privatization Agency, explaining that the Commercial Court had ordered BD Agro to act in accordance with instructions from the Commercial Appellate Court and set a 15 days deadline. He stressed that failure to act in accordance with the order of the Commercial Court would lead to the rejection of the Amended pre-pack reorganization plan.[480]

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477 Amended pre-pack reorganization plan, pp. 21, 24, 26, **CE-101**.

478 Email from W. Rand to I. Markićević, 4 November 2015, **CE-569**.

479 Markićević Third WS, ¶ 118.

480 Letter from I. Markićević to the Privatization Agency dated 26 October 2015, **CE-360**. *See also* Markićević Third WS, ¶ 120.

457. The Privatization Agency never responded, the 15 days deadline for BD Agro's compliance with the court order expired, and the first instance court rejected the Amended pre-pack reorganization.[481]

### 2. The Privatization Agency appointed Mr. Zoran Ristić as the new General Manager of BD Agro

458. On 16 November 2015, BD Agro's security agency caught Mr. Zoran Ristić, the self-described director of the United Industry Unions "Independence", trespassing on BD Agro's premises. When security asked him what he was doing there, he said that he was a representative of the Privatization Agency and claimed to have a meeting with BD Agro's trade union—even though no such meeting was scheduled.[482] As described above, it was Mr. Ristić who, at minimum, contacted the Privatization Agency in 2013 regarding BD Agro.

459. Even more surprisingly, when the Privatization Agency replaced the management of BD Agro with its own nominees in December 2015, the same Zoran Ristić, a self-proclaimed trade union leader who had never worked at BD Agro, was appointed as the new General Manager of BD Agro.[483]

460. The coincidence of Mr. Ristić's prior communication with the Privatization Agency and subsequent appointment as General Manager of BD Agro is glaring. Claimants are left to wonder if the appointment was intended to reward Mr. Ristić for his role in the expropriation of the Claimants' investment.

### 3. After 10 months under the Privatization Agency's management, BD Agro was declared bankrupt

461. On 30 August 2016, less than a year after the Privatization Agency expropriated the Beneficially Owned Shares, BD Agro was declared bankrupt.[484]

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481 Decision of the Commercial Court in Belgrade dated 8 December 2015, p. 1, **CE-361**. *See also* Markićević Third WS, ¶ 121.

482 Letter from Hercules Security to I. Markićević, 16 November 2015, **CE-781**.

483 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, 23 August 2017, **CE-072**.

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

462. Serbia claims that the fact that BD Agro was declared bankrupt was not caused by the termination of the Privatization Agreement and the replacement of the entire management. According to Serbia, this is because the bankruptcy proceedings were initiated based on a bankruptcy petition filed by Banca Intesa in January 2015.[485]

463. Serbia's argument does not make any sense. It is true that Banca Intesa filed a bankruptcy petition in January 2015. However, as Serbia itself admits, "*Banca Intesa's request was initially dismissed on 6 August 2015 since BD Agro's attempted reorganization was ongoing.*"[486] Had the Privatization Agency not terminated the Privatization Agreement, the pre-pack reorganization plan would have been approved and there would have been no bankruptcy in August 2016.

464. Furthermore, Serbia conveniently omits from its narrative the fact that the new management appointed after the termination of the Privatization Agreement continued in the efforts to put in place a pre-pack reorganization plan and submitted its own plans. However, unlike the former management led by Mr. Markićević, the new management appointed under the control of the Privatization Agency never managed to get the support of the court and the creditors.[487]

465. That is the reason why BD Agro was declared bankrupt in August 2016—ten months after the expropriation of the Beneficially Owned Shares. All BD Agro employees lost their jobs and all of its cows were sold.

466. Thus, BD Agro's new General Manager, Mr. Ristić, achieved the exact opposite of the objectives he declared when he allegedly represented workers and minority shareholders in BD Agro and pushed for termination of the Privatization Agreement.

## Y. Cui bono?

467. On 7 March 2019, *.i.e.* almost three years after the Commercial Court in Belgrade declared BD Agro bankrupt, BD Agro's bankruptcy trustee announced a public sale of BD Agro. The public auction was announced for 9 April 2019 and the initial price was

485 Counter-Memorial, ¶¶ 205-207.

486 Counter-Memorial, ¶ 206.

487 Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro, 30 August 2016, pp. 3-5, **CE-109**.

set at RSD 1,535,376,081.65 (approximately EUR 13,012,000).[488] The announcement was published on a single day, in Cyrillic, in two Serbian daily newspapers, "Politika" and "Novosti".[489] Mr. Markićević confirms that he is not aware of any other channels used to advertise the sale.[490]

468. The creditors' committee had approved the sale in a highly contested 2:1 vote. The one member voting against the sale was Imlek, the biggest milk processing company in the Balkans region and BD Agro's biggest purchaser of raw milk. The two members voting in favor were state managed Nova Agrobanka and Agrounija. As is described below, Agrounija was in a clear conflict of interest.

469. Agrounija is owned by MK Group doo Belgrade,[491] which in turn belongs to Mr. Miodrag Kostić, Serbia's second richest tycoon and one of the most connected people in the country.[492] Mr. Kostić, or one of his affiliated companies, participated in the public auction for BD Agro shares on 29 September 2005.

470. Agrounija became BD Agro's creditor only after the expropriation of the Beneficially Owned Shares, by acquiring Banca Intesa's secured receivables.[493] Agrounija's receivables registered in the bankruptcy proceedings amount to RSD 1,508,814,501.61 (approximately EUR 12,755,216).[494]

471. The potential bidders had to make a deposit of RSD 614,150,432.66 (approximately EUR 5,205,000) in cash or in the form of a bank guarantee within less than four weeks,

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488 Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Novosti, 7 March 2019, pp. 2-3, **CE-548**; Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Politika, 7 March 2019, p. 3, **CE-549**.

489 Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Novosti, 7 March 2019, **CE-548**; Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Politika, 7 March 2019, **CE-549**.

490 Markićević Third WS, ¶ 126.

491 Extract from the Commercial Register regarding Agrounija, 22 September 2019, **CE-382**.

492 *Miodrag Kostić*, Wikipedia, 22 September 2019 (accessed), **CE-552**; *Miodrag Kostić*, MK Group, 22 September 2019 (accessed), **CE-383**.

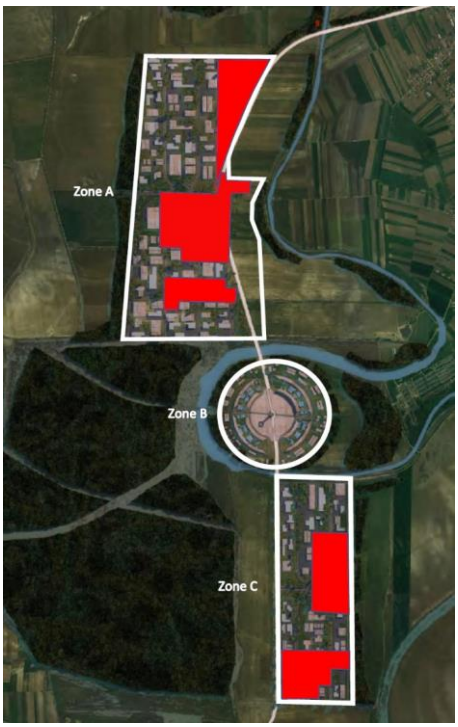
493 Decision of the Commercial Court in Belgrade, 21 June 2017, p. 1 (pdf), **CE-553**.

494 Decision of the Commercial Court in Belgrade, 30 March 2018, pp. 1-2 (pdf), **CE-551**.

by 2 April 2019.[495] The newspaper advertisements stated a wrong address for the delivery of the bank guarantee.

472. The bidders had to pay for a copy of the sales documentation.[496] The information about BD Agro's land ownership was outdated.[497] The bidders were not able to obtain the information from the cadastral offices because they were on a long strike.[498]

473. The sale of BD Agro did not include all of BD Agro's commercial land. The following map shows the commercial land in Zones A, B and C that was not included in the sale (in red).[499]




495 Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Novosti, 7 March 2019, p. 2, **CE-548**; Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Politika, 7 March 2019, p. 3, **CE-549**.

496 Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Novosti, p. 3, 7 March 2019, **CE-548**; Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Politika, p. 3, 7 March 2019, **CE-549**.

497 Broshko Third WS, ¶ 33.

498 *E.g.* J. Mirković, *Strike continues in the Geodetic Authority of the Republic, no improvement after the meeting with Minister Djordjevic*, N1, 25 March 2019, **CE-574**. *See also* Markićević Third WS, ¶¶ 133-134.

499 Amended pre-pack reorganization plan, 6 March 2015, pp. 91-92, **CE-101**; Report on evaluation of market value of bankruptcy debtor's property and evaluation of debtor as legal entity "BD AGRO" AD Dobanovci, 24 January 2019, p. 15 (pdf), **CE-511**. *See also* Markićević Third WS, ¶ 135.

474. The exclusion of significant parts of BD Agro's commercial land was extremely important, not only because it decreases the surface of the land put up for sale, but also because it effectively bars access from the Sremska gazela road to virtually all sold land plots in Zone A. This made the sale attractive especially—and perhaps only—to a buyer who could reasonably hope that it would be able to buy the excluded land at a later stage.

475. The Claimants' real estate expert, Mr. Krzysztof Grzesik, unequivocally concludes that:

> *The actual sales process of the BD Agro property carried out under the bankruptcy proceedings* could not have been more different than [a] proper marketing process […], and *could not have been expected to result in securing anything near market value for the property*.[500]

476. The public auction was eventually held on 9 April 2019 and "incidentally," Agrounija was the only bidder. Agrounija bought BD Agro for the opening price of RSD 1,535,376,081.65 (approximately EUR 13,012,000).[501] Because Agrounija has registered a secured receivable of RSD 1,507,989,745.72 (approximately EUR 12,748,243), it is to be expected that Agrounija will receive—or has already received—most of the purchase price as distribution from the bankruptcy estate.[502]

## Z. Serbia has been intimidating the Claimants' Serbian witnesses in this arbitration

477. In summer 2019, the Serbian Police started to intimidate the two Serbian witnesses that the Claimants put forward in this arbitration, Messrs. Markićević and Obradović, and to collect information related to key jurisdictional issues discussed in this arbitration. Unfortunately, the harassment continued even after 25 July 2019, when the Tribunal reminded the Parties not to aggravate the dispute.[503]

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500 Grzesik ER, ¶ 16.21.

501 According to the announcement, the sale and purchase agreement was to be signed by Agrounija within the required three days from the day of the public bidding. Agrounija was then supposed to settle the remaining amount of the sale and purchase price within 20 days after the signing of the sale and purchase agreement. Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Novosti, 7 March 2019, pp. 2-4, **CE-548**; Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Politika, 7 March 2019, pp. 3-4, **CE-549**.

502 Decision of the Commercial Court in Belgrade on Agrounija's receivables, 30 March 2018, pp. 1-2 (pdf), **CE-551**. *See also* Markićević Third WS, ¶ 138.

503 Letter from the Tribunal, 25 July 2019.

478. While the Police pretend to investigate a matter relating to Mr. Obradović and Crveni Signal completely unrelated to this arbitration, their conduct is highly problematic for three independent reasons:

(i) the investigation seems to relate to a matter many years old and Serbia has offered no explanation as to why the Police started to investigate it only after the Claimants filed this arbitration;

(ii) the Police inspectors have repeatedly behaved in a very rude manner with Mr. Markićević, including, for example, by having a uniformed Police officer ring at his personal address on a Sunday late afternoon to deliver him a summons for an interview scheduled in less than 24 hours, on the following Monday morning at 9:00am; and

(iii) the Police inspectors repeatedly asked Mr. Markićević, "unofficially," about Mr. Rand, Mr. Obradović, and their relationship and about various aspects of Mr. Rand's investments in BD Agro. Mr. Obradović was also questioned about these matters as recently as 4 September 2019.

479. The harassment is described in detail in the witness statements of Messrs. Markićević and Obradović, and the Tribunal is aware of its first stages from the Claimants' request that the Tribunal remind Serbia not to aggravate the dispute. Unfortunately, the harassment continued even after the Tribunal's reminder.

480. The worst example of the harassment is the unannounced visit of a uniformed police officer in Mr. Markićević's private apartment in Belgrade on Sunday 11 August 2019 at 4:15pm with a summons for an interview scheduled less than 24 hours later, on Monday 12 August 2019 at 9:00am. The Police officer made sure that Mr. Markićević's neighbors could hear that Mr. Markićević was summoned for an investigation of a serious economic crime. There was certainly no justifiable need for the Police to deliver the summons in person and on a Sunday afternoon rather than simply mail it to Mr. Markićević or his lawyer sufficiently in advance of the interview.[504]

[504] Markićević Third WS, ¶¶ 151-154.

481. Mr. Obradović had to respond to the inspectors' questions as recently as 4 September 2019. The inspectors were clearly collecting information relevant for this arbitration. They wanted to know about when and how Mr. Obradović met with Mr. Rand and about their agreement on Mr. Obradović's nominal ownership of BD Agro.[505] The Police also asked Mr. Obradović how he financed the purchase of BD Agro and the additional investments.[506]

482. The Claimants fully respect Serbia's right to conduct criminal investigations. However, Serbia should explain why the Police started to investigate matters more than ten years old only after the Claimants started this arbitration, and the investigations must not be misused by Serbia to collect information that is now more than 14 years old and only relevant for this arbitration.

483. Finally and most importantly, Serbia should refrain from using its uniformed police officers to frighten the Claimants' witnesses and their families. This disputes falls to be decided by the Tribunal, not by the Serbian Police.

505 Obradović Second WS, ¶ 94.

506 Obradović Second WS, ¶ 94.

## III. THE TRIBUNAL HAS JURISDICTION OVER THE ENTIRETY OF THE CLAIMANTS' CLAIMS

### A. The Tribunal has jurisdiction *ratione materiae* under the Canada-Serbia BIT

#### 1. The Beneficially Owned Shares are a protected investment under the Canada-Serbia BIT

484. The Beneficially Owned Shares are "shares" and thus an "investment" under the definition in Article 1 of the Canada-Serbia BIT.[507] Serbia does not claim otherwise. The only remaining issue is, therefore, whether the Beneficially Owned Shares are a "covered investment" within the meaning of the same Article.

485. To qualify as a "covered investment," the Beneficially Owned Shares must be "*owned or controlled, directly or indirectly"* by the Canadian Claimants.

486. The Claimants will demonstrate below that that requirement is amply satisfied and the Beneficially Owned Shares thus constitute a "covered investment" within the meaning of Article 1 of the Canada-Serbia BIT.

##### a. The history of the investment shows that the Beneficially Owned Shares were always indirectly controlled *and* owned by the Canadian Claimants

487. As Messrs. Rand and Obradović explained in their respective first witness statements, the investment in the Beneficially Owned Shares started in 2005, when Mr. Rand and Mr. Obradović agreed orally that Mr. Obradović would submit a bid in the auction for the Beneficially Owned Shares and, if successful, would nominally acquire the Beneficially Owned Shares and assist in dealing with Serbian officials while Mr. Rand would secure the financing and become the beneficial owner.[508]

488. In consideration for such services, Mr. Rand would pay Mr. Obradović a success fee if, and when the investment become profitable.[509]

489. On 19 September 2005, Mr. Obradović and MDH concluded the MDH Agreement which implemented the prior oral agreement and established MDH's—and by

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507 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "investment," item (b), **CLA-001**.

508 Rand First WS, ¶ 17, ¶ 19; Obradović First WS, ¶ 7.

509 Rand First WS, ¶ 17; Obradović First WS, ¶ 7.

extension Mr. Rand's—beneficial ownership and control over the Beneficially Owned Shares and BD Agro.

490. On 22 February 2008, Mr. Rand's beneficial ownership was restructured under the Sembi Agreement to involve all of the other Canadian Claimants. Sembi's acquisition of beneficial ownership of the Beneficially Owned Shares was entirely financed by Mr. Rand.[510] Since 2008, Sembi has recorded its beneficial ownership of the Beneficially Owned Shares in its reports and financial statements.[511]

491. 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, until the Privatization Agency's seizure of the Beneficially Owned Shares on 21 October 2015. Since 22 February 2008, Mr. Rand exercised such control through Sembi, which is in turn controlled by Mr. Rand.

492. Mr. Rand's control over Sembi—which is undisputed between the parties[512] —stems from the control agreement between Mr. Rand and the remaining directors of Sembi.[513] It also stems from the control agreement between Mr. Rand and Mr. Jennings—the trustee of the Ahola Family Trust—who undertook to seek and follow Mr. Rand's instruction with respect to all matters involving the Ahola Family

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510 Confirmation of EUR 3,610,000.00 wire transfer from Mr. William Rand to Sembi executed on 3 August 2008, **CE-060**; Confirmation of EUR 2.001.000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-061**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-056**; Register of Directors of Indonesian Developments Co. Ltd., **CE-075.**

511 Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, p. 13, **CE-420**; Report and financial statements of Sembi Investment Limited as of 31 December 2009, p. 15, **CE-656**; Report and financial statements of Sembi Investment Limited as of 31 December 2010, p. 14, **CE-657**; Report and financial statements of Sembi Investment Limited as of 31 December 2011, p. 14, **CE-658**; Report and financial statements of Sembi Investment Limited as of 31 December 2012, p. 14, **CE-659**; Report and financial statements of Sembi Investment Limited as of 31 December 2013, p. 14, **CE-660**; Report and financial statements of Sembi Investment Limited as of 31 December 2014, p. 14, **CE-661**; Report and financial statements of Sembi Investment Limited as of 31 December 2015, p. 14, **CE-662**; Report and financial statements of Sembi Investment Limited as of 31 December 2016, p. 14, **CE-663**; Report and financial statements of Sembi Investment Limited as of 31 December 2017, p. 14, **CE-664**. *See also* Rand Second WS, ¶¶ 52-59.

512 Counter-Memorial, ¶¶ 480-481

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

Trust.[514] Mr. Jennings always observed such an undertaking, including with respect to all matters relating to BD Agro and the Ahola Family Trust's shareholding in Sembi.[515]

493. Sembi controlled BD Agro by, for example, requiring BD Agro's management to report to Sembi on important issues relating to BD Agro such as progress on farm construction works, the status of BD Agro's herd and crops, and other issues relating to BD Agro[516] and to submit to Sembi for approval material transactions involving BD Agro, such as the sale and acquisition of land and major construction.[517]

494. There is overwhelming evidence showing that Mr. Obradović always acted as a purely nominal owner of the Beneficially Owned Shares and Mr. Rand's agent and that the Claimants beneficially owned the Beneficially Owned Shares and Mr. Rand exercised control over BD Agro.

495. All of the funds for the acquisition of the Beneficially Owned Shares and subsequent investments in BD Agro were secured by Mr. Rand from his long-standing business partners, the Lundin Family.[518] The total amount secured from the Lundins amounted

514 Jennings WS, ¶ 7.

515 Jennings WS, ¶ 11.

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

517 *E.g.* Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, pp. 1-2, **CE-422**.

518 Rand Second WS, ¶¶ 13, 27, 52, 57; Obradović Second WS, ¶¶ 19-20; Azrac WS ¶ 12.

to approximately EUR 13.8 million.[519] Mr. Obradović did not have any funds to finance these Investments.[520]

496. BD Agro's management regularly reported to Mr. Rand, answered his queries and followed his instructions with respect to BD Agro's strategic direction and day-to-day operations, including issues such as conclusion of agreements on sale of milk,[521] sale of crops,[522] sale of eggs,[523] sale of property,[524] investments into mechanization and

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519 Agreement between Mr. Obradović and Sembi, 22 February 2008, Preamble C, **CE-029**; Agreement between Mr. Djura Obradović, the Lundin Family, Mr. William Rand and Sembi, 28 February 2008, **CE-028**; Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, 15 September 2005, **CE-384**; Confirmation of transfer EUR 399,950 from Oil Company to Mr. Obradović, 2 January 2006, **CE-385**; Bank confirmation of transfer of EUR 399,950 from Oil Company to Mr. Obradović, 2 January 2006, **CE-386**; Confirmation of transfer of EUR 100,000 from Oil Company to Mr. Obradović, 20 January 2006, **CE-387**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 1 February 2006, **CE-388**; Confirmation of transfer of EUR 500,000 from Mr. Lundin to Mr. Obradović, 20 February 2006, **CE-389**; Confirmation of transfer of EUR 400,000 from Mr. Lundin to Mr. Obradović, 23 February 2006, **CE-390**; Confirmation of transfer of EUR 5,000 from Mr. Lundin to Marine Drive Holding, 3 March 2006, **CE-391**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 6 March 2006, **CE-392**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 7 April 2006, **CE-393**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 20 April 2006, **CE-394**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 5 May 2006, **CE-395**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović,11 May 2006, **CE-396**; Confirmation of transfer from Longdale Assets Ltd of EUR 50,000 to Mr. Obradović,13 June 2006, **CE-397**; Confirmation of transfer from Longdale Assets Ltd of EUR 10,000 to Marine Drive Holding, 5 July 2006, **CE-398**; Confirmation of transfer from Longdale Assets Ltd of EUR 130,000 to Mr. Obradović, 11 July 2006, **CE-399**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović, 17 July 2006, **CE-400**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 7 August 2006, **CE-401**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović, 28 August 2006, **CE-402**; Confirmation of transfer from Longdale Assets Ltd of EUR 1,200,000 to Mr. Obradović, 2 November 2006, **CE-403**; Confirmation of transfer from Longdale Assets Ltd of EUR 200,000 to Mr. Obradović, 28 December 2006, **CE-404**; Confirmation of transfer of EUR 800,000 from Mr. Lundin to Mr. Obradović, 29 December 2006, **CE-405**; Confirmation of transfer of EUR 250,000 from Mr. Lundin to Mr. Obradović, 5 April 2007, **CE-406**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 4 May 2007, **CE-407**; Confirmation of transfer from Longdale Assets Ltd of EUR 230,000 to Mr. Obradović, 30 May 2007, **CE-408**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 7 June 2007, **CE-409**; Confirmation of transfer from Longdale Assets Ltd of EUR 350,000 to Mr. Obradović, 1 November 2007, **CE-410**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović dated 1 February 2008, **CE-411**.

520 Obradović Second WS, ¶¶ 7, 19-20.

521 *E.g.* Email from BD Agro to W. Rand, 10 January 2008, **CE-568**; Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, **CE-608**.

522 *E.g.* Email from Marine Drive Holdings Inc. to W. Rand, 10 January 2008, **CE-609**.

523 *E.g.* Email from W. Rand to Marine Drive Holdings Inc, 15 February 2006, **CE-610**; Email communication between W. Rand and BD Agro, 26 July 2006, **CE-611**; Email communication between W. Rand and A. Jorga, 10 August 2006, **CE-605**.

524 Email from Marine Drive Holdings Inc. to W. Rand re Sokolac, 10 January 2008, **CE-612**.

machinery,[525] engagement of various consultants and entering into various associations[526] and cooperation with such consultants.[527]

497. BD Agro's management submitted to Mr. Rand for his comments and approval BD Agro's financial reports, cash flow statements and business plans.[528]

498. Mr. Rand was personally heavily involved in the replacement of BD Agro's herd by communicating with the vendors, assisting BD Agro's employees to obtain visas to fly to Canada to personally select the heifers[529] and arranging for the transport of the heifers from Canada to Belgrade.[530] Mr. Rand financed the purchase of the heifers in the amount of approximately EUR 2.2 million.[531]

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525 *E.g.* Email from A. Jorga to W. Rand, 30 June 2006, **CE620**; Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, **CE-608**.

526 Email from L. Jovanović to W. Rand, 18 December 2006, **CE-599**; Email from L. Jovanović to W. Rand, 29 March 2006, **CE-600**; Email from L. Jovanović to W. Rand, 1 June 2006, **CE-601**; Email from Marine Drive Holdings Inc. to W. Rand, 15 December 2006, **CE-602**; Email from Marine Drive Holdings Inc. to W. Rand et al., 25 December 2006, **CE-603**; Email from D. Groves to L. Jovanović and D. Obradović, 1 March 2006, **CE-412**; Email from B. Bogovac to W. Rand, 23 February 2006, **CE-604**; Email communication between W. Rand and A. Jorga, 10 August 2006, **CE-605**.

527 Email from L. Jovanović to W. Rand, 27 February 2006, **CE-613**; Email from L. Jovanović, 1 June 2006, **CE-601**.

528 *E.g.* Email from Marine Drive Holdings Inc. to W. Rand, 23 March 2007, **CE-602**; Email from A. Jorga (BD Agro) to W. Rand et al., 2 November 2006, **CE-623**; Email from A. Jorga (BD Agro) to W. Rand et al., 26 July 2006, **CE-624**; Email from Marine Drive Holdings Inc. to W. Rand, 24 October 2007, **CE-625**; Email from A. Jorga (BD Agro) to W. Rand, 20 October 2006, **CE-626**; Email from Marine Drive Holdings Inc. to W. Rand, 6 July 2007, **CE-627**; Email from Marine Drive Holdings Inc. to W. Rand, 26 November 2007, **CE-628**; Email from Marine Drive Holdings Inc. to W. Rand and P. Bagnara, 29 December 2006, **CE-443**; Email from M. Leposavić (BD Agro) to W. Rand, 9 October 2008, **CE-673**; Email from M. Leposavić (BD Agro) to W. Rand, 28 July 2008, **CE-674**.

529 *E.g.* Email from BD Agro to W. Rand, 10 January 2008, **CE-598**; Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, **CE-608**; Email from Marine Drive Holdings Inc. to W. Rand, 10 January 2008, **CE-609**; Email from W. Rand to Marine Drive Holdings Inc, 15 February 2006, **CE-610**; Email communication between W. Rand and BD Agro, 26 July 2006, **CE-611**; Email communication between W. Rand and A. Jorga, 10 August 2006, **CE-605**; Email from Marine Drive Holdings Inc. to W. Rand re Sokolac, 10 January 2008, **CE-612**; Email from L. Jovanović to W. Rand, 27 February 2006, **CE-613**; Email from L. Jovanović to W. Rand, 1 June 2006, **CE-601**; Email from A. Jorga to W. Rand, 1 August 2006, **CE-614**; Email from A. Jorga to W. Rand, 30 June 2006, **CE-620**; Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, **CE-608**; Email communication between W. Rand and D. Ceramilać, 5 February 2007, **CE-621**. *See also* Rand Second WS, ¶ 66.

530 Email from J. Shore (Willjill Farms), 30 December 2008, **CE-688**; Email form L. Jovanović to W. Rand, 2 April 2008, **CE-684**; Email communication between P. Trudeau, L. Jovanović et al., 23 December 2008, **CE-685**; Email from L. Jovanović to W. Rand, 4 December 2008, **CE-686**; Email from K. Lutz to A. Janičić, 28 February 2008, **CE-687**; Email from P. Trudeau to W. Rand, 19 December 2008, **CE-688**; Email communication between W. Rand and I. Cvetković, 28 February 2008, **CE-089**.

531 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

499. The members of BD Agro's Board of Directors and BD Agro's management were selected, or approved by, Mr. Rand.[532] Mr. Rand also decided on the replacement of Mr. Jovanović, BD Agro's long-term CEO, by Mr. Markićević.[533]

500. When Mr. Rand requested Mr. Obradović to resign from the position of the Chairman of the Managing Board, Mr. Obradović complied and was replaced by Mr. Markićevic.[534]

501. Mr. Rand's beneficial ownership of BD Agro was widely known. The Serbian officials who were specifically informed of Mr. Rand's beneficial ownership included, without limitation, Mr. Predrag Bubalo, the Minister of Economy in 2004–2007,[535] Mr. Saša Radulović, the Minister of Economy in 2013–2014,[536] Mr. Ljubiša Jovanović, the Deputy Minister of Economy until October 2005, Mr. Dragan Stevanović, the State Secretary at the Ministry of Economy in 2013–2014,[537] and Ms. Neda Galić, an advisor at the Ministry of Economy in approximately 2013–2015.[538]

502. Mr. Rand's beneficial ownership was also known to Mr. Mladjan Dinkić, the Minister of Finance in 2004–2006 and then Deputy Prime Minister in 2007–2011.[539]

503. In the Privatization Agency, the officials who were specifically informed of Mr. Rand's beneficial ownership included, without limitation, Ms. Marijana Radovanović, Ms.

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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**.

532 Rand First WS, ¶¶ 19, 39, 42-43; Obradović First WS, ¶ 16; Email from W. Rand to L. Jovanović et al., **CE-428**;

533 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Aro, 23 August 2017, **CE-72**.

534 Rand First WS, ¶ 45, Obradović First WS, ¶¶ 25-26.

535 *E.g.* Letter from W. Rand to P. Bubalo, 1 November 2004, **CE-581**. *See also* Rand Second WS, ¶ 91.

536 Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, pp. 1-3, **CE-769**.

537 Broshko First WS, ¶ 28; Broshko Second WS, ¶ 39.

538 Broshko First WS, ¶ 28; Broshko Second WS, ¶ 39.

539 Rand Second WS, ¶ 8.

Julijana Vučković, Ms. Tanja Mitrović, Ms. Mira Kostić, Ms. Katarina Misailović, who were all dealing with BD Agro in years 2013 – 2015.[540]

504. In 2014, Mr. Rand's representatives met with and unsuccessfully solicited the help of SIEPA. They explained Mr. Rand's beneficial ownership to SIEPA's director and deputy director, Messrs. Vladimir Milenković[541] and Goran Džafič.[542]

505. Other important officials were specifically informed of Mr. Rand's beneficial ownership in the course of negotiations of the pre-pack reorganization plan and during Mr. Rand's final personal attempt to avert the expropriation of the Beneficially Owned Shares. These included Mr. Ivica Kojić, the then Chief of Staff to the Prime Minister of Serbia,[543] and Mr. Ristović, expert advisor to the Deposit Insurance Agency in charge of Nova Agrobanka.[544]

506. Mr. Rand's beneficial ownership was general knowledge in the Serbian business community. For example, it was known to the representatives of the Canadian Embassy in Serbia,[545] the EBRD,[546] and to BD Agro's main creditors, Nova Agrobanka and Banca Intesa.[547] It was known to BD Agro's business partners and, most importantly, to BD Agro's management and employees.[548]

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540 *See* Minutes of the meeting at the Privatization Agency, 30 January 2014 (emphasis added), **RE-028**. In a letter to Mr. Markićević from 21 August 2014, the Privatization Agency confirmed its acknowledgment of Mr. Rand's beneficial ownership as follows: "*At the meeting, you introduced Erinn Broshko, director of "Rand Investments" ltd. Vancouver, Canada, company owned by William Rand, and you stated that that his means were used to finance the entire process of privatization of "BD Agro" Dobanovci. Erinn Broshko noted that he presented the company, which had given the means invested in [BD Agro], and that such practice was common in Canada. [Mr. Broshko] said that William Rand was not pleased by the work and management of the person they had entrusted purchase of the company and that he was interested in fast completion of the assignment process.*" Letter from the Privatization Agency to BD Agro, 21 August 2014, p. 2, **CE-317**.

541 Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, p. 1, **CE-769**.

542 Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, p. 1, **CE-769**.

543 Rand Second WS, ¶ 98.

544 Markićević Third WS, ¶ 27; Email from Mr. Markićević to Mr. Ristović, 22 April 2014, **CE-289**.

545 Email communication between W. Rand and J. Morrison, 9 June 2010, **CE-705**; Broshko Second WS, ¶ 29.

546 Email communication between W. Rand and A. King (EBRD), 10 June 2008, **CE-696**. *See also* Rand Second WS, ¶ 45.

547 *E.g.* Email from K. Lutz to P. Djurišić dated 2 June 2013, attaching letter from Mr. Rand, **CE-295**. *See also* Markićević Second Witness Statement, ¶ 51; Markićević Third WS, ¶ 35.

548 Email from A. Janičić to W. Rand, 18 July 2013, **CE-694**.

507. Serbia cannot seriously contend that Mr. Rand's beneficial ownership and control did not exist, or that they were kept secret.

### b. The MDH Agreement was valid and enforceable

508. On 19 September 2005, MDH and Mr. Obradović entered into the MDH Agreement the subject matter of which was (a) creation of beneficial ownership of MDH over the shares of BD Agro, (b) establishing of MDH's control over BD Agro and (c) a call option to be exercised by MDH for the shares in BD Agro, including a specification of a transfer method of such shares from Mr. Obradović that would result from exercise of the call option by MDH.[549]

509. As shown above, while the MDH Agreement did not contain an express provision on governing law, the Claimants' experts on Serbian private international law and British Columbia law both conclude that the MDH Agreement is governed by British Columbia law.[550]

510. Article 1 of the MDH Agreement granted MDH a call option "*to purchase all of [Mr. Obradović's] interest in [BD Agro], both debt and shares, including any shares of [BD Agro] acquired by [Mr. Obradović] after the acquisition of the shares from the Government and up to the date of the expiry of the option […]*".[551]

511. Article 2 of the MDH Agreement contemplated that, upon MDH's exercise of the call option, Mr. Obradović would transfer the Beneficially Owned Shares to MDH by endorsing share certificates.[552] Such a method of transfer of shares could not be performed under Serbian law because shares of Serbian joint stock companies, including BD Agro, may only be issued in a dematerialized form. Nevertheless, as Mr. Deane explains, "*Mr. Obradović would not be released from any of his contractual obligations under the MDH Agreement merely because under Serbian law, Article 2 could not be complied with in the specific manner contemplated*."[553] Accordingly, had MDH exercised the call option, Mr. Obradović would have been required to perform his

549 Deane ER, ¶¶ 30, 33.

550 Grušić ER, ¶¶ 10-17; Deane ER, ¶¶ 10-18.

551 MDH Agreement, 19 September 2005, Art. 2, **CE-015**.

552 MDH Agreement, 19 September 2005, Art. 2, **CE-015**.

553 Deane ER, ¶ 96.

obligation to transfer the legal title to the Beneficially Owned Shares in any manner compliant with Serbian law.[554]

512. Ms. Tomić Brkušanin explains that Serbian law allows for the following three methods by which the transfer of the Beneficially Owned Shares based on the MDH Agreement could have been effectuated:

a. a block trade transaction on the stock exchange;

b. an in-kind contribution of the BD Agro shares to a limited liability company and a subsequent transfer of the limited liability company to MDH; or

c. after 3 January 2008, delisting BD Agro from the BSE and subsequently transferring the shares outside of the BSE.[555]

513. The MDH Agreement also granted to MDH rights that were not contingent upon MDH's exercise of the call option.

514. In Article 4 and 5 of the MDH Agreement, Mr. Obradović undertook to: (*i*) hold the Beneficially Owned Shares "at the risk of MDH"; (*ii*) not encumber, pledge, sell, option or alienate the Beneficially Owned Shares; (*iii*) not encumber, pledge, sell, option or alienate the Beneficially Owned Shares; (*iv*) cause the board of directors of BD Agro to consist of MDH's nominees; and (*v*) follow MDH's instructions regarding the management of BD Agro.[556]

515. Such rights, as observed by Mr. Deane, are "*the quintessential rights of the controlling shareholder of a corporation in British Columbia*."[557] Mr. Deane concludes that under British Columbia law, MDH became the beneficial owner of these rights, and accordingly the beneficial owner of the Beneficially Owned Shares themselves, as soon as Mr. Obradović acquired them and independent of the call option.[558] From his acquisition of the Beneficially Owned Shares on 4 October 2005, until the conclusion of the Sembi Agreement on 22 February 2008, Mr. Obradović was a constructive trustee

554 Deane ER, ¶ 96.

555 Tomić Brkušanin ER, ¶ 25.

556 MDH Agreement, 19 September 2005, Arts. 4-5, **CE-015**.

557 Deane ER, ¶ 91.

558 Deane ER, ¶ 91.

who, as a fiduciary, was required to exercise all rights in respect of the Beneficially Owned Shares for the sole benefit of MDH.[559]

516. Serbia levies several objections against the validity and effects of the MDH Agreement.

517. *First*, Serbia claims[560] that by entering into the MDH Agreement, Mr. Obradović violated article 5.3.1 of the Privatization Agreement prohibiting Mr. Obradović to "*sell, assign, or otherwise alienate shares in the period of 2 years as of the day of the conclusion of the* [Privatization Agreement]."[561] This provision, however, would have only come into play had MDH exercised the call option within two years after the Privatization Agreement's conclusion. It is undisputed that MDH never exercised the call option.

518. Serbia's objection thus appears to be based on a premise that Mr. Obradović's transfer of beneficial ownership to MDH somehow qualifies as an alienation of shares. It does not. As explained by Mr. Milošević, under Serbian legal theory, alienation denotes a change of legal owner.[562] The conclusion of the MDH Agreement did not alter the status of Mr. Obradović as the sole legal (registered) owner of the Beneficially Owned Shares. Serbia's objection thus fails.

519. *Second*, Serbia asserts that without exercising the call option, MDH could not acquire neither nominal, nor beneficial ownership of the Beneficially Owned Shares.[563] This argument is purportedly based on the language of Article 2 of the MDH Agreement, which stipulates that the share certificates delivered by Mr. Obradović to MDH "*shall be in the form sufficient to enable [MDH] to become the registered and beneficial owner of the [Beneficially Owned Shares]*."[564] This provision, however, does not contradict Mr. Obradović's obligation to transfer beneficial ownership to MDH under Article 4 and 5 immediately upon acquiring the Beneficially Owned Shares, even without MDH's exercise of the call option.

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559 Deane ER, ¶ 18.

560 Counter-Memorial, ¶ 248.

561 Privatization Agreement, Art. 5.3.1, **CE-017**.

562 Milošević Second ER, ¶ 188.

563 Counter-Memorial, ¶ 230.

564 MDH Agreement, 19 September 2005, Art. 2, **CE-015**.

520. *Third*, Serbia raises an argument that lies in the very heart of its entire case against the Claimants' beneficial ownership: The Claimants were allegedly never the beneficial owners of the Beneficially Owned Shares because neither MDH nor Sembi was ever registered in the Serbian Central Securities Registry as an owner of the Beneficially Owned Shares.[565]

521. In making that argument, Serbia relies on the following provision of Serbian law which describes the mechanics of the acquisition of legal title to shares under Serbian law:

a. Article 207 of the Law on Companies which states that "*a shareholder as against the joint stock company and third persons is the persons entered in to the Central Security Registry in accordance with the law regulating market of securities*."[566]

b. Article 11(2) of the 2002 Law on Market in Securities ("**2002 Securities Law**") which provides that "*[l]egal title holders of securities shall acquire the pertaining rights by entering the securities into their account held with the Central Securities Registry*."[567]

c. Article 11(4) of the 2002 Securities Law which states that "[t]*ransfer of rights pertaining to securities shall be conducted by transferring the securities into the account of a new owner in the Central Securities*."[568]

d. Article 11(5) of the 2002 Securities Law which provides: "[t]*hird party rights arising from securities shall be acquired and transferred by entering such rights and their beneficiaries into legal title holders' securities account held with the Central Securities Registry*."[569]

522. According to Serbia, these provisions establish the rule that the person registered as owner in the Central Security Registry is the "*legal title holder*."[570] This rule, however, evidently only applies to transfer and acquisition of legal title to shares and other *in rem* rights to shares. The Claimants never asserted that they have acquired any such rights

565 Counter-Memorial, ¶ 238, ¶ 240.

566 2004 Law on Companies, Article 207(1), **RE-096**.

567 2002 Law on Market in Securities and other Financial Instruments, Art. 11 (2), **RE-119**.

568 2002 Law on Market in Securities and other Financial Instruments, Art. 11 (4), **RE-119**.

569 2002 Law on Market in Securities and other Financial Instruments, Art. 11 (4), **RE-119**.

570 Counter-Memorial, ¶ 238.

under Serbian law. The cited provisions do not purport to regulate any contractual arrangements relating to exercise of voting rights attached to the registered shares, composition of board of directors or transfer of economic benefits stemming from the shares to other shareholders or third parties. In other words, the Central Security Registry only registers nominal owners, and not beneficial owners.[571]

523. The existence of MDH's, and by extension Mr. Rand's, beneficial ownership of the Beneficially Owned Shares and control over BD Agro was thus not subject to any registration in the Central Securities Registry. This, however, does not mean that such arrangements would not be legal under Serbian law. Nor does it support Serbia's argument that Serbian law does not recognize beneficial ownership. Quite to the contrary, as explained by Mr. Milošević, "*Serbian law does recognize the concept of beneficial ownership and imposes certain legal obligations on the basis of beneficial ownership and rights that form a part of or stem from beneficial ownership*."[572]

524. The term "beneficial owner" was introduced into Serbian law in 2011, with the Article 2 (34) Law on Capital Markets Article 2 (34) expressly defining beneficial owner as:

> [A] person who has the benefits of ownership of a financial instrument either entirely or partially, including the power to direct the voting or disposition of the financial instrument or to receive the economic benefits of ownership of that financial instrument, and yet does not nominally own the financial instrument itself.[573]

525. Similarly, Article 3 of the 2018 Law on Centralized Records of Beneficial Owners ("**Law on Beneficial Owners**") defines beneficial owners as:

> (1) Individual which directly or indirectly holds 25% or more shares, stake voting rights or other rights, based on which he/she participates in managing of the Registered subject, and/or participates in the capital of the Registered subject with 25% or more shares;
>
> (2) Individual who directly or indirectly holds prevailing interest on business activities and decision making process;
>
> (3) Individual who indirectly secured or secures the means for the Registered subject and based on that has significant impact on decision

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571 Milošević Second ER, ¶ 173.

572 Milošević Second ER, ¶ 174.

573 2011 Law on Capital Markets, Arts. 2(33) and (34), **CE-728**.

> making by the management bodies of the Registered subject when deciding on financing and business;
>
> (4) Individual who is the owner, trustee, protector, beneficiary if appointed, as well as individual with dominant position in trust management, and/or in another entity of foreign law;
>
> (5) Individual registered for representation of cooperatives, associations, foundations, endowments and institutions if the person authorized for representation has not registered other individual as real owner.[574]

526. The foregoing definitions are very broad. They cover, *inter alia*, beneficial ownership of a beneficiary of a trust or any other person under foreign law or a natural person who has a dominant influence over the management of business or decision-making of a company. The fact—on which Serbia relies so prominently—that the Claimants were never registered in the Central Securities Registry only proves the uncontested fact that they have never acquired *nominal* ownership of the Beneficially Owned Shares. It is wholly irrelevant to the existence of the Claimants' *beneficial* ownership.

527. *Fourth*, Serbia alleges that MDH was required under Article 67 of the 2002 Securities Law to issue a takeover bid with respect to BD Agro's remaining shareholders.[575] However, as Ms. Tomić Brkušanin explains, the takeover rules under the 2002 Securities Law only applied to transfer of *nominal* ownership in a joint stock company.[576] The conclusion of the MDH Agreement did not cause transfer of nominal ownership to any shares and thus did not trigger any takeover-bid obligation.[577]

528. *Fifth*, Serbia argues that the call option could have never been exercised under Serbian law due to its alleged conflict with the requirement under Article 52 of 2002 Securities Law that "*securities shall be traded only through a public offer on an organized market*."[578]

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574 Law on Centralized Records of Beneficial Owners, Art. 3, **CE-729**.

575 Counter-Memorial, ¶ 236.

576 Tomić Brkušanin ER, ¶ 88.

577 Tomić Brkušanin ER, ¶ 38.

578 Tomić Brkušanin ER, ¶ 21.

529. However, as confirmed by Ms. Tomić Brkušanin, Serbian law does not prevent shareholders in listed privatized joint stock companies from selling their shares to a specific buyer and on negotiated terms.[579]

530. As already explained, the transfer of shares under such transactions could be lawfully effectuated by: (*i*) a block trade transaction on the BSE; (*ii*) an in-kind contribution of the shares into a LLC and subsequent transfer of the shares of the LLC to the buyer; or (*iii*) after 3 January 2008, by delisting the shares and subsequently transferring them to the buyer outside of the BSE. None of these methods of transfer would violate Article 52 of 2002 Securities Law, or any other provision of Serbian law.

531. Serbia's purported reliance on the Serbian Supreme Court's decision Prev. 438/2007[580] is equally of no avail. In that decision, the Supreme Court considered a share purchase agreement null and void not because it was *agreed* outside the BSE, but because it provided for the actual *transfer* of shares in a public joint stock company outside the BSE. This is evident from, among other things the Supreme Court's reasoning that the agreements violated Articles 59 and 73 of the Law on Privatization, which according to the Supreme Court "*prescribe that transfer of [shares] acquired on the basis of regulations on privatization can be effected only through the stock exchange*."[581]

532. Serbian law permits option agreements on shares and there is nothing in the Supreme Court's decision that would suggest otherwise.[582] Had MDH exercised the call option, the transfer of shares could have been effectuated by any of the three methods described above.

533. Moreover, Serbia's assertion that the MDH Agreement is null and void under Serbian law is incorrect. The MDH Agreement was not governed by Serbian law, but rather by British Columbia law.[583] Mr. Deane confirms that—despite the fact that the method of transfer of shares stipulated under Article 2 of the MDH Agreement could not be effectuated under Serbian law—the MDH Agreement is perfectly valid under the laws

579 Tomić Brkušanin ER, ¶ 25.

580 Decision of the Supreme Court of Serbia, Prev. 438/2007, 19 March 2008, **RE-002**.

581 Decision of the Supreme Court of Serbia, Prev. 438/2007, 19 March 2008, **RE-002**.

582 Tomić Brkušanin ER, ¶ 75.

583 Grušić ER, ¶¶ 10-17; Deane ER, ¶¶ 10-17.

of British Columbia.[584] Mr. Grušić confirms that under Serbian private international law, the validity of a contract is to be determined under its governing law.[585] Accordingly, even if any provision of the MDH Agreement conflicted with the mandatory provisions of Serbian law, this would still have no bearing on the validity of the MDH Agreement.

534. In any event, even if the MDH Agreement were governed by Serbian law (*quod non*), and even if Serbian law rendered the call option null and void (*quod non*), this would still fail to affect the validity of the provisions of the MDH Agreement establishing MDH's beneficial ownership over the Beneficially Owned Share. This is because under Serbian law, the aspects of the MDH Agreement establishing MDH's beneficial ownership and control are severable from the call option.[586]

535. Accordingly, the MDH Agreement is valid and enforceable under British Columbia law and would be considered as such under Serbian law.

### c. The Sembi Agreement is valid and enforceable

536. Under the Sembi Agreement, Sembi assumed all of Mr. Obradović's obligations, including any payments owing to the Privatization Agency and the repayment of loans provided by the Lundins.[587] In consideration thereof, Mr. Obradović agreed to transfer to Sembi "*all his right, title and interest in and to*" the Privatization Agreement and further to "*sign any such documents and do all such things as may be necessary to effect the transfer to [Sembi] of the [Privatization Agreement] together with any other assets whatsoever held by Mr. Obradović which are related to the business of BD Agro*."[588]

537. The "*other assets*" to which this provision refers comprised, *inter alia*, the Beneficially Owned Shares and shareholder's loans that Mr. Obradović had provided to BD Agro.

538. The Sembi Agreement contains an express choice of law in favor of Cyprus law.[589] Mr. Georgiades confirms that Cyprus law gives effect to the parties' choice of law and that

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584 Deane ER, ¶ 17.

585 Grušić ER, ¶ 44.

586 Tomić Brkušanin ER, ¶ 59.

587 Agreement between D. Obradović and Sembi, 22 February 2008, **CE-029**.

588 Agreement between D. Obradović and Sembi, 22 February 2008, Art. 4, **CE-029**.

589 Agreement between D. Obradović and Sembi, 22 February 2008, Art. 9, **CE-029**.

the mutual obligations between Mr. Obradović and Sembi under the Sembi Agreement, as well as the validity of the Sembi Agreement, are therefore governed by Cyprus law.[590] Mr. Grušić confirms this conclusion from the perspective of Serbian private international law.[591]

539. Mr. Georgiades explains that the effect of the Sembi Agreement—and specifically Mr. Obradović's obligation to transfer to Sembi "*all his right, title and interest in and to*" the Privatization Agreement—is twofold.

540. *First*, the rights and assets which could be transferred without Mr. Obradović signing additional documents or without an approval of third parties were transferred to Sembi immediately upon the conclusion of the Sembi Agreement.[592] The Sembi Agreement thus transferred on 22 February 2008 to Sembi claims for money against BD Agro under the shareholder's loans that Mr. Obradović had provided to BD Agro.

541. *Second*, with respect to those rights and assets the transfer of which required additional documents to be signed or a third party to consent—as envisaged by Article 4 requiring Mr. Obradović to "*sign any such documents and do all such things as may be necessary to effect the transfer*"—the Sembi Agreement transferred to Sembi equitable title to such rights. This was the case with respect to the assignment of the Privatization Agreement and transfer of the Beneficially Owned Shares. This is because under Article 41ž of the 2001 Law on Privatization, the assignment of the Privatization Agreement required prior approval of the Privatization Agreement.[593] Such an approval was never granted by the Privatization Agency, and the assignment of the Privatization Agreement and the Beneficially Owned Shares was thus never effective vis-à-vis the Privatization Agency, or BD Agro. Nevertheless, under Cyprus law, a restriction on assignment contained in the original contract—here the Privatization Agreement—does not invalidate the assignment as between the assignor and assignee.[594] Instead, the assignment is fully effective between them in equity. Such an assignment creates a constructive trust

590 Georgiades Second ER, ¶ 3.6.

591 Grušić ER, ¶ 115.

592 Georgiades Second ER, ¶ 3.13.

593 2002 Law on Privatization, Art. 41ž, **CE-220**.

594 Georgiades Second ER, ¶ 3.19.

relationship between the assignor—who holds such assets in trust—and the assignee, who is the beneficiary of the right vis-à-vis the assignor.[595]

542. Accordingly, the Sembi Agreement transferred to Sembi the beneficial (equitable) title to the Privatization Agreement and the Beneficially Owned Shares.

543. Like with the MDH Agreement, and on the same grounds, Serbia argues that the Sembi Agreement is null and void under Serbian law. These objections fail for the same reasons for which they failed with respect to the MDH Agreement. In addition, Serbia also claims that had the MDH Agreement transferred beneficial ownership to MDH, Mr. Obradović would no longer have any right of beneficial ownership to transfer to Sembi.[596] However, both Mr. Obradović and Mr. Rand testify that the Sembi Agreement was intended to supersede and replace the MDH Agreement.[597] As MDH's sole owner, Mr. Rand was entitled to terminate the MDH Agreement and replace it with the Sembi Agreement. The fact that the MDH Agreement was not expressly terminated bears no relevance. Mr. Georgiades concludes that under Cyprus law, the existence of the MDH Agreement did not prevent the transfer of beneficial ownership to Sembi under the Sembi Agreement.[598]

544. Serbia's argument that the Sembi Agreement is null and void due to an alleged conflict with the mandatory provisions of Serbian law is groundless. Even if the Sembi Agreement conflicted with a mandatory provision of Serbian law (*quod non*), the issue of the validity of the Sembi Agreement and mutual obligations between Mr. Obradović and Sembi would still fall to be assessed under its governing law, that being the Cyprus law. And as concluded by Mr. Georgiades, the Sembi Agreement is valid and Sembi's beneficial ownership rights are enforceable against Mr. Obradović.[599]

#### d. The Canadian Claimants' *ownership* of the Beneficially Owned Shares is protected under the Canada-Serbia BIT

545. As shown above, the Claimants acquired beneficial ownership in the Beneficially Owned Shares by implementing the 2005 oral agreement between Mr. Rand and Mr.

595 Georgiades Second ER, ¶ 3.20.

596 Counter-Memorial, ¶¶ 332-333.

597 Obradović Second WS, ¶ 42; Rand Second WS, ¶¶ 55-56.

598 Georgiades Second ER, ¶ 3.22.

599 Georgiades Second ER, ¶ 3.11.

Obradović,[600] the MDH Agreement and the Sembi Agreement and consistently acted as the beneficial owners of the Beneficially Owned Shares, while Mr. Obradović acted as a nominal owner and the Claimants' agent.[601]

546. The Canada-Serbia BIT protects such beneficial ownership. It is a well-established principle of public international law that where ownership title is split between a nominal owner and a beneficial owner, the latter is entitled to prosecute its claims before an international tribunal.[602]

547. As stated by Bederman:

> International law authorities have agreed that the real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner. […] *The notion that beneficial (and not nominal) owner of property is the real party-in-interest before an international court may be justly considered as a general principle of international law*.[603]

548. Jennings and Watts similarly observe that:

> Where a claim is made in respect of property which is beneficially owned by one person, although the nominal title is vested in another, and they are of different nationalities, it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim.[604]

549. The protection of beneficial ownership was recently confirmed by both the tribunal and the Annulment Committee in *Occidental Petroleum v. Ecuador*. The dispute concerned a Participation Contract entered into in 1999 between Occidental Exploration and Production Company ("**OEPC**") and Petroecuador, a national oil company of Ecuador. The Participation Contracted granted to OEPC the right to carry out hydrocarbon exploration and exploitation in the area of the Ecuadorian Amazon known as "Block

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600 Rand First WS, ¶ 17, ¶ 19; Obradović First WS, ¶¶ 7, 13.

601 Rand Second WS, ¶ 47.

602 *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-004**.

603 David J. Bederman, "*Beneficial Ownership of international Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 936 (emphasis added), **CLA-078**.

604 Robert Jennings and Arthur Watts eds., *Oppenheim's International Law – Volume 1*, 9th ed., Oxford University Press 2008, p. 514, **CLA-079**.

15". The Participation Contract was exclusive and required that "*the transfer of a [Participation Contract] or the assignment to third parties of rights derived from [Participation Contract] shall be null and void and shall have no validity whatsoever if there is no prior authorization from the Ministry of Energy and Mines, without prejudice to the declaration of caducidad […].*"[605]

550. In 2000, OEPC entered into a Farmout Agreement with Alberta Energy Corporation Ltd. ("**AEC**"), a Bermudan subsidiary of EnCana Corporation. The Farmout Agreement, envisaged a transfer from OEPC to AEC of 40% interest in Farmout Property, which included the rights under the Participation Contract as well as "*all wells, equipment, ancillary pipelines, facilities and personal property situated in Block 15*." The division of rights and obligation of the parties to the Farmout Agreement was divided as follows:

> - AEC, who had paid the consideration for acquiring ownership, would be the "beneficial owner" of its portion of the Farmout Property;
>
> - While OEPC would be acting as a "nominee" for AEC, appearing as formal owner vis-à-vis third parties (including vis-à-vis the Ecuadorian public administration).
>
> *Ownership title was thus divided between a nominee (OEPC, who held legal title on behalf of the beneficial owner) and a beneficial owner (AEC who bore the costs, profits, risks and rewards of ownership, whose instructions the nominee agreed to follow and who thus controlled its share of the investment).*[606]

551. As a result of OEPC's unauthorized transfer of the 40% interest to AEC, Ecuador declared the Participation Contract terminated. The termination was justified under the express terms of the Participation Agreement, which allowed for termination "*due to a transfer of rights and obligations of the Participation Contract without prior authorization*." Nonetheless, the tribunal considered the termination disproportionate and violative of the US-Ecuador BIT.[607] The tribunal explained that had the Farmout Agreement effectively transferred the 40% interest to AEC, the tribunal would not

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605 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 618, **CLA-075**.

606 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, ¶¶ 202-203, **CLA-005**.

607 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 452, **CLA-075**.

compensate OEPC for the same. This is because "*under international law, the owner of a beneficial interest in contractual rights [i.e. AEC] is able to bring its own claim for compensation*."[608]

552. The tribunal, however, considered the transfer of rights under the Farmout Agreement to be legally inexistent and, thus, awarded to Occidental damages for 100% of its interest in the Participation Agreement.[609]

553. The ICSID Annulment Committee, however, considered that Farmout Agreement effective, until declared null and void by a competent court.[610] Because the nullity was never so declared, the Annulment Committee considered the transfer of 40% interest to AEC effective and annulled the decision of the tribunal to compensate OEPC for such 40% interest.[611] The Annulment Committee then clearly explained that while OEPC—as a nominal owner—is not entitled to be compensated for the 40% interest in the Participation Contract, AEC—as beneficial owner—is protected under international law. This is because 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

608 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 614, fn. 77, **CLA-075**.

609 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 658, **CLA-075**.

610 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, ¶ 241, ¶ 255, **CLA-005**.

611 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, ¶ 270, **CLA-005**.

> from interferences by host States. *Such investors will enjoy the protection granted under the treaties which benefit their nationality.*[612]

554. The *Occidental* tribunal and Annulment Committee thus both confirmed that protection of beneficial ownership—deeply rooted in public international law—equally applies in the context of investment treaty arbitration. The Claimants are entitled to benefit from such a protection. It is obvious that the Claimants, like AEC in Occidental, were the ones who "*bore the costs, profits, risks and rewards of ownership, whose instructions the nominee agreed to follow and who thus controlled"* the investment. The conclusion that "ownership" includes "beneficial ownership" should apply stronger here than in *Occidental*.

555. *First*, in *Occidental*, the undisclosed and unapproved transfer of AEC's beneficial ownership constituted a ground for termination under the express terms of Participation Agreement. Nevertheless, such beneficial ownership was still deemed worthy of protection under international law. Conversely, the Claimants' beneficial ownership was disclosed not only to Serbia, but also to BD Agro's management, employees and existing and prospective business partners and did not violate any provision of the Privatization Agreement.[613]

556. *Second*, the Canada-Serbia BIT—which, as Serbia itself acknowledges, is "evidently" based on the Canada Model BIT—contemplates the protection of beneficial ownership. For example, the definition of "enterprise" in Article 1 includes trusts. An enterprise, and therefore also a trust, constitutes an investment susceptible of being "owned" by an investor of the other Party. The beneficiaries of the trust however, do not have nominal ownership over the trust. Instead, they only have a *beneficial* ownership over the trust's assets. It is thus implicit in the Canada-Serbia BIT that the term "owned" in Article 1—which describes the requisite nexus between "investor" and "investment"—includes beneficial ownership.

557. Serbia does not dispute that beneficial ownership is protected under public international law in general, or the Treaties in particular. Instead, it raises a plethora of irrelevant

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612 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, ¶¶ 262 and 272, **CLA-005**.

613 *See Supra* § III.A.1.a.

arguments, largely premised on an incorrect assumption that the MDH Agreement and Sembi Agreement are null and void under Serbian law (which does not govern them) and, *thus,* do not grant to the Claimants any right of ownership and control recognizable under international law (which is a *non sequitur* and, in any event, wrong).

558. *First*, Serbia focuses primarily on the alleged nullity of the MDH Agreement. However, for the purposes of the Tribunal's jurisdiction, the Claimants only have to demonstrate their ownership or control over the Beneficially Owned Shares at the date of the alleged breach of the Canada-Serbia BIT.[614] Even though Serbia attempts to avoid the Tribunal's jurisdiction *ratione temporis* by introducing the novel concept of "*gist of breach*", Serbia itself identifies as such "gist" the Privatization Agency's notice of 1 March 2011.[615] This is three years *after* the conclusion of the Sembi Agreement, which removed MDH from the Claimants' beneficial ownership structure. Accordingly, even if the MDH Agreement was null and void (*quod non*), this would not deprive the Claimants of their standing. In fact, the only consequence of the alleged nullity of the MDH Agreement would be to render moot—as already refuted—Serbia's argument that Mr. Obradović was not in a position to transfer the beneficial ownership to Sembi because he had already transferred the same beneficial ownership to MDH.[616]

559. *Second*, Serbia's objections are based on straw-man arguments. The basis of the Claimants' standing in this arbitration is not their *nominal* or registered ownership of the Beneficially Owned Shares, but their *beneficial* ownership of the same. The Claimants made this distinction absolutely clear, hence the abbreviation "Beneficially Owned Shares." Serbia understands this perfectly well, and correctly observes that "*the notion [of beneficial ownership] applies when the legal title is split between "a nominee and a beneficial owner*."[617]

560. Nonetheless, Serbia chose to ignore this fundamental distinction, and repeats *ad nauseam* the undisputed facts that the Claimants never became a party to the Privatization Agreement, never acquired *nominal* ownership of the Beneficially Owned

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614 See e.g. *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award, 15 September 2011, ¶ 332, **RLA-006**.

615 Counter-Memorial, ¶ 397.

616 Counter-Memorial, ¶¶ 332-333.

617 Counter-Memorial, ¶ 335.

Shares and were never registered as the shareholders of BD Agro in the Central Securities Registry.[618] The Claimants, however, never claimed otherwise.[619]

561. The Claimants' beneficial ownership is not based on the acquisition of any right *in rem* to the Beneficially Owned Shares under Serbian law, which would be subject to the rules of Serbian law on transfer of nominal and registered ownership of shares. Indeed, as Bederman observes, "*beneficial ownership, by definition, implicates the standing of a person who does not have legal title to property*."[620]

562. The Claimants' beneficial ownership stems from the 2005 oral agreement between Mr. Obradović and Mr. Rand, the MDH Agreement and the Sembi Agreement. Both the MDH Agreement and the Sembi Agreement created a trust relationship with respect to the Beneficially Owned Shares as between Mr. Obradović (as the trustee) and MDH and Sembi, respectively (as the beneficiaries). Under British Columbia law and Cyprus law, a trust relationship combines the elements of *in personam* and proprietary rights.[621] The Sembi Agreement gave Sembi the right to compel Mr. Obradović not only to act with respect to the Beneficially Owned Shares as instructed by Sembi, but also to protect the Beneficially Owned Shares against third parties' interference.[622]

563. Nevertheless, the protection of the Claimants' beneficial ownership does not rest upon the recognition of such *proprietary* aspects of the Claimants' beneficial ownership under Serbian law. Nor does it hinge on the enforceability of the Claimants' beneficial ownership against BD Agro or against the Privatization Agency. Instead, it only depends on whether the Claimants' beneficial ownership rights are enforceable against Mr. Obradović under the proper law governing their relationship, *i.e.* British Columbia law and Cyprus law, respectively. There is no requirement under international law that the bundle of rights creating beneficial ownership be enforceable against anyone other

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618 *E.g.* Counter-Memorial, ¶¶ 233-240, 328-330, 337-340.

619 Due to the Privatization Agency's unlawful refusal to release the pledge over the Beneficially Owned Shares or to allow for the assignment of the Privatization Agreement, the Claimants were prevented from "uniting" the ownership title to the Beneficially Owned Shares. Accordingly, since the conclusion of the Privatization Agreement until the seizure of the Beneficially Owned Shares on 21 October 2015, the ownership title remained split between Mr. Obradović, the nominal and registered owner, and the Claimants, the beneficial owners.

620 David J. Bederman, "*Beneficial Ownership of International Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 935, **CLA-078**.

621 Deane ER, ¶¶ 100-101; Georgiades Second ER, ¶¶ 3.14-3.16.

622 Georgiades Second ER, ¶ 3.16.

than the nominal owner. This conclusion is apparent from *Occidental*—where AEC clearly did not have any rights enforceable against Petroecudaor or Ecuador—and it was expressly articulated in *Saghi v. Iran*.[623]

564. In *Saghi,* the claimants asserted their standing before the Iran-U.S. Claims Tribunal ("**IUSCT**") based on beneficial ownership of shares in an Iranian company, Novzohour Paper Industries ("**NPI**"). The shares were nominally held by—and registered in the name of—NPI's employees, but held by them for the benefit of the claimants. Iran argued that Iranian law does not allow for beneficial ownership because Article 40 of the Commercial Code of Iran required that "*the transfer of registered shares must be entered in the share register of the company*." The IUSCT, however, dismissed Iran's objection, holding that:

> *"The Respondent has argued that Article 40 of the Commercial Code of Iran bars the alleged beneficial ownership. However, the issue here is not the validity vel non under Iranian law of beneficial ownership interests vis-a-vis the company or third parties. Rather, it is whether the Government of Iran is responsible, under international law, to beneficial owners for "expropriations and other measures affecting property rights".*
>
> The Tribunal's awards have recognized that beneficial ownership is both a method of exercising control over property and a compensable property interest in its own right. […] [I]t is the nationality of the beneficial owner of the claim, rather than that of the nominal owner, that determines the nationality of the claim. As the United States Foreign Claims Settlement Commission put it in Claim of American Security & Trust Co., "*the national character of a claim must be tested by the nationality of the individual holding a beneficial interest therein rather than by the nationality of the nominal or record holder of the claim*."[624]

565. Without much explanation, Serbia relies on an excerpt from *Anglo-Adriatic Group v. Albania* for the contrary proposition that, to be protected under international law, beneficial ownership has to be registered under national law.[625] Serbia's reliance on this case casts immediate doubts. The *Anglo-Adriatic* tribunal was presided by Mr. Fernández-Armesto and featured Professor Stern, both of whom endorsed in *Occidental*

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623 *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran*, IUSCT Case No. 298, Award, ¶¶ 25-26, **CLA-080**.

624 *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran*, IUSCT Case No. 298, Award, ¶¶ 25-26, **CLA-080**.

625 Counter-Memorial, ¶¶ 239-240.

the "secretive" beneficial ownership of AEC as protected under international law. And even a cursory review of *Anglo-Adriatic* shows that the esteemed arbitrators did not change their views.

566. Anglo-Adriatic Group ("**AAG**") alleged that four trust deeds governed by English law transferred *from* "foreign shareholders" *to* AAG the beneficial ownership in shares of an Albanian company, Anglo Adriatika Investment Fund ("**AAIF**"). The trust deeds—the only evidence of AAG's alleged beneficial ownership—however contemplated that the transfer would take place in the opposite direction:

> In the four Trust Deeds, it is Claimant (not the Foreign Shareholders) who acts as settlor. The Trust Deeds, on their face, prove the transfer of ownership from settlor (AAG) to the trustees (the Foreign Shareholders) for the benefit of the beneficiary (again AAG). This is the opposite of what Claimant is trying to prove: i.e. the transfer of ownership from the Foreign Shareholders to AAG.[626]

567. AAG argued that this was just a "mishap" because the intention of the parties had been to transfer the beneficial ownership *from* the "foreign shareholders" *to* AAG, rather than the other way round.[627] AAG further submitted that, because English law requires that a trust deed be interpreted in accordance with parties' intention, the tribunal should overlook the "mishap" and interpret the trust deeds as giving the beneficial ownership to AAG. After considering the following factors (none of which is present in the present case), the tribunal concluded that there was no evidence supporting such an alleged intention:

a. the accuracy of the text of the trust deed had been confirmed by four independent expert reports;[628]

b. AAG did not register its beneficial ownership, despite the requirement of the Albanian Law on Investment Funds that "*all rights in the shares of a fund must be held by the registered shareholders of these share*" and that "*transfer of any*

626 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 233, **RLA-007**.

627 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 156, **RLA-007**.

628 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶¶ 237-238, **RLA-007**.

*shares in the AAIF should be registered with the Albanian authorities within 10 day;*[629]

c. there was no evidence that the Albanian authorities were aware of AAG's beneficial ownership;[630] and

d. there was no evidence that AAG paid any consideration for the acquisition of shares.[631]

568. With respect to the second element, the tribunal considered–in an excerpt cited by Serbia that:

> There is no evidence in the record that either the AAIF or AAG ever informed the Albanian authorities that the Foreign Shareholders had transferred ownership of the AAIF Foreign Shares to AAG, or that AAG asked for registration as a new shareholder. *The absence of such information and the inexistence of registration – both of which are required under Albanian law – undermines the credibility of Claimant's argument that AAG was the beneficial owner of the shares since 1996*.[632]

569. It is obvious that *Anglo-Adriatic* does not assist Serbia's attempt to fabricate a requirement of a compulsory registration of beneficial ownership, where no such obligation exists under municipal law, here Serbian law. In the present case, Serbia appears to argue that the impossibility under Serbian law at that time to register beneficial ownership means that such beneficial ownership should not be protected under international law.[633] Conversely, in *Anglo-Adriatic*, the claimant did have an obligation under Albanian law to register its beneficial ownership. Its failure to do so, however, did not discard the rights of beneficial ownership created under English law, but rather only "*undermine*[d] *the credibility of Claimant's argument that AAG was the beneficial owner*."[634]

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629 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 239, **RLA-007**.

630 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶¶ 237-238, **RLA-007**.

631 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶¶ 242-246, **RLA-007**.

632 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 240, **RLA-007**.

633 Counter-Memorial, ¶ 240.

634 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 240, **RLA-007**.

570. Moreover, *Anglo-Adriatic* demonstrates that even where an instrument conferring beneficial ownership contains significant deficiencies—including an allegedly incorrect identification of who transfers the shares to whom—the tribunal should examine whether the subsequent conduct of the parties confirms their alleged intention to create such a beneficial ownership.

571. In sum, beneficial ownership is protected under international law regardless of whether beneficial ownership is regulated under host State law and regardless of whether the rights of the beneficial owner are enforceable against the beneficially owned company or third parties. The only necessary requirement is that the rights creating beneficial ownership—not necessarily labeled as such—exist under the proper law governing the relationship between the beneficial owner and the nominee. And as shown above, the MDH Agreement and the Sembi Agreement do grant to the Claimants beneficial (equitable) ownership in the Beneficially Owned Shares.

572. *Fourth*, Serbia is unable to credibly challenge the validity of the MDH Agreement and Sembi Agreement under the laws that actually govern them, *i.e.* laws on British Columbia and Cyprus law, respectively. It thus argues that "*the only law applicable to the issue of whether the property rights (contractual rights included) enjoying protection under the BIT were validly created is the Respondent's law*."[635]

573. Based on this purported principle and undisturbed by the principle of party autonomy, Serbia even claims that "[t]*he fact that the* [Sembi Agreement] *designates the Cypriot law as applicable has no relevance.*" This cannot be so. There is strictly nothing in the Canada-Serbia BIT that would even suggest that only contracts governed by the host State's law should be protected. There is equally no support for Serbia's theory that by operation of some mysterious principle of public international law, contracts governed by "foreign" law (here British Columbia law and Cyprus law) should be transformed into contracts governed by the host State's law.

574. Unsurprisingly, Serbia's theory that choice of law "*bears no relevance*" finds no support in the practice of investment tribunals. Contracts governed by "foreign law" are

635 Counter-Memorial, ¶ 304.

routinely accepted as protected investment and their validity is not being tested against the host State's law.[636]

575. Serbia heavily relies on Professor Douglas' treaties, where he opines that "*whenever there is a dispute about the scope of property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property*."[637] Serbia also quotes an example of such an approach, where Professor Douglas explains that where the relevant investment is in shares of a company incorporated in the host State, "*the protection of an investment treaty is contingent upon securing the legal rights to those shares in accordance with the relevant municipal law where the company is incorporated.*"[638]

576. Serbia's reliance is inapposite. Mr. Obradović acquired nominal ownership to the Beneficially Owned Shares in full accordance with Serbian law. The Beneficially Owned Shares are an asset that qualifies as an investment under the Canada-Serbia BIT. The remaining question is whether the oral agreement between Mr. Obradović and Mr. Rand, the MDH Agreement and the Sembi Agreement provided for the requisite link—i.e. indirect ownership or control—between the Claimants and the Beneficially Owned Shares. There is no reason to assess the validity and effects of such contracts under Serbian law (which does not govern them), rather than under their proper law (British Columbia law and Cyprus law).

577. Serbia' nonsensical theory that choice of law "*bears no relevance*" also does not find support in *Anglo-Adriatic*—Serbia's sole legal authority on beneficial ownership. There, the trust deeds—purportedly transferring beneficial ownership to shares in an Albanian company—were governed by English law and the tribunal analyzed them under English law, rather than under Albanian law.

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636 *E.g. Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 291, **CLA-067**; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 51, **CLA-081**.; *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, ¶ 4.17., **CLA-082**.

637 Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 52, **RLA-004**.

638 Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, pp. 52-53, **RLA-004**.

578. Serbia's attempt to rely on *Occidental* is also unavailing. The *Occidental* tribunal and Annulment Committee assessed the validity of the Farmout Agreement under Ecuadorian law, not because Ecuador was the host State, but because the Farmout Agreement expressly provided that it shall be governed by New York law "*except to the extent that the laws of Ecuador require application of the laws of Ecuador to the Participating Agreements and Block 15 or other property situated in or operations or activities conducted in Ecuador*."[639]

579. In other words, Ecuadorian law governed the issue of validity of the transfer of beneficial ownership because "*New York courts would give effect to mandatory Ecuadorian laws governing the Farmout Agreement, including the HCL, when considering the validity of the assignment*."[640] Accordingly, even if the MDH Agreement and the Sembi Agreement contravened any mandatory provision of Serbian law (*quod non*), this would only be relevant for the Tribunal's jurisdiction if the courts of British Columbia or Cyprus would consider such provisions of Serbian law to prevent the transfer of beneficial ownership from Mr. Obradović to MDH and Sembi, respectively. They would not, as explained by Mr. Deane[641] and Mr. Georgiades[642].

580. *Fifth*, as shown above, Serbia's objections are unfounded because neither the MDH Agreement nor the Sembi Agreement are null and void under their respective governing laws, or even under Serbian law.

581. *Sixth*, Serbia argues that the Claimants never disclosed their beneficial ownership to Serbia. The Claimants have already provided a laundry list of persons to whom they have disclosed their beneficial ownership over the years. It features, for example, such

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639 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 92, **CLA-075**.

640 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, ¶ 231, **CLA-005**.

641 Deane ER, ¶ 91.

642 Georgiades Second ER, ¶¶ 3.10.

high-ranking politicians as two Ministers of Economy, Mr. Bubalo[643] and Mr. Radulović and Chief of Staff to the Prime Minister in 2015, Mr. Kojić.[644]

582. The disclosure of beneficial ownership Mr. Radulović is supported by a clear contemporaneous written evidence and cannot be disputed even under Serbia's nonsensical theory that testimonies of witnesses interested in the outcome of the case do not have any probative value.[645]

583. Serbia's attempt to discard the disclosure of beneficial ownership to Mr. Bubalo is equally unconvincing. Serbia—ignoring all other facts evidencing the disclosure of Mr. Rand's beneficial ownership—argues that Mr. Rand's e-mail from 5 February 2008 to Mr. Bubalo is irrelevant, "*because it contained no mention of the* [MDH Agreement] *or Mr. Obradović's role as Mr. Rand's nominee*."[646] To satisfy Serbia, Mr. Rand and his representatives would have to preface every communication with Serbian officials by repeating the already disclosed division of roles between Mr. Obradović and Mr. Rand. This is not how people communicate in the real world.

584. As Mr. Rand explains, Mr. Bubalo approached him with an offer to participate at the auction for the BD Agro´s shares.[647] Mr. Rand then communicated in a 5 February 2008 e-mail to Mr. Bubalo that he "*would be interested in participating in the auction sale of the company and, if successful, would bring new funding and financial strength to the operation.*"[648] Mr. Rand also asked Mr. Bubalo to "*commence the auction sale as soon as possible*."[649] Mr. Bubalo then ordered the Privatization Agency not to accept the request of another potential bidder to postpone the auction.[650] Immediately after the auction, Mr. Jovanić—the then deputy and direct subordinate to Mr. Bubalo—wrote to

643 Letter from W. Rand to P. Bubalo, 1 November 2004, **CE-581**. Rand First WS, ¶¶ 15, 20; Rand Second WS, ¶ 10; Obradović First WS, ¶ 11; Obradović Second WS, ¶ 10.

644 Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, pp. 1-3, **CE-769**.

645 Counter-Memorial, ¶ 253.

646 Counter-Memorial, ¶ 253.

647 Rand Second WS, ¶¶ 8-11.

648 E-mail from W. Rand to P. Bubalo dated 4 June 2005; **CE-014**.

649 E-mail from W. Rand to P. Bubalo dated 4 June 2005; **CE-014**.

650 Rand Second WS, ¶¶ 21-23.

Mr. Rand that that he "*presume[d] that [Mr. Obradović] ha[d] already informed [Mr. Rand] that [they] all succeeded in farm acquisition.*"[651]

585. Mr. Bubalo remained in contact with Mr. Rand after the auction[652] and, for example, gave a laudatory speech during a 2007 visit of an official delegation of Serbian officials to BD Agro.[653] It is thus apparent that Mr. Bubalo knew full well that Mr. Rand was the beneficial owner of BD Agro.

586. Moreover, the Claimants' beneficial ownership was also disclosed to third parties, including the EBRD and various consultants and business partners of BD Agro. There would be no reason for Mr. Rand or BD Agro to casually inform their business partners that Mr. Rand was the beneficial owner, which they did, if he were not.

587. Serbia, however, argues that the Claimants should have not only disclosed to Serbia the existence of the beneficial ownership, but should have also provided Serbian officials with a proof of such ownership. For example, Serbia alleges that the Claimants cannot rely on Mr. Bubalo's knowledge of the Claimants' beneficial ownership because Mr. Rand did not send the MDH Agreement to Mr. Bubalo.[654] This is absurd. Not only that such disclosure—or any other disclosure—of beneficial ownership was not required under Serbian law or international law, it was also never requested by Mr. Bubalo or any other person.

588. Similarly, Serbia argues that the Claimants cannot rely on Mr. Broshko's disclosure of Mr. Rand's beneficial ownership during the 30 January 2014 meeting with the Privatization Agency.[655] This is allegedly because Mr. Broshko "*did not offer any proof for such assertion and no issue of the alleged ownership of Mr. Rand over the shares of BD Agro was raised.*"[656] This is precisely the point. The Privatization Agency did not request Mr. Broshko to provide any such proof because the Privatization Agency already knew about—and did take any issue with—Mr. Rand's beneficial ownership.

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651 E-mail from Mr. Ljubiša Jovanović to Mr. William Rand dated 29 September 2005, **CE-016**.

652 E-mail from Aleksandra Janicić to Mr. Rand, 16 July 2008, **CE-704**.

653 Obradović Second WS, ¶¶ 34-37.

654 Counter-Memorial, ¶ 253.

655 Counter-Memorial, ¶ 265; Minutes of the meeting at the Privatization Agency, 30 January 2014 (emphasis added), **RE-028**; Letter from the Privatization Agency to BD Agro, 21 August 2014, p. 2, **CE-317**.

656 Counter-Memorial, ¶ 265.

589. The Privatization Agency's clear lack of concern about Mr. Rand's beneficial ownership also belies Serbia's made-for-arbitration argument that, had the Privatization Agency known about Mr. Rand' role, it would have never agreed to enter the Privatization Agreement with Mr. Obradović, "*in clear contravention to the Law on Privatization.*"[657] To be clear, Mr. Rand's role did not contravene the Law on Privatization in any manner.

590. The fact that Mr. Rand did not describe his beneficial ownership, for example, in his letter of 18 September 2014, therefore bears no relevance.[658] As shown above, the Privatization Agency already knew about Mr. Rand's beneficial ownership and obviously did not have any issue with it.

591. Serbia also alleges that even if the Claimants disclosed their beneficial ownership to Serbia, that such a disclosure in any event would not "*give any validity to [an] otherwise void agreement*."[659] Serbia's argument is simplistic at best. As demonstrated in *Anglo-Adriatic*, the intention of the parties to an otherwise deficient contract establishing beneficial ownership may—if this is called for under the law governing such a contract—be ascertained based on parties' subsequent conduct. Such conduct may include disclosure of the transfer of beneficial ownership to third parties. Conversely, as demonstrated in *Occidental*, a lack of such disclosure does not invalidate an otherwise effective transfer of beneficial ownership.

592. The Claimants, however, need not rely on these principles. The 2005 oral agreement between Mr. Rand and Mr. Obradović, the MDH Agreement and—most importantly—the Sembi Agreement were all valid and conferred on the Claimants beneficial ownership of the Beneficially Owned Shares. Moreover, such beneficial ownership was disclosed to several representatives of various Serbian organs and agencies on multiple occasions.

593. In sum, the Canadian Claimants' beneficial ownership of the Beneficially Owned Shares satisfies the requirements of the Canada-Serbia BIT. This alone would be sufficient to

657 Counter-Memorial, ¶ 265.

658 Counter-Memorial, ¶ 266.

659 Counter-Memorial, ¶ 252.

firmly ground the Tribunal's jurisdiction *ratione materiae* over the Beneficially Owned Shares under the Canada-Serbia BIT.

### e. Mr. Rand's *control* of the Beneficially Owned Shares is protected under the Canada-Serbia BIT

594. The Canada-Serbia BIT expressly applies also to investments directly or indirectly *controlled* by Canadian nationals.[660] Mr. Rand's control over the Beneficially Owned Shares, described in detail above, thus satisfies the jurisdictional requirements of the Canada-Serbia BIT, independently of his and his children's beneficial ownership thereof.

595. Serbia, however, argues that "*control is not an alternative to ownership for the purpose of jurisdictional requirements in Article 1 of the Canada-Serbia BIT*."[661] This is absurd. The phrase *"owned **or** controlled, directly or indirectly"* means what it says: that control *is* an alternative to ownership. Under the Canada-Serbia BIT, an investment can thus be "controlled", without being at the same time "owned" by the investor.

596. Serbia's reliance on *Aguas del Tunari v. Bolivia* for the proposition that "*ownership*" is a necessary element of—and not an alternative to—"*control*" is of no avail. In that case, the tribunal interpreted the term "controlled" contained in the definition of investor in the Netherlands-Bolivia BIT. In the relevant part, the BIT defined protected investors as "*legal persons controlled directly or indirectly, by nationals of that Contracting Party*."[662] This definition is of course fundamentally different from the one contained in Article 1 of the Canada-Serbia BIT because it does not refer to ownership. The conclusion of the *Aguas del Tunari* tribunal that "*given the context of defining the scope of eligible claimants, the word "controlled" is not intended as an alternative to ownership*"[663] is thus inapposite and incapable of supporting Serbia's attempt to rewrite the phrase "*owned **or** controlled*" in Article 1 of the Canada-Serbia BIT.

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660 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "Covered Investment," **CLA-001**.

661 Counter-Memorial, ¶ 279.

662 *Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3,* Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 217, **RLA-010**.

663 *Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3,* Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 242, emphasis added, **RLA-010**.

597. Accordingly, even if the Claimants' beneficial ownership over the Beneficial Owned Shared did not qualify as ownership under the Canada-Serbia BIT (which it does), Mr. Rand would still have standing to bring his claims due to his control over Beneficially Owned Shares, and of the entirety of BD Agro.

598. As explained by several tribunals, the term control is broad and encompasses both "*de facto control*" and "*legal capacity to control*." The case-law of NAFTA tribunals interpreting Article 1117 of NAFTA—which requires that the local enterprise be a juridical person that the investor *"owns or controls directly or indirectly*"—offers helpful guidance in determining the meaning of "control" under the similarly worded Article 1 the Canada-Serbia BIT.

599. The tribunal in *B-Mex v. Mexico* recently explained that:

> [A]ny ability to "exercise restraining or directing influence over" or to "have power over" a company would satisfy the ordinary meaning of control. There is no specific manner or form that "control" must take.[664]

600. The tribunal elaborated on the meaning of control as follows:

> *[C]ontrol" can mean both the legal capacity to control and de facto control.* Article 1117 thus applies whenever the investor:
>
> a. owns all of the outstanding shares in an enterprise (an enterprise that the investor "owns");
>
> b. owns a lesser number of shares that is still sufficient in the specific circumstances to confer the legal capacity to control (an enterprise that the investor "controls"); or
>
> c. *does not own a number of shares sufficient to confer the legal capacity to control but is otherwise able to exercise de facto control* (also an enterprise that the investor "controls").[665]

601. Accordingly, an investor can establish control over a company even without owning majority or minority shareholding, where it is "*otherwise able to exercise de facto control*."

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664 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 212, **CLA-083**.

665 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 205, **CLA-083**.

602. This is consistent with the findings of the Annulment Committee in *Caratube v. Kazakhstan*, cited in the Claimants' Memorial. Serbia, however, argues that the decision of the Annulment Committee "*does not help [Claimants'] case" because* it allegedly only demonstrates that legal ownership without actual exercise of control is not sufficient to establish control.

603. Serbia's reading, however, finds no support in the decision of the Annulment Committee. Quite to the contrary, the Annulment Committee expressly confirmed that "control" does not require nominal ownership of shares, but can be achieved 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.[666]

604. Unable to find any relevant case-law to support its attempt to discard "de facto" control, Serbia—as respondent States often do—again turns to Professor Douglas's book: a thought-provoking treatise, rarely followed by investment tribunals.

605. According to Professor Douglas, control is a question of law and denotes a "*power to control that property that is recognized by the lex situs*."[667] In the same time, Professor Douglas qualifies this statement by observing that the test for control found in municipal law is not dispositive for the interpretation of the autonomous concept of "control" found in a treaty. He remarked on the role of municipal law "*merely to observe the tribunal need not stare into a void in its search for the meaning of this term*."[668] This is a solution in search for a problem. A tribunal need not "stare in the void," but can—

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666 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, ¶¶ 253-254, **CLA-016**.

667 Zachary Douglas, The International Law of Investment Claims, Cambridge University Press, 2009, pp. 303, 301, **RLA-004**.

668 Zachary Douglas, The International Law of Investment Claims, Cambridge University Press, 2009, pp. 303, 302, **RLA-004**.

and should—interpret the treaty term "control" in light of its ordinary meaning, with a guidance offered by the decisions of investment tribunals established under similarly-worded treaties. The Claimants have demonstrated that such tribunals consider "de facto" control to be sufficient.

606. However, even accepting *pro tem* that the term "*controlled*" under Article 1 of the Canada-Serbia BIT should be tempered by an understanding of control under municipal law, for example Serbian law, this would still fail to help Serbia.

607. For example, Article 4(3) of 2006 Takeover Law stipulated that control is deemed to exist when a person has the right to manage (that is, to conduct the business and financial policy of a legal person) on the basis of a statute, agreement or contract or has "*indirectly or directly the prevailing influence on business management and decision making*."[669]

608. The term "prevailing influence" has been given a broad meaning by the Serbian Ministry of Finance's guidelines to the Law on Beneficial Owners ("**LoBO Guidelines**"). According to the LoBO Guidelines, a natural person has a prevailing influence over a company—and thus control and beneficial ownership over the same—when, for example:

> [I]t has the right to appoint majority of directors or members of the supervisory board of the company, if it is significantly involved in management and conducting business policy of the company (e.g. natural person not being a member of the board of directors, but regularly directing and influencing the decision making of the board of directors or when member of the company having majority participation in fixed capital always, or almost always, accepts recommendation of that natural person when exercising voting rights).[670]

609. Mr. Rand's control over BD Agro ticks all the boxes in the above definitions. Accordingly, the inappropriate *renvoi* to Serbian law for the meaning of "control"—advocated by Serbia in reliance on Professor Douglas[671]—only confirms that "de facto"

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669 2006 Takeover Law, Arts. 4(2) and (3), **CE-540**.

670 Guidelines of the Ministry of Finance to the Law on Centralized Records of Beneficial Owners, 8 January 2019, **CE-792**.

671 Counter-Memorial, ¶¶ 277-278.

control is sufficient. It is thus apparent that Mr. Rand controlled BD Agro within the meaning of both Serbian law, and, far more importantly, the Canada-Serbia BIT.

610. However, the distinction between "de facto" control and "legal capacity to control" is unnecessary and artificial in this case. Mr. Rand had the legal capacity to control BD Agro by the virtue of his oral agreement with Mr. Obradović, the MDH Agreement and the Sembi Agreement. However, what is more important is the reality showing that Mr. Rand *exercised* control over BD Agro. For *ten years* Mr. Rand directed Mr. Obradović and BD Agro's management on all important matters relating to BD Agro and for *ten years* they have always followed his instructions. It is clear they were doing so not out of a deference to a potential buyer who wanted to acquire BD Agro in *2013*—as Serbia would have it. Instead, it was because Mr. Obradović and BD Agro's management considered themselves to be legally bound by Mr. Rand's directions. There is nothing that Serbia's attempt to *ex post facto* discard the MDH Agreement and Sembi Agreement—both of which were fully complied with by the parties—could change about this reality.

611. Serbia, however, maintains that Mr. Rand did not control the BD Agro because "*there is an abundant evidence that it was Mr. Obradović who acted both as the nominal and beneficial owner of BD Agro*."[672] Serbia thus again attempts to conflate the terms "owned" and "controlled." As explained above, even if Mr. Rand did not beneficially own the Beneficially Owned Shares (which he did), this would not mean that he could not control BD Agro.

612. In any event, the "*abundant evidence*" Serbia marshals only demonstrates the undisputed fact that Mr. Obradović was the *nominal* owner of the Beneficially Owned Shares.

613. *First*, Serbia attributes a great significance to Mr. Obradović' remarking in an interview for local press that "*as an owner of 80 percent of shares*", he was "*under no legal obligations to buy shares from minority shareholders*."[673] This statement is fully

672 Counter-Memorial, ¶ 287

673 Counter-Memorial, ¶ 288; *Minority Shareholders accuse the owner of BD "Agro" Djura Obradovic for theft and misdeeds"*, Kurir, 24 May 2009 (emphasis added), **RE-109**.

consistent with Mr. Obradović's position of a nominal owner.[674] Moreover, an interview for the press was hardly an appropriate forum for Mr. Obradović to provide an unsolicited account of BD Agro's ownership structure.

614. *Second*, Serbia argues that Mr. Obradović's filing of a lawsuit, later withdrawn, against the Privatization Agency somehow discredits the Canadian Claimant's beneficial ownership. This is nonsensical. None of the Claimants were a party to the Privatization Agreement and the only person with standing under Serbian law to file such a lawsuit was Mr. Obradović.

615. That Mr. Obradović alluded in his letter to the Privatization Agency to his Canadian citizenship and the existence of the Canada-Serbia BIT is equally irrelevant.[675] Mr. Obradović is a dual citizen of Canada and Serbia and was a nominal owner of the Beneficially Owned Shares. It was thus in no in no way improper, or contradictory to the beneficial ownership of the Canadian Claimants, for Mr. Obradović to remark in passing on the existence of the Canada-Serbia BIT. Moreover, as testified by Mr. Broshko, while Mr. Obradović—as the nominal owner and party to the Privatization Agreement—signed the letter, it was drafted by Messrs. Broshko, Markićević and Doklestić and approved by Mr. Rand.[676]

616. *Third*, Serbia argues that the "*economic reality unequivocally proves Mr. Obradović's position of the BD Agro's owner*" because "*BD Agro was stripped of its assets*" which were used "*as collateral for debts of other Mr. Obradović's companies*" or "*ended up as his personal property*".[677] As shown above, the Claimants vehemently deny Serbia's allegation that BD Agro was stripped of its assets. In any event, the companies that Serbia alleges benefited from these transactions, being Inex and Crveni Signal, are in reality beneficially owned by Mr. Rand in a similar way that BD Agro was.[678]

617. In sum, both Claimants and Serbia asserts that there is in abundant evidence for their account of who beneficially owned and controlled the Beneficially Owned Shares.

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674 *See* Obradović Second WS, ¶¶ 21, 25-26.

675 Letter from Mr. Obradović to the Privatization Agency, 8 September 2015, **CE-048**.

676 Broshko Third WS, ¶¶ 15-16.

677 Counter-Memorial, ¶¶ 291.

678 Rand Second WS, ¶ 15; Obradović Second WS, ¶ 65.

618. The Claimants' position is confirmed by the witness statements of Mr. Rand[679], Mr. Obradović[680], Mr. Broshko[681] and Mr. Markićević[682] and Mr. Jennigs[683]. It is also supported by numerous contemporaneous documentary evidence[684] showing, *inter alia*, that Mr. Rand financed the investment, decided single-handedly the composition BD Agro's organs, made—directly, or through Sembi—strategic decisions with respect to BD Agro's business and received regular updates relating to BD Agro's day-to-day operations.

619. Serbia's position—that Mr. Obradović was the beneficial owner and controlled BD Agro—is allegedly supported by a news interview (where Mr. Obradović "failed" to provide an unsolicited explanation of the ownership structure of BD Agro) and a by a false allegation that Mr. Obradović funneled BD Agro's assets into Inex and Crveni Signal (which were both beneficially owned by Mr. Rand). Moreover, Serbia does not offer witness testimony of anyone but Mr. Cvetković, who does not remember much more than that there was a company named BD Agro.[685] The most notable missing witness statement is the one from the former Minister of Economy, Mr. Bubalo, with whom Mr. Rand personally discussed the investment.

620. Serbia alleges that "*outside the legal realm, […] Mr. Rand remaine[d] invisible – and this alone should be enough to make him and other Claimants invisible for the protection of the Canada-Serbia BIT*."[686] It is unclear whether this is supposed to constitute a legal argument, or just a metaphor of some kind. In any event, it is apparent that Mr. Rand was very much visible throughout the entire lifetime of his investment. Yet, Serbia chose to make Mr. Bubalo literally invisible to the Tribunal.

621. In sum, the Claimants demonstrated that Mr. Rand controlled BD Agro and that such control is more than sufficient to qualify for protection under Article 1 of the Canada-

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679 *See* e.g. Rand First WS, ¶ 20; Rand Second WS, ¶ 20.

680 *See* e.g. Obradović First WS, ¶¶ 10-11; Obradović Second WS, ¶ 17.

681 *See* e.g. Broshko First WS, ¶¶ 4, 8-10, 21, 26; Broshko Second WS ¶¶ 8, 11; Broshko Third WS, ¶¶ 10-11.

682 *See* e.g. Markićević First WS, ¶¶ 8-9, 20-30; Markićević Second WS, ¶¶ 6-7, 12; Markićević Third WS, ¶ 35.

683 Jennings WS, ¶¶ 9-10.

684 *See Supra* ¶¶ 4-22.

685 Cvetković WS, ¶ 11.

686 Counter-Memorial, ¶ 523.

Serbia BIT, independent of the Claimants' beneficial ownership of the Beneficially Owned Shares.

### 2. The Canadian Claimants' indirect interest in the Sembi Agreement is an investment protected under the Canada-Serbia BIT

622. As shown above, the Sembi Agreement transferred to Sembi beneficial ownership to the Beneficially Owned Shares. This beneficial ownership provides a link of ownership between the Canadian Claimants—investors protected under the Canada-Serbia BIT—and the Beneficially Owned Shares. The Beneficially Owned Shares are "shares" and thus a qualifying investment under the Canada-Serbia BIT.[687]

623. However, besides providing such a link of ownership, the right stemming from the Sembi Agreement also themselves qualifies as an investment. Indeed, as observed by the IUSCT in *Saghi,* "*beneficial ownership is both a method of exercising control over property and a compensable property interest in its own right.*"[688]

624. Sembi's right under the Sembi Agreement—granting Sembi equitable title over the Beneficially Owned shares—qualify as "*an interest in an enterprise that entitles the owner to share in income or profits of the enterprise*."[689] BD Agro is a corporation organized under Serbian law and thus qualifies as an "enterprise" within the meaning of the Canada-Serbia BIT.[690] The Sembi Agreement provided Sembi with an interest in the Beneficially Owned Shares, which entitled Sembi to "*share in income or profits*" of BD Agro.

625. Moreover, Sembi's right under the Sembi Agreement also qualifies as "*an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory*."[691] Sembi committed capital in Serbia by repaying

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687 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "investment," item (b), **CLA-001**.

688 *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran*, IUSCT Case No. 298, Award, ¶ 26, **CLA-080**.

689 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "investment," item (f), **CLA-001**.

690 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "enterprise," **CLA-001**.

691 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "investment," item (h), **CLA-001**.

the loans of Mr. Obradović (a Serbian national),[692] owed by him to the Lundin Family for the acquisition of shares in, and further investment to, BD Agro (a Serbian company). The funds for repaying such loans were provided to Sembi, and thus ultimately committed, by Mr. Rand.[693]

626. Serbia, however, claims that because Article 41ž of the Law of Privatization provides that a privatization agreement may only be assigned with the prior approval of the Privatization Agency,[694] Mr. Obradović could not transfer to Sembi any "*rights and duties*" to Sembi without such an approval.[695] However, the text of the Sembi Agreement shows that the parties thereto never intended to effectuate the assignment of the Privatization Agreement on the basis of the Sembi Agreement alone. Instead, the Sembi Agreement contemplated that the parties were "*to sign any such documents and do all such things as may be necessary to effect the transfer to the Purchaser [Sembi] of the [Privatization Agreement]."* In order to effectuate the assignment of the Privatization Agreement, Mr. Obradović would naturally have to obtain the prior approval of the Privatization Agency and conclude a separate assignment agreement with Sembi. As concluded by Mr. Milošević, the Sembi Agreement is not in conflict with Article 41ž of the Law on Privatization.[696]

627. As explained above, Mr. Georgiades concludes that, even without the approval of the Privatization Agency, the MDH Agreement transferred beneficial (equitable) title to the Privatization Agreement and the Beneficially Owned Shares.[697]

628. Serbia also argues that the Canadian Claimants do not have any interest in the Sembi Agreement because they were not a party thereto. According to Serbia, "*indirect*

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692 Confirmation of wire transfer from Sembi to Mr. Ian Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-057**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-058**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-059**; Rand First WS, ¶ 33; Azrac WS, ¶ 16.

693 Confirmation of EUR 3,610,000.00 wire transfer from Mr. William Rand to Sembi executed on 3 August 2008, **CE-060**; Confirmation of EUR 2.001.000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-061**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-056**; Register of Directors of Indonesian Developments Co. Ltd., **CE-075.**

694 2002 Law on Privatization, Art. 41ž, **CE-220**.

695 Counter-Memorial, ¶¶ 300-303.

696 Milošević Second ER, ¶¶ 204-206.

697 Georgiades Second ER, ¶¶ 3.12-3.13.

*contractual interest*" does not qualify as an investment under the Canada-Serbia BIT.[698] This objection is belied by the express provision of Article 1 of the Canada-Serbia BIT which defines as investments, for example, contractual rights such "*loans to an enterprise*", "*an interest in enterprise*" or "*a contract where remuneration depends on the production, revenues or profits of an enterprise*" and expressly applies to investments "*owned or controlled, directly, or indirectly*".

629. All of the Canadian Claimants held, directly or indirectly, shares in Sembi and, thus, indirectly owned also Sembi's interest in the Beneficially Owned Shares, stemming from the Sembi Agreement.

630. Accordingly, the Canadian Claimants indirect interest in the Sembi Agreement qualifies as an investment under Article 1 of the Canada-Serbia BIT, items (f) and (h).

### 3. Mr. Rand's Indirect Shareholding is an investment protected under the Canada-Serbia BIT

631. Mr. Rand's ownership of 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**"), qualifies as an investment in shares, indirectly held by Mr. Rand through MDH Serbia. Mr. Rand's Indirect Shareholding thus squarely qualifies as a covered investment under the Canada-Serbia BIT and Serbia does not appear to argue otherwise.

### 4. 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

632. Mr. Rand made payments of approximately EUR 2.2 million for the replacement of BD Agro's herd.[699] Mr. Rand also paid approximately EUR 160,000 for the services

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698 Counter-Memorial, ¶¶ 288-289.

699 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-021**; 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-022**; Confirmation of wire transfer from William Rand to Trudeau International Farms for CAD 443,080.00 executed on 21

provided to BD Agro by herd management experts Mr. David Wood and Mr. Gligor Vasile Calin.[700]

633. These payments were loans to BD Agro and thus qualify as "a loan to an enterprise", a qualifying investment under item (d) of the Canada-Serbia BIT's definition of investment.

634. Serbia argues that these loans do not qualify as a protected investment since they did not lead to the acquisition of any asset. Curiously, Serbia at the same time argues that, because Mr. Rand's payments "*were acknowledged as his claims towards BD Agro in the bankruptcy proceeding*," the "obvious" conclusion is that Mr. Rand "*did not characterize those payments as an investment in BD Agro's capital*."[701] Not only that such conclusion is not "obvious", it is outright nonsensical. The fact that Mr. Rand's payments were acknowledged in BD Agro's bankruptcy only confirms that such payments were made and gave rise to Mr. Rand's claim for payment against BD Agro. Mr. Rand's claim for payment against BD Agro is an asset.

635. Serbia's attempt to wish into existence a requirement that only "investment in company's capital" should qualify fails under the express terms of the Canada-Serbia BIT. It is obvious that the Canada-Serbia BIT protects both equity financing and debt financing, including "loans to an enterprise".

636. Serbia's reliance on *Burimi v Albania* and *Inmaris v. Ukraine* is also of no help.

637. Serbia summarizes that the upshot of *Burimi* is that "*financing the investment owned by another person is not an investment itself*". This conclusion is consistent with the definition of investment in the Italy-Albania BIT, which applies to "*claims to money or any right arising from commitments or services having an economic value and <u>related to an investment</u>, as well as income reinvested*."[702] There is no requirement under the

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October 2008, **CE-023**; Confirmation of wire transfer from William Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-024**.

700 Overview of Payments to Mr. David Wood, **CE-062**; Overview of Payments to Mr. Gligor Calin, **CE-068**. *See also* First Rand WS, ¶¶ 40, 44.

701 Counter-Memorial, ¶ 309.

702 In the Italian original, the phrase reads "crediti finanziari o qualsiasi diritto derivante da impegni o prestazioni di servizi aventi valore economico *e relativi ad investimenti*, nonché i redditi reinvestiti". Agreement for the Promotion and Protection of Investments concluded between the Republic of Italy and the Republic of Albania, 29 January 1996, signed 29 January 1996, Art. 1(c), **CLA-084**.

Canada-Serbia BIT that "loans to enterprise" be related to a separate investment. They constitute an investment in their own right. Even had there been such a requirement, it would be easily satisfied here. While Serbia disputes the Claimants' beneficial ownership of the Beneficially Owned Shares, even Serbia does not appear to contest that Mr. Rand's Indirect Shareholding qualifies as an investment.

638. *Burimi* is inapposite also for another reason. In that case, the loans were provided by Burimi to Ms. Laka, a shareholder in an Albanian company, Eagle Games. The tribunal found that such loans do not qualify as an investment, also because they are "*free-standing contracts between Ms. Alma Leka and Burimi SRL, and exist independently of Eagle Games' gambling business*".[703] *Burimi* is thus clearly distinguishable. *First*, Mr. Rand made the payments and loans to, or for a direct benefit of, BD Agro. *Second*, the loans and payments enabled BD Agro to replace its herd and thus to "*secure continuity of business operations of the [BD Agro] in main business activity*", as required under Article 5.3.2 of the Privatization Agreement.[704] They thus clearly did not "exist independently" of BD Agro's business.

639. *Inmaris v. Ukraine* is also unhelpful to Serbia. The *Inmaris* tribunal considered that the claimant's payments for the repairs of Khersones, "a windjammer sail training ship", does not itself constitutes an investment because they did not result in acquisition of any asset, such as claims to money. Conversely, as shown above, Mr. Rand loans and payments gave rise to Mr. Rand's claim against BD Agro.

640. *Finally*, Serbia argues that Mr. Rand paid the fees of Mr. Wood and Mr. Calin "*evidently […] in preparations for Coropi's intended takeover of BD Agro*" and these payments thus constitute mere pre-investment expenditures unprotected under the Canada-Serbia BIT or the ICSID Convention.[705] This is both legally and factually wrong.

641. As shown above, these payments constituted Mr. Rand's asset qualifying as "*loan to an enterprise*" and thus, on its own, a qualifying investment under the Canada-Serbia BIT. More importantly, as conclusively demonstrated above, Mr. Rand beneficially owned

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703 *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013, ¶ 145, **RLA-012**.

704 Privatization Agreement, Art. 5.3.2 , **CE-017**.

705 Counter-Memorial, ¶ 501.

and controlled BD Agro since 2005. The involvement of Mr. Wood is yet another example showing this.

642. Mr. Wood was personally interviewed and selected by Mr. Rand,[706] was paid by Mr. Rand,[707] lived in Mr. Rand's Belgrade apartment[708] and, most importantly, was appointed as the Chairman of BD Agro's Board of Directors[709] as a result of Mr. Obradović compliance with Mr. Rand's instructions.[710] Serbia's insistence that BD Agro appoint Mr. Wood—an apparent representative of Mr. Rand and not Mr. Obradović—to such a key position solely in "*preparation for Coropi's intended takeover of BD Agro*" is untenable.

643. In sum, Mr. Rand's payments of approximately EUR 2.4 million for the replacement of BD Agro's herd and fees of BD Agro's herd management consultants thus qualifies as an investment under the Canada-Serbia BIT.[711]

## B. The Tribunal has jurisdiction *ratione materiae* under the Serbia-Cyprus BIT

644. Under Article 1(1) of the Serbia-Cyprus BIT, "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*."[712]

645. Sembi's rights stemming from the Sembi Agreement qualify as investment under at least two categories under Article 1(1) of the Serbia-Cyprus BIT.

646. *First*, the Serbia-Cyprus BIT also follows the general principle of public international law affording protection to beneficial owners. The Beneficially Owned Shares are

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706 Rand First WS, ¶ 39; Broshko First WS, ¶ 17.

707 Overview of Payments to Mr. David Wood, **CE-062**. See First Rand WS, ¶ 40, ¶ 44.

708 Email from W. Rand to BD Agro, 29 March 2013, **CE-429**.

709 Confirmation of the Serbian Business Registrer Agency on the Members of Management Board and Board of Directors of BD Aro, 23 August 2017, **CE-072**.

710 *See* e.g. Email from W. Rand to L. Jovanović et al., 10 April 2013, **CE-428**; Rand First WS, ¶ 43.

711 Overview of Payments to Mr. David Wood, **CE-062**; Overview of Payments to Mr. Gligor Calin, **CE-068**. *See also* Rand First WS, ¶¶ 40, 44.

712 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 1(1), **CLA-002**.

"shares" and thus an "investment" within the meaning of Article 1(1) of the Cyprus-Serbia BIT.

647. *Second*, Sembi's rights under the Sembi Agreement qualify as "*claims to money or to any performance under contract having economic value*." This is because, as shown above, Sembi acquired under the Sembi Agreement an equitable title to the Beneficially Owned Shares, and thus a right enforceable under Cyprus law to compel Mr. Obradović, for example, to vote the Beneficially Owned Shares as instructed by Sembi.

648. Serbia's objections against the Tribunal's jurisdiction *ratione materiae* over Sembi's investments lack any merit.

649. *First*, Serbia argues that "*there is no evidence on the record that the Claimants ever invested anything of value in the territory of Serbia*."[713] This is manifestly wrong.

650. 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.

651. By October 2010, Sembi had repaid to the Lundins EUR 5.6 million out of the EUR 13.8 million commitment,[714] with the funds advanced to Sembi by Mr. Rand.[715] 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.[716]

652. Moreover, such funds have been invested "in the territory" of Serbia. The Claimants and Serbia both agree that *Alpha Projectholding v. Ukraine* provides clear guidance on

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713 Counter-Memorial, ¶ 349.

714 Confirmation of wire transfer from Sembi to I. Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-057**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-058**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-059**; Rand First WS, ¶ 33; Azrac WS, ¶ 16.

715 Confirmation of EUR 3,610,000.00 wire transfer from Mr. William Rand to Sembi executed on 3 August 2008, **CE-060**; Confirmation of EUR 2.001.000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-061**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-056**; Register of Directors of Indonesian Developments Co. Ltd., **CE-075.**

716 Memorial, ¶¶ 93-95; Rand First WS, ¶ 33; Azrac WS, ¶ 16.

the requirement of territorial nexus.[717] The *Alpha Projectholding* tribunal, relying on *SGS v. Philippines*, explained that:

> [i]t is the "activity" that must take place "in the territory" of Ukraine and not necessarily the flow of funds that allows that "activity" to take place.
>
> In the words of the SGS v. Philippines tribunal, the location of the project in question constitutes the "center of gravity" and the "focal point" insofar as the territorial dimension of an "investment" is concerned.[718]

653. It is apparent that in the present case, the "project in question" is BD Agro, a Serbian company. Moreover, all of the Privatization Agreement, the Beneficially Owned Shares, the shareholder loans, as other assets held by Mr. Obradović and related to BD Agro, were located in Serbia. Sembi thus "invested" and did so "in the territory" of Serbia.

654. *Second*, Serbia claims that the term "invested" used in the definition of investment requires "*an active involvement of an investor*."[719] Serbia asserts that Sembi does not satisfy this purported requirement because "*there is no evidence that would even suggest any involvement of Sembi in the business activities of BD Agro*."[720] Serbia's argument is wrong both on the law and on the facts.

655. As to the law, the term "*invested*" does not impose any additional requirement—such as active involvement of the investor in the target's business—not already contained in the definition of investment. This was expressly confirmed by the tribunal in *Saluka v. Czech Republic*:

> Although the chapeau of Article 2 refers to "every kind of asset invested", the use of that term in that place does not require, in addition to the very broad terms in which "investments" are defined in the Article, the satisfaction of a requirement based on the meaning of "investing" as an economic process: the chapeau needs to contain a verb which is apt for the various specific kinds of investments which are listed, and since all of them are being defined as various kinds of

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717 Counter-Memorial, ¶ 348.

718 *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, **RLA-017**.

719 Counter-Memorial, ¶ 344.

720 Counter-Memorial, ¶ 350.

> investment it is in the context appropriate to use the verb "invested" without thereby adding further substantive conditions.[721]

656. This conclusion was later endorsed by the tribunal in *Mytilineos v. Serbia*.[722] Accordingly, the term "invested" does not imply any active involvement of the investor in the management of the target company. Unable to find any favorable authorities on the meaning of "invested", Serbia claims that "*invested*" has been treated as synonym for "*made*", and that "*made*" is in turn a synonym for "*making*." The sole authority purportedly bridging this gap is *Bluebank v. Venezuela*, which does nothing of the sort.[723]

657. Based on this terminological jugglery, Serbia cites *Standard Chartered Bank* for the proposition that, in order for an investment to be "of" an investor, the investor must demonstrate that it "*controlled the investment in an active and direct manner*."[724] Serbia also cites the conclusion of the *Mera v. Serbia* tribunal, holding that the phrase "*making investment*" comprises "*holding and management of the investment*."[725] Even if such requirements were appropriate under the Serbia-Cyprus BIT (*quod non*), Sembi would easily satisfy them.

658. Despite Serbia's insistence to the contrary, Sembi has been precisely a "*vehicle for the direction and management of BD Agro's business."*[726] Sembi's Board of Directors always included not only Mr. Rand and two Cypriot directors, but also one Serbian director who had been at the same time on BD Agro's Board of Directors. These were

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721 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 211, **RLA-073**.

722 *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia I*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶ 130, **CLA-085**.

723 The *Bluebank* tribunal prefaced its analysis of the phrase "*investment" means every kind of asset invested*" by observing that "*the central question to be determined for purposes of jurisdiction is whether the Claimant, found to have the requisite nationality, has made an "investment*." The focus of the tribunal's analysis was the word "investment", a not whether "invested" is synonymous with "made." *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017, **RLA-014**.

724 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12230, Award, 2 November 2012, ¶ 230, **RLA-015**.

725 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, 93 **CLA-022**.

726 Counter-Memorial, ¶ 316.

Mr. Obradović and, after Mr. Rand had asked Mr. Obradović to step down from the management of both Sembi and BD Agro, Mr. Markićević.[727]

659. Moreover, as confirmed by Mr. Rand, BD Agro was regularly discussed during meetings of Sembi's directors.[728] This is also supported by documentary evidence showing that BD Agro's management reported to Sembi on important issues relating to BD Agro such as progress on farm construction works, the status of BD Agro's herd and crop, and other issues relating to BD Agro.[729] BD Agro's management had also submitted for approval of Sembi's Board of Directors strategic decision such as sale of BD Agro's land, acquisition of the Sokolac farm and reconstruction thereof and the reconstruction of BD Agro.[730] Sembi's control over BD Agro is also evidenced by the fact that since 2008, BD Agro has been reflected in Sembi's books as Sembi's subsidiary.[731]

660. *Third,* Serbia again reiterates that the Sembi Agreement produced no effects because Sembi never acquired the nominal ownership in BD Agro's shares. As explained above, this objection is pointless because Sembi's standing is not based on any nominal or registered ownership over the Beneficially Owned Shares, but on its beneficial

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727 Extract from the Company Register regarding Sembi dated 7 June 2017, **CE-053**.

728 Rand Second WS, ¶ 62.

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

730 Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, pp. 1-2, **CE-422**.

731 Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, p. 13, **CE-420**; Report and financial statements of Sembi Investment Limited as of 31 December 2009, p. 15, **CE-656**; Report and financial statements of Sembi Investment Limited as of 31 December 2010, p. 14, **CE-657**; Report and financial statements of Sembi Investment Limited as of 31 December 2011, p. 14, **CE-658**; Report and financial statements of Sembi Investment Limited as of 31 December 2012, p. 14, **CE-659**; Report and financial statements of Sembi Investment Limited as of 31 December 2013, p. 14, **CE-660**; Report and financial statements of Sembi Investment Limited as of 31 December 2014, p. 14, **CE-661**; Report and financial statements of Sembi Investment Limited as of 31 December 2015, p. 14, **CE-662**; Report and financial statements of Sembi Investment Limited as of 31 December 2016, p. 14, **CE-663**; Report and financial statements of Sembi Investment Limited as of 31 December 2017, p. 14, **CE-664**. *See also* Rand Second WS, ¶ 60.

ownership thereto. And as confirmed by Mr. Georgiades, Sembi did acquire beneficial ownership of the Beneficially Owned Shares.[732]

661. *Finally*, Serbia argues that Sembi cannot be a beneficial owner of the Beneficially Owned Shares because it is not the ultimate beneficial owner thereof. This is incorrect. "Ultimate beneficial owner" is not a pleonasm and "direct beneficial owner'" is not an oxymoron.

662. As Serbia correctly observes, the doctrine of beneficial ownership relied on by the Claimants "*applies when the legal title is split between* '*a nominee and a beneficial owner*.'"[733] Under the Sembi Agreement, the title to Beneficially Owned Shares was split between Mr. Obradović (the nominal owner) and Sembi (the beneficial owner). Sembi was thus beneficial owner of the Beneficially Owned Shares. Rand Investments holds shares in Sembi, and Mr. Rand is in turn the sole shareholder of Rand Investments. The remaining the Canadian Claimants are beneficiaries of the Ahola Trust, which holds shares in Sembi. The link of beneficial ownership between the Beneficially Owned Shares and all the Canadian Claimants is thus uninterrupted and is protected under the Canada-Serbia BIT.

663. Based on the above, it is obvious that the Tribunal has jurisdiction over Sembi's investments under the Serbia-Cyprus BIT.

## C. The Tribunal has jurisdiction *ratione materiae* under the ICSID Convention

### 1. The Claimants made an investment within the meaning of the ICSID Convention

664. Article 25(1) of the ICSID Convention states:

> 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.

732 Georgiades Second ER, ¶ 3.23.

733 Counter-Memorial, ¶¶ 334-335.

665. The ICSID Convention does not include a definition of *investment*. Given the Convention's failure to define "investment," ICSID jurisdiction is restricted only by the investment treaty applicable between the parties to a dispute. As Professor Mortenson explains, "*tribunals should treat the definition of 'investment' under the Convention as encompassing any plausibly economic activity or asset*."[734]

666. A number of 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. And as explained above, the Claimants have made *investments* within the meaning of the Treaties.

667. These tribunals include the following:

a. Gruslin v. Malaysia: "*[Article 25(1)] does not operate to define the particular investment. This is a matter to be determined by the terms of the IGA as the document relied upon as constituting the consent*."[735]

b. Lanco International, Inc. v. Argentine Republic: "*As regards the fact that this disputearises directly out of an investment, once again here the term 'investment' is not defined in the ICSID Convention, but it is defined in the ARGENTINA-U.S. Treaty, which sets the bounds within which we operate in this case*."[736]

c. M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador: "*From a simple reading of Article 25(1), the Tribunal recognizes that the ICSID Convention does not define the term 'investments' […]The BIT indicates in its Article 1 which investments are to be protected under it*."[737]

d. Ambiente Ufficio SPA and others v. the Argentine Republic: "*The scope of the term 'investment' in a given case would therefore be a product of a liberal*

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734 J. Mortenson, *The Meaning of Investment: ICSID Travaux and the Domain of International Investment Law*, Harvard International Law Journal, Vol. 51, 2010, p. 261, **CLA-086**.

735 *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **CLA-087**.

736 *Lanco Int'l, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 4, **CLA-088**.

737 *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 159-60, **RLA-034**.

*understanding of the concept of 'investment', combined with possible restrictions to the consent to arbitration as provided by the host State*."[738]

668. The Claimants submit that this Tribunal should follow this approach and not impose on the Claimants any jurisdictional requirements not already set forth in the Treaties.

669. Other tribunals have identified typical hallmarks of an investment under the ICSID Convention under the so-called *Salini* test: commitment of financial resources or other assets, assumption of commercial risks and certain duration of the commercial operation.[739]

670. Serbia argues, in reliance on *Malicorp v. Egypt,* that a contribution to the host State's development should also form part of the jurisdictional test under the ICSID Convention. The vast majority of tribunals, however, simply rejects that an investment must necessarily contribute to the host state's economy.[740]

671. And even when the tribunals do accept such a requirement, they adopt a presumption of contribution to the host State's economy[741]—in effect reducing the requirement to "*the elements of contribution/duration/risk*"—except in cases where the investor carried out "*no economic activity*".[742]

672. In any event, the Claimants' investment complied even with the broadest of tests put forth by any tribunal.

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738 *Ambiente Ufficio SPA and others v. The Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **CLA-089**.

739 *Salini v Morocco,* ICSID Case No Arb/00/04, Decision on Jurisdiction, 23 July 2001, ¶ 52, **CLA-020**.

740 *E.g. Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 295, **CLA-067**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 187, **CLA-032**; *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶ 111, **CLA-090**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Pliurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 Sept. 2012) ¶ 224-25 (affirming Fakes), **RLA-024**.; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013) ¶¶ 171-73, **RLA-095**.

741 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), ¶ 85, **RLA-005**.

742 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), ¶ 85, **RLA-005**.

### a. The Claimants made substantial contributions

673. The Claimants made substantial contributions, including, but not limited to:

a. the EUR 5,549,000 purchase price for the Privatized Shares;

b. EUR 2 million additional investment in BD Agro;

c. the EUR 0.2 million purchase price for Mr. Rand's Indirect Shareholding; and

d. Mr. Rand's EUR 2.2 million financing of the replacement of BD Agro's herd and other payments and loans made for the benefit of BD Agro.

674. While Serbia does not even allege that the commitment of such resources would be insufficient for the purposes of the ICSID Convention, it claims that the contributions noted in (a) and (b) above should be disregarded because they were made by Mr. Obradović rather than the Claimants.[743]

675. It was Mr. Obradović who wired the money to the Privatization Agency because he was the buyer under the Privatization Agreement and the nominal owner of the Beneficially Owned Shares. The Serbian Government, however, was fully aware that the ultimate beneficial owner was Mr. Rand. Mr. Rand had also secured the financing from his long-time business partners, the Lundin Family.[744] The existence of all these contributions is confirmed by the witness testimony of Mr. Obradović,[745] Mr. Rand[746] and Mr. Azrac,[747] long-term banker of the Lundin Family. They are also confirmed by contemporaneous documentary evidence.[748]

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743 Counter-Memorial, ¶ 498.

744 Memorial, ¶¶ 88-95.

745 Obradović First WS, ¶ 11.

746 Rand First WS, ¶¶ 16-17; ¶¶ 30-33.

747 Azrac WS, ¶¶ 9-16.

748 Confirmation of wire transfer from Sembi to Mr. Ian Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-057**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-058**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-059**; Confirmation of EUR 3,610,000.00 wire transfer from Mr. William Rand to Sembi executed on 3August 2008, **CE-060**; Confirmation of EUR 2.001.000.00 wire transfer from Indonesian DevelopmentsCo. Ltd. to Sembi executed on 13 October 2010, **CE-061**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-056**; Register of Directors of Indonesian Developments Co. Ltd., **CE-075**.

676. With respect to the distribution of contributions among the individual Claimants, it is apparent that Sembi made a substantial contribution because it repaid Mr. Obradović's loans to the Lundins. The Canadian Claimants' may rely on Sembi's contribution because they own Sembi's shares. There is simply no requirement that all shareholders must contribute to the acquisition of an asset by its subsidiary. However, even Serbia seems to note that Rand Investments and Mr. Rand made contributions of money, for example by advancing the funds to Sembi for its repayment of Mr. Obradović loans to the Lundins.[749]

677. The remaining Canadian Claimants—Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand—were not required to make any independent contribution.

678. *First*, as the beneficiaries of the Ahola Trust (which owned shares in Sembi), Mr. Rand's children can rely on the contribution made by Sembi. Any other interpretation would render the protection of trusts under the Canada-Serbia BIT meaningless because trusts inherently confer beneficial ownership on beneficiaries.

679. *Second*, as his children, they can rely on contributions made by Mr. Rand. This is consistent with findings of investment tribunals. For example, in *Renée Rose Levy de Levi v. Peru*, the claimant acquired her shareholding in a Peruvian bank, BNM, by a gratuitous assignment from her father. The tribunal analyzed the claimant's investment fulfillment of the *Salini* criteria—including the contribution element—not in separation, but rather based on the "*initial investment made by the Claimant's relatives*."[750]

680. The *Levy* tribunal then dismissed Peru's objection that the gracious assignment amounted to an abuse of process:

> Firstly, *because this is a transfer between very close family members* and, secondly, because the transfer occurred in July 2005 and it was not until five years later that the Claimant decided to resort to ICSID arbitration.[751]

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749 Counter-Memorial, ¶ 493.

750 Counter-Memorial, ¶ 151.

751 *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 154 (emphasis added), **CLA-091**.

681. Accordingly, as his "close family members", Mr. Rand's children can rely on the contributions made by their father for the purposes of the *Salini* "test", including its contribution element.

682. In sum, all Claimants satisfy the "contribution" element.

**b. The Claimants' investment were of a sufficient duration**

683. The duration of the Claimants' investment was ten years with respect to Mr. Rand and seven years for the remaining Claimants. This is of course amply sufficient, and Serbia does not even claim otherwise.

**c. The Claimants' investment involved significant risk**

684. The Claimants' investment in BD Agro involved not only risks inherent to the volatile agricultural business, but also significant risks connected with the unpredictable legal and business environment in Serbia—which ultimately materialized when Serbia committed the breaches of the Treaties claimed in this arbitration.

685. Serbia argues that the Claimants did not undertake any risk because they have failed to make any contribution. As shown above, all Claimants satisfy the "contribution" test.

**d. The Claimants' investments contributed to Serbia's development**

686. Even if "*contribution to the development*" was required under the ICSID convention (*quod non*), the Claimants' investment would clearly satisfied it. The Claimants significantly contributed to Serbia's development by turning BD Agro, a socialist-style farm with outdated equipment and a disease-stricken herd, into "*the most modern cow farm not only in Serbia, but also in Europe*"[752] and one of the main milk producers in Serbia.

687. Serbia, however, argues, without any corroboration that "*less than seven years of Mr. Obradovic's management was enough to thoroughly destroy income generating potential of a company that has existed since 1947*."[753] Serbia of course does not bother explaining which income generating potential it refers to or, how did the Claimants

752 News Article "*Where cows listen to Beethoven*" published on 27 November 2010, **CE-026**.

753 Counter-Memorial, ¶ 503.

destroy it. Moreover, Serbia's argument is belied by the clear contemporaneous endorsements of the Claimants' significant contributions by Serbian authorities.

688. For example, in 2012—precisely at the time which allegedly marked the total destruction of BD Agro—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*."[754]

689. There can thus be no doubt that the Claimants contributed to Serbia's economy.

* * *

690. In sum, the Claimants' investments clearly satisfies all criteria of the *Salini* "test".

### 2. The Claimants have standing under the ICSID Convention

691. Serbia alleges that because "*none of the Claimants has ever been a party to [the Privatization Agreement]*",[755] the Claimants allegedly lack standing to bring any claim under the ICSID Convention in relation to the Privatization Agreement. Serbia reaches this incorrect conclusion by reference to an alleged principle that "*if an investor is not a contracting party in a contract forming a basis of his investment, the investor has no right of standing before an ICSID tribunal*."[756]

692. No such principle exists under the ICSID Convention. Quite the opposite, ICSID tribunals routinely adjudicate on treaty claims relating to a contract signed by the claimant investors' subsidiaries.[757] As observed by the ICSID tribunal in *Gas Natural v. Argentina*:

> The assertion that a claimant under a bilateral investment treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT has

754 Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012, **CE-033**.

755 Counter-Memorial, ¶ 486.

756 Counter-Memorial, ¶ 486.

757 *See* e.g. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award on Jurisdiction, 8 December 2003, ¶¶ 65-66, **CLA-064**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction, 17 July 2003, ¶ 68, **CLA-065**.

> been made numerous times, never, so far as the Tribunal has been made aware, with success.[758]

693. This clear consensus of investment tribunals is confirmed by the reputable arbitrator Stanimir Alexandrov, who concluded—after conducting a detailed review of jurisprudence of investment tribunals on this issue—that:

> It is noteworthy that all the tribunals' decisions discussed above gave little if any credence to the argument that when a shareholder invokes a dispute relating to assets of the local company (e.g., rights under a license, or contractual rights), such a dispute does not arise directly out of an investment in the stock of the company. Tribunals disposed of this argument in a rather summary fashion. It is clear that they all considered it to be beyond doubt that a shareholder's interest in a company includes an interest in the assets of that company, including its licenses, contractual rights, rights under law, claims to money or economic performance, etc., and that in finding jurisdiction they based that reasoning on the broad definition of investment in the applicable BITs.[759]

694. Serbia seeks to rely on the award in *Consortium v. Algeria*, which allegedly "*fits perfectly the facts of the case at hand*."[760] In *Consortium*, the tribunal considered a claim brought by a Consorzio Groupement LESI-DIPENTA, an external consortium formed under Italian law by companies LESI and DIPENTA. The consortium alleged that its investment was constituted by contractual rights under a construction contract concluded by LESI and DIPENTA with an Algerian state entity.[761] The consortium did not hold any interest in LESI or DIPENTA. Rather, LESI and DIPENTA held an interest in the consortium. It is thus obvious that the consortium did not have a standing relating to alleged violations of a contract entered into by the companies forming such a consortium.

695. Conversely, the Canadian Claimants all own (nominally or beneficially) shares in Sembi and thus have standing under the Canada-Serbia BIT and the ICSID Convention to bring

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758 *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, ¶ 50, **CLA-066**.

759 Stanimir Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis*, The Law & Practice of International Courts and Tribunals, p. 45, **CLA-092**.

760 Counter-Memorial, ¶ 488.

761 *Consortium Groupement L.E.S.L- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08*, Sentence, 10 janvier 2005 (English Translation from ICSID website), ¶ 8, **RLA-098**.

claims relating to Serbia's interference with the Privatization Agreement, despite the fact that they are not party thereto.

696. In any event, Serbia's objection misses the point also because the primary basis of the Claimants' investment is their interest in BD Agro—and not only their interest in the Privatization Agreement.

## D. The Tribunal has jurisdiction *ratione voluntatis* over the Claimants' claims

### 1. The Tribunal has jurisdiction *ratione voluntatis* because the Claimants did not violate Serbian law

697. Serbia argues that, even if the mandatory provisions of Serbian law did not prevent the Claimants from acquiring ownership in BD Agro and, thus, from establishing the Tribunal's jurisdiction *ratione materiae*, their violation would still render the investment illegal and thus outside the Tribunal's jurisdiction *ratione voluntatis*.[762] But substituting the words "*materiae*" for "*voluntatis*" is not a sufficient ground for creating a new jurisdictional battlefield.

698. In fact, Serbia does not event pretend that its *ratione voluntatis* objection brings any new element. Instead, Serbia's *ratione voluntatis* section only incorporates, without any additional analysis or explanation, a reference to its *ratione materiae* objection. The Claimants cannot but do the same. Accordingly, Serbia's first *ratione voluntatis* objection must be dismissed for the same reasons as Serbia's *ratione materiae* objection.

### 2. The Tribunal has jurisdiction over Mr. Rand's claims relating to Mr. Rand's Indirect Shareholding

699. Serbia argues that the Tribunal lacks jurisdiction *ratione voluntatis* over Mr. Rand's Indirect Shareholding because MDH Serbia did not submit a waiver of its right to initiate or continue local proceedings (or to engage in other means of dispute settlement).[763]

700. Serbia's objection is fundamentally misplaced. It is based on the erroneous predicate that Mr. Rand brings this claim *on behalf* of MDH Serbia pursuant to Article *21(2)* of the Canada-Serbia BIT. This is obviously incorrect—Mr. Rand advances this claim *on*

762 Counter-Memorial, ¶¶ 352-353.

763 Counter-Memorial, ¶¶ 365-367.

*his own behalf* under Article *21(1)* of the Canada-Serbia BIT. The requirement for MDH Serbia to submit a waiver under Article 22(2)(f) of the Canada-Serbia BIT is thus plainly inapplicable—and that alone puts an end to Serbia's flawed objection.

701. In addition, this jurisdictional objection must in any event fail because MDH Serbia substantively fulfills the purpose underlying the requirement of waiver. Serbia obviously knows not only that that MDH Serbia has *not* engaged in any local proceedings to obtain compensation for unlawful expropriation of Mr. Rand's Indirect Shareholding, but also that no such remedies are even available to MDH Serbia under Serbian law. In addition, to accommodate Serbia's unwarranted and purely formalistic insistence on a submission of MDH Serbia's waiver, the Claimants now attach this waiver so as to formally confirm that MDH Serbia will not initiate any proceedings before an administrative tribunal or court in Serbia, or other dispute settlement procedures, with respect to Serbia's measures which are alleged to be a breach of the Canada-Serbia BIT.[764] As ample investment authority confirms, submission of waiver at a later stage of the proceedings is more than sufficient to meet the waiver requirement prescribed by the investment treaty, especially when the enterprise in question substantively fulfils the waiver requirement anyway. As a result, Serbia's objection is now moot.

702. Finally, Serbia's objection must be rejected also because it is submitted both belatedly and in blatant abuse of Serbia's rights. Serbia never requested a waiver from MDH Serbia although it had ample opportunity to do so during the pre-arbitration discussions with the Claimants and ICSID the object of which was precisely to ensure that the formal requirements under Article 22 of the Canada-Serbia BIT had been fulfilled. Serbia thus clearly breached the requirement under ICSID Arbitration Rule 41(1) requiring it to raise all its jurisdictional objections *as early as possible.* At the same time, Serbia has known all along that MDH Serbia effectively meets the waiver requirements anyway. In seeking to deprive the Tribunal of jurisdiction on the basis of a purely formalistic objection—which moreover, is raised belatedly—Serbia abuses its rights and its objection must be dismissed for this additional reason.

764 MDH Serbia's waiver, 31 May 2019, **CE-793**.

### a. Mr. Rand makes an investment claim *on his own behalf*, not on behalf of MDH Serbia

703. The first and most important reason why Serbia's objection based on the lack of waiver from MDH Serbia is bound to fail is that it is based on a legally erroneous characterization of the nature of claims in relation to Mr. Rand's Indirect Shareholding. Contrary to Serbia's flawed assertion, Mr. Rand does not—and is not required to under international investment law—bring these claims on behalf of MDH Serbia. Mr. Rand brings this claim on his own behalf and for his own losses that he suffered as a result of Serbia's wrongful conduct towards BD Agro as its indirect 3.9% shareholder.

704. Serbia's objection is based on Article 22(2)(f) of the Canada-Serbia which reads as follows:

> An investor may submit a claim to arbitration under Article 21 only if:
>
> […]
>
> (f) *in the case of a claim submitted under Article 21(2):*
>
> (i) not more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby, and
>
> (ii) both *the investor and the enterprise* waive their right to initiate or continue before an administrative tribunal or court under the domestic law of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the respondent Party that is alleged to be a breach referred to in Article 21.[765]

705. The Claimants have made perfectly clear in their submissions in this arbitration thus far that Mr. Rand brings this claim *in his own name and on his own behalf* in relation to the losses that he has sustained as an indirect shareholder in BD Agro (not in MDH Serbia) as a result of Serbia's unlawful conduct targeting BD Agro.[766] Mr. Rand thus makes an investment claim pursuant to Article *21(1)*—not 21(2) of the Canada-Serbia BIT. As a result, the requirement for MDH Serbia to submit a waiver—which is only relevant for claims made under Article 21(2) of the Canada-Serbia BIT—is plainly inapplicable.

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765 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 22(2)(f)(emphasis added), **CLA-001**.

766 Notice of Dispute, ¶¶ 119, 137; Request for Arbitration, ¶¶ 188, 242; Memorial, ¶¶ 299, 387, 405, 408, 563, 565-569; Reply to Request for Bifurcation, ¶¶ 34, 36, 52-56.

706. Under the Canada-Serbia BIT, an investor such as Mr. Rand—who owns the shares which qualify as protected investment under an investment treaty indirectly through a local company—is perfectly free to either bring an investment claim on his own behalf or on behalf of the local company which has suffered losses as a result of the host state's breach—here, being BD Agro. This is obvious from the plain reading of Article 21 of the Canada-Serbia BIT as follows:

> ARTICLE 21
>
> Claim by an Investor of a Party *on Its Own Behalf or on Behalf of an Enterprise*
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that:
>
> (a) the respondent Party has breached an obligation under Section B, other than an obligation under Articles 8(3), 12, 15 or 16; and (b) the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor of a Party, on behalf of an enterprise of the respondent Party that is a juridical person that the investor owns or controls directly or indirectly, ***may submit to arbitration*** under this Section a claim that:
>
> (a) the respondent Party has breached an obligation under Section B, other than an obligation under Articles 8(3), 12, 15 or 16; and
>
> (b) the enterprise has incurred loss or damage by reason of, or arising out of, that breach.[767]

707. The alternative and permissive language of Article 21 of the Canada-Serbia BIT leaves no doubt that an investor can either submit a claim *on his own behalf* under Article 21(1) of the Canada-Serbia BIT, for the losses that the *investor itself* has sustained as a result of the host State's breach, or submit a claim *on behalf of a locally incorporated enterprise* (that the investor owns or controls) under Article 21(2) of the Canada-Serbia BIT, for the losses that the *enterprise* has suffered as a result of the host State's breach—and the choice lies strictly with the investor.

708. Investment tribunals unequivocally support this conclusion.

709. Most famously, the tribunal in *UPS v. Canada* was faced with Canada's objection that UPS, the US claimant, should have brought a claim against Canada related to losses

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767 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 21 (emphasis added), **CLA-001**.

incurred by UPS's wholly-owned Canadian subsidiary UPS Canada under Article 1117 of NAFTA—which regulates claims brought by investors on behalf of local enterprises and thus constitutes NAFTA's equivalent of Article 21(2) of the Canada-Serbia BIT[768]—rather than under Article 1116 of NAFTA—which in turn regulates claims brought by investors on their own behalf and thus constitutes NAFTA's equivalent of Article 21(1) of the Canada-Serbia BIT.[769] The tribunal resolutely rejected this objection:

> We agree with UPS that the claims here are properly brought under article 1116 and agree as well that *the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada*. If there were multiple owners and divided ownership shares for UPS Canada, the question of how much of UPS Canada's losses flow through to UPS – the question posed by Canada here - may have very different purchase. As it is, there is no reason to ask that question in the instant proceeding. *Whether the damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction over these claims*. That is clearly the same position taken by the tribunal in the *Pope* & *Talbot* proceeding. Moreover, in this context, *there is no substantial difference between claims filed under article 1116 and under article 1117. Canada has not been deprived of any notice about the nature of the claim, and there is no reasonable question whether UPS Canada or UPS would consent to filing the particular claims. We would not, in these circumstances, require that UPS refile its complaint under article 1117 if that were the better basis for its claims*. In the event, however, that is not a conclusion we need reach here.[770]

710. The tribunal in *Copper Mesa v. Ecuador* subsequently endorsed the reasoning in *UPS v. Canada* and stated in no uncertain terms that the wording of Article XIII(3) of the (now terminated) Canada-Ecuador BIT—which *reads almost exactly the same* as Article 21(1) of the Canada-Serbia BIT[771]—left no doubt that the claimant in that case

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768 North American Free Trade Agreement (NAFTA), Art. 1117, **RLA-026**.

769 North American Free Trade Agreement (NAFTA), Article 1116, **RLA-026**.

770 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, ¶ 35 (emphasis added), **CLA-093**. The *UPS* tribunal also pointed out that where the investor is the sole and full owner of the local subsidiary, the distinction between Articles 1116 and 1117 NAFTA becomes purely formal because the losses of the investor effectively correspond to the losses of its fully owned local subsidiary.

771 Article XIII.3 of the Canada-Ecuador BIT read as follows:

"*An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:*

*(a) the investor has consented in writing thereto;*

was perfectly entitled to advance *its own claim* for the losses that it had itself sustained due to the diminution in the value of the shares which it held via its local Ecuadorian subsidiaries:

> The Tribunal considers that *the Claimant is entitled, as a matter of jurisdiction and admissibility, to advance its own claims against the Respondent, in respect of its own* investments *in Ecuador pursuant to Article XIII(1) and (2) of the Treaty*. The Tribunal also considers t*hat is what the Claimant has done in this arbitration for its primary claims: it has not there sought to advance or espouse any claim in the name of any its subsidiaries; and it is only claiming compensation for harm which it has itself suffered* and not any harm suffered by its subsidiaries […].[772]

711. The *Copper Mesa* tribunal then concluded that the claimant in that case was not required to submit any separate waivers from its subsidiaries precisely because the waiver requirements pertaining to claims brought on behalf of enterprises, such as those under Article 22(2)(f)(ii) of the Canada-Serbia BIT,[773] were inapplicable to individual claims of investors:

> Article XIII: The Tribunal considers that *the Claimant has complied with the formal requirements of Article XIII(3) & (4)(c) of the Treaty*, with the UNCITRAL Arbitration Rules, for commencing this arbitration against the Respondent. Moreover, *the Tribunal does not understand the Respondent to contend otherwise*.
>
> […]
>
> *In these circumstances, no question can arise here as to any requirement imposed by Articles XIII(1) and (2) of the Treaty upon the Claimant to obtain the consents or waivers of its* subsidiaries *in commencing this arbitration against the Respondent*. In the Tribunal's view, *the requirements of Article XII(12)(a) [sic] of the Treaty are*

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*(b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;*

*(c) if the matter involves taxation, the conditions specified in paragraph 5 of Article XII have been fulfilled; and*

*(d)* ***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.***" Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, signed 29 April 1996, Art. XIII.3, **CLA-094**.

772 *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, ¶¶ 5.50 (emphasis added), **RLA-120**.

773 Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, signed 29 April 1996, Art. XIII(12)(a), **CLA-094**.

> *simply not applicable to the Claimant's case under Articles XIII(1) and (2).* It is therefore unnecessary to consider further the Respondent's submission that Article XII(12) operates as an improved or exclusive 'fork-in-the-road' provision.[774]

712. The findings of the *UPS and Copper Mesa* tribunals exactly apply to claims brought by Mr. Rand for the losses he suffered as an indirect owner of 3.9% of the shares in BD Agro held through this wholly-owned Serbian company, MDH Serbia: Mr. Rand brings these claims for the losses he himself suffered, not for the losses that MDH Serbia suffered. Mr. Rand correctly filed this claim under Article 21(1) of the Canada- Serbia BIT and attached the only waiver that was required from him under Article 22(2)(e)(ii) of that treaty—i.e. his own.

713. For the sake of completeness: Serbia's alternative assertion that Article 22(2)(e)(iii) of the Canada-Serbia BIT requires Mr. Rand to provide MDH Serbia's waiver even when he brings his own claim under Article 21(1) of that treaty is equally misplaced.

714. Article 22(2)(e)(iii) of the Canada-Serbia BIT[775] requires the investor who brings a claim on his own behalf under Article 21(1) to submit a waiver of the local company exclusively in the event that the investor's claim "*is for loss or damage to an interest in an enterprise of the respondent Party that is a juridical person that the investor owns or controls directly or indirectly*."[776]

715. That provision is plainly inapplicable here.

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774 *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, ¶¶ 5.49, 5.53 (emphasis added), **RLA-120**.

775 The full wording of this provision reads as follows:

"*[…] in the case* ***of a claim submitted under Article 21(1):***

*(i) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby,*

*(ii) the investor waives its right to initiate or continue before an administrative tribunal or court under the domestic law of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the respondent Party that is alleged to be a breach referred to in Article 21, and*

*(iii)* ***if the claim is for loss or damage to an interest in an enterprise of the respondent Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise waives the right referred to under subparagraph (ii)***." Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 22(2)(e)(iii), **CLA-001** (emphasis added).

776 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 22(2)(e)(iii), **CLA-001**.

716. Article 22(2)(e)(iii) of the Canada-Serbia BIT makes clear that the requirement for the locally incorporated enterprise to also submit a waiver alongside the investor would only be triggered had Mr. Rand claimed for the losses caused to his interest in *MDH Serbia*—which he fully owns and controls. Mr. Rand however makes no claim for losses to his interest in MDH Serbia. Instead—as has been made abundantly clear—he seeks compensation for the losses to his (indirect) interest in *BD Agro* because BD Agro and its shares were the target of Serbia's illegal conduct. Mr. Rand's interest in BD Agro is merely channeled through MDH Serbia and that is why Article 22(2)(e)(iii) of the Canada-Serbia BIT, with its requirement to submit a waiver from the locally incorporated enterprise, simply does not apply here.

717. In sum: There is no requirement in the Canada-Serbia BIT or in international investment law that Mr. Rand submit his claim for losses that he sustained as an indirect 3.9% shareholder in BD Agro *on behalf of* MDH Serbia, or to at least to include MDH Serbia's waiver alongside his own, as Serbia argues in its short-circuited (and utterly erroneous) analysis. Mr. Rand chose the proper avenue to bring his claim and complied with all the waiver formalities that the Canada-Serbia BIT requires. Serbia's misplaced objection must therefore be dismissed for this reason alone.

#### b. Serbia's objection is in any event incapable of affecting the Tribunal's jurisdiction

718. Further, even if the Canada-Serbia BIT did require the Claimants to include the waiver from MDH Serbia—and it does not—the absence of such a waiver has no impact on the jurisdiction of this Tribunal. This is most importantly because MDH Serbia *effectively fulfills* the true purpose of the formal requirement of waiver: MDH Serbia is not—and, as a matter of Serbian law, *cannot* be—engaged in any proceedings in which it could obtain compensation for damages for the losses that it sustained as a result of Serbia's expropriation of its shares in BD Agro. And in addition, in order to satisfy Serbia's formalistic insistence on MDH Serbia's waiver, the Claimants now attach MDH Serbia's waiver and, in any event, have put an end to Serbia's objection.

719. *First*, MDH Serbia has substantively fulfilled the conditions underlying the waiver requirements and Serbia's insistence on the submission of its waiver thus constitutes, at best, excessive formalism.[777]

720. It is uncontroversial that the purpose of the requirement of a waiver from the local enterprise under Article 22 of the Canada-Serbia BIT is to prevent a potential double recovery of damages—and Serbia itself expressly recognizes this in its Counter-Memorial.[778] That is why Article 22 requires that the local enterprise waive its right to pursue either domestic proceedings or another dispute settlement procedure to seek the same *pecuniary* remedy as the international arbitration pursued by its foreign owner or controlling shareholder.[779]

721. However, as Serbia itself very well knows, MDH Serbia has *not* engaged in any such proceedings and thus plainly does not seek double recovery. More importantly yet, MDH Serbia *cannot* even engage in any such proceedings before Serbian courts because it because does not have any available remedy under Serbian law to challenge the expropriation of its direct 3.9% shareholding in BD Agro—and Serbia offers strictly no authority to support its assertion to the contrary.[780] Serbia also knows that MDH Serbia is not privy to any contractual arrangement under which it could theoretically pursue claims against the Privatization Agency or Serbia.

722. In the absence of any available remedy for MDH Serbia under Serbian law (or any other dispute settlement procedure), there can be no question that the true purpose of any potential requirement of a waiver from MDH Serbia has, in any event, been fulfilled and Serbia's objection is thus plainly based on mere formalism.

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777 However, as further explained below, in relying on the absence of MDH Serbia's waiver as a purported reason ground to divest the Tribunal of its jurisdiction, Serbia not only engages in excessive formalism, it also plainly abuses its rights.

778 Serbia states that the "*[p]urpose of the waiver referred to above is to prevent double recovery and to eliminate the duplication of claims and proceedings*." Counter-Memorial, ¶ 370.

779 Article 22(3) of the Canada-Serbia BIT thus limits the waiver to proceedings seeking monetary damages and excludes proceedings for „*injunctive, declaratory or other extraordinary relief*". Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 22(3) (emphasis added), **CLA-001**.

780 Serbia states that *"[s] ince it is the company (and not Mr. Rand) who owns the shares, it is MDH doo that could initiate proceedings before Serbian courts in order to obtain compensation for its shareholding interest. This could lead to double recovery (since both Mr. Rand and MDH doo could be awarded compensation for the company's shares) and it is precisely the kind of result that the provisions cited above are designed to prevent.*" Counter-Memorial, ¶ 371.

723. However, in order to put an end to Serbia's unwarranted insistence on MDH Serbia's waiver objection based on the initial absence of MDH Serbia's waiver, the Claimants now attach MDH Serbia's waiver which merely confirms that MDH Serbia has not and will not engage in any parallel proceeding with respect to Serbia's measures which are the object of this investment arbitration.[781]

724. In this situation, the initial absence of MDH Serbia's waiver plainly has no jurisdictional consequences. Investment tribunals have held that the requirement of a waiver is merely procedural and its initial absence does not deprive the investment tribunal of jurisdiction. In *Thunderbird v. Mexico*, for example, a NAFTA tribunal rejected Mexico's jurisdictional objection based on the claimant's initial failure to submit the relevant waivers with its Notice of Arbitration as required under Article 1121 NAFTA—*i.e.* the equivalent of Article 22 of the Canada-Serbia BIT. The tribunal—expressly relying on the findings of other NAFTA tribunals—rejected the objection and held that the requirement of NAFTA to submit a waiver together with the submission of the claim was purely formal:

> Although Thunderbird failed to submit the relevant waivers with the Notice of Arbitration, Thunderbird did proceed to remedy that failure by filing those waivers with the PSoC. *The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA.* The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings. The Tribunal joins the view

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781 MDH Serbia's waiver dated 31 May 2019, **CE-793** which states that MDH Serbia "*waives its right to initiate or continue before an administrative tribunal or court under the domestic law of the Republic of Serbia, or other dispute settlement procedure, any proceedings with respect to the following measures taken by the Republic of Serbia, including, without limitation, the Privatization Agency of the Government of Serbia* ***("Privatization Agency"),*** *the Protector of Citizens of the Republic of Serbia and the Ministry of Economy of the Republic of Serbia:*

*(a)* *the termination on September 28, 2015 of the Agreement on Sale of Socially Owned Capital through the Method of Public Auction entered into between Djura Obradović and the Privatization Agency dated October 4, 2005;*

*(b)* *the appropriation on October 21, 2015 of 75.9% shareholding in BD Agro AD, Dobanovci ("BD Agro"), nominally owned by Djura Obradović and beneficially owned by Rand Investments Ltd., Mr. William A. Rand, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand, Mr. Robert Harry Leander Rand and Sembi Investment Limited (a limited liability company organized under the laws of Cyprus), (collectively, the "Investors"); and*

*(c)* *any other measure claimed in the Memorial, which was filed by the Investors against the Republic of Serbia before the International Centre for Settlement of Investment Disputes on January 16, 2019.*"

> of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.[782]

725. The *Thunderbird* tribunal then expressly emphasized that the local enterprises which failed to submit the waiver did not engage in any parallel proceedings and, thus, effectively complied with the purpose of the waiver:

> In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that *article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure*. In the present proceedings, the Tribunal notes that the EDM entities did not initiate or continue any remedies in Mexico while taking part in the present arbitral *proceedings*. Therefore, the Tribunal considers that Thunderbird has effectively complied with the requirements of Article 1121 of the NAFTA. [783]

726. Indeed, those investment tribunals which did deny jurisdiction based on issues related to alleged defects in waivers only did so in situations where the purpose of the waiver was gravely compromised, most commonly because of the actual existence of parallel proceedings.[784] However, this is plainly not the case here—as amply explained above, MDH Serbia has at all times substantively complied with the waiver requirement.

727. In sum, the *initial* absence of MDH Serbia's waiver—in any event remedied now by its submission and moreover so–cannot deprive the Tribunal of jurisdiction in a situation where MDH Serbia substantively fulfills the purpose of such a waiver.

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782 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶117, **CLA-095**.

783 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶118, **CLA-095**.

784 *E.g., Waste Management, Inc. v. United Mexican States*, Arbitral Award, ICSID Case No. ARB(AF)/98/2, ¶¶ 27-31, **CLA-096**; *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 119, **CLA-097**; *Commerce Group Corporation and San Sebastian Gold Mines Inc. v. El Salvador*, Award, ICSID Case No. ARB/09/17, 14 March 2011, ¶¶ 79-115, **CLA-098**.

### c. Serbia's objection must in any event fail because it is submitted belatedly and in bad faith

728. Finally, Serbia's objection based on the absence of MDH Serbia's waiver must be dismissed for an additional and independent reason: it is raised both belatedly and in bad faith.

729. *First*, Serbia's waiver objection is belated. It is being raised more than a year after Serbia first had the opportunity to do so because the pre-arbitration communications between the Parties directly addressed the issue of compliance with applicable waiver requirements. In raising the waiver objection only in its Counter-Memorial, Serbia thus directly contravenes the ICSID Arbitration Rule 41(1) which prescribes that jurisdictional objections must be raised as early as possible:

> *Any objection that the dispute* or any ancillary *claim is not within the jurisdiction of the Centre* or, for other reasons, *is not within the competence of the Tribunal shall be made as early as possible.* A party shall file the objection with the Secretary-General no later than the expiration of the ***time*** limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.[785]

730. The language of the provision is unambiguous: any preliminary objection to the Tribunal's jurisdiction "*shall be made as early as possible.*" This means that the host state is required to raise any jurisdictional objection as soon as it becomes apparent—and this requirement is notwithstanding the additional time limit provided for in ICSID Arbitration Rule 41(1)—that is, "*no later than* […] *the filing of the Counter Memorial*,"[786] which operates as a secondary rule.

731. Numerous ICSID tribunals have confirmed the mandatory nature of the requirement to raise jurisdictional objections as early as possible. In *Pac Rim v. El Salvador*, El Salvador raised additional objections to jurisdiction within its Counter-Memorial on the Merits. El Salvador argued that, in so doing, it had complied with the deadline set forth in ICSID Arbitration Rule 41(1), and its objections were admissible. The tribunal

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785 ICSID Arbitration Rules, Rule 41(1), **CLA-017**.

786 ICSID Arbitration Rules, Rule 41(1), **CLA-017**.

disagreed. It explained that the governing condition under ICSID Arbitration Rule 41(1) was that the objections were to be raised at the earliest possibility:

> The Tribunal considers that the *ordinary meaning of this provision establishes as the primary rule that* jurisdictional *objections must be made as early as possible*. *This rule is subject to the further condition that any such objection may not exceed the time limit for the counter-memorial. The imposition of this time limit is an* additional *condition, not an alternative requirement. In other words, the indicated deadline does not negate the primary obligation to raise jurisdictional objections as early as possible.* The exception to the time limit for objections based on facts that were unknown at that time further confirms that *the governing condition remains that they should be raised "as early as possible*.[787]

732. Because some of El Salvador's objections were solely based on facts it knew or ought to have known before submitting its Counter-Memorial, the tribunal concluded that those objections were raised too late:

> The Tribunal therefore concludes that the *Respondent has failed to fulfil the "as early as possible" requirement of ICSID Arbitration Rule 41(1)' because 'These objections have not been raised at the earliest possibility, even if they were raised before the expiration of the time limit for the Respondent's Counter-Memorial* (on the merits).[788]

733. The *Desert Line* tribunal similarly observed:

> *The fact that objections shall be filed with ICSID 'no later' than the deadline for the Counter-Memorial does not mean that the Respondent was not bound to raise them before that date, if such objections were or ought to have been already manifest*, in view of the 'as early as possible' requirement in the first sentence ***of*** Article 41."[789]

734. ICSID Arbitration Rule 41(1) is an expression of a broader duty of procedural good faith which is widely recognized in international investment arbitration.[790] For example, the

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787 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, ¶ 5.42 (emphasis added) **CLA-099**.

788 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, ¶ 5.49 (emphasis added), **CLA-099**.

789 *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 97 (emphasis added), **CLA-100**.

790 The tribunals in *Methanex, Quilborax*, and *Libananco* have pointed out that States, as much as investors, owe a general duty to arbitrate in good faith, and, in the words of the *Metal Tech* tribunal, "*have a good faith obligation to cooperate in procedural matters.*"[790] *See Methanex Corporation v. United States of America*, UNCITRAL Tribunal under NAFTA Chapter XXI, Final Award, 3 August 2005, Part II – Chapter I, ¶ 54, **CLA-101**; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 590-593, **RLA-108**; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008, ¶ 78, **CLA-102**.

tribunal in *Amto v. Ukraine* held that Ukraine's failure to raise its jurisdictional objections immediately amounted to a breach of the principle of procedural good faith, with the consequence that Ukraine was barred from raising such objections in the arbitration:

> Additionally, *a State party that considers the amicable settlement requirements of Article 26(2) have not been complied with by an Investor has an obligation, as a matter of procedural good faith, to raise its objections immediately*. *This ensures the Investor can, if necessary, remedy the defect* so *that* both parties are in a position to engage in the amicable settlement discussions envisaged by the ECT, and thereby help to preserve their long term cooperation in the energy sector. Accordingly, *the Tribunal finds that by failing to raise any immediate objection to the Claim Letters, the Respondent recognized the existence of the dispute and the validity of the Claim Letters.*[791]

735. Serbia's jurisdictional objection based on the alleged lack of waiver from MDH Serbia was obviously not raised "*as early as possible*." Serbia had ample opportunity to raise this objection *over a year* before the submission of its Counter-Memorial because the question of the Claimants' formal compliance with any applicable waiver requirements was the express object of pre-arbitration communications between the Parties and the ICSID Secretariat in March 2018. At that time however, Serbia failed to formulate any objection based on the alleged lack of waiver from MDH Serbia.

736. On 13 March 2018, the ICSID Secretariat asked the Claimants to "*clarify how the requirements of Article 22(2)(e)(iii) and Article 22(4) of the Canada-Serbia BIT have been met in this case*."[792]

737. On 16 March 2018, the Claimants sent a letter to the ICSID Secretariat and explained the reasons why their waivers complied with the relevant provisions. The Claimants also confirmed that all the required consents and waivers had been submitted with their Request for Arbitration and thus duly delivered to Serbia.[793]

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791 *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, ¶ 53 (emphasis added), **RLA-090**.

792 Letter from ICSID to the Claimants, 13 March 2018, **CE-794**.

793 Letter from the Claimants to ICSID, 16 March 2018, **CE-795**.

738. This entire exchange of correspondence was also sent in copy to Serbia's representative, the state attorney Olivera Stanimirović.[794] Serbia clearly had a perfect opportunity to object to the form of the Claimants' waivers and expressly request a waiver from MDH Serbia. However, Serbia kept silent. Against this background, there is no question that Serbia has raised its waiver objection belatedly.

739. *Second*, untimeliness is not the only problem with Serbia's waiver objection. Much more seriously than that, in raising an objection on the basis of an alleged lack of MDH Serbia's waiver, Serbia seeks to rely on a *purely formalistic* requirement to evade the jurisdiction of this Tribunal. As amply explained above, Serbia seeks to rely on a merely formal requirement of MDH Serbia's waiver as a ground precluding this Tribunal's jurisdiction while it knows all along that MDH Serbia *substantively fulfills the purpose of a waiver*. Serbia is well aware that MDH Serbia has no available avenue to even theoretically pursue its claims for compensation for the expropriation of its direct shareholding in BD Agro against Serbia (or the Privatization Agency). MDH Serbia has not engaged and *cannot* engage in any other proceedings and cannot obtain double recovery.

740. Serbia thus clearly does not insist on MDH Serbia's waiver to truly vindicate its right to be protected from double recovery. Instead, Serbia merely disingenuously fabricates formalistic reasons to attempt to escape justiciability of the Claimants' claims.

741. This is a textbook example of *abus de droit*.

742. The prohibition of abuse of rights was formulated for example in *Phoenix v. the Czech Republic*. The *Phoenix* tribunal resolutely stated that "*[n]obody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused*."[795] The *Saipem* tribunal similarly held that "*[i]t is generally acknowledged in international law that a State exercising a right for*

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794 Letter from ICSID to the Claimants dated 13 March 2018, **CE-794**; Letter from the Claimants to ICSID dated 16 March 2018, **CE-795**.

795 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 107, **RLA-005**.

*a purpose that is different from that for which that right was created commits an abuse of rights.*"[796]

743. Even more to the point, a NAFTA tribunal in the recent *Renco v. Peru* case recognized that a State's objection to the form of a waiver required by the underlying treaty would be abusive, and therefore ineffective, where such objection would be "*raise[d] […] for an improper motive*."[797] According to the *Renco* tribunal, that would be the case where the host state "*is seeking to evade its duty to arbitrate [the investor's] claims under the Treaty rather than ensure that its waiver rights are respected or that the waiver provision's objectives are served*."[798]

744. This is precisely the situation with Serbia's waiver objection. As explained above, Serbia is by no means at risk of parallel proceedings initiated by MDH Serbia in order to obtain compensation for losses due to the expropriation of its 3.9% shareholding in BD Agro, simply because MDH Serbia has not engaged—and *cannot* engage—in any such proceedings. Serbia's waiver rights thus cannot even theoretically be compromised and its waiver objection therefore constitutes nothing more than a mere attempt to "*evade its duty to arbitrate*." Serbia's objection is abusive, and must fail for this additional reason.

## E. The Tribunal has jurisdiction *ratione temporis* over the Canadian Claimants' claims under the Canada-Serbia BIT

### 1. Introduction

745. Serbia's next attempt to dismantle the Tribunal's jurisdiction under the Canada-Serbia BIT is based on two assertions, both equally flawed.

746. *First*, Serbia argues that the claims brought by the Canadian Claimants fall outside of the three-year time limit for initiating arbitration proceedings under Article 22(2)(e)(i) of this treaty. That provision requires the Claimants to bring an investment claim no later than three years "*from the date on which the investor first acquired, or should have*

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796 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 160, **CLA-047**.

797 *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 185, **CLA-097**.

798 *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 185, **CLA-097**.

*first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby*."[799]

747. This element of Serbia's *ratione temporis* objection patently fails. The Claimants brought their claims on 14 February 2018 when they filed their Request for Arbitration. Therefore, the three-year time limit would only bar the Claimants' claims in the event that the Claimants had first acquired (or should have first acquired) knowledge of Serbia's alleged breach and the resulting knowledge that they *had incurred* loss thereby *before 14 February 2015*. This is not the case.

748. Serbia's most serious breach of its obligations under the Canada-Serbia BIT which eventually prompted this arbitration occurred with Serbia's direct expropriation of BD Agro's shares on 21 October 2015 as a result of the unlawful termination of the Privatization Agreement dated 28 September 2015—and that date is fully within the three-year limitation period.

749. 21 October 2015 is the date when the Claimants lost control and beneficial ownership of their investment. It is also the first day when the Claimants acquired definitive knowledge that they had incurred loss, as required under Article 22(2)(e)(i) of the Canada-Serbia BIT. The Claimants' claim on quantum quantifies their loss as of the same date 21 October 2015.

750. It is true that the expropriation was not Serbia's first breach because Serbia had already been in breach of its obligation to release the pledge over BD Agro's shares since the Privatization Agreement expired on 8 April 2011.[800] However, *that breach continued and was repeated* after the cut-off date of 14 February 2015 as the Privatization Agency was again and again refusing the repeated requests for release—this is amply demonstrated by the audio recording of the Commission for Control's meeting of 23 April 2015.[801]

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799 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 22(2)(e)(i)(emphasis added), **CLA-001**.

800 Confirmation of the Privatization Agency on the Buyer's Full Payment of the Purchase Price, 6 January 2012, **CE-019**.

801 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, **CE-768**.

751. In any event, as a matter of simple logic, the Claimants could not have known that Serbia's conduct breaches the Canada-Serbia BIT before that Treaty entered into force on 27 April 2015—and that date is undisputedly within the three-year limitation period.

752. *Second*, Serbia argues that the Claimants' claims brought under the Canada-Serbia BIT are precluded by the general principle of non-retroactivity of treaties because they are allegedly based on events which had occurred before the Canada-Serbia BIT entered into force and thus cannot constitute the basis of Serbia's liability under that treaty.

753. This is again obviously incorrect. The Canada-Serbia BIT entered into force on *27 April 2015*. Serbia's single most important breach of the Canada-Serbia BIT—the expropriation of the Claimants' investment in BD Agro—occurred on *21 October 2015*, almost six months after the Canada-Serbia BIT entered into force. [802] The transfer of BD Agro's shares followed after the implementation of the Privatization Agency's earlier unlawful termination of the Privatization Agreement, itself dated *28 September 2015*, *i.e.* five months after the Canada-Serbia BIT entered into force.[803] Further, Serbia was in a continuous breach of its obligation to release the pledges over BD Agro's shares on 27 April 2015 when that the Canada-Serbia BIT entered into force and this breach continued thereafter. There is thus no question that the claim based on the failure of the Privatization Agency to release the pledge over BD Agro's shares also fully complies with the principle of non-retroactivity.

754. The five paragraphs constitute all that it takes to put an end to Serbia's unwarranted *ratione temporis* objection. However, the Claimants are compelled to address Serbia's flawed objection at much more length, only because Serbia chose a strategy of diverting focus away from the truly relevant factual and legal issues by way of lengthy recitals of the theory of international investment law so as to seemingly fit its initially flawed predicates.

755. In the following, the Claimants will first show that Serbia grossly distorts the factual basis of the Claimants' claims in an attempt to conveniently place the origin of this investment dispute into 2011, *i.e.* before both cut-off dates for the application of the three-year time limit under Article 22 of the Canada-Serbia BIT (which is on

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

803 Notice on Termination of the Privatization Agreement, 28 September 2015, p. 3, **CE-050**.

14 February 2015) and for the application of the principle of retroactivity (which is on 27 April 2015). Afterwards, the Claimants will demonstrate in turn that the entirety of their claims brought under the Canada-Serbia BIT undisputedly falls within its three-year time-limit and is not in any way precluded by the principle of non-retroactivity of international treaties.

### 2. Serbia impermissibly mischaracterizes the factual basis of its breaches of the Canada-Serbia BIT

756. In an attempt to manufacture an objection *ratione temporis*, Serbia resorts to a gross mischaracterization of the factual basis of the Claimants' claims when it argues that, "*all acts complained of in this arbitration are nothing but direct and imminent result of the Buyer's breach of the Privatization Agreement that was made known to him on 1 March 2011. **The finding of the violation of the Privatization Agreement is the gist of the alleged BIT breach pursued by the Claimants***."[804]

757. This assertion is incorrect, if not outright absurd. It is obvious that this statement is merely the result of Serbia's self-serving attempts to search for a date of an event before the cut-off date relevant for the assessment of Serbia's objection *ratione temporis*, so as to conveniently claim that such event must be the basis of the Claimants' claim and thus deprive the Tribunal of its jurisdiction.

758. This implausible attempt must fail for several reasons, as shown *seriatim* below.

#### a. It is for the Claimants—not for Serbia—to formulate the factual basis for their claims for the purpose of jurisdiction *ratione temporis.*

759. As investment law uncontroversially recognizes, it is *for the Claimants—not for Serbia*—to formulate their factual claims and identify the conduct of the host state that the Claimants consider to constitute a breach of the applicable investment treaty. The tribunal in *Infinito v. Costa Rica*, for example, eloquently formulated the principle as follows:

> Accordingly, *the Tribunal must assess the case before it focusing on the measures that the Claimant has deemed fit to challenge, and determine its jurisdiction, the admissibility of these claims* and, if appropriate, the prima facie existence of rights to be protected at the merits phase, *on*

[804] Counter-Memorial, ¶ 397.

> *that basis*. It is a different question whether, assuming there is jurisdiction and admissibility, the claims as raised are founded or not. This is a matter for the merits stage where the Claimant will have to establish that the claims as presented arise from breaches of the BIT and caused a compensable loss.[805]

760. The tribunal also emphasized that doing otherwise would breach the claimant's due process rights:

> Further, *at the jurisdictional* stage, *a tribunal must be guided by the case as put forward by the claimant in order to avoid breaching the claimant's due process rights*. To proceed otherwise is to incur the risk of dismissing the case based on arguments not put forward by the claimant, at a great procedural cost for that party.[806]

761. Even more to the point, a NAFTA tribunal in *Glamis Gold v. USA* confirmed that this principle applies with full force in the context of jurisdictional objections based on time-bar provisions, such as the three-year limitation period set forth Article 22(2)(f)(i) of the Canada-Serbia BIT. In that case, the United States alleged that the Tribunal lacked jurisdiction because the claim brought by Glamis in connection with the cancellation of a mining project was allegedly rooted in governmental measures adopted more than three years before Glamis filed its Notice of Arbitration. The United States thus argued that adjudication of Glamis' claim was time-barred under Article 1117 of NAFTA—*i.e.* the equivalent of Article 22(2)(f)(i) of the Canada-Serbia BIT which sets forth an identical three-year time limit in the context of claims brought by an investor on behalf an enterprise).[807]

762. Faced with this objection, the *Glamis* tribunal stated that "*[t]he basis of the claim is to be determined with reference to the submissions of Claimant.*"[808] After observing that Glamis "*d[id] not in its Notice of Arbitration, nor its subsequent filings, bring a claim on the basis of the earlier events listed by Respondent*," the tribunal dismissed this objection without any further examination.[809]

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805 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶ 187 (emphasis added), **CLA-103**.

806 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶ 186 (emphasis added), **CLA-103**.

807 Article 22(2)(f)(i) is the equivalent of Article 22(2)(e)(i) for claims submitted under Article 21(2).

808 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 349, **RLA-099**.

809 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 350, **RLA-099**.

763. The tribunal in *Eli Lilly v. Canada* also confirmed the principle that *it is for the claimants to formulate the alleged breaches of the applicable investment treaty* and did so in the precise context of its assessment of the objection based on the three-year limitation period in NAFTA as follows:

> However, *as Claimant is the Party asserting the Tribunal's jurisdiction to decide its substantive claim, the "alleged breach" must, in the first instance, be identified by reference to Claimant's submissions.* Claimant has repeatedly asserted that the measure at issue is the Canadian courts' invalidation of the Zyprexa and Strattera Patents by application of the promise utility doctrine; Claimant denies that it is challenging the promise doctrine in the abstract or the doctrine's application to the Raloxifene Patent.
>
> *The Tribunal has carefully examined Claimant's written and oral submissions to evaluate whether Claimant's characterization of its claim for the purpose of jurisdiction is supported by its position on the merits. In light of Respondent's argument that Claimant "recast" its claim in the Reply, the Tribunal has paid particular attention to this pleading. An overall reading of the Reply confirms that Claimant's challenge is aimed solely at the invalidation of the Zyprexa and Strattera Patents.* Indeed, this is clear even if one focuses specifically on the paragraphs of the Reply cited by Respondent for its portrayal of the claim. Claimant does not allege that the promise utility doctrine itself in the abstract is a violation of NAFTA Chapter Eleven.
>
> *Therefore, Respondent's attempt to re-characterize Claimant's case cannot be accepted.* The Tribunal finds that the "alleged breach" for purposes of NAFTA Articles 1116(2) and 1117(2) is the invalidation by the Canadian judiciary of the Zyprexa and Strattera Patents through application of the promise utility doctrine.[810]

764. Investment law thus makes clear that the assessment of its jurisdiction *ratione temporis* (whether under the principle of non-retroactivity or under the three-year time limit set forth in Article 22(2)(e)(i) of the Canada-Serbia BIT) must be based on those factual measures that *the Claimants allege* constitute Serbia's breaches of the Canada-Serbia BIT.

765. It is *not* –and never has been— the Claimants' case that Serbia breached the Canada-Serbia BIT on 1 March 2011 when Mr. Obradović received the First Notice from the Privatization Agency. Instead, the Claimants have always made it perfectly clear that the "*gist of the alleged BIT breach*" (in Serbia's own words)[811] was the Privatization

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810 *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Award, 16 March 2017, ¶¶ 163-165 (emphasis added), **RLA-128**.

811 Counter-Memorial, ¶ 397.

Agency's Notice on Termination of 28 September 2015, which unlawfully declared the Privatization Agreement terminated, and the subsequent transfer of the Beneficially Owned Shares to the Privatization Agency dated 21 October 2015.[812] This is the most serious conduct of Serbia which breached the Canada-Serbia BIT because it constituted unlawful direct expropriation of the Claimants' investment and thus prompted this arbitration—and not the First Notice.

766. Serbia's attempt to place the origin of its alleged breach to that moment only to be able to manufacture a *ratione temporis* objection should thus be dismissed.

### b. The Privatization Agency's First Notice plainly is not the "*gist of the alleged BIT breach*"

767. Serbia's attempt to place the origin of its breach on 1 March 2011 as the "*gist of the alleged BIT breach pursued by the Claimants*"[813] is in any event manifestly flawed.

768. *First,* the First Notice is plainly not the factual cause of this dispute because *it does not constitute any alleged breach of Serbia's obligations under the Canada-Serbia BIT*.

769. Both the application of the three-year limitation period and the application of the principle of retroactivity are predicated on the existence—as alleged by the Claimants—of Serbia's *breach* of the Canada-Serbia BIT. And the Claimants argue in this arbitration that the following three instances of conduct violated Serbia's obligations under the Canada-Serbia BIT: *First,* Serbia's continuous refusal of the Privatization Agency to release the pledge over the Privatized Shares, *second,* the unjustified and arbitrary investigation of BD Agro by the Ombudsman and his unlawful issuance of his "*recommendations,*" and *third,* Serbia's unlawful termination of the Privatization Agreement and the subsequent unlawful transfer of BD Agro shares.

770. This is the conduct that falls to be assessed under Serbia's objection *ratione temporis*—and, as further shown below, they all fully fall within the time limitations imposed by the Canada-Serbia BIT as well the principle of non-retroactivity.

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812 Notice of Dispute, ¶ 107; Request for Arbitration, ¶ 240; Memorial, ¶¶ 4, 43, 47, 387; Reply to Request for Bifurcation, ¶¶ 47, 51.

813 Counter-Memorial, ¶ 397.

771. The First Notice is merely the earliest example of the problematic conduct of the Privatization Agency—and investment law uncontroversially recognizes that it is perfectly permissible for the Claimants to include factual events pre-dating the cut-off dates in their narrative in order to provide factual background to Serbia's subsequent breach of its investment obligations.

772. For example, the *Eli Lilly* tribunal formulated this principle as follows, relying on a number of earlier cases:

> A remaining issue concerns the Tribunal's treatment of those events that did occur more than *three years before this arbitration was initiated.*
>
> […]
>
> In this context, *many previous NAFTA tribunals that have found it appropriate to consider earlier events that provide the factual background to a timely claim*. As stated by the tribunal in Glamis Gold v. United States, a claimant *is permitted to cite "factual predicates" occurring outside the limitation period, even though they are not necessarily the legal basis for its claim*.
>
> The tribunal in Grand River v. United States reached the same conclusion, drawing on past decisions: […]
>
> The Tribunal also adopts this well accepted approach. *The following analysis of the merits of Claimant's claim will be informed where appropriate by reference to earlier relevant events,* including the Canadian judiciary's interpretation of the utility requirement over time. NAFTA Articles 1116(2) and 1117(2) in no way limit or preclude such consideration."[814]

773. It is thus perfectly admissible for the Claimants to point out that the Privatization Agency was incorrect to issue its First Notice (because there was not a breach of the Privatization Agreement in the first place)—but that does not mean that the Claimants must also allege that this conduct already constituted a breach of the Canada-Serbia BIT: it did not and the Claimants have never argued otherwise.[815]

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814 *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Award, 16 March 2017, ¶¶ 171-173 (emphasis added), **RLA-128**.

815 This claim is without prejudice to Sembi's claim that the refusal to release the pledge over BD Agro's shares constituted a violation of the Cyprus-Serbia BIT. These claims are fully consistent: Serbia's refusal to release the pledge was a violation of the Cyprus-Serbia BIT before it became a violation of the Canada-Serbia BIT.

774. *Second*, none of Serbia's later violations of the Canada-Serbia BIT could have realistically been foreseeable to the Claimants at the time that the Privatization Agency sent its First Notice to Mr. Obradović on 1 March 2011. Indeed, while the Privatization Agency erred in its assessment of the existence of a breach of the Privatization Agreement already on 1 March 2011, the Claimants could not have conceivably expected that this erroneous assessment of the fulfillment of the Privatization Agreement would lead to outright violations of Serbia's investment obligations several years later.

775. *Third,* if there was any legal merit in Serbia's theory that the First Notice constitutes the "*gist of the alleged BIT breach pursued by the Claimants*," the Claimants would have been right in initiating this investment arbitration already in spring 2011 after having received the Privatization Agency's First Notice on 1 March 2011. It is obvious that such a move would have been absurd: an investment dispute initiated by the Claimants on the basis of the First Notice would be doomed to fail on the basis of its prematurity—as the tribunal in *Achmea II* succinctly explained:

> The Tribunal is being invited to engage in a speculative exercise, looking into the future to examine a State conduct that has not yet materialized and whose features may not be determined with certainty at this stage. The Tribunal concludes that that is impermissible under the BIT and thus falls outside the ambit of the Tribunal's jurisdiction.[816]

776. The tribunal in *Glamis Gold* similarly held that mere threats of expropriation are insufficient to make an expropriation claim ripe and, therefore, actionable before an investment tribunal:

> In the determination of whether the Tribunal has subject matter jurisdiction to decide the Article 1110 claims before it, the Tribunal begins from the premise that a finding of expropriation requires that a governmental act has breached an obligation under Chapter 11 and such breach has resulted in loss or damage. NAFTA Article 1117(1) establishes standing for an investor of a State Party to bring a claim for harm done to its subsidiary in the territory of another State Party under the investment provisions of Chapter 11. *Through the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs to have incurred loss or damage in order to bring a claim for compensation under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to*

816 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2013-12 (Number 2), Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 251, **CLA-104**.

> *make such a claim ripe*; for an Article 1110 claim to be ripe, *the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor*.[817]

777. In sum—Serbia's attempt to place the "gist" of the factual breach of the Canada-Serbia BIT on the First Notice dated 1 March 2011 borders on absurdity and must be rejected both as a matter of fact and law.

778. Instead, the Claimants will now explain in turn that their claims—based on those facts which the Claimants allege as violations of the Canada-Serbia BIT—are fully within the time-limits set forth by both Article 22(2)(e)(i) of the Canada-Serbia BIT and the principle of non-retroactivity of international treaties.

### 3. The Claimants' claims are not time-barred by the three-year limitation period under Article 22(2)(e)(i) of the Canada-Serbia BIT

779. Serbia's first objection *ratione temporis* is based on the allegation that the Claimants' claims fall outside of the three-year time limit for initiating arbitration proceedings set forth in Article 22(2)(e)(i) of the Canada-Serbia BIT. That provision requires the Claimants to bring an investment claim no later than three years "*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*."[818]

780. The Claimants submitted this claim to arbitration on 14 February 2018 when ICSID received their Request for Arbitration. Thus, Article 22(2)(e)(i) of the Canada-Serbia BIT would operate to exclude Canadian Claimant's claims exclusively in the event that Claimants would have first acquired (or should have first acquired) knowledge of the Serbia's *breach* of the treaty *and* knowledge of loss they suffered as a result of that breach three years before that date, *i.e.* before *14 February 2015*.

781. The date of 14 February 2015 therefore constitutes the cut-off date for the application of the three-year time limit. As further shown below, the Canadian Claimants' claims are timely because the Claimants acquired knowledge of Serbia's breach of this treaty as well as the knowledge of the resulting loss after this cut-off date.

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817 *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award, 8 June 2009, ¶ 328 (emphasis added), **RLA-099**.

818 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 22(2)(e)(i)(emphasis added), **CLA-001**.

### a. The three-year time limit is triggered when the Claimants acquire both the knowledge of breach and knowledge of loss

782. The plain wording of Article 22(2)(e)(i) of the Canada-Serbia BIT makes clear that the three-year limitation period starts to run when the investor becomes aware (or should become aware) of *both* the existence of the host state's breach and the existence of *damage*.

783. The Canada-Serbia BIT imposes the very same requirements of both the *breach* and the *loss* in its Article 21(1) which defines the standing of an eligible investor to bring an investment claim under the Canada-Serbia BIT as follows:

> 1. An investor of a Party may submit to arbitration under this Section a claim that:
>
> (a) the respondent Party has *breached an obligation* under Section B, other than an obligation under Articles 8(3), 12, 15 or 16; and
>
> (b) the investor has incurred ***loss or*** *damage* by reason of, or arising out of, that breach.[819]

784. Thus, it is uncontroversial that both the knowledge of *breach* of the Canada-Serbia BIT and the knowledge of *loss* are necessary to trigger the three-year time-limit, which starts to run on the *later* of these two dates. The *Glamis* tribunal confirmed this in no uncertain terms.[820]

785. The Claimants undisputedly acquired knowledge of both Serbia's breach of the Canada-Serbia BIT and the knowledge of the resulting loss after the cut-off date of 14 February 2015.

### b. The Claimants became aware of Serbia's breach of the Canada-Serbia BIT on and after 27 April 2015 when the Canada-Serbia BIT entered into force

786. Investment law makes clear that the knowledge of "*breach*" is predicated on the existence of the underlying legal obligation. This stands to reason: there can be no

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819 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 21 (1), **CLA-001** (emphasis added).

820 The *Glamis* tribunal stated that "[*t]he three-year limitation period presumably runs from the later of these events [knowledge of breach and of damage] to occur in the event that the knowledge of both events is not simultaneous*." *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 347, **RLA-099**.

breach without a legal obligation in the first place.[821] Thus, the three-year time limit cannot start to run earlier than the Claimants acquire a cause of action under the Canada-Serbia BIT.

787. This principle simply means that the Claimants could only conceivably have acquired knowledge of Serbia's breach of the Canada-Serbia BIT on the day that it entered into force and thereafter, *i.e.* after 27 April 2015, thus in any event after the cut-off date of 14 February 2015. As the *Spence* tribunal put it:

> *A putative claimant cannot acquire knowledge of an alleged breach of a treaty until that treaty enters into force*. While the date of the entry into force of a treaty may be, and usually is, known some time in advance of the actual entry into force date, *a breach of treaty can only arise once the treaty in question has the force of law. A putative U.S. claimant against Costa Rica could not therefore acquire knowledge, whether actual or constructive, of a breach of the CAFTA until 1 January 2009, at the earliest. Before this date, there was no operable CAFTA obligation to breach.*[822]

788. This principle by itself dismantles Serbia's implausible attempt to argue that the First Notice was a breach of the Canada-Serbia BIT. In addition to other factual and legal flaws in this theory –which are more fully explained above—the First Notice was in any event not capable of triggering the three-year time limit simply because the Canada-Serbia BIT was not even in force. The Canadian Claimants thus cannot plausibly have acquired any knowledge of its breach.

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821 As Serbia itself correctly observes, the Canada-Serbia BIT—just like NAFTA—limits the Tribunal's jurisdiction to hear only claims that certain obligations under that investment treaty have been breached and cites *Feldman v. USA* for the proposition that the Tribunal's assessment of its jurisdiction *ratine temporis* is delimited by its jurisdiction *ratione materiae*. *See*, Counter-Memorial, ¶ 411. However, Serbia itself obviously fails to understand the meaning of this statement—the plain meaning of this principle is that in order for an investor to make a claim that certain obligations under the Canada-Serbia BIT have been breached, the investor must in the first place have a cause of action under the Canada-Serbia BIT.

822 *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, ¶ 220 (emphasis added), **RLA-031**. Further, the findings of other tribunals that Serbia seeks to rely on are wholly irrelevant. These tribunals (such as *Corona* or *Ansung*) addressed the issue of whether the claimants acquired knowledge of the breach and of the loss within the required deadlines in the specific factual circumstances of those cases and are inapposite in this factual setting.

789. Instead, it is plain to see that the Claimants acquired knowledge of Serbia's violations of the Canada-Serbia BIT on or after 27 April 2015 when that treaty entered into force, and thus after the cut-off date of 14 February 2015.

790. *First*, Serbia violated its obligations under the Canada-Serbia BIT by the continuous refusal of the Privatization Agency to release the pledge over the Privatized Shares. This breach was ongoing when the Canada-Serbia BIT entered into force and lasted until the expropriation of the Claimants' investment.

791. Ample investment authority recognizes that conduct which precedes the cut-off dates falls within the ambit of the tribunals' jurisdiction *ratione temporis* if it continues on and after the cut-off date. For example, the *Feldman* tribunal held:

> NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994. However, this also means that *if there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date and which, therefore, "became breaches" of NAFTA Chapter Eleven Section A on that date (January 1, 1994), that post-January 1, 1994 part of Respondent's alleged activity is subject to the Tribunal's jurisdiction*, as the Government of Canada points out (paras. 18, 19) and also the Respondent concedes (Counter-Memorial, para. 232). Any activity prior to that date, even if otherwise identical to its post-NAFTA continuation, is not subject to the Tribunal's jurisdiction in terms of time.[823]

792. The finding of the *Feldman* tribunal is an expression of a broader doctrine of continuous breach of an international obligation, which is deeply enshrined in customary international law. Article 14(2) of ILC Draft Articles defines a "continuous act" as follows:

> *The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation […].*[824]

793. The Commentaries to the ILC Draft Articles, in turn, clarify that a course of conduct, which has started before the underlying treaty entered into force, can give rise to

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823 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (English), 6 December 2000, ¶ 62 (emphasis added), **CLA-105**.

824 ILC Draft Articles, Art. 14(2) (emphasis added), **CLA-024**.

a continuing wrongful act in the present, notwithstanding that the relevant obligation did not exist at the outset of the course of conduct:

> Thus, *conduct which has commenced sometime in the past, and which* constituted *(or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present.*[825]
>
> *In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence.*[826]

794. A similar principle is set forth in Article 15 of the ILC Draft Articles which defines a so-called "composite act." Unlike "a continuous act," a composite act is not a single act extending over a period of time. Rather, it is composed of a series of different acts that extend over that period. The ILC Commentaries, again, shed light on the notion:

> *Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.* Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in aggregate as wrongful".[827]
>
> *Only after a series of actions or omissions takes place will the composite act be revealed,* not merely as a succession of isolated acts, but as a composite act, i.e. *an act defined in aggregate as wrongful*.[828]

795. Numerous international investment tribunals have considered ongoing courses of conduct from the perspective of the doctrine of continuous breach.

796. Most famously, perhaps, the tribunal in *Société Générale v. Dominican Republic* recognized that events which constitute continuous acts may result in international law violations after the applicable treaty's entry into force. The tribunal described the principles underpinning the doctrine of continuous breach as follows:

> *The Tribunal is persuaded, however, that there might be situations in which the continuing nature of the acts and events questioned could result in a breach as a result of acts commencing before the critical date but which only become legally characterized as a wrongful act in*

825 ILC Draft Articles, p. 61 (emphasis added), **CLA-024**.

826 ILC Draft Articles, pp. 63-64 (emphasis added), **CLA-024**.

827 ILC Draft Articles, p. 62 (emphasis added), **CLA-024**.

828 ILC Draft Articles, p. 63 (emphasis added), **CLA-024**.

*violation of an international obligation when such an obligation had come into existence after the effective date of the treaty.* The tribunals in MCI, Feldman and Mondev, while not accepting jurisdiction over acts and events preceding the date of entry into force of the treaty, nevertheless did not exclude the consideration of prior acts for "purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force" or the relevance of prior events to breaches taking place after the treaty's entry into force."

[…]

*It follows that the Tribunal must be satisfied that there could be a breach of obligations under the Treaty for jurisdiction over treaty violations to be established, and this again can only happen once the obligation has come into force.* The actual determination of which acts specifically meet the continuing requirement is a matter for the merits because it is only then that it can be decided which acts amount to breaches and when this took place. At the jurisdictional stage only the principle can be identified.

*The same reasoning applies to composite acts*. While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found, and could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court. *As noted in Article 15 of the Articles on State Responsibility, the series of actions or omissions must be defined in the aggregate as wrongful and when taken together it "is sufficient to constitute the wrongful act". But of course the latter determination can only be made when the obligation is in force.*

*In situations of this kind, the preceding acts might be relevant as factual background to the violation that takes place after the critical date, and this is the meaning that the cases discussed above will have in considering that factual background and its relevance to explain later breaches*. As the Respondent has rightly recalled, this explains why in Tecmed, while often believed to have assumed jurisdiction over acts preceding the treaty, this was only to the effect that such acts represented "converging action towards the same result". In such a situation, the obligations of the treaty will not be applied retroactively but only to acts that will be the final result of that convergence and which take place when the treaty has come into force.[829]

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829 *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 87, 90-92 (emphasis added), **CLA-106**.

797. Relying on the conclusions of the *Société Générale* tribunal, the tribunal in *Bau v. Thailand* found that Thailand's cumulative pre-treaty conduct turned into a breach of its fair and equitable treatment obligation when the applicable treaty entered into force. It held:

> In the Tribunal's view, the continued refusal of the Respondent to implement toll increases under MoA2 for eight years – from the date of signing MoA2 until the Toll Plaza event in December 2004 – are "omissions" which come within the Société Générale formulation. The failure to increase tolls was the culmination of a series of wrongful acts of the Respondent which converged when the Respondent decreased the tolls.
>
> Looking at the cited Société Générale formulation as a guide and reference point, the refusal to increase tolls originated long before the crucial date in October 2004; but it continued in existence after that date, thus amounting to a breach of a Treaty obligation in force at the time when it occurred. Even although Société Générale concerned a claim of expropriation, the same reasoning must apply to breaches of the FET requirement.[830]

798. Serbia's continuing refusal to release the pledge over BD Agro's shares undisputedly qualifies as a continuous act which became a breach of the Canada-Serbia BIT on the day that that treaty entered into force. There is no doubt that the Claimants acquired knowledge of that continuous breach of the Canada-Serbia BIT resulting from Serbia's refusal to release the pledge over BD Agro's shares *after* the cut-off date of 14 February 2015.

799. *Second*, Serbia breached the Canada-Serbia BIT because the Ombudsman subjected BD Agro to unjustified, heavily publicized and politically-motivated investigations that culminated in the issuance of his unlawful "recommendations", which directly prompted the termination of the Privatization Agreement and the expropriation of the Claimants' investment. The Claimants became aware of the Ombudsman's unlawful investigation and his "recommendations" on 23 June 2015,[831] *i.e.* after the cut –off date of 14 February 2015.

800. *Third—and most importantly*— Serbia violated its obligations under the Canada-Serbia BIT because the Privatization Agency unlawfully terminated the Privatization Agreement on 28 September 2015, and subsequently unlawfully ordered the transfer of

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830 *Walter Bau AG v. Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, ¶¶ 12.36-12.37, **CLA-055**.

831 The Ombudsman's On-Line Statement dated 23 June 2015, **CE-045**.

the Privatized Shares on 21 October 2015. The Claimants thus plainly acquired knowledge of both these events after the cut-off date of 14 February 2015.

### c. The Claimants became aware that they had incurred loss as a result of Serbia's breach of the Canada-Serbia BIT after the cut-off date of 14 February 2015

801. However, in order to trigger the three-year time limit under Article 22(2)(e)(i) of the Canada-Serbia BIT, the Canadian Claimants must not only have acquired knowledge of Serbia's breach of the treaty but *also of the fact that they suffered damage* as a result of that breach.

802. Remarkably, Serbia completely failed to discuss the requirement of the Claimants' knowledge of *loss* in its *ratione temporis* objection based on the three-year time limit. The one exception is Serbia's illogical and unsupported comment that, as of the cut-off date of 14 February 2015, "*the knowledge of the possible breach and loss must have been triggered at that point – it is not required to have loss at that time*."[832]

803. Serbia's comment is plainly incorrect.

804. There is ample investment authority for the proposition that an investor's knowledge of loss, in addition to its knowledge of breach, is imperative to trigger the three-year period. To name just a few, the tribunals in *Spence*,[833] *Grand River*,[834] *Mondev*[835] and *Corona*[836]—all relied on by Serbia—have found that the limitation period cannot start running unless the claimant has acquired knowledge of not only the breach, but also of the ensuing damage. In the words of the *Corona* tribunal, "*knowledge of the breach in and of itself is insufficient to trigger the limitation period's running.*"[837]

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832 Serbia's Counter Memorial, ¶ 401.

833 *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica,* ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, ¶ 211, **RLA-031**.

834 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, Decisions on Objections to Jurisdiction, 20 July 2006, ¶ 38, **RLA-032**.

835 *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 52, **RLA-039**.

836 *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, ¶ 194, **RLA-028**.

837 *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, ¶ 194, **RLA-028**.

805. More to the point yet, the *Pope & Talbot* tribunal stated that actual damage, rather than predicted future damage, is required to trigger the three year limitation period:

> The critical requirement is *that* the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur.[838]

806. The *Mobil II* tribunal specifically required that "*there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained*":

> Even if it is possible to read the requirement in Articles 1116(2) and 1117(2) that the investor must have acquired knowledge that loss or damage *has been* incurred as embracing a case in which the investor knows that loss or damage *will be* incurred, the *time limit imposed in those provisions could not start to run until the investor had knowledge that it would suffer such loss or damage. To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty*. While the Tribunal agrees with Canada that it is not necessary that the quantum of loss or damage be known, it is clear *that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained*. Thus, although Mobil knew about the 2004 Guidelines on 5 November 2004, when they were promulgated, it could not have had the requisite knowledge that it would incur loss or damage as a result of those Guidelines until the Canadian courts had finally disposed of its challenge to the Guidelines.[839]

807. Therefore, for the Claimants' claims to be time barred, Serbia would have to establish that the Claimants gained knowledge of loss caused by Serbia's breach of the Canada-Serbia BIT before the cut-off date of 14 February 2015. Tellingly, it did not even attempt to make such a showing.

808. There is no question that the Claimants acquired the knowledge of loss after the cut-off date of 14 February 2015.

809. *First*, the Claimants acquired knowledge of the loss caused by Serbia's refusal to release the pledge over the BD Agro shares on 27 April 2015, i.e. after the cut-off date of 14 February 2015. This is because the cumulative nature of the requirements of *breach* of

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838 *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada ("The Harmac Motion"), 24 February 2000, ¶ 12, **CLA-107**.

839 *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018 (emphasis added), **CLA-108**.

the Canada//Serbia BIT and the requirement of *loss* means that the Canadian Claimants could only have gained knowledge of the loss caused upon the Canada-Serbia BIT's entry into force.

810. *Second*, the Claimants acquired knowledge of the loss caused by the unlawful investigation and recommendations of the Ombudsman on 21 October 2015 when Serbia expropriated the Claimants' investment because that act was obviously prompted by the illegal conduct of the Ombudsman.

811. *Finally*, and it goes without saying, the Claimants acquired knowledge of loss suffered as a result of Serbia's expropriatory transfer of BD Agro's shares on 21 October 2015, the date when this transfer was executed. And that date undisputedly occurred after the cut-off date of 14 February 2015.

812. Therefore, there is no question that the Claimants' claims are *not* time-barred under Article 22(2)(e)(i) of the Canada-Serbia BIT because the Claimants acquired knowledge of Serbia's violations of that treaty, as well as of the losses they suffered as a result, after the cut-off date of 14 February 2015.

### 4. The Claimants' claims are not precluded by the principle of non-retroactivity

813. In its Counter-Memorial, Serbia has spilt much ink on a theoretical narrative dedicated to the principle of non-retroactivity of international law. This is once again unnecessary and irrelevant.

814. It is of course an uncontroversial principle of international law that "*a State can only be held internationally responsible for breach of a treaty obligation if the* obligation *is in force for that State at the time of the alleged breach*."[840] The Claimants do not argue otherwise.

815. Yet, the principle of retroactivity in no way precludes the Claimants' claims under the Canada-Serbia BIT because these claims are based on Serbia's conduct which occurred *after* the cut-off date of 27 April 2015 when the Canada-Serbia BIT entered into force.

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840 Counter-Memorial, ¶ 404.

816. To reiterate the Claimants' claims under the Canada-Serbia BIT, the following conduct of Serbia qualifies as a breach of this treaty.

817. Serbia's continuous refusal to release the pledge over BD Agro's shares: The Privatization Agency was in continuous breach of its obligation to release the pledge over the BD Agro shares from the moment when it first refused to release the pledge after the full purchase price under the Privatization Agreement was paid on 8 April 2011, until the shares of BD Agro were expropriated on 21 October 2015. Serbia was thus in breach of this obligation on the cut-off date of 27 April 2015 and *subsequently*. Under the doctrine of continuous breach of an international obligation set forth above, this claim is fully in line with the principle of non-retroactivity.

818. The unlawful intervention of the Ombudsman: While the Ombudsman initiated his unlawful investigation of BD Agro in late 2014, he only made this investigation public on 23 June 2015 when he also issued his unlawful "*recommendations*." Thus, both his continuous investigation—ongoing as of the cut-off date of 27 April 2015—and his unlawful instruction to terminate the Privatization Agreement post-dating the cut-off date—fully comply with the principle of non-retroactivity.

819. The unlawful termination of the Privatization Agreement and subsequent transfer of the BD Agro shares. There is no question that both these acts occurred after the cut-off date of 27 April 2015 (on 28 September 2015 and 21 October 2015, respectively).

820. In sum, *each and every* element of Serbia's conduct that constitutes a violation of the Canada-Serbia BIT occurred (or at least continued) while that treaty was in force. Claims of the Canadian Claimants, brought under the Canada-Serbia BIT, are thus plainly in compliance with the principle of non-retroactivity of international treaties.

821. For the sake of completeness, Serbia's attempt to escape this clear and simple conclusion by reference to the alleged "real causes" of the present dispute—which, as Serbia claims, pre-date the cut-off date, is inapposite and in any event factually flawed.

822. *First*, Serbia's reliance on the importance of the "*real cause*" of the Claimants' claims under the analysis of the tribunal in *Eurogas v. Slovakia* is plainly inapposite because the *Eurogas* tribunal assessed its jurisdiction *ratione temporis* on a basis of a wholly different wording of the provision setting the relevant time limitation.

823. The analysis of the time limitation in *Eurogas v. Slovakia* was based on Article 15(6) of the Canada-Slovakia BIT which limited the treaty's application "*to **any dispute** that has arisen not more than three years prior to its entry into force*."[841] There is no such clause in the Canada-Serbia BIT. The issue in Eurogas thus was whether the *dispute* between the Parties *arose* more than three years before the Canada-Slovakia BIT entered into force—and the tribunal held that it did. However, this Tribunal is faced with a wholly different issue—whether the Claimants brought their claims under the Canada-Serbia BIT no later than three years after they acquired knowledge of Serbia's breach of that treaty and the resulting loss. Thus, the analysis of the "*real cause of the dispute*"—relevant for the *Eurogas* tribunal—is of no relevance here.

824. *Second*, Serbia can neither find solace in *Spence v. Serbia* which stated that "*the tribunal cannot evaluate conduct on which the Claimants found their claims because these claims are deeply and inseparably rooted in the pre-BIT entry into force conduct.*"[842]

825. Neither the "*real cause*" nor the "*inseparable root*" of the Claimants' claims under the Canada-Serbia BIT can conceivably be traced to Serbia's conduct pre-dating the cut-off date of 27 April 2015. Quite the opposite, as shown above, the Claimants' claims are all rooted in Serbia's conduct which either directly post-dates the entry into force of the Canada-Serbia BIT or at least continued thereafter.

826. *First*, the Claimants already explained above that the First Notice is not—and cannot be—the real source of this dispute because at that time, the Claimants obviously believed that the Privatization Agency would rectify its incorrect assessment and recognize that there was no breach of the Privatization Agreement. The First Notice could not have conceivably indicated to the Claimants that Serbia would proceed to expropriate the Claimants' investment more than four years later.[843]

827. It is plainly irrelevant in this context that the Privatization Agency referred to the possibility of termination of the Privatization Agreement in the First Notice. As ample investment authority confirms, the host state can only be held liable for unlawful

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841 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, ¶¶ 427, 457-459 (emphasis added), **RLA-043**.

842 Counter-Memorial, ¶ 416.

843 Obradović Second WS, ¶¶ 72, 78; Markićević Third WS, ¶¶ 64, 78.

expropriation when the investor has already been deprived of its property as a result of a governmental taking:

> There may thus be a difference between the date of different breaches arising from a given course of governmental conduct. The Claimant alleges breaches of Articles 1102(3) (national treatment), 1105(1) (unfair and inequitable treatment), and 1110(1) (expropriation). Breaches of Articles 1102(3) and 1105(1) occur when the ***governmental*** conduct complained of occurs. *By contrast a breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before. The gist of an expropriation is the loss of the property in question, as a result of a governmental taking (direct or indirect). Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation under Article 1110(1).*[844]

828. Serbia's assertion that the termination of the Privatization Agreement and the expropriation of the Beneficially Owned Shares was an "*inevitable and announced consequence of* [Mr. Obradović's] *deliberate breach of the Privatization Agreement*" is plainly incorrect. Serbia's breaches—the unlawful refusal to release the pledge on the Privatized Shares, the unlawful termination of the Privatization Agreement and the unlawful expropriation of the Beneficially Owned Shares—were not an inevitable consequence of Mr. Obradović conduct.

829. Fundamentally, an unlawful State act can never be labeled as an inevitable consequence of anything. This is because the State always has an obligation to act lawfully and cannot escape liability for its unlawful conduct by claiming that such unlawful conduct was foreseeable.

830. Further, the long list of events that ultimately led to the termination of the Privatization Agreement and expropriation of the Beneficially Owned Shares clearly shows that the termination and the expropriation were not "unavoidable" until they were decided by Serbia. After all, it is Serbia's own case that the termination was justified because Mr. Obradović did not show compliance with Article 5.3.4 of the Privatization Agreement until 27 July 2015.[845] On Serbia's own case, the termination and the expropriation could have been avoided at least until that date.

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844 *Resolute Forest Products Inc. v the Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 154 (emphasis added), **CLA-109**.

845 Counter-Memorial, ¶¶ 72, 75, 76.

831. Thus, it is the date of the actual expropriation of the BD Agro shares which falls to be assessed for the purpose of assessing the compliance with the principle of non-retroactivity, not the date of the First Notice.

832. *Second*, the notification of Privatization Agency's refusal to release the pledge dated 4 February 2014 is neither a real cause nor the "inseparable root" of the Claimants' claims. Rather, the real and actual source of the Claimants' claim related to Serbia's refusal to release the pledge is the Privatization Agency's *continuous* and *unremedied* refusal to do so *on and after the cut-off date*.

833. *Finally*, the failure of the Privatization Agency to approve of the assignment of the Privatization Agreement to Coropi does not constitute the real cause or the inseparable root of the Claimants' claims either.

834. In sum, both limbs of Serbia's objection *ratione temporis* are manifestly flawed and must be dismissed. Claims brought by the Canadian Claimants under the Canada-Serbia BIT are fully within the ambit of the Tribunal's jurisdiction *ratione temporis.*

## F. The Tribunal has jurisdiction *ratione personae* under the Cyprus-Serbia BIT

835. Serbia's objection to the Tribunal's jurisdiction *ratione personae* over the claims submitted by Sembi under the Cyprus-Serbia BIT is based on the assertion that Sembi does not qualify as an *investor* under that treaty because, allegedly, it does not have a "*seat*" in Cyprus. Under Serbia's theory, this is because the term "*seat*" under the Serbia-Cyprus BIT must mean "*something more*" than a registered office, namely—and wishfully—the location of a company's "*effective management*."

836. Serbia's objection manifestly fails, if only because it is squarely contradicted by the recent finding of an investments tribunal—*Mera v. Serbia*— constituted under the *very same* investment treaty. The *Mera* tribunal held in no uncertain terms that the term "seat" under that treaty quite simply equals "registered office".

837. But more than that, Serbia's interpretation of the term "seat" is also at odds with common sense and the very purpose of the Cyprus-Serbia BIT. Indeed, if Serbia's interpretation was correct, then none of the tens of thousands foreign-owned or controlled companies incorporated in Cyprus could ever satisfy the test for an *investor* under the Cyprus-Serbia BIT (or, for that matter, other BITs entered into by Cyprus with

the same definition of *investor*). Such a manifestly absurd outcome cannot have been intended by either Cyprus or Serbia—and Serbia offers no evidence to the contrary.

838. Serbia's *entire* objection against Sembi as an eligible *investor* is based on an untenable predicate that because the definition of a Cypriot *investor* under the Cyprus- Serbia BIT requires both the "incorporation" and a "seat" in Cyprus, these terms must allegedly mean something different under both international law and Cyprus law. Serbia then obviously chooses a deliberately high threshold in a hope to disqualify Sembi: It argues that under both international law and Cyprus law, "seat" means the location of the company's "*effective management*" or "*some sort of actual or genuine corporate activity*."[846]

839. In the absence of any compelling authority supporting Serbia's implausible attempt to import a wholly-new requirement of "effective management" into the wording of Article 1(3)(b) of the Cyprus-Serbia BIT, Serbia once again resorts to a strategy of pure distortions allegedly supported by recitals of theory of international investment law in an attempt to give seeming weight to its unfounded argument. Serbia devotes no less than *sixteen* pages to these laborious attempts.

840. Serbia's efforts, however, are of no avail. As the Claimants show below, international law has no relevance for the analysis of the meaning of the term "seat" because this is a matter for Cyprus law. And under Cyprus law, Sembi clearly has a "*seat*" in Cyprus because it has its registered office there—and *nothing* more is needed by Sembi to qualify as an investor and bring its claims under the Cyprus-Serbia BIT.

### 1. The meaning of "seat" under the Cyprus-Serbia BIT is governed by Cyprus—not international—law

841. In an attempt to bypass the simple fact that Sembi has a "seat" in Cyprus within the meaning of Cyprus law—which is determinative for this analysis—Serbia desperately searches for support in *any* theoretical concepts of international law, treaty and arbitral practice imaginable so as to magically import into Article 1(3)(b) of the Cyprus-Serbia BIT the requirement of "*effective management.*"

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846 Counter-Memorial, ¶ 475.

842. These attempts are fundamentally misplaced. The interpretation of the term "seat" is not governed by international law, much less can it be guided by findings of investment tribunals constituted under *different* investment treaties. However, even if the Tribunal were to conclude that the term "seat" indeed means the location of Sembi's effective management, Sembi's seat would still be in Cyprus.

**a. International law does not include an autonomous definition of "seat" and the meaning of "seat" is thus governed by municipal law**

843. The term "seat" in Article 1(3)(b) of the Cyprus-Serbia BIT cannot be interpreted by reference to international law simply because international law includes no autonomous definition of this term. This was succinctly explained by Professor Park by reference to both the ILC Draft Articles on Diplomatic Protection and UNCTAD Series —which Serbia also seeks to rely on:

> Significantly, *the ILC Draft Articles on Diplomatic Protection state that "international law has no rules of its own for the creation, management and dissolution of a corporation* or for the rights of shareholders and their relationship with the corporation, *and must consequently turn to municipal law for guidance on this subject*" ILC, 58th Sess. (A/61/10), 2006 Yearbook International Law Commission (Vol II Part 2).
>
> Although useful in some situations, *UNCTAD pronouncements carry no authority as a source of international law.* In this *context*, both sides referenced the UNCTAD Series on Issues in International Investment Agreements […], which does not purport to confirm any rule of international law, but simply mentions (page 83) that "generally speaking " a seat connotes place of effective management, adding that some investment agreements require "real economic activities" or "business activities."[847]

844. The *Mera* tribunal—which recently addressed the meaning of "seat" under the very same investment treaty—confirmed the absence of the definition of "seat" in relevant sources of international law and thus concluded that the term "seat" falls to be interpreted by reference to Cyprus law:

> Since there is no definition of "seat" in the ICSID Convention, nor in the BIT, and no uniform definition under international law, *the Arbitral Tribunal considers that the term in question must be interpreted by way of renvoi to municipal law*.[848]

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847 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, p. 2, footnote 7 (emphasis added), **CLA-023**.

848 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 89 (emphasis added), **CLA-022**.

845. Serbia's lengthy appeals to international law theories, treaty and arbitral practices are thus *a priori* futile: the meaning of "seat" under Article 1(3)b) of the Cyprus-Serbia BIT must be assessed in the light of Cyprus law.

### b. Findings of investment tribunals under different investment treaties are not determinative for the analysis of the Cyprus-Serbia BIT

846. Further, Serbia's reliance on a few isolated investment cases which did require "something more" than the registered office to qualify as a "seat" are plainly inapplicable because they related to interpretation of *differently worded* investment treaties.

847. Indeed, the tribunal in *Tenaris v. Venezuela*—on which Serbia itself heavily relies—expressly cautioned against reliance on the findings of tribunals constituted under different investment treaties.

848. In that very case, Venezuela—exactly like Serbia here—strongly emphasised the decision in *Alps Finance v Slovak Republic*[849] in which Slovakia successfully argued that the term "seat" under the Switzerand-Slovakia BIT meant the "actual place of business" of a company. Relying on this finding, Venezuela claimed that Tenaris' extract from the commercial registry was an insufficient proof of "seat" within the meaning of the underlying Portugal-Venezuela and Luxembourg-Venezuela BITs.[850]

849. The *Tenaris* tribunal rejected Venezuela's argument, and cautioned against reliance on cases under different investment treaties:

> But on a closer analysis, *the Alps case provides no support at all for Venezuela's case. On the contrary, it appears to cut exactly the other way, and demonstrate that the terms in question are susceptible of different meanings in different contexts.* Article 1(1)(b) of the Switzerland-Slovak Republic BIT (in issue in that case) provides as follows: […]
>
> *It is immediately apparent that this is a differently worded provision* to that in both the Luxembourg and Portuguese Treaties, and that – unlike here – the tribunal in the Alps case had to apply a "real economic activities" test, as specifically provided for in the treaty.

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849 Counter-Memorial, ¶ 454.

850 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 118, **RLA-045**.

> But more than this, *the juxtaposition in Article 1(1)(b) of the Switzerland-Slovak Republic BIT of the two requirements of "seat" and "real economic activities", which are clearly expressed as separate and cumulative criteria, demonstrates that "seat" in this particular context must mean something other, and presumably less, than "real economic activities*.[851]

850. The most relevant findings of investment tribunals are obviously those which have addressed the meaning of "seat" under the Cyprus-Serbia BIT. And the Claimants have already shown that neither of the two relevant cases under the Cyprus-Serbia BIT—supports Serbia's attempt to argue that the term "seat" under the Cyprus—Serbia BIT means "effective management."

851. The tribunal in *Mera v. Serbia*, constituted under the Cyprus-Serbia BIT, recently confirmed that the term "seat" under Article 1(3)(b) means registered office.[852] As explained above, the *Mera* tribunal relied on the definition of "seat" within the meaning of Cyprus law and concluded that the correct meaning of "seat" under Cyprus law—and hence under the Cyprus-Serbia BIT—was the place of the company's "registered office."[853]

852. The *Mera* tribunal thus expressly endorsed the dissenting opinion of Professor Park in an earlier case *CEAC v. Montenegro* who also emphasized that "*the plain meaning of registered office, best matches the meaning of 'seat' in Cyprus as used in this particular* [Cyprus-Serbia] *Treaty*."[854]

853. In *CEAC v. Montenegro*, the majority of tribunal held, *without determining the meaning of the term "seat"* under Article 1(3)(b) of the Serbia-Cyprus BIT, that the claimant did not have a seat in Cyprus although it had its registered office there.

854. There is no question, however, that the conclusion of the *CEAC* tribunal was based on extreme circumstances of that case which are plainly *not* present here: the claimant's

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851 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶¶ 141-143 (emphasis added), **RLA-045**.

852 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, 93, **CLA-022**.

853 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, 93, **CLA-022**.

854 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, **CLA-023**.

registered office showed strictly no signs of activity and the claimant never offered any evidence that the address was ever used for any business purposes.[855] The findings of the *CEAC* tribunal are thus plainly distinguishable.

855. Crucially, although the *CEAC* tribunal ultimately held that the existence of a registered office in Cyprus was not sufficient in those particular circumstances, to qualify as a "seat" in Cyprus, the tribunal never held that the term "seat" under the Cyprus-Serbia BIT implied "*effective management*" as Serbia now proclaims.

856. As a result, Sembi—whose registered office is located at a modern premises reachable by both the public and courier during business hours—clearly meets the requirement of "seat" under *Mera v. Serbia*. Sembi cannot even remotely be compared with the claimant in *CEAC v. Montenegro* so as to warrant the applicability of that case.

### c. International law does not allow Serbia to import the requirement of effective management into the definition of "investor" under the Cyprus-Serbia BIT

857. Serbia is obviously right to state that Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**"), which codifies customary law rules for the interpretation of treaties, mandates that Article 1(3)(b) of the Cyprus-Serbia BIT be interpreted in *good faith*, in accordance with the ordinary meaning of its terms and in light of the Cyprus-Serbia BIT's object and purpose.

858. However, Serbia turns that basic principle of interpretation on its head. Throughout its Counter-Memorial, Serbia goes to great pains to do the very thing that the principles of good faith interpretation enshrined in Article 31(1) VCLT prohibits (and of which Serbia, ironically, accuses the Claimants of doing): it impermissibly writes a new requirement of "effective management" into Article 1(3)(b) of the Cyprus-Serbia BIT and its definition of "investor".

859. While Serbia contends that "*the ordinary meaning of the term seat is the place of effective management of a legal person*,"[856] it offers strictly no authority for such a proposition. This is unsurprising—there is none. The wording of Article 1(3)(b) of

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855 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶¶ 135, 190, **CLA-021**.

856 Counter-Memorial, ¶ 431.

the Cyprus-Serbia BIT includes no requirement of "effective management" and other interpretative methods mandated by Article 31 of the VCLT clearly do not allow the importation of such a requirement into the wording of that provision. This holds true regardless of whether the Tribunal determines that the term "seat" has an autonomous meaning (it should not), or whether it links that term to domestic rules.

860. The recent *Orascom v. Algeria* case—where the tribunal adopted an "autonomous meaning" approach to interpret the term "siège social"—proves the point. In that case, Algeria—just like Serbia here—purported to strip the tribunal of its jurisdiction *ratione personae* by seeking to import the "place of effective management" into the definition of investor under Article 1(1)(b) of the applicable Algeria-Belgium-Luxembourg Economic Union BIT.[857] As here, that treaty defined an investor by reference of both the place of incorporation and the "siège social" in the host State,[858] but made no reference to "effective management" or "real seat."

861. The *Orascom* tribunal categorically rejected Algeria's attempts. It did so on the basis of Article 31(1) of the VCLT. "[A] *good faith interpretation of the ordinary meaning*" of "*siège social,*" the tribunal held, leaves no doubt that the term means "*registered office*"[859]—not "*effective management*".

862. Serbia's reliance on Article 31(1) of the VCLT thus leads Serbia nowhere. The ordinary meaning of "seat" under international law is the same as the term's ordinary meaning under Cyprus domestic law: "seat" equals "registered office."

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857 Article 1(1)(b) reads:

"*For the purposes of this Agreement,*

*1. The term "investors" shall mean:*

*(…)*

*(b) "Companies", i.e. any legal person constituted in accordance with Belgian, Luxembourg or Algerian legislation and having its registered office in the territory of Belgium, Luxembourg or Algeria.*" Agreement between the Belgo-Luxembourg Economic Union and the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments, signed 24 April 1991, **CLA-110**.

858 The exact wording of the definition of *investor* with respect to juridical persons read as follows: " *Les «sociétés», c'est-à-dire, toute personne morale constituée conformément à la législation belge, luxembourgeoise ou algérienne, et ayant son siège social sur le territoire de la Belgique, du Luxembourg ou de l'Algérie.*" *See Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, ¶ 269, **CLA-111**.

859 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, ¶ 298, **CLA-111**.

863. The *Orascom* tribunal also refuted another Algeria's contention—also raised by Serbia here—that interpreting the term "siège social" as "registered office" would run counter to the principle of effectiveness because the first limb of Article 1(1)(b)—the requirement that a company be constituted in accordance with domestic law—would have already prescribed an incorporation test. In the tribunal's view, the principle of effectiveness was left intact because "registered office" and "constitution" were two components of the same incorporation test :

> While it acknowledges that in most instances the constitution of a company in a Contracting State implies the presence of the registered office in that *State, the Tribunal does not consider that interpreting siège social as "registered office" renders such term meaningless*. In its opinion, the *Contracting Parties chose in Article 1(1)(b) to define corporate nationality for the purposes of the BIT by reference to the place of incorporation*. They did so *by naming the two elements normally part of the incorporation test, i.e. "constitution" and "registered office*". In other words, constitution in accordance with local law (i.e. the creation of a company as a legal person within a given system of municipal law) and registered office or *siège statutaire* in the respective State (i.e. the seat appearing in the corporation's constitutive documents) are two elements of one single test (place of incorporation) and not two different tests.[860]

864. The tribunal expressly relied on the landmark ICJ decision in *Barcelona Traction* for the same proposition.[861] It pointed out that, just like "*the Court set 'two conditions' within the "traditional rule" of nationality for the purposes of diplomatic protection, so equally may a BIT provide for these same two conditions to describe its nationality requirement for purposes of investment treaty protection.*"[862]

865. Once again, therefore, even under an international law interpretation of the effectiveness principle based on Article 31(1) of the VCLT, Serbia's stance that "*the term seat read in the context of this article can only be understood as something additional to incorporation and therefore cannot be taken to mean registered office*"[863] is simply untenable.

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860 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, ¶ 289 (emphasis added), **CLA-111**.

861 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, ¶ 290, **CLA-111**.

862 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, ¶ 296, **CLA-111**.

863 Counter-Memorial, ¶ 143.

866. The *Orascom* tribunal further held—still pursuant to the interpretative canons codified in the VCLT—that the Contracting Parties' treaty practice also confirmed that "siège social" referred to "registered office".[864] The reason for that conclusion was straightforward: the treaties concluded by the Contracting Parties all included either the term "siège social" or "registered office" but not "effective management". This conclusion fully applies here: where none of the treaties cited by Serbia contains the requirement of "effective management" either.

867. For the sake of completeness: While it is true that the *Orascom* tribunal did not interpret the term "siège social" by reference to domestic law but instead sought to establish an "autonomous meaning" of that term, the main reason it did so was that the corporate nationality tests under domestic laws were irreconcilable with the nationality test provided for in the treaty. In fact, while the treaty expressly required that a company be incorporated in the host State, no such requirement was to be found under domestic law:

> *Moreover, and importantly, under no reading of the BIT does the term siège social (whether statutaire or réel) correspond to the Contracting Parties' domestic law tests for the determination of nationality of corporations*. Indeed, *while the BIT defines "investor" by reference to both "constitution in accordance with law" and "siège social", under Belgian and Luxembourg law nationality is determined only by reference to principal établissement or administration centrale, the place of constitution playing no role in that determination.* In reality, the role of the place of constitution is expressly disavowed for such purpose and the Belgian and Luxembourgish legislations recognize that place of constitution and *siège réel* (*recte, principal établissement* or *administration* centrale) may be located in different states. *This also confirms that the BIT Contracting Parties incorporated in the BIT a test that differs from the nationality tests under their domestic laws*, providing instead for an autonomous notion "for the purposes of this Agreement", as the chapeau of Article 1 expressly state.[865]

868. That is not an issue here. Under both the Cyprus-Serbia BIT and Cyprus law, a company's registered office determines that company's nationality. As the Claimants' Cyprus law expert, Mr. Agis Georgiades, explains:

> The distinction between 'real' and 'statutory' seat is relevant to member states which abide by the real seat theory, such as Greece. *In states adopting the incorporation test, like Cyprus,* the distinction is irrelevant because *the registered office of the company determines the law*

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864 Counter-Memorial, ¶ 143.

865 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, ¶ 279, **CLA-111**.

> *applicable to the company and its nationality*. Hence, Cyprus law does not and need not make such distinction.[866]

869. Accordingly, unlike the tribunal in *Orascom*, the present Tribunal need not resort to international law in order to overcome the obvious discrepancy between domestic law and the definition in the BIT because no such discrepancy exists here.

870. Even should it proceed to do so, however, the above analysis makes it clear that international law defines "seat" in the very same way that domestic law does: the meaning of "seat" is nothing more than "registered office."

871. Finally, Article 31(1) VCLT requires treaties to be interpreted "in their context and ***in the light of its object and purpose***."[867] Serbia's interpretation of Article 1(3)(b) of the Cyprus-Serbia BIT, however, clearly runs counter the intention of the Contracting Parties to the treaty and does not "*correspond with the proclaimed goal of the BIT*."[868]

872. Under Serbia's flawed theory, all foreign-controlled companies would be excluded from the protection of Cypriot investment treaties which use the same—or similar—definition of investor. Such an outcome would not only be absurd and at odds with the long-standing status of Cyprus as a leading offshore jurisdiction, it would also run counter to the very intention of the Contracting Parties. As the *Mera* tribunal aptly put it:

> *According to the Respondent it is "usual practice in Cyprus as it has been known for years as a popular offshore jurisdiction*, and one need only google 'Cyprus offshore' to find a plethora of links to various law and consultancy firms offering services of incorporating and maintaining companies on Cyprus." *If the Respondent is of this viewpoint, then when it negotiated the BIT in question it could have required that in order for a legal entity to qualify as an investor under the BIT, it would need to be managed and controlled in the place of incorporation. It is not for the Arbitral Tribunal to insert additional requirements into the BIT which could have easily been inserted by the negotiators at the time of drafting, but were not*.[869]

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866 Georgiades Second ER, ¶ 2.18 (emphasis added).

867 Vienna Convention on the Law of Treaties, Article 31(1), **RLA-044**.

868 Counter-Memorial, ¶ 436.

869 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 88 (emphasis added), **CLA-022**.

873. In addition, while Serbia shows strictly no evidence that the intention of the Contracting Parties was to include the requirement of "*effective management*" within the term "seat," the *Mera* tribunal did face such evidence in the form of a testimony of Cyprus's former Minister of Foreign Affairs and a signatory of the *Cyprus—Serbia* BIT—who confirmed in no uncertain terms that "seat" was meant to mean, plainly and simply, registered office:

> 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.[870]

874. As a result, Serbia plainly distorts the rules of interpretation of international treaties in its ill-conceived attempts to import the requirement of "*effective management*" (or "*some form of genuine corporate activity*") into the notion of "seat" under the Cyprus-Serbia BIT. On the contrary, a good faith analysis of the purpose of the Cyprus-Serbia BIT allows no other conclusion that the term "seat" means quite simply "registered office".

### 2. Sembi has a "*seat*" in Cyprus because it has its registered office there

875. As explained in detail above, the tribunal in *Mera v. Serbia*, constituted under the Cyprus-Serbia BIT, recently confirmed that the term "seat" under its Article 1(3)(b) means nothing more than "registered office".[871]

876. Serbia does not even attempt to dispute that Sembi meets the plain and simple definition of "seat" upheld by the tribunal in *Mera v. Serbia*. Rather, Serbia attempts to undermine the conclusions of the *Mera* tribunal by arguing that it failed to acknowledge that Cyprus law itself allegedly distinguishes between a "registered office" and a "seat." Serbia

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870 *Mera Investment Fund Limited v. Republic of Serbia,* ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 91 (emphasis added), **CLA-022**.

871 *Mera Investment Fund Limited v. Republic of Serbia,* ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, ¶ 93, **CLA-022**.

claims that the term "seat" under Cyprus law means "*more than the existence of 'registered office*.'"[872]

877. In making that argument, Serbia relies on the statements of its expert on Cyprus law, Mr. Thomas Papadopoulos, who argues that the term "seat" under Cyprus law denotes the place where "*a legal entity is effectively managed and financially controlled and where it carries out its business activities*,"[873] while the term "registered office" "*determines the place of incorporation*."[874]

878. That assertion is plainly untenable. As the Claimants' Cyprus law expert, Mr. Agis Georgiades, conclusively shows, Cyprus law equates "seat" with "registered office" and both terms are used interchangeably in both Cypriot statutes and case-law.

879. *First*, Mr. Georgiades makes clear that the registered office of a company does not necessarily determine that company's place of incorporation. While the registered office is indeed an address which finds itself *originally* at the company's place of incorporation, Mr. Georgiades explains that such address—and thus the registered seat—"*may subsequently be transferred to another state.*"[875] There is thus no merit in Serbia's crucial assertion that the term "place of incorporation" and "registered office" are interchangeable. They are not.

880. This showing is of fundamental importance for the assessment of Serbia's objection *ratione personae* against Sembi. This objection is predicated on the argument that because the definition of a Cypriot *investor* under the Cyprus- Serbia BIT requires both "incorporation" and a "seat" in Cyprus, then these terms must necessarily mean something different. Building up on this premise, Serbia goes on to claim that because "incorporation" equals "registered office" under Cyprus law, then "seat" must mean something more.[876] As Mr. Georgiades made clear, that logic must fail because the terms "incorporation" and "registered office" are not identical under Cyprus law.

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872 Counter-Memorial, ¶ 467; Papadopoulos ER, ¶ 25.

873 Papadopoulos ER, ¶ 25.

874 Counter-Memorial, ¶ 468; Papadopoulos ER, ¶ 10.

875 Georgiades Second ER, ¶ 2.3.

876 Counter-Memorial, ¶ 468.

881. *Second*, Mr. Georgiades reiterates that the terms "seat" and "registered office" have the exact same meaning under Cyprus law. Mr. Georgiades observes:

> That the term 'seat' in the Cyprus Companies Law has the same meaning as 'registered office' was explained in my first report and is most clearly evident from s.354K(c). This section refers to the obligation of a company to state the date it purports to establish a 'seat' abroad. But the general title for ss.354A-354R is "Transfer of Registered Office of Companies to and from the Republic". And s.57B(1)(d), which relates to the same matter, refers to transferring abroad the company's 'seat'. *It is obvious from these provisions that the two terms are used interchangeably, denoting the same meaning*.[877]

882. As Mr. Georgiades further explains, the fact that several amendments to Cyprus Companies Law refer to the term "seat" instead of referring to the term "registered office" changes nothing in the conclusion that both terms are interchangeable. It certainly does not mean, as Serbia's expert Mr. Papadopoulous incorrectly asserts, that "*the Cyprus legislature distinguished intentionally between the terms*."[878] Quite to the contrary, the use of two terms with an identical meaning in the amending laws was merely a result of a translation problems in connection with Cyprus' accession to the EU.

883. As Mr. Georgiades explains, "*in the process of Cyprus's accession but also later, in the process of transposition of EU law into the Cypriot legal order*," terms and phrases, which derive from Greek legal terminology, and do not reflect the specific Cypriot legal terminology, made their way into statutes which purport to translate EU law.[879] Conversely, concepts derived from EU law, such as the transfer of a company's seat, introduced the term "seat"—commonly used in EU legal instruments and literature—into the Cyprus Companies Law as an *alternative* to the term "registered office."[880]

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877 Georgiades Second ER, ¶ 2.7 (emphasis added).

878 Papadopoulos ER, ¶¶ 18-20.

879 Georgiades Second ER, ¶ 2.17.

880 Georgiades Second ER, ¶ 2.22. As Mr. Georgiades also points out, ***even EU institutions*** use the terms 'seat' and 'registered office' interchangeably when referring to transferring a company from one member state to another. Georgiades Second ER, ¶ 2.23.

884. As a result, not only the Cypriot legislature, but also case law currently uses the two terms interchangeably.[881]

885. Mr. Georgiades also points out that if the Cypriot legislature intended to introduce a new legal concept with the term "seat," it would have defined this concept in the amending laws.[882] However, no such new definition was adopted simply because the term "seat" was never intended to mean anything more than "registered office" in Cyprus law.

886. All in all, as Mr. Georgiades concludes, "*there is nothing in the Companies Law to suggest that the term 'seat' is used in a different meaning, or that it refers to the place where the company is effectively managed and financially controlled and where it carries out its business activities*."[883]

887. There is thus no doubt that Cyprus law uses the terms "seat" and "registered office" interchangeably—and that puts an end to Serbia's wishful—but wholly fabricated—attempt to argue that these terms are different as a matter of Cyprus law.

888. By providing its Certificate of Registered Office, Sembi has thus conclusively established its compliance with the requirement of "seat" under Article 1(3)(b).

### 3. Sembi in any event meets the *Tenaris* test for a seat

889. Finally—and for the sake of a theoretical exercise—Serbia's insistence on the requirement of "*effective management*" under *Tenaris v. Venezuela* is in any event in vain. This is because, even if this requirement was relevant for the analysis of the meaning of the term "seat" under the Cyprus-Serbia BIT—and it is not—Sembi would still meet it.

890. Indeed, the *Tenaris* tribunal explicitly stated that holding companies are not excluded from the ambit of protection of investment treaties but, at the same time, cannot be required to meet the same demanding standards of "effective management" as ordinary companies:

> In so far as either entity is no more than a holding company, or a company with little or no day-to-day operational activities, its day-to-

881 Georgiades Second ER, ¶ 2.23.

882 Georgiades Second ER, ¶ 2.25.

883 Georgiades Second ER, ¶ 2.25.

> day "management" will necessarily be very limited, and so will its physical links with its corporate seat. Put another way, *it would be entirely unreasonable to expect a mere holding company, or a company with little or no operational responsibility, to maintain extensive offices or workforce, or to be able to provide evidence of extensive activities, at its corporate location. And yet holding companies, and companies with little or no operational responsibility, have "management", and are certainly not excluded from the Treaties* in this case. Indeed, countries such as Luxembourg and Portugal clearly consider it to their respective benefit to attract such companies, and to maintain a corporate regulatory regime that allows for them.[884]

891. Further, the *Tenaris* tribunal also rejected Venezuela's assertion that Tenaris was in fact not seated in Luxembourg, but rather in Argentina because its directors and CEO resided in Argentina and it had thousands of employees there. The *Tenaris* tribunal considered that these facts were irrelevant for determining Tenaris's seat.[885] The *Tenaris* case therefore not only does not help Serbia—it expressly contradicts Serbia's theory that Mr. Rand's control over Sembi somehow transforms Sembi into a Vancouver-seated company.[886]

892. Therefore, Sembi would plainly meet the requirement of effective management in Cyprus—and Serbia's attempts to show the opposite by reference to wholly irrelevant isolated factual circumstances must fail.

893. *First*, as the Claimants already demonstrated in their Memorial, registered office is located at a modern office building that is fully accessible to the public during business hours. Sembi is fully amenable to service by both regular mail and courier at its registered office. That is all that matters for corporate activities of a holding company such as Sembi.

894. Serbia's assertion that Sembi's registered office is located at the premises of an accounting company is plainly irrelevant.[887] Once again, it is more than common for holding companies such as Sembi to be seated at premises together with accounting

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884 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 199 (emphasis added), **RLA-045**.

885 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 219, **RLA-045**.

886 Counter-Memorial, ¶ 485.

887 Counter-Memorial, ¶ 476.

firms and Serbia itself offers no authority for its proposition that companies are required to have their own separate premises to qualify for protection of the Cyprus-Serbia BIT.

895. *Second*, Serbia's accusation that Sembi has not filed its annual returns is wholly irrelevant for the analysis of Sembi's seat. As shown by the Claimants' expert Mr. Georgiades already in his first report, Mr. Georgiades explains, the obligations to maintain books or registries do not constitute any pre-conditions for a place to be designated as a registered office.[888]

896. As a result, even if, *pro tem*, Serbia's implausible theory that the term "seat" required "effective management" was to be accepted, Sembi would still have its seat in Cyprus. However, this theoretical exercise is wholly redundant. This is because Mr. Rand did not "effectively manage" Sembi from Canada. The meetings of Sembi's Board of Directors were held telephonically, with the two Cypriot directors calling-in from the place of Sembi's registered office and Mr. Obradović and then later Mr. Markićević, joining the conference call from Belgrade. Mr. Rand confirms in his testimony that due to certain tax related issues, he avoided attending meetings of Sembi's directors while in Canada.[889]

## G. The Claimants' claims are not an abuse of process

897. Serbia alleges that "*the Claimants initiated the present proceedings with full awareness of the fact that they are not entitled to protection under the Treaties and the ICSID Convention, thereby committing an abuse of process*."[890] This is absolutely incorrect.

898. To begin with, this purported objection has no basis because the Claimants are firmly convinced that they are entitled to protection under the Treaties and the ICSID Convention—and Serbia obviously offers no evidence to support its false accusations that they are not. The Claimants have established by contemporaneous documentary evidence and witness testimony that the contracting parties always considered the MDH Agreement and the Sembi Agreements as fully effective and duly performed their respective contractual rights and duties.

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888 Georgiades Second ER, ¶ 2.9.

889 Email communication between W. Rand and HLB, 1 July 2008, **CE-672**. *See also* Rand Second WS, ¶ 64;

890 Counter-Memorial, ¶ 508.

899. Moreover, Serbia appears not to understand what constitutes an abuse of process. A claimant may commit an abuse of process when it purports to claim protection under international law based on forged documents or fictitious transactions. An abuse of process can also be committed if a claimant restructures its investment only *ex post*, in order to obtain protection under international law after it suffers harm.

900. The Claimants have done nothing of the sort. They claim protection under the Treaties based on transactions made well before Serbia's violations of the Treaties. For example, the MDH Agreement was entered into in 2005. The 2008 Agreements were entered into three years later. This was years before Serbia expropriated the Claimants' investments, and committed the other breaches of the Treaties, in the fall of 2015.

901. Serbia does not allege that these agreements were forged or fictitious. It only remarks in passing elsewhere in its Counter-Memorial that the 2008 Agreements "*were not court-certified or notarized which raises the question when the documents were created*."[891] It raises no such question. The agreements needed not to be court-certified or notarized, so they were not. More importantly, the documents on the record clearly show that the 2008 Agreements were concluded on 22 February 2008.[892]

902. Finally, all of Serbia's lengthy objections *ratione materiae* were apparently raised to lay ground for what Serbia wrongly perceives to be set of devastating rhetorical questions. Serbia alleges that the request for the assignment of the Privatization Agreement to Coropi was:

> [A] maneuver [which] brings in mind a question for which Claimants have not proved and answer - why would one request to become a party to the contract and the owner of the contractual rights and shares in BD Agro if one is already the owner? How logical would it be to enter into the contract with oneself? There is no logic in it but the logic fortunately speaks for itself – Mr. Rand was not the owner of BD Agro's shares but wanted to become one.[893]

903. This is yet another instance where Serbia purposefully ignores the distinction between nominal and beneficial ownership. Mr. Rand indeed was not the nominal owner of the

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891 Counter-Memorial, ¶ 253.

892 *E.g.* Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, p. 13, **CE-420**; Confirmation of EUR 3,610,000.00 wire transfer from Mr. William Rand to Sembi executed on 3 August 2008, **CE-060**.

893 Counter-Memorial, ¶ 511.

Beneficially Owned Shares, and he indeed wanted (one of his companies) to become one. There is a perfect logic to that "maneuver". As already explained in Mr. Rand's witness statement, he requested that the Privatization Agreement be assigned to Coropi because "*Mr. Obradović was no longer assisting* [Mr. Rand] *in overseeing BD Agro*, [Mr. Rand] *decided to replace him as the nominal owner of BD Agro in the summer 2013*."[894]

904. In sum, the Claimants clearly did not act in bad faith and did not abuse the process by raising their claims in the present arbitration.

894 Rand First WS, ¶ 45.

## IV. ACTIONS OF THE PRIVATIZATION AGENCY ARE ATTRIBUTABLE TO SERBIA

905. Serbia does not dispute that the conduct of the Ministry of Economy and the Ombudsman is fully attributable to Serbia by virtue of their status as state organs under Serbian law.[895] However, Serbia goes to great pains to contest the attribution of the conduct of the Privatization Agency to Serbia.[896]

906. Serbia's refusal to accept its responsibility for the acts of the Privatization Agency that destroyed the Claimants' investment is disingenuous, at best, because it simply ignores that Serbian law itself unequivocally characterizes the Privatization Agency's activity as an exercise of public powers in the pursuit of a governmental mission. It also ignores that the conduct of the Privatization Agency was closely directed and supervised by the Ministry of Economy, and in the case at hand, also by the Ombudsman.

907. Therefore, there can be no doubt that the Privatization Agency's conduct is attributable to Serbia under public international law, and also that it is sovereign—and not commercial—in nature.

### A. The Privatization Agency was a public agency and a holder of public powers

#### 1. The Privatization Agency pursues a sovereign mission and exercises public powers in its fulfillment

908. When Serbian courts had to characterize the conduct of the Privatization Agency in terminating privatization agreements, they held in no uncertain terms that the notice on termination is an act that "*represents the state's will to terminate the contract*" and that constitutes the Privatization Agency's use of "*its legal power, obtained by the transfer of authority under public law from the state to terminate the agreement that did not achieve the legal goal and the social purpose of privatization*:"[897]

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895 Counter-Memorial, ¶ 539. Serbia however also argues that "*not even Claimants' allege that actions of these organs violated their rights under the Treaties*." This is absolutely incorrect. The Claimants do argue that the acts and omissions of the Ministry of Economy and the Ombudsman violated the Claimants' rights under the Treaties.

896 Counter-Memorial, ¶¶ 537-590.

897 Judgment of the Higher Commercial Court, Pž. 6463/2007, 8 December 2008, p. 4 (pdf), **RE-164**.

> *The notice of the Agency regarding the termination* of the agreement on the sale of the capital, i.e., assets, *represents the state's will to terminate the contract* due to the non-performance. *The act of notification* that the agreement on the sale of capital is terminated *is* not an administrative act, but *an act by which the Privatization Agency uses its legal power, obtained by the transfer of authority under public law from the state, to terminate the agreement that did not achieve the legal goal and the social purpose of privatization* due to non-performance.[898]

909. This characterization is extremely helpful because it highlights three key aspects of the Privatization Agency's role that conclusively show that the Privatization Agency's conduct is attributable to Serbia under public international law and sovereign—rather than commercial—in nature.

910. *First*, the Notice on Termination was an expression of the Serbian state's will to terminate the Privatization Agreement—such an act is obviously attributable to Serbia under public international law.

911. *Second*, the Privatization Agency used its "*legal power obtained by the transfer of authority under public law from the [Serbian] state*"—the use of delegated public law authority is a sovereign activity, and thus attributable to Serbia under public international law.

912. *Third*, the Privatization Agency was called to assess whether privatization agreements "*achieved […] the legal goal and social purpose of privatization*" and terminate those privatization agreements that "*did not achieve [these objectives] due to non-performance.*" This confirms three important characteristics of the privatization process and the Privatization Agency's role:

a. the privatization process serves a social purpose;

b. the Privatization Agency is specifically tasked to assess the fulfilment of such social purpose of privatization—such assessment is a sovereign activity, and thus an activity attributable to Serbia under public international law; and

c. the Privatization Agency is specifically tasked to enforce the achievement of the legal goals of the privatization agreements and the social purpose of privatization

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898 Judgment of the Higher Commercial Court, Pž. 6463/2007, 8 December 2008, p. 4 (pdf) (emphasis added), **RE-164**.

by deciding on termination of privatization agreements that did not achieve these objectives due to non-performance—again, such enforcement is a sovereign activity, and thus an activity attributable to Serbia under public international law.

913. The Privatization Agency's institutional set-up corresponded to the sovereign character of its conduct and the public law character of the objectives that it was tasked to pursue. The Privatization Agency certainly was not as an independent, autonomous and commercially-driven entity, as Serbia tries to portray it in this arbitration.[899]

914. This attempt must fail because in truth, the Privatization Agency effectively operated as a part of the Serbian State administration, carried out administrative and sovereign functions, lacked financial autonomy and was subject to continuous supervision and direction by the Ministry of Economy.

915. The Privatization Agency was a public agency[900] entrusted with certain tasks in the process of privatization of State and socially-owned capital and property.[901] It was tasked to implement all privatization processes in Serbia with the objective of creating favorable conditions for Serbia's economic development and social stability.[902]

916. While the Law on the Privatization Agency endowed it with a separate legal personality,[903] this was merely an issue of form because the rights and obligations of the Privatization Agency were identical to those of state administrative organs.[904] In fact, the tasks of the Privatization Agency were originally carried out by the Ministry of Economy, and they were assumed by the Ministry of Economy again upon the Privatization Agency's dissolution under amendments to the 2014 Law on Privatization, which came in force on 1 February 2016.[905]

917. The Privatization Agency exercised its tasks as a holder of public powers.[906] It was mandated to control the buyers' compliance with the terms of the privatization

899 Counter-Memorial, ¶¶ 548 *et seq*.

900 Memorial, ¶ 350; Milošević Second ER, ¶¶ 14-15; Milošević First ER, ¶¶ 40, 42.

901 2001 Law on the Privatization Agency, Art. 6, **CE-238**.

902 2001 Law on Privatization, Art. 2, **CE-220**.

903 Memorial, ¶ 352; Milošević First ER, ¶ 43; 2001 Law on the Privatization Agency, Art. 2, **CE-238**.

904 Memorial, ¶ 350; Milošević First ER, ¶¶ 35, 42; 2005 Law on State Administration, Art. 4, **CE-237**.

905 Milošević First ER, ¶ 51; 2015 amendments to the 2001 Law on Privatization, Arts. 31-32, **CE-244**.

906 Milošević First ER, ¶ 68; Milošević Second ER, ¶ 14; Memorial, ¶ 255; Radović ER, ¶ 16.

agreements[907] and to enforce the legal goals and social purposes of privatization by imposing remedies to violations of the privatization agreements, and if justified, by deciding on their termination.

918. Thus, rather than "*hospitals, kindergartens, and schools,*" as Serbia would have it, the Privatization Agency is much more comparable to state regulatory authorities vested with the powers to grant administrative permits for certain business operations and to subsequently supervise the compliance with the terms of such permits under the threat of potential revocation. It is plainly irrelevant in this respect whether such authorities formally have a separate legal personality or not, the essential issue is that such authorities—just like the Privatization Agency—carry out governmental functions and are entitled with powers to decide on the rights of private parties.

### 2. The Privatization Agency lacked financial independence

919. Serbia is also incorrect when it argues that the Privatization Agency was a financially autonomous entity. Quite the opposite, the Privatization Agency had strictly no say on the use of the funds it acquired in the privatization process.

920. It is undisputed that the initial funds for the establishment of the Privatization Agency were provided from the State budget.[908] However, Serbia claims that the governmental origin of funds is irrelevant because the Privatization Agency subsequently operated with a financial autonomy in the same manner as a shareholding company.[909] This is manifestly not the case: both the origin and the use of the Privatization Agency's funds were strictly regulated and were not subject to its autonomous decision-making.

921. The Privatization Agency's financial operations were governed by the Law on the Privatization Agency. Under the terms of this law, the expenses arising out of the Privatization Agency's work were primarily to be funded by the revenues from the privatization process, private sponsorship by domestic or foreign legal entities and individuals, and commission from the sale of privatized shares or stakes.[910] While

907 Milošević Second ER, ¶ 35; Milošević First ER, ¶ 59.

908 Counter-Memorial, ¶ 549; 2001 Law on the Privatization Agency, Art. 5, **CE-238**.

909 Counter-Memorial, ¶ 549.

910 2001 Law on the Privatization Agency, Art. 5, **CE-238**.

Serbia does not dispute these statutory rules, it seeks to argue that such resources constituted an autonomous source of funding.[911]

922. Again, this is a gross distortion: As Serbia's own expert Dr. Radović makes clear, the Privatization Agency did not have any ownership rights to the privatized assets and all the revenues and benefits that the Privatization Agency acquired in connection with the sale of the privatized assets had to be transferred, in accordance with the Law on Privatization, to the State budget to finance the Disability and Pension Fund of the Republic of Serbia and other programs for the development of Serbian economy.[912] The Privatization Agency thus clearly enjoyed no financial autonomy of its own.

923. Further, the fact that the Privatization Agency acquired a "commission" from the sale of privatized shares or stakes changes nothing on this conclusion. This is because the commission under the Law of the Privatization Agency was not a commission as traditionally understood by the law of obligations, *i.e.* a separate fee charged by the commissioner for the purposes of making a profit. Instead, this commission was merely a deduction from the purchase price to cover the costs of the privatization.[913] The amount of the commission was not left to the discretion of the Privatization Agency but was prescribed by the minister in charge of economic affairs.[914]

924. Plainly, the main financial role of the Privatization Agency was to channel the flow of privatization revenues to the State budget—and it had no decision-making powers in this process. The mere fact that the funds passed through a separate bank account is wholly irrelevant—the Privatization Agency had no financial autonomy or a discretion to decide on the origin or the use of its funds. Serbia's attempts to compare the Privatization Agency to a commercial shareholding company is therefore wholly inapposite.

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911 Counter-Memorial, ¶ 549.

912 Radović ER, ¶ 12.

913 Milošević Second ER, ¶ 18.

914 2001 Law on the Privatization Agency, Art. 5, **CE-238**.

### 3. The Privatization Agency was subordinated to the Ministry of Economy and the Council of Ministers

925. The Privatization Agency was subject to direction and supervision by the Ministry of Economy and the Council of Ministers. Serbia's contention that the Privatization Agency had a managerial autonomy over the exercise of its functions in the privatization process[915] is unsupported by the applicable law and, in any event, in stark contrast with the reality.

926. The Director and all the members of the Managing Board of the Privatization Agency were appointed and dismissed by the Serbian Council of Ministers.[916] In 2014, an amendment to the Law on the Privatization Agency delegated the most important tasks of the Privatization Agency to two commissions: a commission entrusted with the issuance of consents of the Privatization Agency in the privatization process[917] and, more importantly, a Commission for Control responsible for supervising the performance of privatization agreements who was also endowed with the power to decide on their *ex lege* termination.[918]

927. Both these commissions included the representatives of Serbian ministries.[919] The Commission for Control included 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.[920] The commission for issuing consents consisted of one representative of the Ministry of Economy and four employees of the Privatization Agency.[921]

928. The Privatization Agency as a whole was in fact a *subordinate* of the Serbian Ministry of Economy. As Serbia itself recognizes,[922] the Privatization Agency was legally

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915 Counter-Memorial, ¶¶ 551-552.

916 Memorial, ¶ 354; Milošević First ER, ¶ 44; 2001 Law on the Privatization Agency, Art. 12, **CE-238**.

917 Memorial, ¶ 355; Milošević First ER, ¶¶ 45-46; 2001 Law on the Privatization Agency, Art. 15a, **CE-238**.

918 Memorial, ¶ 355; Milošević First ER, ¶ 47; 2001 Law on the Privatization Agency, Art. 15b, **CE-238**.

919 Memorial, ¶ 355; Milošević First ER, ¶¶ 46-47; 2001 Law on the Privatization Agency, Arts. 15a and 15b, **CE-238**.

920 Memorial, ¶ 355; Milošević First ER, ¶¶ 46-47.

921 Memorial, ¶ 355; Milošević First ER, ¶¶ 46-47.

922 Counter-Memorial, ¶ 556.

required to report to the Ministry of Economy at least twice a year[923] and inform it of any irregularities identified during the control of the companies under privatization.[924]

929. The Ministry's supervisory powers over the Privatization Agency went beyond mere reporting obligations: The Privatization Agency's conduct in the privatization process[925] and in the implementation of the privatization laws[926] were subject to the Ministry's review and instructions.

930. This is best illustrated by the Ministry of Economy's supervision procedure over the work of the Privatization Agency concerning the privatization of BD Agro that was launched on 23 December 2013. Under the Law on State Administration, the purpose of such procedure was to investigate "*the legality of work […] of state administration authorities and holders of public authorities while performing delegated state administration tasks.*"[927]

931. In the course of the supervision, the Privatization Agency plainly acted as a subordinate to the Ministry of Economy subordinate. It fully complied with the Ministry's requests for documents and complied with its procedural instructions.[928]

932. The Privatization Agency was adamant that it would not issue any decision with respect to BD Agro while the review was pending.[929]

933. In a letter to the Ombudsman, the Privatization Agency itself acknowledged that its decision-making on BD Agro was fully dependent on the Ministry of Economy's decisions:

> decisions made by the Ministry during the supervision procedure are obligatory for further actions of the Privatization Agency.[930]

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923 Milošević First ER, ¶ 49; 2001 Law on the Privatization Agency, Art. 18 **CE-238**.

924 Milošević First ER, ¶ 49; 2001 Law on the Privatization Agency, Art. 11, **CE-238**.

925 Milošević Second ER, ¶¶ 9-10; Milošević First ER, ¶¶ 36-37; 2001 Law on Privatization, Arts. 32, 39a, **CE-220**.

926 2001 Law on Privatization, Art. 62, **CE-220**.

927 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 1, **CE-098**.

928 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 2, **CE-098**.

929 Memorial, ¶ 160; Markićević Second WS, ¶¶ 69, 83, 147; Broshko Second WS, ¶ 33.

930 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-043**.

934. The Ministry of Economy's decision, issued on 7 April 2015, was for the Privatization Agency to grant to Mr. Obradović an additional 90-day deadline 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.*"[931] The Ministry of Economy also directed the Privatization Agency "*to undertake the measures within its legal authorizations*" in the event that Mr. Obradović would fail to demonstrate the fulfillment of his alleged obligations.

935. The Privatization Agency did as the Ministry of Economy had said.

## B. The conduct of the Privatization Agency is attributable to Serbia under international law

936. The Privatization Agency's conduct is attributable to Serbia. Claimants explain below that there are three alternative grounds for this conclusion.

937. *First*, the conduct of the Privatization Agency is generally attributable to Serbia because the Privatization Agency is a *de facto* organ of the Serbian state. Indeed, the European Court of Human Rights reached a conclusion that the Privatization Agency is a *state body* in *two different* cases.[932] These decisions by themselves constitute overwhelming authority that the conduct of the Privatization Agency plainly is attributable to the Serbian state under Article 4 of the ILC Articles.

938. *Second*—and in the alternative—the conduct of the Privatization Agency *specifically* towards the Claimants' investment is attributable to Serbia because the Privatization Agency is empowered under Serbian law to exercise elements of governmental authority and it acted in this capacity each time that its conduct harmed the Claimants' investment in breach of international investment law.

939. *Finally*—and in further alternative, the conduct of the Privatization Agency in terminating the Privatization Agreement is also attributable to Serbia under Article 8 of the ILC Articles because the Privatization Agency acted under the control of the Serbian state and its specific instructions.

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931 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-098**.

932 *R. Kačapor and others v. Serbia*, Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ECtHR 2008, ¶ 75, **CLA-025**. *See also Zastava It Turs v. Serbia*, No. 24922/12, ¶ 21, ECtHR 2013, **CLA-069**.

### 1. The Privatization Agency was a *de facto* organ of Serbia under Article 4 of the ILC Articles

940. Although the Privatization Agency is not explicitly described as a State organ under Serbian law, it undisputedly qualifies as a *de facto* State organ and its conduct thus gives rise to Serbia's liability in public international law under Article 4 of the International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"). This is the unequivocal result of the fact that the Privatization Agency is structurally and functionally a part of the Serbian state administration.

941. Serbia's assertion that the Privatization Agency is structurally independent from the state is based on the separate legal personality and the existence of a separate bank account of the Privatization Agency.[933] These two attributes are purely formal and are plainly not sufficient to render the Privatization Agency autonomous of the Serbian state. Neither are they sufficient to disqualify the Privatization Agency from the ambit of Article 4 of the ILC Articles.

942. This is effectively confirmed the analysis of tribunals in *Jan de Nul*,[934] *Bayindir*[935] and *Almas*[936] which Serbia purports to invoke in support of the assertion that a separate legal personality and a bank account are enough to disqualify an entity as a state organ under Article 4 of ILC Articles. Neither of these cases lends support to Serbia's formalistic approach.

943. The tribunal in *Jan de Nul* held that the Suez Canal Authority (SCA) was not a state organ under Article 4 of the ILC Rules, but this conclusion was obviously *not* based on the mere facts that the SCA had a separate legal personality and its own bank account. Rather, the tribunal reached this conclusion on the basis that the SCA operated in a manner comparable to business corporations, its activities thus qualified as commercial in nature, and its budget was autonomous:

> 161. Indeed, the SCA was created to take over the management and utilization of a nationalized activity. There is no doubt that from a functional point of view, the SCA can be said to generally carry out public activities, as acknowledged by the Respondent itself. However,

933 Counter-Memorial, ¶¶ 548-550, 552.

934 Counter-Memorial, ¶¶ 543, 553.

935 Counter-Memorial, ¶¶ 544, 555.

936 Counter-Memorial, ¶¶ 545, 558.

> structurally, it is clear that the SCA is not part of the Egyptian State, as results from Articles 4, 5 and 10 of the Law No. 30/1975. *Indeed, these provisions insist on the commercial nature of the SCA activities and its autonomous budget.* They read respectively as follows:
>
> Article 4
>
> The SCA shall follow the appropriate methods of management and exploitation in accordance with what is being followed in the business enterprises without any commitment by the governmental systems and conditions.
>
> Article 5 The SCA shall have an *independent budget that shall be in accordance with the rules adopted in the business enterprises* without prejudice to the supervisory of the Central auditing Department on the final account of the SCA.
>
> Article 10
>
> The SCA's funds are considered private funds.
>
> 162. For these reasons, the Tribunal concludes that the SCA is not an organ of the State, and that, as a consequence, its acts cannot be attributed to Egypt.[937]

944. This scenario is quite obviously distinguishable from the present case. As explained in detail above, the Privatization Agency was set up to pursue governmental tasks, it was endowed with corresponding public powers and it enjoyed practically no financial autonomy.

945. The findings of the tribunal in *Almas v. Poland* are equally inapposite: In that case, the tribunal did not consider that the Polish Agricultural Property Agency (the "**APA**") qualified as a State organ under Article 4 of the ILC Articles[938] for reasons which are plainly not present here.

946. As the excerpt of the award cited by Serbia itself shows,[939] the APA was financially independent of Poland,[940] and operated on a self-financing basis, earning revenues from

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937 *Jan de Nul N.V. and Dreding International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶¶ 161-162, **RLA-083**.

938 Counter-Memorial, ¶¶ 550, 552.

939 Counter-Memorial, ¶ 545.

940 *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, ¶ 213, **RLA-085**.

the sale of its own assets and other activities unrelated to the privatization process.[941] It also retained substantial managerial control over its operations. Poland's supervisory powers towards the APA were restricted to general regulations and approvals of specific categories of sales of shares.[942] Compared to the competences of the Serbian Ministry of Economy, the Polish Ministry for Rural Development did not interfere in the APA's activities in the form of extensive review procedures or by binding decisions on *ad hoc* matters.[943]

947. Finally, Serbia seeks to rely on *Bayindir v. Pakistan* for the proposition that a separate legal personality is the decisive criterion for the issue of attribution under Article 4 of the ILC Articles.[944] This is a clear misunderstanding of the tribunal's reasoning. The *Bayindir* tribunal merely dealt with the question whether the National Highway Authority (the "**NHA**") was "*a distinct legal personality under the laws of Pakistan.*"[945] The tribunal never examined whether the NHA could qualify as a *de facto* organ, simply because it established Pakistan's responsibility for the NHA's conduct on the basis of Article 8 of the ILC Articles.[946]

948. None of these cases therefore supports Serbia's flawed theory that a separate legal personality and a bank account are by themselves enough for an entity's independence from the state.

949. Tellingly, Serbia nowhere even attempts to address the *functional* perspective, equally relevant for the application of Article 4 of the ILC Articles. Serbia does not challenge the fact that the Law on the Privatization Agency and the Law on Privatization delegated to the Privatization Agency certain governmental tasks and authorities which originally

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941 USA International Business Publications (2007). *Lithuania Mineral & Mining Sector Investment and Business Guide: Vol. 1, Strategic Information and Regulation* (Washington D.C.: International Business Publications), p. 114, **CE-790**.

942 *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, ¶ 213, **RLA-085**.

943 *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, ¶ 213, **RLA-085**.

944 Counter-Memorial, ¶¶ 544, 555.

945 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 119, **RLA-084**.

946 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 124-128, **RLA-084**.

belonged to the Ministry of Economy.[947] Neither does Serbia seem to take issue with the fact that the privatization process—which the Privatization Agency implemented and subsequently monitored from a position of power vis-à-vis private parties—itself pursued public policy objectives of the Republic of Serbia, such as the development of its economy, social security and economic well-being.[948] There can be no doubt that the Privatization Agency carried out functions and enjoyed powers that normally belong to state organs.

950. In its Memorial, Claimants explained that investment authority overwhelmingly supports the qualification of entities *substantially similar* to the Privatization Agency as state organs under Article 4 of the ILC Articles. For example, in *AWDI v. Romania*, the tribunal held that the Authority for Privatization and Management of State's Shares ("**AVAS**") was an organ of the Romanian State, because "*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*."[949]

951. This finding applies with equal force here: The Privatization Agency entered into privatization agreements not as a regular commercial party but with a position of authority and the power of unilateral decision-making over the rights of buyers and privatized entities. It thus clearly pursued a public interest and effectively acted as a state organ.

952. Serbia's attempt to escape the clear conclusions of the *AWDI* tribunal is unavailing. Serbia claims that that the *AWDI* award fails to provide any information about the status or powers of AVAS and thus purportedly cannot thus serve as a meaningful guidance for this case.[950] This is obviously incorrect: the reasoning of the *AWDI* tribunal provides ample information on AVAS's status and functions—and this information reveals a striking similarity to the Privatization Agency.

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947 Memorial, ¶ 351; Milošević First ER, ¶¶ 35, 41.

948 2001 Law on Privatization, Art. 2, **CE-220**.

949 *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 323, **CLA-026**.

950 Counter-Memorial, ¶ 560.

953. As the *AWDI* award explains, AVAS—just like the Privatization Agency—was established by a legal act (*i.e.* the Government Emergency Ordinance 23/2004, through a merger of two governmental agencies).[951] As the tribunal noted, AVAS was entrusted with a governmental authority to pursue the State privatization policy and, by virtue of this function, to conclude and implement privatization contracts concerning State assets in accordance with the Romanian privatization plan.[952] Again, the similarity to the Privatization Agency is undeniable.

954. Further, contrary to Serbia's assertions, the *AWDI* tribunal also analyzed additional evidence on the non-commercial nature of AVAS's actions, such as specific obligations of buyers incorporated in the privatization contracts and found that these obligations were extraneous to purely private business relationships.[953] And it was precisely based on these factors that the tribunal qualified AVAS as a state organ within the meaning of Article 4 of the ILC Articles. Needles to say, this conclusion (and the tribunal's underlying reasoning) applies with full force to the Privatization Agency.

955. Even more to the point, Claimants have previously demonstrated that there is specific international law authority which addressed the attribution of the conduct of Privatization Agency to the Serbian state under public international law and held in no uncertain terms that the Privatization Agency *is a State organ*. This was precisely the finding of the European Court of Human Rights (the "**ECHR**") in the case *Kačapor and others v. Serbia* which elaborated on Serbia's domestic laws:

> [A]s of 2002, companies whose capital is predominantly socially-owned (preduzeća koja posluju većinskim društvenim kapitalom), 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 the taking or giving of loans and guarantees outside the scope of their "regular business operations" (van toka redovnog poslovanja). Any decisions adopted in the absence of such approval shall be declared null

951 *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, § p. vi, **CLA-026**.

952 *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-026**.

953 *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 322, **CLA-026**.

> and void by the Privatisation Agency (see, in particular, Article 398a of the Corporations Act 1996).[954]

956. The very same observation was made by the European Court of Human Rights in another case *Zastava It Turs v. Serbia* which referred to the *Kačapor* case as follows:

> In the instant case the applicant company is a company predominantly comprised of socially-owned capital and, as such, is closely controlled by the Privatisation Agency, *itself a State body*, and/or the Government (see R. Kačapor and Others v. Serbia, cited above, §§ 97).[955]

957. These findings by themselves put an end to Serbia's attribution objection because they authoritatively confirm that the Privatization Agency materially qualifies as an organ of the Serbian state. Serbia's only answer is an unconvincing attempt to dismiss the relevance of the ECHR's case-law[956] with reference to the allegedly "*different and a very specific context*", namely the area of human rights law.[957]

958. Serbia's assertion is patently incorrect: international human rights law applied by the ECHR is not an isolated legal regime but—just like international investment law—it operates within the broader context of general rules of public international law, including the rules on state responsibility.[958] Indeed, commentaries on ILC Articles themselves frequently refer to the decisions of the ECHR.[959] The findings of the ECHR are highly relevant for investment tribunals. There is ample investment arbitration authority which relies on ECHR case-law[960]—and Serbia's proposition to the contrary must be dismissed.

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954 *R. Kačapor and others v. Serbia*, Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ECtHR 2008, ¶ 75, **CLA-025**.

955 *Zastava It Turs v. Serbia*, No. 24922/12, ¶ 21, ECtHR 2013, **CLA-069**.

956 *R. Kačapor and others v. Serbia*, Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ECtHR 2008, ¶ 75, **CLA-025**; *Zastava It Turs v. Serbia*, No. 24922/12, ¶ 21, ECtHR 2013, **CLA-069**.

957 Counter-Memorial, ¶ 559.

958 *E.g. Kotov v. Russia*, No. 54522/00, ECtHR, 2012, ¶¶ 30-32, **CLA-070**; *Liseytseva and Maslov v. Russia*, Nos. 39483/05 and 40527/10, ECtHR, 2015, ¶¶ 128-130, **CLA-071**; *Bureš v. Czech Republic,* No. 37679/08, ECtHR, 2013, ¶ 54, **CLA-072**; *Jones and Others v. United Kingdom*, Nos. 34356/06 and 40528/06, ECtHR, 2014, ¶¶ 107-108, **CLA-073**; *Jaloud v. The Netherlands*, No. 47708/08, ECtHR, 2014, ¶¶ 97-98, **CLA-074**.

959 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 87, **CLA-024**.

960 *See, e.g. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 409, **CLA-075**; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Award, 8 July 2016, ¶¶ 398-399, **CLA-076**.

### 2. Alternatively, the conduct of the Privatization Agency is attributable to Serbia under Article 5 of the ILC Articles

959. Even if the Privatization Agency did not qualify as a State organ for the purposes of attribution under Article 4 of the ILC Articles, its conduct would still be attributable to Serbia under Article 5 of the ILC Articles.

960. This is because *first*, the Privatization Agency is empowered by Serbian law to exercise elements of the governmental authority and, *second*, it acted in that capacity in each particular case when it harmed the Claimants' investment and thus breached Serbia's investment obligations, namely in refusing to release the pledge over BD Agro's shares even after the purchase price had been paid and in terminating the Privatization Agreement which then triggered the transfer of BD Agro's shares.[961] These are the two limbs of the test for attribution Article 5 of the ILC Articles, and both are fulfilled here.

#### a. The Privatization Agency carries out governmental authority throughout the entire privatization process.

961. Serbia itself does not contest that the Privatization Agency fulfills the first element of the test, *i.e.* that the Privatization Agency was empowered by the Law on Privatization Agency[962] and the Law on Privatization[963] to exercise certain tasks and authorities—originally belonging to the Ministry of Economy[964]—in the process of privatization of State or socially-owned assets.

962. The non-commercial nature of the entire privatization process is evident from the contents of the Privatization Agreement. According to the jurisprudence of the Supreme Court of Cassation of the Republic of Serbia, a privatization agreement is a *sui generis* contract which pursues a specific aim of promoting the economic development and social security stability.[965] Serbia's own expert Dr. Radović confirms that the terms of

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961 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Art. 5, **CLA-024**.

962 2001 Law on the Privatization Agency, Art. 6, **CE-238**.

963 2001 Law on Privatization, Art. 5, **CE-220**.

964 Memorial, ¶ 351; Milošević First ER, ¶¶ 35, 41.

965 Judgment of the Supreme Court of Cassation of the Republic Serbia, Prev 104/2013, 19 June 2014, **CE-253**.

a privatization agreement are, to a large extent, non-negotiable and impose on buyers various obligations to safeguard economic interests of the Republic of Serbia.[966]

963. Privatization agreements were subject to supervision by the Privatization Agency, the Privatization Agency itself stated that, when performing these tasks, it was "*not [acting] as a contract party but as the holder of public powers*."[967]

964. It is thus plain to see that the design of the entire privatization process was governmental, not commercial in nature. The Privatization Agency acted in this manner throughout the entire privatization process of BD Agro and subsequently until the termination of the Privatization Agreement and seizure of the Beneficially Owned Shares.

### b. The Privatization Agency's conduct towards the Claimants' investment was not based on use and abuse of *puissance publique*

965. Serbia disputes that the Privatization Agency fulfills the *second* limb of the test of attribution under Article 5—which requires that the impugned conduct be *specifically* carried out in the exercise of governmental authority. Serbia's objection is essentially based on the assertion that the conduct of the Privatization Agreement was "*typical commercial act[s] of a contracting party whose opposite is not performing its contractual obligations*."[968]

966. This is fundamentally flawed: the Privatization Agency did not act as a commercial party when it terminated the Privatization Agreement, instead it was pursuing governmental objectives and using—and abusing—its governmental powers (or *puissance publique*).

967. The Privatization Agency first abused its (unequal) power in its consistent and repeated refusals to release the pledge on the Privatized Shares. The audio recording from the meeting of the Commission for Control held on 23 April 2015 shows that this refusal had no commercial motivation—indeed, there can be no legitimate commercial motivation for an intentional violation of law.

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966 Radović ER, ¶ 27.

967 *Uniworld v Privatization Agency and Srbija-Turist A.D.,* ICC Case No. 14361/AVB/CCO/JRF/GZ, Award, 2011, ¶ 295, **CE-252**.

968 Counter-Memorial, ¶ 568.

968. The Commission for Control unlawfully refused to release the pledge because it wanted to retain its ability to exercise its *puissance publique* by terminating the Privatization Agreement and seizing the Privatization Shares.[969] Had the Privatization Agency duly released the pledge upon the payment of full purchase price—as it was supposed to in accordance with the Privatization Agency's Rulebook on Procedure for Control,[970] Mr. Obradović could have freely transferred the nominal ownership of the Beneficially Owned Shares to the Claimants and the Privatization Agency would have no longer been able to seize them.

969. The Commission for Control knew that such seizure was unavoidable because they knew that Mr. Obradović would not be able to perform the purported "remedies" within the imposed deadline.[971]

970. The motivation for the Privatization Agency's conduct was patently political. The members of the Commission for Control acted under the pressure exercised by the self-styled trade unions of BD Agro's employees—and their self-proclaimed leader, Mr. Zoran Ristić. The members of the Commission for Control made it absolutely clear that they could not release the pledge on shares because, were they to do so, the resulting backlash would mean that "*not even God could cleanse [them]*."[972]

971. After her unjustified arrest in the Azotara case, the president of the Commission, Ms. Vučković, and her colleagues all had a very precise idea of what the consequences might have been had they complied with the law and released the pledge.[973]

972. The termination of the Privatization Agreement and the subsequent seizure of the Beneficially Owned Shares also qualify as an abuse of *puissance publique* and not as a regular private commercial conduct.

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969 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**.

970 Privatization Agency's Rulebook on Procedure for Control, 20 May 2010, **CE-763**.

971 Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 9-10 (pdf), **CE-768**.

972 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 11, **CE-768**.

973 *Arrests because of "Azotara": Damage caused to state exceeds 1 billion dinars*, Novosti.rs, 23 April 2012, **CE-772**.

973. In the pursuit of its usual strategy to divert focus from truly relevant issues, Serbia quotes selected provisions of Serbian law to purportedly prove that the termination of the Privatization Agreement and the transfer of shares were private law acts. This is obviously incorrect.

974. Serbian courts have clearly stated the notice on termination is an act that "*represents the state's will to terminate the contract*" and that constitutes the Privatization Agency's use of "*its legal power, obtained by the transfer of authority under public law from the state to terminate the agreement that did not achieve the legal goal and the social purpose of privatization*."[974]

975. The plain words of the Serbian court make clear that the decision on termination is *not* a private law act because it is an act rendered in the exercise of the Privatization Agency's public law authority delegated from the State.

976. The public law character of the termination is also evident from the statutory construction of the termination as an *ex lege* consequence of the alleged breaches of the Privatization Agreement under the Law on Privatization. The Law on Privatization is a public law regulation.

977. Further reasons why the decision on termination is not a private law act are explained in the expert reports of Mr. Miloš Milošević.[975]

978. The termination of a privatization agreement was followed by the seizure of the Privatized Shares under the Decision on Transfer of Capital.[976] According to Serbia's expert Dr. Radović, such decision did not have "any qualitative meaning" because the Law on Privatization required the Privatization Agency to issue such decision following the termination.[977] This is obviously incorrect because the effect of the Decision on Transfer of Capital was to transfer the ownership of the Beneficially Owned Shares to the Privatization Agency by having them registered on the Privatization Agency's

974 Judgment of the Higher Commercial Court, Pž. 6463/2007, 8 December 2008 (emphasis added), **RE-164**.

975 Milošević First ER, ¶¶ 106-118; Milošević Second ER, ¶¶ 112-132.

976 Decision on Transfer of Capital of the Subject of Privatization BD Agro Dobanovci, 21 October 2015, **CE-105**.

977 Radović ER, ¶ 54.

account with the Central Securities Depositary. Such transfer obviously had a lot of "qualitative meaning" for the Claimants.

979. The key point is that the Privatization Agency was able to seize the Beneficially Owned Shares by having them registered on its own account on the basis of its unilateral decision. As Claimants' expert Mr. Milošević explains, this is not a standard procedure for the restitution of shares in a civil law relationship where the seller would be first required to obtain an enforceable court judgment to request changes in the registration of shares by the Central Securities Depositary.[978]

980. Another public law aspect is that under Article 41a(3) of the 2001 Law on Privatization, was that the notice of termination gave rise to an irrebuttable presumption that the buyer acted as a "dishonest party" and thereby had no entitlement to restitution of the purchase price.[979] In private law relationships, the failure to restitute the previously paid purchase price would constitute unjust enrichment of the seller who would be in turn required to pay it back to the buyer. Yet, this is expressly excluded under the Law on Privatization.[980]

981. It is equally important to consider the Privatization Agency's motivation for the termination of the Privatization Agreement and the subsequent seizure of the Beneficially Owned Shares. Both the statutory motive and the real motive were clearly non-commercial.

982. The statutory motive for termination was, in the words of the Serbian court decision quoted above, the need to enforce achievement of "*the legal goal and social purpose of privatization*" by terminating privatization agreements that did not achieve these objectives due to non-compliance. This is a patently public law motivation (even though this was not the true motivation of the Privatization Agency in this case).

983. The true motivation of the Privatization Agency—and the Ministry of Economy, whose unlawful instructions of 7 April 2015 largely predetermined the outcome—was patently political. They simply gave in to the political pressure for the termination of the

978 Milošević First ER, ¶ 107.

979 2001 Law on Privatization, Art. 41(a)(3), **CE-220**.

980 Milošević First ER, ¶ 109.

Privatization Agreement (and the subsequent seizure of the Beneficially Owned Shares) exercised by the Ombudsman upon the urging of the trade unions led by Mr. Zoran Ristić, whom the Privatization Agency appointed as the General Manager of BD Agro right after the seizure.

984. The motivation for the Privatization Agency's acts is extremely important. In *Jan de* Nul—a case that Serbia heavily relies on for the purpose of its attribution argument—the Tribunal concluded that the SCA did not exercise its "*prérogatives de puissance publique*" because it had a genuine commercial justification for its conduct.[981] In that case, the SCA refused to grant an extension of a tender period to carry out a supplementary soil investigation because it was concerned about the due completion of the dredging contract. This was precisely the reason why the *Jan de Nul* tribunal held that no exercise of governmental authority was involved.

985. The conduct and the motivation of the Privatization Agency were patently different. The Privatization Agency refused to release the pledge because it simply wanted to maintain control over the Claimants' investment so that it can seize it after termination of the Privatization Agreement. Both the statutory and the real reason for the termination and subsequent seizure were political, and thus not commercial. In fact the absence of any economic justification for termination was declared by the Ministry of Economy as early as in 2012.[982] Therefore, the Privatization Agency's conduct plainly qualifies not just as a *use* but as an outright *abuse* of the governmental authority by the Privatization Agency and thus gives rise to Serbia's liability under Article 5 of the ILC Articles.

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

986. Finally, in any event, the conduct of the Privatization Agency is attributable to Serbia under Article 8 of the ILC Articles because the Privatization Agency in fact acted both "*on the instructions*" of Serbia and "*under the direction or control*"[983] of Serbia in both

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981 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶¶ 170-171, **RLA-083**.

982 Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012, **CE-033**.

983 Article 8 of the ILC Articles sets out two instances when a State bears international legal responsibility for unlawful actions of a person or a group of persons, even irrespective of the fact whether they exercise some elements of governmental authority; first, when a State instructs these persons or entities to carry out wrongful conduct (*See* Draft Articles on Responsibility of States for Internationally Wrongful Acts,

instances of its wrongful conduct: the refusal to release the pledge and the termination the Privatization Agreement.

987. Serbia's defense—based on the assertion that the Privatization Agency has managerial autonomy independent of the Serbia state—again rests on a gross distortion of the true *modus operandi* of the Privatization Agency. In truth, the Privatization Agency was subject to continuous general *control* of the Serbian state as well as specific instructions of Serbia's Ministry of Economy throughout the entire process of the privatization of BD Agro and its termination.

988. *First*, Serbia's general *control* over the privatization of BD Agro the stemmed from its powers to appoint and to dismiss members of the Privatization Agency's main bodies—the Director and the Managing Board[984]—which were in charge of managing day-to-day operations of the Agency and making decisions on its behalf.[985]

989. More importantly, Serbia had direct control over the release of pledge over the Privatized Shares, the termination of the Privatization Agreements and the seizure of the Beneficially Owned Shares because these acts were decided by the Commission for Control that—as Serbia itself recognizes—was composed of "*a majority of representatives of government ministries*."[986]

990. The decision on termination of the Privatization Agreement was rendered by only three members of the Commission for Control—two of them were representatives of the Serbian ministries and one was an employee of the Privatization Agency.

991. The fact that the key decisions were made by the Commission for Control composed in majority by representatives of the Serbian ministries puts an end to Serbia's attempt to claim that the Privatization Agency acted independently of the Serbian state.

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with commentaries, Art. 8, ¶¶ 1-2, **CLA-024**) or second, when such conduct occurred under the directions or control of a State (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Art. 8, ¶ 3, **CLA-024**). Both legal grounds are valid for the attribution of the Privatization Agency's conduct in the present case.

984 Memorial, ¶ 354; Milošević First ER, ¶ 44; 2001 Law on the Privatization Agency, Art. 12, **CE-238**.

985 2001 Law on the Privatization Agency, Art. 15, **CE-238**.

986 Counter-Memorial, ¶¶ 583.

992. *Second*, the communication between the Ministry of Economy and the Privatization Agency shows that the Privatization Agency acted as a *de facto* subordinate of the Ministry of Economy. As the Privatization Agency itself told the Serbian Ombudsman, it sought repeated instructions on further steps in response to alleged violations of the Privatization Agreement by Mr. Obradović.[987] Further, in its letter to the Serbian Ombudsman dated 14 November 2014, the Privatization Agency expressly refused to proceed in this matter pending the Ministry's supervision procedure and the publication of its "*obligatory*" decision.[988]

993. The instructions of the Ministry of Economy obviously played a determinative role in the conduct of the Privatization Agency. After the completion of the supervision procedure on 7 April 2015, the Ministry of Economy issued its final report in which it instructed the Privatization Agency to grant additional time-limit of 90 days to Mr. Obradović to prove that he had complied with the terms of the Privatization Agreement and, in case of his failure to do so, to "*undertake the measures within its legal authorizations.*"[989]

994. Serbia's allegation that the instructions from the Ministry of Economy did not dictate any specific conduct and left the Privatization Agency with a discretion to decide on further actions in relation to BD Agro is once again flawed.[990] It is clear that the termination of the Privatization Agreement was the "*measures within the legal authorization*" of the Privatization Agency that the Ministry of Economy referred to in its instruction. Indeed, the Privatization Agency had requested several times the Ministry of Economy's opinion regarding the *termination* of the Privatization Agreement.[991]

995. The Privatization Agency received an instruction to terminate the Privatization Agreement also from the Serbian Ombudsman, Mr. Saša Janković. He publicly declared

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987 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-043**; Letter from the Privatization Agency to the Ministry of Economy with exhibits, 23 December 2013, p. 18 (pdf), **CE-791**.

988 Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-043**.

989 Memorial, ¶ 178; Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-098**.

990 Counter-Memorial, ¶¶ 585-586.

991 Letter from the Privatization Agency to the Ministry of Economy with exhibits, 23 December 2013, **CE-791**; Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-043**.

that the Ministry of Economy and the Privatization Agency had violated their official duties because they had not terminated the Privatization Agreement and requested remedial action.[992] As the Claimants show below, the Ombudsman himself later referred to that request for remedies as an "order."

996. When the Privatization Agency reported to the Ombudsman that Mr. Obradović had been given an additional deadline to show compliance, the Ombudsman made it clear that was not the remedy he had had in mind. In his letters to the Privatization Agency and the Ministry of Economy of 18 September 2015,[993] the Ombudsman expressed his dissatisfaction with the measures taken against BD Agro in response to the findings of his investigation. Dismissing further negotiations with Mr. Obradović as ineffective, the Ombudsman further stated:

> Since, pursuant to the recommendation of the Ombudsman, the Ministry of Economy and the Privatization Agency were *ordered* to undertake all necessary measures in order to determine in the shortest possible period of time whether the conditions were met for termination of the Agreement on sale of socially owned capital through the method of public auction of the subject of privatization "Buducnost" Dobanovci, in order to finally clarify the legal status of the subject of privatization, and since based on the statements in your act no. 07-00-246/2014-05 does not arise that the goal for which the Ombudsman issued the recommendation has been achieved, *it is necessary that you submit to us a new notice on actions based* on the recommendations and undertaken measures in which you will inform us whether the issue of validity of disputable Agreement on sale of socially owned capital was solved or not. *Stated statement is necessary to the Ombudsman in order for us to make the final decision whether the Ministry of Economy and the Privatization Agency acted based on the given recommendations of June 19, 2015.*[994]

997. The Ombudsman would absolve the Privatization Agency only after it had terminated the Privatization Agreement. The Ombudsman closed his investigation, satisfyingly noting that the Privatization Agency and the Ministry of Economy acted in full compliance with his "*recommendations*."[995]

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992 The Ombudsman's On-Line Statement, 23 June 2015, **CE-045**.

993 Letter from the Ombudsman to the Privatization Agency, 18 September 2015, **CE-088**; Letter from the Ombudsman to the Ministry of Economy, 18 September 2015, **CE-115**.

994 Letter from the Ombudsman to the Privatization Agency, 18 September 2015, **CE-088.**

995 Letter of the Ombudsman to the Privatization Agency, 21 October 2015, **CE-727**; Letter of the Ombudsman to the Ministry of Economy, 21 October 2015, **CE-779**.

998. This course of events disproves Serbia's allegations that the Ombudsman did not have powers to issue binding directions to the Privatization Agency,[996] and that the Ombudsman's "*recommendations*" never directed the Privatization Agency to a specific action.[997]

999. The events leading to the termination of the Privatization Agreement and the seizure of the Beneficially Owned Shares are strikingly similar to *Bayindir v. Pakistan*. That tribunal established Pakistan's responsibility for the NHA's termination of the construction contract based on continuous governmental interferences into a motorway project.[998] The Tribunal paid particular attention to a clearance from the Pakistani President to the chairman of the NHA to resort "*to the available contract remedies, including termination*"[999] in response to Bayindir's failure to comply with the contractual terms.

1000. Just like in the present case, the instructions by the President of Pakistan did not specifically dictate the NHA to terminate the construction contract with Bayindir. However, the *Bayndir* tribunal did not attach relevance to the lack of absolute specificity in the instruction and still considered that the NHA's subsequent conduct was still attributable to Pakistan under Article 8 of the ILC Articles.

1001. This conclusion fully applies in this case: it is clear that the Privatization Agency sought and received instructions from the Ministry of Economy regarding its conduct *vis-à-vis* Mr. Obradović and followed the unlawful instruction of the Serbian Ombudsman in the termination of the Privatization Agreement.

1002. To sum up, Serbia controlled and directed the actions of the Privatization Agency during the privatization process of BD Agro and, most importantly, the termination of the Privatization Agreement. On this basis, the conduct of the Privatization Agency is attributable to Respondent in accordance with Article 8 of the ILC Articles.

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996 Counter-Memorial, ¶ 587.

997 Counter-Memorial, ¶ 588.

998 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 126-127, **RLA-084**.

999 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 128, **RLA-084**.

1003. Even more remarkably, in terminating the Privatization Agreement, the Privatization Agency acted upon the orders of the Ministry of Economy and the instructions—euphemistically labelled as "*recommendations*"—of the Serbian Ombudsman.

## V. SERBIA VIOLATED ITS OBLIGATIONS UNDER THE TREATIES

### A. Serbia exercised its sovereign powers

1004. Serbia's primary defense against the overwhelming evidence of its violations of the Treaties is to assert that the Privatization Agency purportedly acted as a regular commercial party and its conduct thus cannot violate international investment law.

1005. This defense is bellied by everything that the Claimants have shown in the preceding section regarding attribution of the impugned conduct to Serbia. As the Serbian courts put it, the privatization process pursues broader social purposes and legal goals and the Privatization Agency held public powers to assess and enforce the buyers' compliance with these objectives.[1000]

1006. The Privatization Agency's enforcement measures included the power to determine and request remedies to alleged violations of privatization agreements, to declare privatization contracts terminated *ex lege* if the violations were not remedied to the Privatization Agency's satisfaction, and to ultimately seize the privatized shares and keep the purchase price under the irrebuttable presumption that the buyer acted in bad faith when violating the privatization agreement.

1007. These special powers stemmed from the Law on Privatization and the Law on the Privatization Agency, two pieces of Serbian public law legislation. They clearly show that the Privatization Agency's conduct in the privatization process had nothing to do with an ordinary commercial conduct.

1008. Serbia's formalistic argument that the Privatization Agency's conduct regarding the Claimants' investment was commercial because it was based on the Privatization Agreement cannot withstand scrutiny.

1009. In fact, it is nothing short of ironic for Serbia to argue that the conduct of the Privatization Agency in this specific case was strictly contractual, and thus commercial. The crux of this case is that the Privatization Agency terminated the Privatization Agreement and seized the Beneficially Owned Shares because of the alleged breach of

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1000 Judgment of the Commercial Appellate Court No. Pž 8687/2011 dated 18 December 2012, p. 4 (pdf), **CE-722**; Slobodan Spasic, Professional Commentary – e – press Commercial Courts proceeding in litigations for termination of agreements on sale of social capital, chapter: VII – 6 – General Commercial Acts/ Privatization, e – press 2006/242, pp. 3-4 (pdf), **CE-717**.

Article 5.3.4. The termination provisions of Article 7 of the Privatization Agreement clearly did not list breaches of Article 5.3.4 as a potential ground for termination. The Privatization Agency simply disregarded Article 7 and relied on an allegedly broader definition of the grounds for termination found in Article 41a(1) of the Law on Privatization. Thus, the Privatization Agency used its alleged broader public law powers to expand its narrower contractual rights and terminate the Privatization Agreement on a ground that had not been agreed in the Privatization Agreement. This is not contractual, commercial conduct.

1010. Simply put, Serbia cannot have it both ways. If the Privatization Agency's conduct had been purely contractual and commercial, as Serbia claims, the Privatization Agency would have respected Article 7 of the Privatization Agreement and would not have terminated the Privatization Agreement. The Privatization Agency's resort to the allegedly overriding statutory provisions of Article 41a(1) shows that even from a purely formal perspective, its conduct was not contractual and commercial.

1011. The Claimants also explained in the section on attribution that the Privatization Agency's motivations were definitely not commercial, but purely political. The Ministry of Economy determined in 2012 that there was no economic justification for termination of the Privatization Agreement, and neither the Privatization Agency at the time, nor Serbia in this arbitration ever argued otherwise.

1012. Finally, the conduct of an ordinary contractual party would not have been subject to the "orders" of the Ministry of Economy and the "recommendations" of the Ombudsman. Serbia cannot seriously claim that the conduct of the Privatization Agency was purely contractual and commercial despite such instructions, which were themselves motivated exclusively politically and were sovereign in nature.

1013. In light of this overwhelming evidence of the sovereign character of the Privatization Agency's conduct, it is almost unnecessary to recall that Serbia's defense overemphasizes the alleged rule that only sovereign conduct may violate an investment treaty. In real life, the border between sovereign and commercial conduct is not sharp.

### 1. There is no firm requirement that any Treaty breach requires exercise of sovereign powers

1014. Serbia's insistence that exercise of sovereign powers is a prerequisite for the Tribunal to find a violation of the Treaties ignores the complexity of the economic relations in modern world. It is becoming increasingly commonplace for the State and its organs or instrumentalities to enter into contracts with private investors and thus seemingly step into the shoes of private contractual parties. However, the mere existence of a contractual relationship cannot deprive the State and its instrumentalities of their status as governmental bodies and of the sovereign powers that they are endowed with. Moreover, commercial and governmental acts often intertwine in such contractual relationships and any attempts to draw a line between sovereign and commercial acts may be artificial, if not outright impossible.[1001]

1015. This position was implicitly upheld in *Eureko*[1002] and *Ampal,*[1003] and succinctly explained in *SGS v. Paraguay* as follows:

> 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.[1004]

1016. Serbia's assertion that the relevance of the foregoing analysis is limited for the purposes of jurisdictional analysis of breaches of contracts with State organs cannot stand. The tribunal in *SGS v. Paraguay* made this statement in response to Paraguay's defense on the *merits*[1005] and its reasoning addresses the State's liability, not the Tribunal's jurisdiction.

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1001 Guido Santiago Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, In: Jan Van den Berg (ed)., International Arbitration 2006: Back to Basics?, ICCA Congress Series, Volume 13 (2007), p. 525, **CLA-112.**

1002 *Eureko B.V. v. Republic of Poland,* UNCITRAL, Partial Award, 19 August 2005, **CLA-030**.

1003 *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-031**.

1004 *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, **CLA-041**.

1005 *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶¶ 134-136 , **CLA-041**.

1017. The analysis of the tribunal in *SGS v. Paraguay* applies with full force here and simply means that there is no reason in international investment law to allow a State such as Serbia to escape its liability under an investment treaty merely because its relationship with a protected investor is formally based on a contract.

1018. Indeed, the formalistic test advocated by Serbia would enable States to pursue their sovereign objectives—such as privatization and subsequent nationalization of property—with impunity under the guise of a "contractual relationship," arguing that their conduct—such as a wrongful termination of a contract—qualifies as a purely contractual behavior and thus cannot violate investment treaties.

1019. Serbia's argument is also predicated on the incorrect assumption that as long as host State's domestic law does not expressly label such a contract as administrative contract or public-law contract, it is somehow exempted from the purview of an international tribunal. Indeed, the formalistic test advocated by Serbia would enable States to conceal their abusive behavior towards investors simply by entering into contractual arrangements with them and unless the investor provides a specific showing of the exercise of sovereign powers. Such an approach would plainly run contrary to the very purpose of international investment protection and thus cannot be endorsed. It would violate the basic principle that a State cannot invoke its domestic law to escape its international liability.[1006]

### 2. All of the alleged breaches stem from Serbia's exercise of sovereign powers

1020. Serbia cannot seriously argue that the Privatization Agency acted within "*ordinary commercial contractual practice*" and did not exercise any State functions.[1007] The Claimants have disproved this erroneous assertion in the context of the attribution analysis and will show again below that (*i*) the entire procedure of implementation of privatization by the Privatization Agency generally constitutes the exercise of State

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1006 Vienna Convention on the Law of Treaties, signed 23 May 1969, Art. 27, **RLA-044**; Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Article 3, **CLA-024**.

1007 Counter-Memorial, ¶ 595.

functions; and (*ii*) each of the specific Treaty violations stems from acts carried out in the exercise of Serbia's sovereign powers.[1008]

### a. Privatization in Serbia was an inherently governmental process

1021. It is disingenuous for Serbia to claim that the Privatization Agency acts as an ordinary commercial party in the context of the privatization process. The privatization process plainly pursued Serbia's public policy goals, and it was steered and monitored by entities exercising sovereign powers.

1022. *First*, the plain purpose of the Privatization Agreement was to pursue governmental interests. As the Claimants explained, the Privatization Agreement was a *sui generis* contract[1009] with specific—and non-negotiable—obligations imposed on the buyer for the purposes of fulfilling Serbia's public policy objectives, namely the transformation of its economic system, attraction of foreign capital and creation of favorable conditions for social stability.[1010]

1023. In an attempt to downplay this chiefly public purpose, Serbia comes up with a comparison between the privatization process and "*any change of ownership over state property*,"[1011] concluding that the mere involvement of state ownership cannot turn a transaction into a sovereign act. Such a comparison is wholly inapposite. Clearly, not every transaction involving State property has a sovereign aim, but privatization plainly does.

1024. The process of privatization in Serbia aimed to achieve a "*radical change in the socio-political and economic order*"[1012]—namely by imposing obligations on buyers to make mandatory investments into privatized companies,[1013] secure the continuity of their operations[1014] or comply with social programs for Serbian workers.[1015] The funds

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1008 Counter-Memorial, ¶ 599.

1009 Judgment of the Supreme Court of Cassation of the Republic Serbia, Prev 104/2013 dated 19 June 2014, **CE-253**.

1010 Milošević First ER, ¶ 28; Article 2 of the 2001 Law on Privatization, **CE-220**; Explanatory note to the 2005 amendments to the Law on Privatization 2001, p. 12, **CE-224**.

1011 Counter-Memorial, ¶ 606.

1012 Milošević First ER, ¶ 28.

1013 Article 5.2.1 of the Privatization Agreement, Article 5.2.1, **CE-17**.

1014 Article 5.3.2. of the Privatization Agreement, **CE-17**.

1015 Annex 1: Social Program, Privatization Agreement, **CE-17**.

collected from the sale of the privatized companies were entirely streamlined into the State budget for financing the Disability and Pension Fund and other programs for the development of Serbian economy.[1016]

1025. Investment arbitration authority confirms that privatization *per se* has a governmental nature, as confirmed by the tribunals in *Awdi v. Romania*[1017] and *Bosca v. Lithuania*.[1018] It is of no relevance that these statements were made in the context of the analysis of attribution as Serbia implausibly argues:[1019] the nature and goal of privatization is a question of fact and thus may be addressed by tribunals within a variety of legal issues that fall to be addressed in a particular case.

1026. Serbia's further attempts to distinguish *Awdi* and *Bosca* on the basis that these tribunals applied the criterion of the exercise of sovereign powers, either in the form of "*the issuance of a normative document*"[1020] or "*a multi-step State-approval process*,"[1021] is unavailing.[1022] In any event, the element of governmental interference in the process of privatization present in both *AWDI* and *Bosca* was also present in this case. For example, the Serbian Ministry of Economy retained supervisory powers over the work of the Privatization Agency[1023] and was heavily involved in the entire privatization process because it issued detailed instructions to the Privatization Agency.[1024]

1027. Serbia also cannot discard the findings of the *AWDI* and *Bosca* tribunals on the basis that the contractual violations in *Awdi* and *Bosca* occurred at the beginning of the

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1016 Article 60 of the 2001 Law on Privatization, **CE-220**. Serbia's attempted query as to how the policy goal of privatization is different to policy goals comparison of privatization to a "*system change from state to private health providers*" makes no sense. Indeed, such a systemic change in the health care system could also qualify as sovereign in nature.

1017 Claimants' Memorial, ¶ 457; *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 323, **CLA-026**.

1018 Claimants' Memorial, ¶ 462; *Luigiterzo Bosca v. Lithuania* (UNCITRAL), PCA Case No. 2011-05, Award, 17 May 2013, ¶ 127, **CLA-042**.

1019 Counter-Memorial, ¶¶ 610-611.

1020 *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 321, **CLA-026**.

1021 *Luigiterzo Bosca v. Lithuania* (UNCITRAL), PCA Case No. 2011-05, Award, 17 May 2013, ¶ 127, **CLA-042**.

1022 Counter-Memorial, ¶¶ 610-611.

1023 Milošević Second ER, ¶¶ 10-11; Milošević First ER, ¶ 36; Article 32, Article 39a and Article 62 of the 2001 Law on Privatization, **CE-220**.

1024 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 3-5, 8 **CE-768**.

contractual relationship and not at the stage of termination. This is a distinction without a difference, but if anything, the Privatization Agency's termination of the Privatization Agreement four years after it was consummated is actually less "contractual" than termination of a contract during its agreed term.

1028. *Second*, in addition to its sovereign objectives, the Privatization Agreement substantially differed from regular private law contracts by a remarkable *legal* inequality between the contractual parties. As explained above, the private buyer of privatized property had minimal bargaining power in the negotiation of the Privatization Agreement and was subject to supervision and unilateral decision-making from the Privatization Agency throughout its implementation.

1029. Serbia counters that unequal position of parties is also typical for certain private law contracts, such as contracts with banks.[1025] This is again unconvincing, because the difference in negotiation leverage due to unequal economic strength of the negotiating parties cannot be compared to the *legal* inequality stemming from the Privatization Agency's public law prerogatives under the Law on Privatization.

1030. *Third,* as explained in the attribution section, the Privatization Agency was subordinated to the Ministry of Economy, which had wide-ranging supervisory powers over the legality of the Privatization Agency's work[1026] and could issue decisions with a binding effect.[1027] The conduct of the Ministry of Economy was not commercial in nature, and it did not pursue commercial goals. Instead, the role of the Ministry of Economy was to focus on the broader social objectives on the privatization process.

### b. Serbia's impugned conduct involved the exercise of its sovereign powers

1031. Contrary to Serbia's mantra on the alleged private law nature of the conduct of the Privatization Agency, the Privatization Agency never acted as an ordinary commercial party. The conduct of the Ministry of Economy and of the Ombudsman, who unlawfully

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1025 Counter-Memorial, ¶ 614.

1026 Milošević Second ER, ¶ 10; Milošević First ER, ¶ 36; Article 32, Article 39a and Article 62 of the 2001 Law on Privatization, **CE-220**.

1027 *See*, for instance, Letter from the Privatization Agency to the Ombudsman dated 14 November 2014, **CE-43**.

interfered with the Claimants' rights and prompted the termination of the Privatization Agreement, was inherently governmental as well.

#### i. The Privatization Agency exercised governmental powers in refusing to release the pledge over the BD Agro shares

1032. The Privatization Agency's failure to release the pledge over the shares of BD Agro after the full purchase price under the Privatization Agreement was paid had strictly no commercial justification. The Privatization Agency's decision not to release the pledge was an abuse of the Privatization Agency's position of power over Mr. Obradović motivated by the desire to avoid public backlash and maintain the Beneficially Owned Shares within the Privatization Agency's reach for their impending seizure.

1033. While a commercial party could decide to intentionally violate its contractual and statutory duties, as the Privatization Agency did, no private contracting party would have had the Privatization Agency's motive to do so—simply because no private party seller could simply seize the sold shares ten years after the sale and four years after the payment of the last installment of the purchase price.

#### ii. The conduct of the Ombudsman was an exercise of sovereign powers

1034. The conduct of the Ombudsman—who unlawfully investigated BD Agro's privatization and openly pressurized both the Ministry of Economy and the Privatization Agency to halt any negotiations with Mr. Obradović and terminate the Privatization Agreement—was also governmental in nature. The Ombudsman is an organ of the Serbian State whose conduct in the performance of his legal powers (and, in this case, in clear *excess* of his powers) uncontroversially qualifies as sovereign.[1028]

1035. It is perfectly irrelevant that the Ombudsman's investigation was formally directed against the Ministry of Economy and the Privatization Agency rather than BD Agro or Mr. Obradović, as Serbia purports to argue. The findings of the Ombudsman's plainly influenced the Privatization Agency, to say the least, and prompted it to unlawfully terminate the Privatization Agreement.

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1028 *See*, for instance, 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**.

1036. The tribunal in *Caratube v. Kazakhstan* was faced with a similar situation. In that case, a Kazakh prosecutor issued alleged "recommendations" which prompted the process of contract termination.[1029] The tribunal found that such intervention constituted a sovereign act attributable to Kazakhstan.[1030]

### iii. The Privatization Agency exercised governmental powers in terminating the Privatization Agreement

1037. The termination of the Privatization Agreement was also a sovereign—rather than a commercial—act. As the Claimants' expert Mr. Milošević explained, the notice of termination *materially* fulfils all the criteria of an administrative act within the meaning of the Law on Administrative Disputes.[1031]

1038. The opposite opinion of Serbia's expert Dr. Radović is based on a distortion of the jurisprudence of Serbian courts which, in fact, agreed that irrespective of its formal classification, the notice of termination is "*an act by which the Privatization Agency uses its legal power, obtained by the transfer of authority under public law from the state, to terminate the agreement*".[1032]

1039. The Claimants' legal expert, Mr. Milošević, confirms that under Article 41a(3) of the Law on Privatization, the Notice of Termination did establish an irrebuttable presumption that the buyer acted as a "dishonest party" and thus excluded the restitution of the purchase price.[1033] Again, this is not a standard mode of termination of private law contracts where the paid purchase price would constitute unjust enrichment that would have to be returned to the buyer.[1034] Thus, the termination of the Privatization Agreement had consequences for the Claimants' investment that no ordinary commercial legal relationship could conceivably have had.

1040. Serbia's final attempt to turn the termination of the Privatization Agreement into a purely commercial act rests on the assertion that Mr. Obradović could have initiated

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1029 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 925, **CLA-028**.

1030 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 934, **CLA-028**.

1031 Milošević Second ER, ¶¶ 112-132; Milošević First ER, ¶¶ 111-117.

1032 Judgment of the Higher Commercial Court, Pž. 6463/2007 dated 8 December 2008, **RE-164**.

1033 *Compare* Article 41a(3) of the 2001 Law on Privatization, **CE-220**.

1034 Milošević First ER, ¶ 109.

a legal action against the Privatization Agency in civil courts to quash the notice of termination.[1035] This is once again wholly irrelevant: judicial review before civil courts is available also for administrative acts of State bodies[1036] which *are* uncontroversially governmental in nature.[1037]

1041. More strongly yet, new evidence that came to light in document production shows that the Privatization Agency shockingly abused its powers in a manner unheard of in private contractual relationships. This abuse related both to the Privatization Agency's refusal to release the pledge over the BD Agro shares and to the termination of the Privatization Agreement.

1042. The audio recording of the discussions during the meeting of the Privatization Agency's Commission for Control held on 23 April 2015 reveal that the Privatization Agency was well aware that BD Agro's loans to Crveni Signal and Inex, secured by assets of BD Agro, did not qualify as valid grounds for termination under Article 7.1 of the Privatization Agreement.[1038]

1043. Finally, the termination of the Privatization Agreement qualifies as an exercise of sovereign powers also because the Privatization Agency effectively decided on the termination on the basis of the involvement of two governmental organs of Serbia: the Ministry of Economy and the Ombudsman, who uncontroversially exercise sovereign powers themselves.

1044. The Claimants have already explained at length that the Privatization Agency sought and received instructions from the Ministry of Economy regarding their conduct towards Mr. Obradović and BD Agro. The importance of these instructions can easily be seen from the fact that the Privatization Agency would not decide on anything without such instructions and when the instructions finally arrived, the Privatization Agency referred to them as "orders."[1039]

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1035 Counter-Memorial, ¶ 622.

1036 Milošević Second ER, ¶ 126.

1037 Obradović First WS, ¶ 30.

1038 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, **CE-768**.

1039 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 6, **CE-768**.

1045. The Claimants have also explained at length that the Ombudsman unlawfully interfered and pressurized the Privatization Agency (as well as the Ministry of Economy) to terminate the Privatization Agreement.

1046. While the involvement of both organs of the Serbian state is relevant for the purpose of the attribution of the conduct of the Privatization Agency to Serbia under Article 8 of the ILC Articles, it is equally important for the inevitable conclusion that Serbia acted in the exercise of sovereign powers when terminating the Privatization Agreement. Indeed, it cannot be seriously argued that the termination of the Privatization Agreement was a commercial act in a situation when two supreme Serbian organs were actively involved—and effectively prompted—this process.

1047. All in all, there is no question that Serbia exercised—and misused—its sovereign powers in refusing to release the pledge over the BD Agro shares, in instigating the termination of the Privatization Agreement by means of unlawful intervention of the Ombudsman and in the termination itself.

#### iv. The seizure of the Beneficially Owned Shares

1048. The Privatization Agency's seizure of the Beneficially Owned Shares was undoubtedly an exercise of Serbia's sovereign powers. No private party can simply seize the sold shares if it terminates the share purchase agreement (and keep the purchase price).

1049. Serbia's objection that the seizure is an automatic consequence of the termination and not an administrative act under Serbian law[1040] is completely irrelevant. Mr. Milošević explains that the Notice on Transfer of Capital has all characteristics of an administrative act. Furthermore, the Privatization Agency's legal power to unilaterally appropriate ownership of the Privatized Shares is sovereign in nature, and it does not lose its sovereign nature only because it may be the consequence of another act—which, in fact, was also sovereign in nature.

### B. The exception under Article 18 of the Canada-Serbia BIT is inapplicable

1050. Serbia's next attempt to avoid the Tribunal's scrutiny of its conduct is based on the alleged application of a general exception set forth in Article 18 of the Canada-Serbia

[1040] Counter-Memorial, ¶ 622.

BIT. That provision states that "*for the purpose of this Agreement, a Party may adopt or enforce a measure necessary […] to ensure compliance with domestic law that is not inconsistent with this Agreement*."[1041]

1051. This attempt is unavailing because Serbia's conduct cannot plausibly fulfill the requirements for the application of such an exception.

1052. Article 18 of the Canada-Serbia BIT is modelled upon a similar provision in Article XX of the 1994 General Agreement on Tariffs and Trade (the "**GATT**") which sets out general exceptions for Members of the World Trade Organization (the "**WTO**") which allow them to adopt trade-restrictive measures that promote and protect societal values and interests. Given the nearly identical wording of Article XX GATT, the case law of the WTO panels and the Appellate Body is highly relevant for the interpretation of Article 18 of the Canada-Serbia BIT.

1053. Under the plain reading of Article 18, Serbia's conduct must fulfil conditions for the application of the general exception. *First*, it must fall within one of the specific exceptions enumerated under Article 18(1)(a)(i)-(iii). *Second*, it must also meet the requirements of the general *chapeau* set forth in Article 18(1)(b). Serbia's conduct however fails both of these cumulative requirements.

1054. First, it is plainly disingenuous for Serbia to assert that its conduct was *necessary to ensure compliance with* Article 41a(1)(3) of the Law on Privatization—which provides for termination of a privatization agreement if the buyer "*disposes of the property of the subject of privatization contrary to provisions of the agreement*."

1055. It is Serbia's burden of proof to demonstrate that the impugned conduct was *designed* and *necessary* to secure compliance with Article 41a(1)(3) of the Privatization Law.[1042] It comes nowhere near meeting this burden.

1056. The failure to release the pledge on the Privatized Shares was a serious and intentional violation of the Share Pledge Agreement and applicable law. Serbia cannot seriously argue that an act unlawful under Serbian law was designed and necessary to ensure

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1041 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, signed 1 September 2014, Art. 18 (1)(a), **CLA-001**.

1042 Appellate Body Report, *Korea – Various Measures on Beef (2001)*, ¶ 157, **CLA-113**.

compliance with Article 41a(1)(3) of the Law on Privatization. Furthermore, the failure to release was not necessary also because the release would not have prevented the Privatization Agency from terminating the Privatization Agreement and, for example, seeking damages rather than seizing the Beneficially Owned Shares.

1057. The Claimants have explained above that the termination of the Privatization Agreement was completely unjustified. Thus, there was no need to secure compliance with Article 41a(1)(3), which completely undermines Serbia's entire reasoning regarding Article 18 of the Canada-Serbia BIT.

1058. The lack of justification for the termination ipso facto disqualifies also the seizure of the Beneficially Owned Shares.

1059. Thus, none of Serbia's measures could plausibly qualify as measures "necessary to secure compliance with the Privatization Law" as Article 18(1)(a)(ii) requires.

1060. *Second*, Serbia's conduct in any event falls outside of the ambit of Article 18 because it constitutes a disguised restriction on the Claimants' investment in violation of Article 18(1)(b)(ii).

1061. The term "*disguised restriction*" was interpreted in the report of the WTO panel in *EC – Asbestos (2001)*. In its assessment of Canada's objection to the measures prohibiting asbestos and products containing asbestos imposed by France for the purposes of protection of human, animal or plant life and health within the meaning of Article XX(b) of the 1994 GATT, the panel held:

> [T]he key to understanding what is covered by 'disguised restriction on international trade' is not so much the word 'restriction', inasmuch as, in essence, any measure falling within Article XX is a restriction on international trade, but the word 'disguised'. In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb 'to disguise' implies an intention. Thus, 'to disguise' (*déguiser*) means, in particular, 'conceal beneath deceptive appearances, counterfeit', 'alter so as to deceive', 'misrepresent', 'dissimulate'. *Accordingly, a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.*[1043]

[1043] Panel Report, *EC – Asbestos (2001)*, ¶ 8.236, **CLA-114**.

1062. This finding applies with full force to Serbia's conduct: The Commission for Control decided on the termination of the Privatization Agreement with Mr. Obradović under the pretext of his purported non-compliance with the contractual terms. This purported reason was plainly not genuine.

1063. Serbia therefore fails to meet the requirements of Article 18(1) of the Canada-Serbia BIT and the general exception plainly is not applicable.

## C. Serbia expropriated the Claimants' investment

1064. Serbia's conduct towards the Claimants' investment is a textbook example of expropriation in modern times: Under the guise of a legitimate contractual measure on the basis of Serbian privatization legislation, Serbia in reality fabricated a pretext to terminate the Privatization Agreement in order to take the Beneficially Owned Shares and thus entirely deprive the Claimants of their investment *without any compensation*.

1065. In purported defense of its egregious conduct, Serbia claims that the termination of the Privatization Agreement—and the subsequent transfer of the Beneficially Owned Shares—were lawful measures in response to the violations of the Privatization Agreement by Mr. Obradović. This is a travesty that has now been exposed in full light: Document production in this arbitration has unequivocally shown that Serbia was well aware that it had no strictly no legal justification to terminate the Privatization Agreement. This by itself should be enough to demonstrate Serbia's bad faith and hold it liable for an investment treaty breach.

### 1. The Claimants were the rightful owners of the rights expropriated by Serbia

1066. Serbia alleges that the "*Claimants did not acquire assets or rights allegedly expropriated*."[1044] This is nothing more than a blatant attempt to introduce *again* Serbia's objection—already pursued by Serbia under the labels of jurisdiction *ratione materiae*, jurisdiction *ratione voluntatis* and abuse of process—that the Claimants never acquired ownership or control of the Beneficially Owned Shares.

1067. Serbia does not raise any new argument and there is thus nothing for the Claimants to react to. To err on the side of caution, the Claimants stress that all of their investments

[1044] Counter-Memorial, p. 203.

are capable of being expropriated. The Beneficially Owned Shares and Mr. Rand's Indirect Shareholding are shares, and thus obviously capable of being expropriated.

1068. The same conclusion applies to the Claimants rights under the Sembi Agreement and Mr. Rand's direct payments to BD Agro's Canadian suppliers for the purchase and transport of heifers and other payments and loans for the benefit of BD Agro. Indeed—and Serbia does not dispute this—investment tribunals universally recognize contractual rights and incorporeal rights as capable of being expropriated.[1045] Accordingly, Serbia's barely pleaded objection that the Claimants did not have any right capable of being expropriated must be dismissed.

### 2. Termination of the Privatization Agreement and the transfer of Beneficially Owned Shares separately and together constituted an expropriatory taking

1069. The Claimants amply demonstrated in their Memorial that the termination of the Privatization Agreement and the following transfer of the BD Agro shares constituted an expropriatory taking of the Claimants' rights to the Beneficially Owned Shares.

1070. Mr. Rand's Indirect Shareholding lost any value with Serbia's unlawful termination of the Privatization Agreement and the subsequent transfer of the BD Agro shares back to the Privatization Agency.[1046]

1071. As the Claimants explained in their Memorial, international investment law makes clear that violations of contracts (or their wrongful termination) give rise to expropriatory taking *even if* the State ultimately does not interfere in the investors' rights *in rem*.

1072. This was the case in *Ampal v. Egypt*[1047] (where Egypt wrongfully terminated a gas sale purchase agreement with the investor's subsidiary *without* interfering with Ampal's shareholding therein) and *Eureko v. Poland*[1048] (where Poland breached its contractual

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1045 *See* e.g. *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶ 98, **CLA-152**; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 241, **CLA-30**;, *BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, ¶¶ 114-117.

1046 Claimants' Memorial, ¶¶ 387 *et seq.*

1047 Claimants' Memorial, ¶¶ 402-404; *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, ¶ 345, **CLA-031**.

1048 Claimants' Memorial, ¶¶ 398-400; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 41, ¶ 53, ¶¶ 240-241, **CLA-030**.

duty to let Eureko acquire a majority shareholding in a leading insurance company *without* interfering with Eureko's existing minority shareholding). Serbia offers strictly no response to this overwhelming authority.

1073. Therefore, it does not matter whether the Claimants' beneficial ownership of the Beneficially Owned Shares is qualified as a right *in rem* or a purely contractual right.

1074. Serbia attempts to deny the existence of expropriation by attempting to distinguish the findings of the *Siag* tribunal, on which the Claimants relied in the Memorial. Serbia claims that *Siag v. Egypt* is not applicable on the alleged basis that Egypt admitted its liability for the direct expropriation of the investor's plots of lands and that the expropriation occurred as a consequence of resolutions by Egyptian governmental organs and not as a result of the termination of the contract.[1049]

1075. Neither of Serbia's attempts to distinguish *Siag* is availing: It does not make any difference whether the respondent State accepts its international responsibility outright or it is determined by the tribunal. The exact form of the measure which gives rise to an expropriatory taking is similarly irrelevant: direct expropriation is defined as the taking of legal title to property independently of the type of measure. In *Siag*, the termination of the contract was formally carried out by means of ministerial resolutions, but the purported reason for their issuance was an alleged breach of contract.[1050]

1076. In the absence of any substantive defense, Serbia once resorts to an attempt to avoid the Tribunal's scrutiny overall.[1051] Under Serbia's theory, because the transfer of shares was merely "*an automatic consequence of the termination proscribed by the Law on Privatization*",[1052] it falls outside of any scrutiny under public international law.

1077. This defense is disingenuous—and it must be rejected because it has no basis in international law.

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1049 Counter-Memorial, ¶ 638.

1050 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Repubilc of Egypt*, ICSID Case no. ARB/05/15, Award, 1 June 2009, ¶ 35, ¶ 66, ¶ 427, **CLA-009**.

1051 Counter-Memorial, ¶ 634.

1052 Counter-Memorial, ¶ 635.

1078. Under public international law, Serbia plainly bears liability for both its individual volitional acts as well as for acts which merely *automatically* result from the application of its domestic legislation, as long as they have an impact on the Claimants' investment. Article 27 of the VCLT articulates the established principle that Serbia cannot rely on the legal characteristics of the measures under its domestic laws to escape its international liability under the applicable BITs.[1053]

1079. Therefore, irrespective of whether the Serbian courts classify the decision on transfer of shares as an administrative act or not,[1054] and whether the transfer constitutes an automatic result of the termination of the Privatization Agreement, such classification does not affect the assessment of whether the act violates international law.

1080. The availability of judicial review of the termination is similarly irrelevant.[1055] As further explained below, there is no requirement of exhaustion of local remedies under either of the Canada-Serbia or Serbia-Cyprus BIT and Serbia's proposition that the availability of a local remedy could remove an expropriatory act from the purview of international investment tribunals is plainly and simply unfounded.

1081. Finally, Serbia's claim that Mr. Obradović accepted the consequences of the termination of the Privatization Agreement under the Law on Privatization is as irrelevant as it is unavailing.[1056] Serbia quite obviously comes up with this assertion in an attempt to compare the transfer of the Beneficially Owned Shares to the taking of physical assets by the Venezuelan Governmental agency (the "**CVG**") in *Vannessa v. Venezuela*.[1057]

1082. However, the contract in *Vanessa v. Venezuela* provided explicitly for the consent of the Canadian investor to the taking of property by *CVG* without entitlement to any damages should such contract be terminated "*whatever the cause*".[1058] Further, the tribunal in

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1053 Article 27 of the VCLT reads: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46*." Vienna Convention on the Law of Treaties, signed 23 May 1969, Art. 27, **RLA-44.**

1054 Counter-Memorial, ¶ 639; The Supreme Court of Serbia, Decision no. U. 2263/2006, 7 July 2006, **RE-113**.

1055 Counter-Memorial, ¶ 635.

1056 Counter-Memorial, ¶ 635.

1057 Counter-Memorial, ¶ 636.

1058 *Vannessa Ventures Ltd. V. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)04/6), Award, 16 January 2013, ¶ 215, **RLA-107**.

that case held that the termination was a legitimate reaction to purely contractual breaches and, therefore, did not amount to expropriation of contractual rights within the meaning of the Canada-Venezuela BIT.

1083. None of these considerations applies here. The Privatization Agreement did not provide for termination for alleged violations of Article 5.3.4 because such ground for termination was not listed in Article 7. Neither did the Privatization Agreement provide for a waiver of the buyer's claims for damages. Finally, the termination of the Privatization Agreement was clearly unjustified.

### 3. Serbia's defenses against a finding of expropriation cannot stand

1084. Serbia has fabricated a number of purported general defenses to avoid the inevitable conclusion that the termination of the Privatization Agreement and the taking of the shares in BD Agro constitute expropriatory taking within the meaning of the Canada-Serbia BIT and the Serbia-Cyprus BIT.

1085. *First*, Serbia argues that the termination and the transfer of shares cannot be expropriatory because these measures constituted a lawful response to Mr Obradović's alleged violations of the Privatization Agreement. *Second*, Serbia once again repeats that it in any event did not act in the exercise of sovereign powers. *Third*, Serbia asserts that the requirement of exhaustion of local remedies applies for a finding of expropriation, and *finally*, it attempts to its escape its liability overall by an attempt to shift the blame for that the destruction of the Claimants' investment to Mr. Obradović.

1086. Neither of these defenses stands as a matter of both law and facts, as shown *seriatim* below.

#### a. Termination of the Privatization Agreement and the transfer of the Privatized Shares were unlawful under Serbian law and were carried out in bad faith

1087. Serbia's key defense of the taking of the Claimants' investment is that the termination of the Privatization Agreement was a lawful response to the breaches of the Privatization Agreement and thus cannot qualify as expropriation. This assertion is not only false as a matter of facts and Serbian law but it is squarely contradicted by the contemporaneous views of Serbia itself.

1088. Indeed, document production in this arbitration revealed that the Privatization Agency itself knew very well that no legal grounds to terminate the Privatization Agreement existed but *proceeded to the termination anyway*. This is not mere unlawfulness, but an outright bad faith.

### i. Termination had no legal grounds under Serbian law

1089. The Privatization Agency formally terminated the Privatization Agreement by reference to the alleged violation of its Article 5.3.4.[1059] This termination was unlawful as a matter of fact and Serbian law for the reasons explained in Sections 4 and 5 below.

### ii. The Privatization Agency acted in bad faith in terminating the Privatization Agreement

1090. Worse yet, not only there were objectively no grounds to terminate the Privatization Agency by reference to Article 5.3.4. but the Privatization Agency was well aware that violations of Article 5.3.4 could not constitute a valid ground for contractual termination under Article 7.1 of the Privatization Agreement. Despite that, the Privatization Agency proceeded with the termination.

1091. The documents produced by Serbia in this arbitration demonstrate this unequivocally. One of the members of the commission of control of the Privatization Agency stated during its meeting on 23 April 2015: "*The first of these provisions, 5.3.3, was prescribed as a basis for termination of the agreement, and the other one [5.3.4], which refers to pledges, in accordance with the agreement was not prescribed as a basis for termination of the agreement.*"[1060]

1092. Serbia's allegation that Mr. Obradović was well aware of his breaches and the resulting risk of the termination of the Privatization Agreement based on repeated notices from the Privatization Agency, but that he did nothing to remedy such breaches, is fundamentally flawed. [1061] Mr. Obradović never accepted his responsibility for alleged

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1059 Article 5.3.4 of the Privatization Agreement reads: "*The Buyer will not encumber with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards the subject accrued based on regular business activities of the subject, that is, except for the purpose of acquiring of the funds to be used by the subject.*"

1060 Audio recording from meeting of the Commission for Control dated 23 April 2015, **CE-767**.

1061 Counter-Memorial, ¶ 653.

breaches of the Privatization Agreement because he correctly considered the transactions in dispute to be fully compliant with the contractual terms.[1062]

1093. The Privatization Agency's repeated requests for remedying the purported breach were not only disproportionate,[1063] but were wholly misplaced after the Privatization Agreement expired when the purchase price had been fully paid on 8 April 2011. [1064]

1094. In any event, it is disingenuous for Serbia to accuse Mr. Obradović of not doing anything to remedy the alleged breaches. BD Agro did repay the funds obtained under the 2010 Loan Agreement and the Pledge thus lost any effect. Even assuming, arguendo, that there was a breach of Article 5.3.4, it was remedied by the Pledge losing any effect.

### iii. The Privatization Agency acted disproportionally in terminating the Privatization Agreement

1095. Even assuming, *arguendo*, that the Privatization Agency had the right to terminate the Privatization Agreement, such termination was hugely disproportionate and thus on any account unlawful.

1096. It is obviously not true that the analysis of proportionality is irrelevant if the termination is found to be lawful, as Serbia seeks to argue.[1065] This is a plain misunderstanding of the proportionality analysis because such analysis is effectively *a part of the analysis of lawfulness*.

1097. The proportionality test is based on three sequential questions: first, whether a measure was taken for legitimate reasons; second, whether less obstructive alternatives were available; and third, whether the benefits of the measure outweigh its costs. As Claimants' expert Mr. Milošević explains, the termination of the Privatization Agreement failed on all counts of this proportionality analysis.[1066]

1098. *First*, the Privatization Agency resorted to the termination of the Privatization Agreement as a sanction to purported violations of Article 5.3.4 by Mr. Obradović. As

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1062 Obradović Second WS, ¶ 85.

1063 Milošević Second ER, ¶¶ 54-69.

1064 Milošević Second ER, ¶ 72.

1065 Counter-Memorial, ¶ 654.

1066 Milošević Second ER, ¶ 69; Milošević First ER, ¶¶ 92-97.

explained above, not only did Mr. Obradović comply with his obligations under this provision, but breaches of Article 5.3.4 were not even listed as valid grounds for contractual termination in Article 7.1 of the Privatization Agreement[1067]—as the Privatization Agency itself acknowledged.[1068] The termination therefore did not serve any legitimate purpose.

1099. *Second*, even assuming *arguendo* that the Pledge on BD Agro's assets violated Article 5.3.4 of the Privatization Agreement, the Privatization Agency should have provided Mr. Obradović with reasonable opportunity to remedy the violations either in the form of the repayment of loans from third parties or the non-exercise of the Pledge on BD Agro's assets.[1069] Instead, the Privatization Agency surprisingly insisted on the return of the funds *as well as* the deletion of BD Agro's Pledge from the Real Estate Register,[1070] ignoring the fact that Nova Agrobanka as the pledgee could no longer exercise the Pledge after BD Agro had fully repaid its EUR 2 million loan on 22 June 2012.[1071] There is thus no question that the Privatization Agency's reactions to alleged breaches of Article 5.3.4 of the Privatization Agreement were excessively restrictive.

1100. *Third*, the termination was disproportionate *stricto sensu* because the Privatization Agency's requests for remedying the alleged breaches of Article 5.3.4 lost their purpose following the payment of the full purchase price on 8 April 2011.[1072]

1101. As the Claimants' expert Mr. Milošević explained, the rationale of Article 5.3.4 of the Privatization Agreement was to protect the value of BD Agro's assets as a security for the purchase price.[1073] In this regard, upon the full payment of the purchase price, this goal was achieved and the repeated requests for remedies lacked any justification.[1074] The subsequent termination of the Privatization Agreement and complete loss of the

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1067 Milošević Second ER, ¶ 87; Milošević First ER, ¶¶ 79-86.

1068 Audio recording from meeting of the Commission for Control dated 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control dated 23 April 2015, p. 2, **CE-768**.

1069 Milošević Second ER, ¶ 57.

1070 Letter from the Privatization Agency to D. Obradović dated 27 April 2015, **CE-348**.

1071 Milošević Second ER, ¶ 61.

1072 Milošević Second ER, ¶ 66.

1073 Milošević Second ER, ¶¶ 66, 78; Milošević First ER, ¶ 96.

1074 Milošević Second ER, ¶ 54; Milošević First ER, ¶ 96.

Claimants' investment without any compensation could not be therefore outweighed by any public interest.[1075]

1102. Serbia attempts to do away with the proportionality analysis on the basis of a pure misinterpretation of the findings of the tribunal in *Ampal v. Egypt*: In that case, the tribunal held that the termination of the gas sale purchase agreement between the state-owned Egyptian General Petroleum Company and Ampal's subsidiary was unlawful not only because or the absence of any legitimate reasons (*i.e.* the disputed non-payment of invoices did not constitute a valid termination ground)[1076] but also based on its disproportionality *stricto sensu*.[1077] These findings are exactly applicable here because the termination of the Privatization Agreement was also both illegitimate (it was based on a false pretext of purported applicability of Article 5.3.4 of the Privatization Agreement) and grossly disproportionate.

1103. As a result, the termination of the Privatization Agreement was unlawful as a matter of Serbian law and Serbia's key defense in this arbitration thus plainly fails. The unlawfulness of the termination of the Privatization Agreement also means that the subsequent forceful transfer of the Privatized Shares was equally unlawful.

### b. Expropriation claims require no exhaustion of local remedies

1104. Serbia's next defense against the Claimants' expropriation claim rests on the allegation that no expropriation may occur if the Claimants do not seek redress before domestic courts.[1078] Serbia thus seeks to import a substantive requirement of exhaustion of local remedies into the definition of expropriation.

1105. This is a fundamentally incorrect position, resolutely rejected by investment tribunals as well as commentators and thus merits no more than a very brief response.

1106. First and foremost, Serbia's flawed position has been unhesitantly rejected by the *ad hoc* Annulment Committee in *Helnan*.

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1075 Milošević First ER, ¶ 95.

1076 *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-031**.

1077 *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, ¶ 344, **CLA-031**.

1078 Counter-Memorial, ¶ 655.

1107. In *Helnan*, the dispute in the original ICSID arbitration arose in connection with the termination of a Management Contract with the Egyptian Organization for Tourism and Hotels ("**EGOTH**") following an arbitration in accordance with the contractual dispute resolution clause.[1079] The tribunal held that the downgrading of the five-star hotel on the basis of an administrative decision of the Minister for Tourism did not amount to expropriation because the investor failed to meet its burden of proof regarding sovereign abuse of powers and, on any account, did not challenge the ministerial decision before competent Egyptian courts.[1080]

1108. On annulment, the *ad hoc* Committee upheld the tribunal's finding that expropriation could not occur in the absence of any evidence of governmental interference. However, it reversed the tribunal's reasoning regarding the requirement of exhaustion of local remedies. As the *ad hoc* Committee held, the ministerial decision had to be differentiated from a decision of a low-level official (which would amount to a treaty breach only under the proof of a pattern of State's wrongful conduct).[1081]

1109. The *ad hoc* Committee thus reversed the tribunal's finding because it would plainly bypass the meaning of Article 26 of the ICSID Convention which expressly states that there is no procedural requirement of exhaustion of local remedies before initiating an ICSID arbitration.[1082] The *ad hoc* Committee also warned that rigid insistence on the requirement to pursue local remedies would not only defy the logic of investment arbitration but also effectively deprive investors of their right to bring treaty claims, except for a complaint of unfair treatment based on the denial of justice.[1083]

1110. More recently, the tribunal in *Crystallex v. Venezuela* endorsed this approach. In that case—which also related to the termination of a contract, on the alleged basis of the

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1079 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, ¶ 6, **CLA-115**.

1080 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, ¶¶ 147-148, **CLA-115**.

1081 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010, ¶¶ 50-51, **CLA-116**.

1082 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010, ¶ 47, **CLA-116**.

1083 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010, ¶ 53, **CLA-116**.

investor's failure to perform the contract for one year[1084]—Venezuela also raised an objection that the investor should have first sought local remedies before national courts. The tribunal resolutely dismissed Venezuela's objection and referred to identical policy concerns as the *ad hoc* Committee in *Helnan*.[1085]

1111. The *Crystallex* tribunal also pointed out that such a requirement would be contrary to the requirement of waiver of local proceedings under the Canada-Venezuela BIT.[1086] The very same consideration applies here—indeed, Serbia itself has raised a lengthy jurisdictional objection on the basis of the formal lack of such waiver from MDH Serbia under the alleged fear of double recovery of damages in parallel proceedings.[1087]

1112. Serbia's reliance on *Waste Management v. Mexico* as well as on *Parkerings v. Lithuania* is misplaced. In *Waste Management*, the investor's expropriation claim was based on non-payment of invoices by the City of Acapulco under the Concession Contract for the provision of waste disposal services.[1088] The contract had a dispute resolution clause providing for commercial arbitration. In the absence of any proof regarding governmental interference, the tribunal concluded that the investor was still free to raise its commercial claims before the contractually chosen forum[1089] and could seek compensation in an ICSID arbitration only when access to such remedy was foreclosed.[1090]

1113. In *Parkerings v. Lithuania*, the object of the Agreement in dispute was a concession for operating street parking and multi-storey car parks in the City of Vilnius.[1091] The dispute

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1084 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 700, **CLA-117**.

1085 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 710, **CLA-117**.

1086 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 710, **CLA-117**.

1087 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, signed 1 September 2014, Art. 22(2)(e)(ii), **CLA-001**.

1088 *Waste management, Inc. V. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 58-65, **RLA-093**.

1089 *Waste management, Inc. V. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 175, **RLA-093**.

1090 *Waste management, Inc. V. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 174, **RLA-093**.

1091 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶¶ 81-84, **RLA-114**.

concerned non-compliance with the commercial terms of the Agreement,[1092] and the tribunal expressly held that there was no evidence that the City of Vilnius would have acted in the use of sovereign powers.[1093] The tribunal pointed out that the Lithuanian courts would be a more suitable forum for settling the purely commercial dispute.[1094]

1114. Both *Waste Management* and *Parkerings* thus related to purely commercial contractual disputes and the tribunals' conclusions on the requirement to turn to domestic courts or to contractually agreed forum were thus plainly motivated by the fact that no sovereign act was involved in the breach. This stands in sharp contrast with the present case where the Privatization Agency itself—as well as other Serbian organs which interfered in the termination of the Privatization Agreement—exercised sovereign powers.

1115. Serbia's theory on the requirement of exhaustion of local remedies for a finding of expropriation thus squarely contradicts established international investment law as well as its own jurisdictional argument regarding the importance of no parallel proceedings.

### c. Serbia acted in the exercise of sovereign powers in expropriating the Claimants' investment

1116. Serbia's further defense on the basis of the alleged absence of exercise of sovereign powers—which Serbia claims constitutes a requirement for a finding of expropriation—is effectively a mere repetition of the very same flawed allegations it has made within its general defense with respect to every breach.

1117. The Claimants have already conclusively shown that the Privatization Agency exercised sovereign powers and never acted as a regular commercial party because it used and misused its chiefly governmental prerogatives under the Privatization Agreement. These showings apply with full force here.

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1092 *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 190, **RLA-114**.

1093 *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 445, **RLA-114**.

1094 *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 316, ¶¶ 318-319, ¶ 448, ¶¶ 453-454, **RLA-114**.

### d. The destruction of the Claimants' investment was caused by Serbia, not by Mr. Obradović

1118. Finally, Serbia attempts to shift the blame for the clear destruction of the Claimants' investment to the alleged mismanagement of BD Agro by Mr. Obradović. This attempt is based on an alleged requirement for "*a causal link between the measure adopted by the state and an impairment of the investor's rights under the BIT*."[1095]

1119. Serbia's argument seems to be based on the incorrect premise that the Claimants' investment had no value as of the expropriation date, and the Claimants thus suffered no loss. That was, at least, the factual pattern in *Link Trading v. Moldova*,[1096] and *Oxus v. Uzbekistan*,[1097] on which Serbia seems to rely for its argument.

1120. As explained by the Claimants' valuation expert, this is clearly not the case here. The value of the Claimants' investment was EUR 61.5 million as of the expropriation date of 21 October 2015. Even if Serbia were right that the Claimants' investment had lost value because of factors not attributable to Serbia, the EUR 61.5 million figure is net of such loss because such loss would have necessarily occurred prior to the expropriation. There can be no doubt that Serbia's expropriatory measures impaired the Claimants' Treaty rights, to use Serbia's language.

1121. In any event, BD Agro was not in bankruptcy when the Beneficially Owned Shares were expropriated, and all of its difficulties would have been overcome but for the Privatization Agency's unlawful termination of the Privatization Agreement. The unlawful termination made it impossible for BD Agro to continue its successful efforts to obtain approval of its reorganization plan. BD Agro's management could not make any material decision without the Privatization Agency's prior consent, including the submission of an updated reorganization plan as requested by the Commercial Appellate Court—and the Privatization Agency remained silent.[1098] Further, the termination of the Privatization Agreement meant that BD Agro lost an important source of financing

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1095 Counter-Memorial, ¶ 675.

1096 *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Final Award, 18 April 2002, ¶¶ 90-91, **RLA-122**.

1097 News Article "*Where cows listen to Beethoven*" published on 27 November 2010, **CE-26**.

1098 Law on Privatization, Official Gazette of the Republic of Serbia no, 83/2014 and 46/2015, Art. 47, **CE-223**.

which Mr. Rand had originally agreed to provide to save the company.[1099] Therefore, following the unlawful termination of the Privatization Agreement and the expropriatory transfer of the Beneficially Owned Shares, the reorganization plan was obviously lost.

1122. Serbia's final attempt to discard the effects of its expropriatory conduct on BD Agro by reference to a low purchase price of BD Agro in the public auction following its bankruptcy[1100] does not help Serbia. As the Claimants explained above, the public auction with a single participant raises serious doubts about its transparency and legality. In any event, the Claimants' real estate expert, Mr. Grzesik, unequivocally shows that the purchase price achieved in the public auction does not represent the real value of BD Agro.[1101]

### 4. Serbia's expropriation of Claimants' investment was unlawful under public international law

1123. Finally, not only was Serbia's termination of the Privatization Agreement—and the subsequent transfer of the Beneficially Owned Shares—clearly unlawful under Serbian law, these measures also patently fail each element of the test for a lawful expropriation under international investment law: they did not pursue any public purpose, plainly lacked due process, and were not followed by a payment of any compensation.

1124. *First*, the Claimants have demonstrated in their Memorial that the only conceivable public purpose in terminating the Privatization Agreement was the alleged concern of the Ombudsman "to protect the rights of BD Agro's employees". However, this proclaimed concern was not genuine. Rather, the protection of rights of BD Agro's employees was just a pretext for the Ombudsman's illegal intervention.

1125. Serbia counters that the Ombudsman's intervention had no impact on Claimants' investment because it was restricted to non-binding recommendations to the Ministry of Economy and the Privatization Agency to "*take a definitive position*" to the purported contractual breaches by Mr. Obradović.[1102] The Claimants have already explained that

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1099 Amended pre-pack reorganization plan, pp. 21, 24, 26, **CE-101**.

1100 Counter-Memorial, ¶ 681.

1101 Grzesik ER, ¶ 16.33

1102 Counter-Memorial, ¶ 686.

this is manifestly not the case. The Ombudsman blatantly overstepped his legal mandate when he pushed for the termination of the Privatization Agreement.

1126. Far from fulfilling his legal authority to "*control the legality and regularity of the work of administrative bodies*"[1103] with the strict purpose to protect the rights of Serbian citizens, the Ombudsman's "*recommendations*" showed little concerns for the rights of BD Agro's employees. The purported "recommendations" plainly served as a pretext for the Ombudsman's willful pressure on the Ministry of Economy and the Privatization Agency to refrain from further talks with Mr. Obradović and immediately resort to the contractual termination.

1127. Serbia's reliance on *Tulip v. Turkey* for the proposition that "*a mere recommendation to consider taking an action cannot be deemed as an improper exercise of sovereign power*" is inapposite. In that case—and unlike here—the recommendations of the Supreme Audit Board to consider termination of a contract for construction of a real estate project in Istanbul actually had no impact on the pre-existing decision of the Turkish investment trust to end the contractual relationship with the investor due to severe operational delays of the project.[1104] The situation in the present case is radically different because the Privatization Agency finally decided to terminate the Privatization Agreement only after the Ombudsman's unlawful intervention.

1128. *Second*, no due process of law was followed in the termination and the subsequent transfer of the BD Agro shares.

1129. Serbia's defense—based on the allegation that the requirement of due process of law does not extend to Claimants' right to participate in the decision-making of Serbian State bodies but merely guarantees access to judicial remedies *following* the adoption of the expropriatory measures[1105] is fundamentally flawed.

1130. Serbia's reliance on *South American Silver v. Bolivia* in purported support of this theory is unavailing.[1106] In that case, the specific wording of Article 5(1) of the United

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1103 2005 Law on Ombudsman, Article 17(2), **CE-112**.

1104 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, ¶¶ 131-132, ¶ 323, **RLA-114**.

1105 Counter-Memorial, ¶¶ 690-691, ¶¶ 693-694.

1106 Counter-Memorial, ¶ 692.

Kingdom-Bolivia BIT actually limited this standard only to the investor's right to seek *ex post facto* judicial review.[1107]

1131. However, the wording from Article 10 of the Canada-Serbia BIT and Article 5 of the Serbia-Cyprus BIT is patently different and requires both for the protection of due process during the adoption of the expropriatory measures in addition to the right to seek subsequent judicial review thereof.[1108] Indeed, a similar provision was interpreted for example in *Bear Creek v. Peru* where the tribunal found that Peru violated the requirement of due process by revoking Supreme Decree 083 without making any attempt to previously contact and hear the investor during the decision-making process. The tribunal expressly held that the claimant "*was entitled to be heard* ***before such a fundamental decision was to be considered and taken***". [1109]

> As concluded above, the Supreme Decree 032 effected an indirect expropriation by revoking Supreme Decree 083. The Tribunal considers that, even in the face of the obvious political pressure to which the demonstrations and unrest gave rise, *Claimant was entitled to be heard before such a fundamental decision was to be considered and taken.* This is all the more so in circumstances in which the decision taken was expressly – in Supreme Decree 032 – based on allegedly unconstitutional conduct by Claimant in the process of obtaining the rights granted by Supreme Decree 083. Respondent should have made an effort to contact and hear Claimant, even in the face of political pressure to come to an expeditious solution. The Tribunal has been

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1107 The provision reads: "*Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.* ***The national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph***." Agreement between the Government of the United Kingdom of Great Britain and Norther Ireland and the Government of the Republic of Bolivia on the Promotion and Protection of Investments, signed 24 May 1988, Art. 5(1) (emphasis added), **CLA-118**.

1108 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, signed 1 September 2014, Art. 10(1) and (4), **CLA-001**.

1109 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 446, **CLA-119**.

> presented with no evidence to explain why this could not have happened, and why it did not happen.[1110]

1132. By the same token, the tribunal in *AIG v. Kazakhstan* addressed the issue of whether the investors could claim violation of due process in connection with irregularities during the adoption of decisions of executive bodies of the City of Almaty which prevented them from implementing a real estate development project in Kazakhstan.[1111] The tribunal unhesitantly concluded that Kazakhstan violated the principle of due process since the decisions of the City of Almaty were found to be arbitrary and in contradiction to applicable laws.[1112]

1133. The findings of the tribunals in both *Bear Creek v. Peru* and *AIG v. Kazakhstan* thus make abundantly clear that the requirement of due process relates to the process *leading to* expropriatory conduct, not to the availability of ex-post review thereof.

1134. No such due process was afforded to the Claimants in this case: neither the Claimants, nor Mr. Obradović were given a chance to seriously counter the flawed allegations of violation of the Privatization Agreement.[1113]

1135. The Ombudsman's investigation completely bypassed both Claimants and Mr. Obradović although the alleged "recommendations" directly impacted Mr. Obradović's—and the Claimants'—rights. The process of the termination of the Privatization Agreement was thus conducted in contradiction to the applicable Serbian laws and without giving the Claimants an opportunity to be heard.

1136. *Finally*, it is undisputed that no compensation was ever accorded to the Claimants for the expropriation of their investment. Serbia's defense to this plain fact borders on

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1110 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 446, **CLA-119**.

1111 Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, signed 19 May 1992, Art. III(2), **CLA-120**.

1112 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶¶ 10.5.1-10.5.2, **CLA-121**.

1113 Audio recording from meeting of the Commission for Control dated 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control dated 23 April 2015, pp. 2-3, **CE-768**.

absurdity: Serbia effectively argues that the lack of compensation does not *per se* render the expropriation unlawful.[1114]

1137. In advancing this incredible theory, Serbia misinterprets the award in *Tidewater v. Venezuela*. The *Tidewater* tribunal clearly did not intend to dismiss the requirement of payment of compensation as irrelevant for finding that unlawful expropriation occurred, as Serbia incorrectly suggests. To the contrary, the tribunal's opinion that such expropriation was "*provisionally lawful*"[1115] stemmed from the fact that Venezuela was in fact willing to provide a financial remedy but the parties disagreed as to the basis and process of its calculation.[1116] This is obviously not the case here.

1138. In sum, no doubt remains that Serbia plainly and simply expropriated the Claimants' investment when it terminated—unlawfully and in bad faith—the Privatization Agreement and subsequently forcefully took the Privatized Shares without any compensation.

### 5. Serbia indirectly and unlawfully expropriated Mr. Rand's Indirect Shareholding

1139. Unlike the Beneficially Owned Shares, Mr. Rand's Indirect Shareholding was expropriated indirectly rather than directly. Annex B.10 to the Canada-Serbia BIT explains that "*indirect expropriation results from a measure or a series of measures of a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure*."[1117]

1140. Annex B. 10 further clarifies that:

> [T]he determination of whether a measure or a series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
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> (i) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Party

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1114 Counter-Memorial, ¶ 695.

1115 *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, ¶ 141, **RLA-125**.

1116 *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, ¶ 145, **RLA-125**.

1117 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Annex B.10(a), **CLA-001**.

> has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
>
> (ii) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations, and
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> (iii) the character of the measure or the series of measures;[1118]

1141. Serbia indirectly expropriated Mr. Rand's Indirect Shareholding, because the unlawful termination of the Privatization Agreement and the 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.

1142. Serbia's unlawful measures meet all the indicia of indirect expropriation as identified in the Canada-Serbia BIT.

1143. *First*, the devastating economic impact of Serbia's direct expropriation of the Beneficially Owned shares on Mr. Rand's Indirect Shareholding cannot be seriously disputed. As the Claimants already demonstrated, while the value of the Indirect Shareholding was EUR 3.2 million as of 21 October 2015,[1119] it lost all of its value as a result of Serbia's direct expropriation of the Beneficially Owned Shares. Accordingly, although these measures were primarily directed at the Beneficially Owned Shares, they had an equally devastating effect on Mr. Rand's Indirect Shareholding. It is obvious that a State cannot escape the duty to compensate the investor for the value of his *entire* shareholding by directly expropriating "only" his majority stake and leaving to the investor a legal title to the minority stake, which was rendered worthless as a direct result of the State's direct expropriation of the majority stake.

1144. *Second*, as shown in more detail below, Serbia frustrated the Claimants' legitimate expectations that (*i*) the pledge over the BD Agro shares would be released upon full payment of the purchase price on 8 April 2011 and the Claimants would be free to dispose of their shares; and that (*ii*) the Privatization Agreement would not be terminated for reasons other than those stipulated under the Privatization Agreement.

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1118 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Annex B.10(a), **CLA-001**.

1119 Hern ER, ¶ 169.

1145. *Third*, the "character" of Serbia's measures further confirms their expropriatory and unlawful nature. The Privatization Agency's refusal to release the pledge, and, more importantly, the seizure of the Beneficially Owned Shares were both taken in willful disregard of law. This is clearly evidenced by the deliberations of the Commission for Control and by the Privatization Agency's disregard for the 2013 Legal Opinion, which clearly explained that the Privatization Agency was not entitled to terminate the Privatization Agreement. Both of these measures were also fueled by improper motives, most notably by the desire to satisfy the improper Ombudsman's "recommendations" and to avoid the public pressure exerted by the purported trade unions at BD Agro.

1146. Serbia thus indirectly expropriated Mr. Rand's Indirect Shareholding. Moreover, such indirect expropriation was unlawful for the same reason as Serbia's direct expropriation of the Beneficially Owned Shares.

## D. Serbia impaired Sembi's investment by arbitrary and unreasonable measures

### 1. Sembi is entitled to rely on non-impairment provisions contained in investment treaties entered into between Serbia and third States

1147. The most favored nation clause (the "**MFN clause**") contained in Article 3(1) of the Serbia-Cyprus BIT provides 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*."[1120]

1148. The proposition that an MFN clause allows the investor to attract more favorable standards of treatment contained in an investment treaty concluded between the host State and a third State is widely recognized by investment tribunals.[1121] It should thus not give rise to any controversy between the Parties. Unfortunately, it does.

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1120 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 3(1), **CLA-002**.

1121 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 5 October 2007, ¶ 131, **CLA-033**; *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-010**; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013,¶ 396, **CLA-034**; *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-035**; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, ¶

1149. Entirely ignoring the copious precedent cited by the Claimants, Serbia seeks to rely on *Hochthief v. Argentina* for the proposition that MFN clauses can only be used to import standards that are already contained in the basic treaty.[1122] This proposition is wrong and, if accepted, would defeat the very purpose of MFN clauses. Indeed, as observed by the tribunal in *RosInvest v. Russia*, "*the very character and intention of [MFN clauses] is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty*."[1123]

1150. Moreover, Serbia's theory finds no support in *Hochtief v. Argentina*, Serbia's sole authority on the matter. In *Hochtief*, the tribunal's analysis did not even touch upon the issue whether MFN clause can be used to import substantive standards not contained in the basic treaty. Instead, it related to the issue whether an MFN clause may be used to bypass the basic treaty's requirement that the investor may only resort to arbitration after having litigated the same dispute for 18 months before the local courts. Or, in the words of the *Hochtief* tribunal, the question was whether MFN clause "*can affect the prescribed procedures for accessing* [the tribunal's] *jurisdiction.*"[1124] In fact, Argentina based its defence against such an operation of the MFN clause on the assertion that "*the MFN provision in Article 3 of the Argentina-Germany BIT applies only to substantive protections under the BIT*."[1125] The *Hochtief* decision is thus plainly inapposite.

1151. Accordingly, Sembi is entitled to rely on the MFN clause to raise claims for breach of the non-impairment standard contained in the following provisions of BITs entered between Serbia and third states:[1126]

a. 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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496, **CLA-122**; *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶¶ 554-555, **CLA-123**.

1122 Counter-Memorial, ¶ 698.

1123 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 5 October 2007, ¶ 131, **CLA-033**.

1124 *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, ¶ 20, **RLA-088**.

1125 *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, ¶ 20, **RLA-088**.

1126 The Claimants take note of the fact that the Morocco-Serbia BIT did not yet enter into force. Claimants thus do not raise any claims based on this BIT.

***arbitrary or discriminatory measures*** *the management or use of investments by investors of the other Contracting Party*."[1127]

b. Article 2(2) BLEU-Serbia BIT, which provides that "*[e]xcept for measures required to maintain public order, such investments shall enjoy continuous legal protection and security, i.e.* ***excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof***."[1128]

c. Article 2(3) of the Finland-Serbia BIT, which provides that "*[n]either Contracting Party shall in its territory* ***impair by unreasonable or arbitrary measures*** *the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments of investors of the other Contracting Party*"[1129]

d. Article 3(2) of the UAE-Serbia BIT, which states that "*[n]either Contracting party shall hamper, by* ***arbitrary or discriminatory measures****, the development, management, use, expansion, sale and if it is the case, the liquidation of such investments in the territory of the other Contracting Party.*"[1130]

e. Article 2 of the Croatia-Serbia BIT which states that "*[n]either Contracting Party shall hamper, by* ***arbitrary or discriminatory measures****, the development, management, maintenance, use, enjoyment, expansion, sale and if it is the case, the liquidation of such investments.*"[1131]

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1127 Treaty between the Federal Republic of Germany and the Socialist Federal Republic of Yugoslavia concerning Reciprocal Promotion and Encouragement of Investments, 25 October 2010, Article 2(3), **CLA-036.**

1128 Agreement between the Belgo-Luxembourg Economic Union and The Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments, signed 12 August 2007, Art. 2(2), **CLA-124**.

1129 Agreement Between the Republic of Finland and Serbia and Montenegro on the Promotion and Protection of Investments, signed 29 October 2010, Art. 2(3) **CLA-125**.

1130 Agreement between the Republic of Serbia and the United Arab Emirates on the Promotion and Protection of Investments, signed 25 December 2014, Art. 3(2) (emphasis added), **CLA-126.**

1131 Agreement between the Government of the Republic of Croatia and the Federal Government of the Federal Republic of Yugoslavia on the Reciprocal Promotion and Protection of Investments, 31 January 2002, Article 2, **CLA-127**.

### 2. The legal standard

1152. In *LG&E Energy v. Argentina*, the tribunal set out the criteria for determining 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.[1132]

1153. The tribunal in *Glencore v. Columbia* recently explained that the term "*unreasonable measures*" includes not only arbitrary measures, but also "*measures that are irrational in themselves or result from an irrational decision-making process*."[1133]

1154. In *Siag v. Egypt*, the tribunal did not consider necessary to formulate an elaborate test for reasonableness, and concluded instead that the respondent's measures were "*unreasonable in the ordinary meaning of that term*."[1134]

1155. Similarly, in *Lauder v. Czech Republic*, the tribunal relied on the ordinary meaning of the word arbitrary as meaning "*depending on individual discretion*; [...] *founded on prejudice or preference rather than on reason or fact*."[1135]

1156. Finally, Professor Schreuer summarized in his article several types of measures that investment tribunals considered arbitrary.[1136] In *EDF v. Romania*, Professor Scheuer repeated his summary in an expert report, which the Tribunal accepted as the applicable standard:

> In an attempt to give a content to general expressions such as "unreasonable or discriminatory measures," Claimant relies on the

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1132 *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, ¶ 156 (emphasis added), **CLA-008**.

1133 *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombi*a, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1452, **CLA-128**.

1134 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 459, **CLA-009**.

1135 *Ronald S. Lauder v. Czech Republic*, UNICITRAL, Final Award, 3 September 2001, ¶ 221, **CLA-007**.

1136 Christopher Schreuer, Protection against Arbitrary or Discriminatory Measures, p. 188, in: *The Future of Investment Arbitration* (C. A. Rogers, R.P. Alford eds.), **CLA-013**.

> categories of measures that its legal expert, Professor Christoph Schreuer, has described in his opinion as "arbitrary":
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> a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
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> 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.
>
> The Tribunal will consider the claim of "unreasonable or discriminatory measures" according to the terms proposed by Claimant.[1137]

1157. Serbia raises two arguments against the Claimants' reliance on Professor Schreuer's summary. *First*, it should allegedly not be relied upon, because it was meant merely as "*a summary of arbitral practice*" and not as "*the final statement of law*.*"*[1138] Serbia's observation is baffling. A doctrinal writing by definition does not constitute a *"final statement of the law*." *Second*, Serbia accuses the Claimants of taking Professor Schreuer's analysis out of context by omitting to mention his alleged opinion that bad faith is a necessary component of arbitrariness. Serbia's reasoning process is so absurd, that it cannot be done justice without being reproduced in full:

> [The Claimants] rely on one of Professor Schreuer's categories of arbitrary treatment ("A measure taken for the reasons that are different from those put forward by the decision maker"). But Claimants fail to mention that Professor Schreuer also stated that this category of arbitrary treatment applies "*in particular*, where a public interest is put forward as a pretext to take measures that are designed to harm the investor". *Therefore*, Claimants would have to show that there was also an element of bad faith and even an intention to harm the investor, in addition to showing that real reasons for a decision were different that those stated.[1139]

1158. First of all, the Claimants' omission to quote Professor Schreuer's additional explanation was in no way improper or misleading. Not only that the *EDF* tribunal reproduced the list of various types of arbitrary measures without the further

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1137 *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303, **CLA-035**.

1138 Counter-Memorial, ¶ 706.

1139 Counter-Memorial, ¶ 729 (emphasis added).

explanation, but so did Professor Schreuer in his treatise.[1140] Contrary to Serbia's insistence, Professor Schreuer's further explanation—prefaced by the instructive words "in particular"—was certainly not meant to convey a novel, and incorrect, proposition that bad faith is a necessary component of arbitrary treatment. In fact, numerous investment tribunals confirmed that bad faith is sufficient, and not necessary, element of a breach of BIT.[1141]

1159. Despite Serbia's unnecessary jabs, the parties appear to agree that a measure is arbitrary or unreasonable when it is taken in "*willful disregard of the law*[1142] or in "*willful disregard of due process and proper procedure*"[1143], or when it is "*[itself]irrational […]or result[s] from an irrational decision-making process*",[1144] or when it is "*not based on legal standards but on discretion, prejudice or personal preference,*"[1145] or when it is "*taken for reasons that are different from those put forward by the decision maker*."[1146]

1160. The Claimants will demonstrate below that the Privatization Agency's (*i*) refusal to release the pledge over the Beneficially Owned Shares; (*ii*) refusal to approve the assignment of the Privatization Agreement to Coropi; and (*iii*) termination of the Privatization Agreement were all arbitrary and unreasonable measures.

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1140 Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, p.139, **CLA-130**.

1141 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009, ¶ 616, **RLA-127**; *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 296, **CLA-129**; *Frontier Petroleum Services Ltd. v. The Czech Republic* (UNCITRAL), Final Award, 12 November 2010, ¶ 301, **CLA-131**.

1142 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, Award, 14 July 2016, ¶ 392, **CLA-392**

1143 Christopher Schreuer, Protection against Arbitrary or Discriminatory Measures, p. 188, in: *The Future of Investment Arbitration* (C. A. Rogers, R.P. Alford eds.), **CLA-013**; Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, p.139, **CLA-130**; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303, **RLA-087**.

1144 *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombi*a, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1452, **CLA-128**.

1145 Christopher Schreuer, Protection against Arbitrary or Discriminatory Measures, p. 188, in: *The Future of Investment Arbitration* (C. A. Rogers, R.P. Alford eds.), **CLA-013**; Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, p.139, **CLA-130**; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303, **RLA-087**.

1146 Christopher Schreuer, Protection against Arbitrary or Discriminatory Measures, p. 188, in: *The Future of Investment Arbitration* (C. A. Rogers, R.P. Alford eds.), **CLA-013**; Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, p.139, **CLA-130**; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303, **RLA-087**.

### 3. The Privatization Agency's refusal to release the pledge was arbitrary and unreasonable

1161. Serbia argues that because Article 2(3) of Germany-Serbia BIT only applies to the "*management or use of investments by investors*", it does not cover the non-release of pledge, which purportedly only relates to "*disposal*" of investments, and not to its use.[1147] This is absurd. The term "*use*" obviously covers disposal. In any event, Serbia's argument is moot, because the Claimants rely on several BITs—such as the BLEU-Serbia BIT[1148] or the Finland-Serbia BIT[1149]—which expressly refer in their non-impairment clauses to "disposal" of investments.

1162. The Claimants will show below that the Privatization Agency's refusal to release the pledge over the Privatized Shares was not only manifestly illegal, but also arbitrary.

#### a. The Privatization Agency refusal of the pledge violated Serbian law

1163. Article 2 of the Share Pledge Agreement only allowed the Privatization Agency to maintain the pledge "*for the period of 5 years as of the day of conclusion of the sale and purchase agreement, that is, until final payment of sale and purchase price*."[1150] Accordingly, the Privatization Agency was required to release the pledge immediately after Mr. Obradović's full payment of the purchase price on 8 April 2011.[1151]

1164. Serbia, however, claims—in reliance on Dr. Radović's report—that the Privatization Agency could lawfully maintain the pledge as long as it considered Mr. Obradović to be in breach of any of his obligations under the Privatization Agreement.[1152] This argument is based on three steps, all of them equally erroneous.

1165. *First*, Dr. Radović observes that the parties' intention was to maintain the pledge throughout the lifetime of the Privatization Agreement, regardless of the buyer's payment of the purchase price. This in turn allegedly implies that the pledge secured

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1147 Counter-Memorial, ¶ 715.

1148 Agreement between the Belgo-Luxembourg Economic Union and The Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments, signed 12 August 2007, Art. 2(2), **CLA-124**.

1149 Agreement Between the Republic of Finland and Serbia and Montenegro on the Promotion and Protection of Investments, 29 October 2010, Article 2 (3) **CLA-125**.

1150 Privatization Agreement, 4 October 2005, Schedule 1: Share Pledge Agreement, Art. 2, **CE-017**.

1151 Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price, 6 January 2012, **CE-019**; Milošević Second ER, ¶¶ 66-67, 70.

1152 Counter-Memorial, ¶ 716.

Mr. Obradović's compliance with *all* obligations under the Privatization Agreement, including those arising under Article 5.3.4.[1153] This is wrong. As Mr. Milošević explains, the purpose of a pledge is to secure monetary receivables.[1154] Mr. Obradović's obligation under Article 5.3.4 did not provide for any monetary receivable that could be secured by a pledge.

1166. *Second*, in order to explain why the Privatization Agency was purportedly allowed to maintain the pledge even after the expiry of the Privatization Agreement's five-year term, Dr. Radović argues that "*because of the buyer's non-performance, the term of the agreement was extended*."[1155] This explanation, however, finds no support in Article 2 of the Share Pledge Agreement, which does not refer to the term of the Privatization Agreement.

1167. It is also contradicted, for example, by the recognition of the Ministry of Economy that "*limitations from* [Article 5.3.4 of the Privatization Agreement] *this provision should be considered concluding with April 8, 2011*."[1156] Dr. Radović's theory of an alleged extension of the term of the Privatization Agreement is also at odds with Serbia's admission in this arbitration that "*any disposal of assets in contradiction with Article 5.3.4 that occurred after 8 April 2011 should not be considered as the breach of the Privatization Agreement*."[1157] Since Article 5.3.4 clearly provided that it would apply "*during the term of the* [Privatization Agreement]", it follows that even Serbia considers that the term of the Privatization Agreement expired on 8 April 2011. Accordingly, even if the pledge had secured Mr. Obradović's obligations under Article 5.3.4 (*quod non*), the Privatization Agency would still be required to release the pledge on 8 April 2011, when the term of the Privatization Agreement ended.

### b. The Privatization Agency refusal of the pledge was arbitrary and unreasonable

1168. Apart from asserting that the Privatization Agency's refusal to lift the pledge was justified under Serbian law, Serbia also claims that it did not involve a "*hint of bad faith*"

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1153 Radović ER, ¶ 66.

1154 Milošević Second ER, ¶ 162.

1155 Radović ER, ¶ 66.

1156 Report of Ministry of Economy on the Control over the Privatization Agency dated 7 April 2015, **CE-98**.

1157 Counter-Memorial, ¶ 60.

and was precisely "*what any party to a contract would have done*."[1158] These statements are nothing short of ridiculous.

1169. The Commission for Control's bad faith approach to Mr. Obradović's request permeated its entire deliberations. A member of the Commission made clear at the outset that Mr. Obradović's request for the release of the pledge "*was* […] *submitted in 2012*", but the Privatization Agency "*did not act upon the request* [and] *did not reply to this request*."[1159] This is of course unreasonable and arbitrary. *First*, the Privatization Agency was required under the Share Pledge Agreement to lift the pledge immediately after Mr. Obradović's payment of the purchase price on 8 April 2011, without waiting on Mr. Obradović's request. *Second*, and more importantly, it is simply shocking that when the Privatization Agency did receive Mr. Obradović's request, it refused to even reply to Mr. Obradović, let alone to "*act upon the request."*

1170. With respect the Mr. Obradović's additional request—submitted to the Privatization in June 2015, the Commission acknowledged that the Privatization Agency received such request from Mr. Obradović's attorney.[1160] However, "*without a hint of bad faith*," one Member of the Commission for Control noted with a sigh of relief that "[f]*ortunately, the attorney did not submit a valid power of attorney, so we will reply that we do not know who authorized him, and so forth*."[1161]

1171. This is but one example of the Commission for Control's bad-faith approach. The even more shocking aspect of the Commission for Control's approach is that—contrary to Serbia's made-for arbitration arguments and Dr. Radović's questionable flexibility in confirming them— the Commission for Control knew full well that it acted in a direct violation of the Share Pledge Agreement.

1172. As the Commission clearly explained, it dreaded responding to Mr. Obradović, because it had no way to credibly justify its actions:

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1158 Counter-Memorial, ¶ 721

1159 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4, **CE-768**.

1160 Audio recording from meeting of the Commission for Control, 19 June 2015, **CE-771**; Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 4, **CE-770**.

1161 Audio recording from meeting of the Commission for Control, 19 June 2015, **CE-771**; Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 4, **CE-770**.

> Julijana Vučković: […] if the Agency was to render a decision on deletion of pledge against shares to [Mr. Obradović] registered to his benefit, [Mr. Obradović] would be free to dispose of them, which would be certain bearing in mind the [Mr. Obradović's] request for assignment of the agreement. *If the disposal of shares is permitted, and [Mr. Obradović] is, I repeat, entitled to this in accordance with the agreement*, generally the Agency would no longer be in a contractual relation with someone and you would no longer be able to take measures against the contracting party, when the legal ground had generally ceased with it, and [Mr. Obradović] would be free to dispose of its shares.[1162]

1173. Or, as succinctly put by a Member of the Committee, "*in accordance with the agreement, the pledge should be deleted, practically, when [Mr. Obradović] pays the purchase price which [he] did pay.*"[1163] Indeed, it should have been. Another member of the Committee also correctly observed that "*the agreement prescribes that the pledge is deleted once [Mr. Obradović] pays the purchase price, and not when [he] fulfils its obligations.*"[1164] It is thus evident that the Privatization Agency acted in in bad faith and literally in "*willful disregard of the law*."

1174. It is also clear that, despite Serbia's insistence to the contrary, the non-release of the pledge was not a commercial conduct whose sole purpose was the enforcement of the Privatization Agreement. Instead, it was a measure adopted to avoid the wrath of the public and to ease the pressure exerted on the Privatization Agency by the "*daily communications […] from the employees and trade unions, wherein they are requesting urgent measures to be taken […]*."[1165]

1175. Despite knowing full well that that its actions were unlawful, the Committee preferred to be sued rather than to face this public pressure from which "*not even God could cleanse [them]*":

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1162 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4 (emphasis added), **CE-768**.

1163 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 6, **CE-768**.

1164 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 11, **CE-768**.

1165 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4, **CE-768**.

> Saša Novaković: All right then, we can decide not to give [the pledge release] to [Mr. Obradović] and then we are forcing him […] into suing us. This is…may the court rule.[1166]

1176. The Privatization Agency willfully and in a bad faith disregarded its legal obligations, and did not event attempt to engage in a "*rational decision-making process*," not to mention paying any regard to the considerations of "*due process and proper procedure*." The Privatization Agency's conduct was thus arbitrary and unreasonable in any sense of the words.

### 4. The Privatization Agency's refusal to allow for the assignment of the Privatization Agreement was arbitrary and unreasonable

1177. 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 constituted an arbitrary and unreasonable measure.

1178. Serbia, however, argues that the request for assignment could not be processed by the Privatization Agency, because it allegedly did not contain all the necessary documents, the most important of which was allegedly a bank guarantee securing the Privatization Agency's rights.[1167] However, as already explained, the Privatization Agency clearly did not regard a bank guarantee as the sole method of securing its rights, but expressly communicated to the Claimants that it would be satisfied with "*other means of security.*"[1168] Mr. Obradović provided such security by undertaking in the assignment agreement concluded with Coropi to guarantee the fulfilment of Coropi's obligations under the Privatization Agreement.[1169]

1179. Serbia's insistence that the Privatization Agency never granted the request because it never received the documents it had asked for is simply at odds with reality. As observed by a member of the Commission for Control, the Privatization Agency "*had never […] reached that phase where we would ask them to supplement the documentation.*"[1170] It

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1166 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 11, **CE-768**.

1167 Counter-Memorial, ¶ 725.

1168 List of documents requested by the Privatization Agency dated 11 June 2013, **CE-272**.

1169 Agreement on Assignment of the Privatization Agreement between D. Obradović and Coropi, 21 September 2013, Art. 5, **CE-274**.

1170 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 9, **CE-768**.

is thus apparent that the Privatization Agency engaged in the protracted negotiations regarding the assignment in bad faith, knowing full well it would never accept the request.

1180. Serbia claims that the refusal to allow for assignment of the Privatization Agreement did not impair the Claimants' investments, because it allegedly did not affect any contractual rights of the buyer under the Privatization Agreement. This is absurd. The purpose of the entire Privatization Agreement was to transfer the ownership of the Beneficially Owned Shares to Mr. Obradović. One of the most fundamental aspects of ownership is the owner's ability to dispose with the property as they sees fit. The Privatization Agency prevented Mr. Obradović from transferring the nominal title to the Beneficially Owned Share not only by arbitrarily refusing to release the pledge but also by rejecting without any legitimate reasons the requests for the assignment of the Privatization Agreement to Coropi. The Privatization Agency refusal to allow for the assignment was nothing but a "*measure that inflicts damage on the investor without serving any apparent legitimate purpose*."

### 5. Termination of the Privatization Agreement was arbitrary and unreasonable

1181. Serbia's defense regarding the termination of the Privatization Agreement is entirely based on Mr. Obradović's alleged violations of the contractual terms and the existence of legitimate commercial reasons for sanctioning his non-compliance. Such justification is, however, patently absurd because it serves as a mere pretext to embellish the arbitrary and grossly unreasonable conduct of Serbian State organs in the process of privatization of BD Agro.

1182. *First*, in Serbia's words, the decision of the Privatization Agency to terminate the Privatization Agreement was a rational reaction to Mr. Obradović's continuous failure to remedy his alleged contractual breaches.[1171] This reasoning, however, directly contradicts the instructions of the Ministry of Economy of 30 May 2012[1172] and the advice of Privatization Agency's legal advisors of June 2013[1173] both of which

1171 Counter-Memorial, ¶ 733.

1172 Letter from the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**.

1173 The 2013 Legal Opinion, **CE-34**.

concluded that Mr. Obradović had fulfilled all legal obligations under the Privatization Agreement and there were thus no grounds for its termination.

1183. Serbia's attempts to undermine the relevance of these opinions by arguing that none of them was binding upon the Privatization Agency. Yet, the relevant question is not whether the Privatization Agency was formally obliged to follow but, as Serbia itself aptly noted,[1174] whether the decision to disregard the opinions was rational. The answer is clearly in the negative.

1184. Serbia's submission consists of a litany of alleged analogies between the Privatization Agency and a profit-oriented commercial entity that acts upon prudent business considerations. These analogies are, however, inapt. Had the Privatization Agency acted as a prudent commercial entity, it would not have ignored the findings of legal professionals which it had voluntarily solicited. This is not to say that every legal advice of outside counsel has to be followed by the client. It is, however, another thing to ignore such an advice, not to seek additional advice by another counsel and instead attempt to bury the advice, as the Privatization Agency did in this case. Such a reckless conduct fails to meet the requirement of rationality as advocated by Serbia.

1185. *Second*, the series of inexplicable turnarounds continued when the Ministry of Economy issued its final report from the supervision procedure over the Privatization Agency's work in relation to the privatization of BD Agro. Without further explanation, the Ministry departed from its original opinion in the letter of 30 May 2012 and instructed the Privatization Agency to grant Mr. Obradović a 90-day deadline for delivering additional evidence to prove compliance with his obligations under the Privatization Agreement.[1175]

1186. Such a deadline was not only fully discretionary[1176] but also completely unrealistic. As follows from the minutes of the subsequent meeting of the Privatization Agency's Commission for Control, which took place on 23 April 2015, *i.e.* less than half a year before the actual termination, the Ministry of Economy and the Privatization Agency

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1174 Counter-Memorial, ¶ 733.

1175 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, **CE-98**.

1176 *A contrario* Article 47 of the 2005 Law on State Administration, **CE-237**.

were well aware of the fact that BD Agro would be unable to comply with the instruction but decided to proceed anyway.[1177]

1187. The aim of this charade is clear in the hindsight—it was to find a plausible excuse for postponing the Commission's decision on the release of pledge and prevent Mr. Obradović from transferring the nominal ownership to BD Agro's shares to Coropi.[1178] Such justification was, however, bogus. The Commission itself correctly noted that that the Privatization Agency was legally required to lift the pledge, due to Mr. Obradović's full payment of the purchase price.[1179]

1188. *Third,* in a hopeless attempt to mask the arbitrariness of the entire process leading to the termination of the Privatization Agreement, Serbia refers to the communication between Mr. Obradović and the Privatization Agency regarding the repeated requests to remedy violations of Article 5.3.4 of the Privatization Agreement.[1180]

1189. While the Claimants do not dispute the existence of these notifications, they fail to see their relevance for the actual act of termination. The disagreement as to whether Mr. Obradović abided by the terms of the Privatization Agreement arose after the Privatization Agency's final control of BD Agro in January 2011.[1181] Since then, the Privatization Agency provided Mr. Obradović several deadlines to supply evidence proving his compliance but it remained hesitant to terminate the Privatization Agreement until the shocking intervention by the Ombudsman.

1190. Serbia contests such conclusion, pointing to the absence of any explicit instruction to terminate the Privatization Agreement in the Ombudsman's "*recommendation*" and its non-binding effect.[1182] As explained in the section on attribution, such arguments are groundless.

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1177 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 9, **CE-768**.

1178 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4, **CE-768**.

1179 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 6, **CE-768**.

1180 Respondent's Counter-Memorial with Request for Bifurcation, ¶ 730.

1181 Claimants' Memorial, ¶¶ 99-110.

1182 Respondent's Counter-Memorial with Request for Bifurcation, ¶ 727.

1191. The Claimants do not contest that the "*recommendations*" are not formally binding. Yet, they carry a great deal of authority. Not only are administrative bodies legally obliged to provide reasons whether they complied with the "*recommendations*",[1183] they may also become subject to undesirable public attention for their failure to do so.[1184] These concerns equally explain the high compliance rate that reached 86.3% in 2015.[1185]

1192. The Ombudsman of course did not expressly order the Ministry of Economy and the Privatization Agency to terminate the Privatization Agreement. He did not need to. The message of his opinion on the illegality of the Privatization Agency's prolongation of deadlines[1186] on one hand and subsequent letters to the Ministry of Economy and the Privatization Agency, criticizing their approach,[1187] was more than clear. This is demonstrated not only by the termination of the Privatization Agreement less than ten days after the letter's receipt but also by the ensuing communication.

1193. On 15 October 2010, the Privatization Agency informed the Ombudsman of the termination of the Privatization Agreement.[1188] On 21 October, the day of the seizure of the Beneficially Owned Shares, the Ombudsman communicate his satisfaction to the Privatization Agency by writing that: "*[s]ince it can be concluded based on the received statements that the Privatization Agency acted fully in accordance with the recommendation, the conditions have been met for the work referenced in the complaint of the employees in [BD Agro] to be terminated […]*."[1189]

1194. The Ombudsman's interference was a patent example of an abuse of powers without any legitimate purpose. As Mr. Milošević explained, the Ombudsman is authorized to "*control the legality and regularity of the work of administrative bodies*"[1190] and

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1183 Milošević Second ER, ¶ 149; 2005 Law on Ombudsman, Article 31(3), **CE-112**.

1184 Milošević Second ER, ¶¶ 150-151.

1185 Regular Annual Report of the Protector of Citizens for 2015 dated 15 March 2016, p. 37, **CE-724**.

1186 Recommendation of the Ombudsman Nos. 1-47-4767/13 and 1-47-4768/1 dated 19 June 2015, **CE-042**.

1187 Letter from the Ombudsman to the Privatization Agency dated 18 September 2015, **CE-088**; Letter from the Ombudsman to the Ministry of Economy dated 18 September 2015, **CE-115**.

1188 Letter from the Privatization Agency to Ombudsman, 14 October 2015, **CE-726**.

1189 Letter from the Ombudsman to the Privatization Agency, 21 October 2015, **CE-727**.

1190 2005 Law on Ombudsman, Article 17(2), **CE-112**.

establish violations of Serbian law.[1191] However, the exercise of these powers must always pursue the goal of protecting the rights of Serbian citizens.[1192]

1195. For the sake of appearance, the Ombudsman allegedly launched its investigation of the work of the Ministry of Economy and the Privatization Agency as a means of protection of BD Agro's employees.[1193] Such justification is, however, absurd because neither the Ministry's nor the Privatization Agency's supervision over the fulfilment of Mr. Obradović's duties under Article 5.3.3 and Article 5.3.4 of the Privatization Agreement had any connection to the employees' rights[1194] but were rather strictly confined to the financial aspects of the transaction.

1196. Surprisingly, the alleged violations of Mr. Obradović's contractual obligations were also the main object of the Ombudsman's own scrutiny. As follows from his "*recommendations*" of June 2015, the Ombudsman was not concerned with any specific risks to the exercise of labor rights by BD Agro's employees. Instead, he made an authoritative opinion as to the grounds for termination of the Privatization Agreement and the illegality of the Privatization Agency's prolongation of deadlines.[1195]

1197. In the light of the above, the Ombudsman's actions paid lip service to the purported protection of the well-being of BD Agro's employees. Even worse, by instructing the Privatization Agency to terminate the Privatization Agreement, the Ombudsman ironically contributed to the loss of jobs and livelihood of all of the 161 employees of BD Agro.

1198. The gross arbitrariness of the Ombudsman's intervention in the present dispute may be finally demonstrated with regard to the Ombudsman's reaction to an earlier case of privatization of Minel Transformatori, a major electrical transformer manufacturer, which was bought by the current Serbian Minister without portfolio, Mr. Nenad Popović, in 2008.

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1191 2005 Law on Ombudsman, Article 17(1), **CE-112**.

1192 Claimants' Memorial, ¶¶ 186-187; Milošević Second ER, ¶ 146.

1193 Recommendation of the Ombudsman Nos. 1-47-4767/13 and 1-47-4768/1 dated 19 June 2015, **CE-42**.

1194 Claimants' Memorial, ¶ 189; Milošević Second ER, ¶ 147.

1195 Recommendation of the Ombudsman Nos. 1-47-4767/13 and 1-47-4768/1 dated 19 June 2015, **CE-42**.

1199. According to the Privatization Agency's own findings, the privatization was tainted with serious violations of numerous obligations under the respective privatization agreement, including Mr. Popović's failure to make the required payments to the State pension and health funds on behalf of Minel Transformatori's employees.[1196] While this was a clear instance when the rights of Serbian citizens were in danger, the Ombudsman did not respond to the calls of the workers' union and abstained from initiating any investigation similar to BD Agro two years later, let alone from pressing the Privatization Agency to terminate the agreement.

1200. *Fourth*, the long-term harassment of Mr. Obradović and BD Agro by Serbian State organs culminated in September 2015, when the Privatization Agency succumbed to the pressure of the Ombudsman and the trade unions that had been contacting the Privatization Agency's representatives on a daily basis to complain about alleged problems concerning BD Agro's business operations.[1197]

1201. In the face of the threat of public backlash, the Privatization Agency's Commission for Control abruptly decided to terminate the Privatization Agreement with Mr. Obradović, citing purported violations of his obligations under Art. 5.3.4 of the Privatization Agreement.[1198] Confusingly, the Commission for Control's reasoning did not stop there as it made an additional reference to the alienation of BD Agro's assets by Mr. Obradović,[1199] suggesting that the termination took place equally on the grounds of violations of Art. 5.3.3 of the Privatization Agreement.

1202. While Serbia tries to play down the Commission's comment as an irrelevant side note,[1200] such characterization is highly inappropriate. The decision on the termination of the Privatization Agreement served as a formal basis for subsequently depriving Mr. Obradović of his ownership rights to the BD Agro shares without any pecuniary compensation. Considering the gravity of such consequences, the last-minute

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1196 *Disastrous Privatization by Influential Serbian Minister Goes Uninvestigated*, Organized Crime and Corruption Reporting Project, 11 February 2019, **CE-796**.

1197 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 5, **CE-768**.

1198 Notice on Termination of the Privatization Agreement dated 28 September 2015, **CE-50**.

1199 Notice on Termination of the Privatization Agreement dated 28 September 2015, **CE-50**.

1200 Counter-Memorial, ¶ 731.

fabrication of further legal grounds for termination is a slap in the face of the principle of transparency and due process.

1203. In conclusion, Serbia subjected the Claimants' investment to arbitrary and unreasonable treatment in violation of the MFN clause under Art. 3(1) of the Serbia-Cyprus BIT, in conjunction with the non-impairment standard incorporated in Art. 2(3) of the Article 2(3) of the Germany-Serbia BIT, Article 2(2) BLEU-Serbia BIT, Article 3(2) of the UAE-Serbia BIT and Article 2 of the Croatia-Serbia BIT.

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

1204. In addition to an outright expropriation and a breach of the duty not to impair the Claimants' investment by means of arbitrary of discriminatory measures, Serbia also breached the standard of fair and equitable treatment ("**FET standard**"). Serbia's conduct was effectively the exact opposite of fair and equitable, as demonstrated in detail below.

### 1. Serbia misinterprets the FET standard under the Canada-Serbia BIT

#### a. The FET standards under Canada-Serbia BIT and Serbia-Cyprus BIT confer essentially the same level of protection

1205. At the outset, Serbia again spills much ink on a theoretical exercise related to the meaning of the FET standard.

1206. First and foremost, Serbia argues that the content of the FET standard under Article 6 of the Canada-Serbia BIT—which is linked to the international minimum standard of treatment—confers on investors a far less generous level of protection than autonomous FET standards (such as the FET standard under Serbia-Cyprus BIT). Serbia argues that the State's liability under Canada-Serbia BIT's FET standard can only be triggered by "*an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reason.*"[1201]

[1201] *Eli Lilly and Company v. The Government of Canada* (UNCITRAL), ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, ¶ 222, **RLA-128**; Counter-Memorial, ¶ 745.

1207. Serbia's attempt to escape liability by reference to a purportedly extremely demanding standard under Article 6 of the Canada-Serbia BIT falls flat. Serbia's interpretation has been rejected by a plethora of investment tribunals because it plainly ignores the contemporary, and ever-evolving, content of the international minimum standard.

1208. *First*, it is obvious that the Contracting Parties intentionally chose the term fair and equitable treatment in Article 6 of the Canada-Serbia BIT by reference to the existing concept of the FET standard as defined by treaty practice.

1209. This is all the more evident since customary international law—of which the FET standard of Article 6 forms an integral part—"*is shaped by the conclusion of more than two thousand bilateral investment treaties […] [which] concordantly provide for 'fair and equitable' treatment*:"

> In holding that Article 1105(1) refers to customary international law, *the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties* and many treaties of friendship and commerce. *Those treaties largely and concordantly provide for "fair and equitable" treatment of, and for "full protection and security" for, the foreign investor and his investments*. *Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment* and to full protection and security.[1202]

1210. The express reference to the concept of "fair and equitable treatment" in Article 6 of the Canada-Serbia BIT plainly demonstrates the intent of the Contracting Parties to incorporate precisely *that concept*. Had they not intended to do so, they would not have included it in Article 6 in the first place.

1211. The *Pope & Talbot* tribunal reached precisely this conclusion when it commented on the Free Trade Commission's interpretative note to the minimum standard under Article 1105(1) of the NAFTA—the content of which is now integrated in Article 6(2) of the Canada-Serbia BIT. It held:

> *The Interpretation does not require that the concepts of 'fair and equitable treatment'* and 'full protection and security' *be ignored, but rather that they be considered as part of the minimum standard of treatment that it prescribes. Parenthetically, any other construction of*

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[1202] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 22 October 2002, ¶ 125, (emphasis added) **RLA-39**.

> *the Interpretation where by the fairness elements were treated as having no effect, would be to suggest that the Commission required the word 'including' in Article 1105(1) to be read as 'excluding.' Such an approach has only to be stated to be rejected*. Therefore, *the Interpretation requires each Party to accord to investments of investors of the other Parties the fairness elements as subsumed in*, rather than additive to, *customary international law*.[1203]

1212. Contrary to Serbia's assertions, Article 6 of the Canada-Serbia BIT thus prescribes a duty to provide investors fair and equitable treatment, whose content *springs* from that of autonomous FET standards contained in other treaties. Such FET standard does not "*go beyond what is required under customary international law*" because it is a part of that very customary international law.

1213. *Second*, the international minimum standard of treatment is by no means restricted to a host State's conduct that is "*shocking or egregious*," as Serbia erroneously and conveniently argues. While Serbia invokes primarily the *Glamis Gold* case in support of that proposition, Serbia's theory actually stems from the 1926 *Neer* case.

1214. In *Neer*, the United States-Mexico Claims Commission considered Mexico's alleged failure to investigate and prosecute those responsible for the death of a United States citizen. The *Neer* Commission held that a breach of the minimum standard of treatment of aliens required treatment that amounts to "*an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*."[1204]

1215. Not surprisingly, an overwhelming number of contemporary tribunals has considered the *Neer* formulation of the minimum standard not only as outdated and obsolete,[1205] but also factually inapposite because the case involved physical security of an alien, and not the treatment of foreign *investors*.[1206]

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1203 *Pope & Talbot v. Government of Canada* (UNCITRAL), Award in Respect of Damages, 31 May 2002, ¶¶ 53-54 (emphasis added), **CLA-132**.

1204 *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), ¶ 4, **CLA-133**.

1205 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 218, **CLA-134**; *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-2, Award, 27 September 2016, **CLA-135**.

1206 *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 352, **CLA-135**.

1216. Similarly, a myriad of investment tribunals[1207] and commentators[1208] have unanimously criticized the *Glamis* tribunal for having adopted the *Neer* Commission's outdated interpretation of the minimum standard.

1217. For example, the *Clayton* tribunal had rejected the position "*expressed in Glamis*" and decided to "*move towards the view that the international minimum standard has evolved over the years towards greater protection for investors*."[1209]

1218. This was also the case for the *Railroad* tribunal:

> Put in slightly different terms, *what customary international law projects is not a static photograph of the minimum standard of treatment* of aliens as it stood in 1927 when the Award in the Neer case was rendered. For both *customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development*.[1210]

1219. Therefore, Serbia's erroneous reliance on the *Neer* standard also adopted by the *Glamis* tribunal must resolutely be dismissed.

1220. Instead, the meaning of the standard of protection under Article 6 of the Canada-Serbia BIT was succinctly explained by the *Waste Management II* tribunal on the basis of its analysis of findings of previous NAFTA tribunals as follows:

> Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that *the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative*

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1207 *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Award on the Merits of Phase 2, 10 April 2001, ¶ 118, **CLA-136**; *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, ¶ 93, **RLA-093**; *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 204, **CLA-137**; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 179, **CLA-138**; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 435, **CLA-139**.

1208 Stephen M. Schwebel, "Is Neer Far From Fair and Equitable?" *Int'l Arb. Club*, London, 5 May 2011, **CLA-140**.

1209 *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 435 (emphasis added), **CLA-139**.

1210 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 218, (emphasis added) **CLA-134**.

> *process*. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. *Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case*.[1211]

1221. The tribunals in *Railroad*[1212] and *Clayton*,[1213] to name just two examples, both reproduced and adopted the articulation of the minimum standard proposed by the *Waste Management II* tribunal when considering the claimants' FET claims.

1222. Most tribunals also concur that the FET standard, be it autonomous or linked to the international minimum standard of treatment, is ultimately a "*flexible one which must be adapted to the circumstances of each case*."[1214]

### b. The FET standard is broader than the standards of non-impairment and the prohibition of unlawful expropriation

1223. Serbia's next irrelevant exercise in the theory of international investment law is based on the assertion that the Claimants cannot argue that the same conduct which gives rise to an unlawful expropriation also gives rise to a FET claim.[1215]

1224. Once again, Serbia mischaracterizes the Claimants' position. The Claimants never asserted that a finding of expropriation necessarily resulted in a finding of a violation of the FET standard. Rather, the Claimants' position is, and always has been, that the same facts and measures may give rise to a violation of various standards of protection. This approach is well settled in investment law.[1216]

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1211 *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, ¶¶ 98-99 (emphasis added) **RLA-093**.

1212 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 219, **CLA-134**.

1213 *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 442, **CLA-139**.

1214 *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, ¶ 99, **RLA-093**.

1215 Counter-Memorial, ¶ 747.

1216 *CME Czech Republic BV v Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶¶ 610-612, **CLA-141**; *Flemingo DutyFree Shop Private Limited v the Republic of Poland*, UNCITRAL, Award (Redacted), 12 August 2016, ¶ 597, **CLA-142**; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000, ¶ 104, **CLA-143**.

1225. The *Metalclad* case is germane in this respect: there, the tribunal had little hesitation in concluding that the same conduct constituted both a violation of the FET standard and an expropriation:

> *By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment* breaching Article 1105 *and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved* and endorsed by the federal government, *Mexico must be held to have taken a measure tantamount to expropriation* in violation of NAFTA Article 1110(1).[1217]

1226. Serbia similarly contests the Claimants' invocation of measures, which also amount to a violation of the standard of non-impairment under the FET standard. This is once again wholly incorrect.

1227. It is uncontroversial that any measure involving arbitrariness *automatically* constitutes a violation of the FET standard. The tribunal in *El Paso*, for example, explained this as follows:

> The distinction seems also often difficult between arbitrary or discriminatory treatment and violation of the FET. *It must of course be emphasised that it is quite non-controversial that an arbitrary or discriminatory treatment is necessarily a violation of the FET* as well, as mentioned for example in CMS:
>
> The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. *Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment*."[1218]

1228. The *El Paso* tribunal then pointed out that the FET standard is broader in scope than other traditional treaty standards and is designed to guarantee protection where "*there is an unreasonable interference bringing about an unjust result regarding an investor's expectations*:"

> *FET is designed to guarantee that***,** in situations where the other more precise standards are not violated, but *where there is an unreasonable interference bringing about an unjust result regarding an investor's*

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1217 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000, ¶ 104 (emphasis added), **CLA-143**.

1218 *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 230 (emphasis added), **CLA-144**.

*expectations, that investor can claim a violation of the FET and obtain reparation therefore*.[1219]

1229. It is thus perfectly permissible for the Claimants to argue that the same measures adopted by Serbia simultaneously breach different treaty standards, including the FET standard. Indeed, it is precisely the purpose of the FET standard to provide protection against unfair measures, which may not otherwise constitute a violation of more specific treaty standards. And Serbia clearly breached the FET standard, as explained in detail below.

### 2. Serbia breached the FET Standard

1230. The Claimants have already explained that the conduct of the Privatization Agency,[1220] and the Ombudsman were arbitrary and unreasonable and were thus in breach of the non-impairment standard set forth in Article 2(3) of, *inter alia*, the Germany-Serbia BIT imported into the Serbia-Cyprus BIT by virtue of the MFN clause contained in its Article 3(1). The sheer arbitrariness and unreasonableness of Serbia's conduct which directly impaired the Claimants' investment is sufficient to establish a breach of the FET standard.[1221]

1231. Similarly, the Claimants also explained that the unlawful interference of the Ombudsman plainly lacked due process. Again, Serbia's clear disregard for the rights of the Claimants and Mr. Obradović in the process which directly led to the termination of the Privatization Agreement renders those measures violative of the FET standard as well.[1222]

1232. The Claimants will now explain that Serbia's conduct breached the FET standard by adopting measures that (*i*) were in bad faith; (*ii*) amounted to a pattern of orchestrated

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1219 *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 230 (emphasis added), **CLA-144**.

1220 In particular: (*i*) the Privatization Agency's refusal to release the pledge over the Beneficially Owned Shares; (*ii*) its refusal to allow for the assignment of the Privatization Agreement to Coropi; (*iii*) its termination of the Privatization Agreement; and (iv) its subsequent seizure of the Beneficially Owned Shares.

1221 Claimants' arguments regarding Serbia's violation of the duty of non-impairment are hereby incorporated by reference.

1222 Claimants' arguments regarding Serbia's violation of the due process are hereby incorporated by reference. *See, e.g., Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, ¶¶ 98-99, (emphasis added) **RLA-093**.

wrongful conduct aimed at destroying the Claimants' investment; and (*iii*) frustrated the Claimants' legitimate expectations.

### a. The Privatization Agency acted in bad faith when it refused to release the pledge over the Beneficially Owned Shares and when it terminated the Privatization Agreement

1233. Investment tribunals interpreting both autonomous and customary international law-linked FET provisions have consistently held that bad faith is not necessary for a showing of a breach of the FET standard.[1223] At the same time, however, the *Cargill* tribunal made clear that the presence of bad faith would be *sufficient* for a breach of the FET standard:

> The Tribunal agrees. However, the Tribunal emphasizes that *although bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice*.[1224]

1234. The formulation of the *Glamis Gold* tribunal is even stronger: bad faith, if established, constitutes "*conclusive evidence*" of a breach of the FET standard:

> The Tribunal notes that one aspect of evolution from Neer that is generally agreed upon is that *bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such*.[1225]

1235. In *Frontier Petroleum v. Czech Republic*, the tribunal explained that bad faith action by the host State, which would give rise to a breach of the FET standard, includes "*the use of legal instruments for purposes other than those for which they were created*;" "*the termination of the investment for reasons other than the one put forth by the government*" or "*reliance by a government on its internal structures to excuse non-compliance with contractual obligations.*"[1226]

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1223 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 153, **CLA-145**; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, ¶ 132, **CLA-146**; *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 208, **CLA-137**.

1224 *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 296, (emphasis added) **CLA-129**.

1225 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009, ¶ 616, **RLA-127**.

1226 *Frontier Petroleum Services Ltd. v. The Czech Republic* (UNCITRAL), Final Award, 12 November 2010, ¶ 300, **CLA-131**.

1236. These findings exactly apply here because the Privatization Agency not only acted unlawfully but its conduct transpired outright bad faith. This was conclusively demonstrated by documents that Serbia submitted during document production in this arbitration:

1237. *First*, the Privatization Agency acted in bad faith when it refused to release the pledge over the BD Agro shares and to allow for the assignment of the Privatization Agreement. The sole aim of the Privatization Agency's actions was to retain the option to expropriate the Claimants' shares. The audio recordings from the meetings of the Privatization Agency's Commission for Control from April and June 2015 demonstrate this without any doubt.

1238. The audio recording from the meeting of the Commission for Control dated 23 April 2015 conclusively establish that the members of the Commission for Control had been fully aware since 2012 that the pledge on the BD Agro shares should have been released when Mr. Obradović paid the last installment of the purchase price on 8 April 2011.

1239. Further, the recordings of the 23 April 2015[1227] and of the 19 June 2015[1228] meetings also show that the Commission for Control *deliberately* chose not to release the pledge on the BD Agro shares so as to prevent Mr. Obradović from transferring them.

1240. In addition, the recording of the 23 April 2015 meeting demonstrate that the Commission for Control *deliberately* imposed on Mr. Obradović non-existent contractual obligations, which it knew Mr. Obradović would not be able to fulfill within the additional 90-day period that it provided to him—only to allow Serbia to terminate the Privatization Agreement.[1229] Finally, this audio-recording also evidences that the conduct of the Privatization Agency was fueled by political motives and that it was

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1227 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 9-10, **CE-768**.

1228 Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 4, **CE-770**; Audio recording from meeting of the Commission for Control, 19 June 2015, **CE-771**.

1229 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 8, **CE-768**.

subject to public pressure from labor unions to take action against the owners of BD Agro.[1230]

1241. *Second*, the Privatization Agency acted in bad faith when it terminated the Privatization Agreement because it knew very well that the alleged violation of Article 5.3.4 was not a plausible ground for termination under Article 7.1 of the Privatization Agreement.

1242. The very same audio recording from the meeting of the Commission for Control of 23 April 2015 evidences that the Commission for Control was aware that BD Agro's loans to Crveni Signal and Inex, secured by assets of BD Agro in alleged violation of Article 5.3.4, were not capable of providing a basis for termination under Article 7.1 of the Privatization Agreement.[1231]

1243. This clearly demonstrates that Serbia plainly violated the FET standard by using the provisions of the Privatization Agreement and the Share Pledge Agreement "*for purposes other than those for which they were created*".[1232] Serbia's bad faith alone must therefore lead to a finding of breach of the FET standard.

### b. Serbia engaged in a pattern of orchestrated wrongful conduct aimed at destroying the Claimants' investment

1244. Numerous investment tribunals have recognized that measures taken by government officials that, assessed as a whole, inflict harm to investors' interests amount to a breach of the FET standard. This is so, in particular, when government authorities deliberately cooperate so as to defeat an investor's investment. The *Waste Management II*, for example, held that:

> 138. The Tribunal has no doubt that *a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of Article 1105(1).* A *basic obligation of the State* under Article 1105(1) *is to act in good faith and*

1230 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4, **CE-768**.

1231 Audio recording from meeting of the Commission for Control, 23 April 2015, **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 1, **CE-768**.

1232 *Frontier Petroleum Services Ltd. v. The Czech Republic* (UNCITRAL), Final Award, 12 November 2010, ¶ 300, **CLA-131**.

> *form, and not deliberately to set out to destroy or frustrate the investment by improper means*.[1233]

1245. The tribunal in *Rosinvest v. Russia*, in turn, considered the cumulative effect of various tax measures to amount to Russia's violation of its treaty obligations (in that case, the tribunal held that Russia was liable for expropriation) because those measures could "*only be understood as steps under a common denominator in a pattern to destroy Yukos and gain control over its assets*:"

> *In conclusion therefore, the Tribunal considers that the totality of Respondent's measures were structured in such a way to remove Yukos' assets from the control of the company and the individuals associated with Yukos. They must be seen as elements in the cumulative treatment of Yukos for what seems to have been the intended purpose. The Tribunal, in reviewing the various alleged breaches of the IPPA, even if the justification of a certain individual measure might be arguable as an admissible application of the relevant law, considers that this cumulative effect of those various measures taken by Respondent in respect of Yukos is relevant to its decision under the IPPA.* An illustration is, as Claimant has pointed out, that despite having used nearly identical tax structures, no other Russian oil company was subjected to the same relentless and inflexible attacks as Yukos. In the view of the Tribunal, *they can only be understood as steps under a common denominator in a pattern to destroy Yukos and gain control over its assets*.[1234]

1246. The *Rompetrol* tribunal clarified that, to constitute a violation of the FET standard, there must be a (i) "*pattern of wrongful conduct,*" which is (*ii*) "*sufficiently serious and persistent*;" (*iii*) "*the interests of the investor must be affected*" as a result thereof*;* and *(iv)* no adequate regard must be paid to the protection of those interests.[1235]

1247. The Serbian authorities' conduct uncontroversially fulfills the *Rompetrol* criteria.

1248. *First*, Serbia deliberately and consistently adopted measures with the sole aim of destroying the Claimants' investment in BD Agro.

1249. As already extensively explained, the Privatization Agency unlawfully and continuously refused to release the pledge and to approve the assignment of the Privatization

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1233 *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, ¶ 138, (emphasis added) **RLA-093**.

1234 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award, 12 September 2010, ¶ 621, **CLA-147**.

1235 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 278, Award, 6 May 2013, ¶ 278, **CLA-148**.

Agreement so as to prevent Mr. Obradović from disposing of the BD Agro shares and instead maintain its control over BD Agro. In so doing, the Privatization Agency clearly laid a path towards the subsequent outright expropriation of the Claimants' investment in BD Agro.

1250. Similarly, the "recommendations" of the Ombudsman that the Privatization Agency terminate the Privatization Agreement had the obvious purpose of realizing the termination of the Privatization Agreement under a false pretext of protecting BD Agro's employees.

1251. The same motivations lie behind the actions of the Ministry of Economy. For example, after having concluded its supervision procedure on 7 April 2015, the Ministry of Economy issued a report in which it instructed the Privatization Agency to provide a 90-day time limit to Mr. Obradović for the fulfillment of his wholly fabricated obligations under the Privatization Agreement, and instructed the Privatization Agency to "*undertake the measures within its legal authorizations*"[1236] in the event Mr. Obradović would fail to do so. It was obvious that Mr. Obradović would not be able to conceivably fulfil that task—and that was precisely why it was given to him. .

1252. *Second*, as a result of the measures adopted by the Privatization Agency, the Ombudsman and the Ministry of Economy, the Claimants have been completely deprived of all their interests in BD Agro. Serbia's conduct thus not only "*affected"* the Claimants' interests, it *destroyed* them outright.

1253. *Third*, Serbia also clearly failed to pay any regard whatsoever to the protection of the Claimants' interests.

1254. In sum, Serbia engaged in a pattern of wrongful conduct which effectively destroyed the Claimants' investment and thus breached the FET standard also for this additional reason.

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[1236] Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-98.**

### c. The Privatization Agency's conduct and the Ombudsman's interventions frustrated the Claimants' legitimate expectations

1255. Serbia further breached the FET standard because it frustrated the Claimants' legitimate expectations.

1256. Protection of legitimate expectations is the key component of the FET standard. Professor Schreuer observed that "*[a]n important aspect of the protection of the investor's legitimate expectations is the observance of obligations arising from contracts with the host State.*"[1237] As he further explains, "*[a] look at practice shows that tribunals seem to agree that a failure to perform a contract may amount to a violation of the [fair and equitable treatment] standard*."[1238]

1257. Indeed, the *Mondev* tribunal held in no ambiguous terms that the protection of the customary international law-linked FET of the NAFTA clearly extends to claims involving State contracts:

> *[A] governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105* and with contemporary standards of national and international law concerning governmental liability for contractual performance.[1239]

1258. The tribunal in *SGS v. Paraguay* similarly spoke of a "*baseline expectation of contractual compliance*,"[1240] while the *Noble Ventures v. Romania* tribunal noted that the FET standard includes "*the obligation to observe contractual obligations towards the investor*."[1241]

1259. Most recently, the tribunal in *Glencore v. Colombia* also confirmed the principle:

> *Legitimate expectations arise out of representations, assurances, or commitments made by the State, on which the investor reasonably relies.* The Tribunal has already concluded that, depending on the circumstances, such representations, assurances, or commitments can be generated by acts specifically addressed to the investor or by the

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1237 Christopher H. Schreuer, *Fair and Equitable Treatment (FET): Interactions With Other Standards*, p. 89, In: C. Ribeiro and G. Coop, Investment Protection and the Energy Charter Treaty, 2008, **CLA-149**.

1238 Christopher H. Schreuer, *Fair and Equitable Treatment (FET): Interactions With Other Standards*, p. 90, In: C. Ribeiro and G. Coop, Investment Protection and the Energy Charter Treaty, 2008, **CLA-149**.

1239 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 22 October 2002, ¶ 134 (emphasis added) **RLA-39**.

1240 *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, **CLA-041.**

1241 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, **CLA-040.**

> general legislative framework. *The Tribunal sees no difficulty in including State-investor contracts among the instruments which can generate such representations, assurances, and commitments: the essence of any contract is a reciprocal undertaking that each party will comply with the obligations stated therein*.[1242]

1260. Serbia manifestly violated the Claimants' legitimate expectations based on the Privatization Agreement and the Share Pledge Agreement because it blatantly disregarded the terms of these contracts.

1261. The Privatization Agency frustrated the Claimants' legitimate expectations that (*i*) the pledge over the BD Agro shares would be released upon full payment of the purchase price on 8 April 2011 and the Claimants would be free to dispose of their shares; and that (*ii*) the Privatization Agreement would not be terminated for reasons other than those stipulated under the Privatization Agreement.

1262. *First*, the Share Pledge Agreement provided in no uncertain terms that the purpose of the pledge was to secure the payment of the purchase price.[1243] As the Claimants' expert, Mr. Miloš Milošević, explains, "*[n]owhere in the Privatization Agreement, or in the Share Pledge Agreement, had the Parties agreed on securing other rights than the payment of the purchase price*."[1244]

1263. The Privatization Agency however refused to release the pledge even after it had received the full purchase price on 8 April 2011. And the audio recordings from the meetings of the Privatization Agency's Commission for Control produced by Serbia in this arbitration reveal that the Privatization Agency did so with the sole purpose of preventing Mr. Obradović from transferring the shares.[1245] By blatantly disregarding the purpose of the pledge, the Privatization Agency thus violated the Share Pledge Agreement and the Privatization Agreement, and the Claimants' expectations arising therefrom.

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1242 *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombi*a, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶ 1374-1375, **CLA-128**.

1243 Under Article 2 of the Share Pledge Agreement, shares in BD Agro were to be pledged to the Privatization Agency "*for the period of 5 years as of the day of conclusion of the sale and purchase agreement, that is, until final payment of sale and purchase price*." *See* Share Pledge Agreement dated 4 October 2005, Art. 2, **CE-017**.

1244 Milošević Second ER, ¶ 159.

1245 *Supra* Section II.P.6.

1264. In addition, as Mr. Milošević further explains, by refusing to release the pledge after the payment of the purchase price, "*the Privatization Agency was effectively reinstating a restriction on the buyer's ability to transfer the shares, which was agreed in Article 5.3.1. of the Privatization Agreement for the period of two years after the signing of the Privatization Agreement.*"[1246] This restriction on transferring the shares thus lapsed on 4 October 2007. As a result, Mr. Milošević concludes, the Privatization Agency had no right "*to misuse the pledge to effectively reinstate a non-monetary obligation that had expired long before the Privatization Agency was supposed to release the pledge*."[1247]

1265. *Second*, by terminating the Privatization Agreement on the basis of an alleged violation of Article 5.3.4. of the Privatization Agreement—which, as has now been proven with the audio recordings of the meetings of the Commission for Control, the Privatization Agency *knew very well were not present*—the Privatization Agency breached the Claimants' expectations that the Privatization Agreement would only be terminated for the reasons provided therein.

1266. Serbia therefore plainly frustrated the Claimants' legitimate expectations that the Privatization Agency would commit to its contractual obligations stemming from the Share Pledge Agreement and the Privatization Agreement.

1267. In addition, the Ombudsman also breached the Claimants' legitimate expectations by its unlawful interference and pressure on the Ministry of Economy and the Privatization Agency to terminate the Privatization Agreement.

1268. International investment law widely acknowledges that the standard of legitimate expectations protects also investors' expectation that their business will be conducted in a stable regulatory framework and would be shielded from undue government interference. The tribunal in *Merill and Ring* formulated the principle as follows:

> While it is clear that no representations have been made by Canada to induce the Investor to make a particular decision or to engage in conduct that is later frustrated, *any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives*. Emergency measures or regulations addressed to social well-being are evidently within the

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1246 Milošević Second ER, ¶ 166; Privatization Agreement, Article 5.3.1, **CE-017**.

1247 Milošević Second ER, ¶ 166.

> normal functions of a government and it is not legitimate for an investor to expect to be exempt from them.[1248]

1269. Tribunals generally concur that the essential expectation in a regulatory context is that "*the legal framework will not be applied arbitrarily*."[1249]

1270. The unwarranted and unlawful investigation conducted by the Ombudsman without any prior warning—and without any opportunity to the Claimants or Mr. Obradović to be heard—and the subsequent issuance of his "recommendations" to the Privatization Agency to terminate the Privatization Agreement manifestly frustrated the Claimants' legitimate expectation that the Serbian government would not unduly interfere with their investment. This is because the Ombudsman had *absolutely no authority* to intervene as he did.

1271. As already explained, the Law on Ombudsman, which defines the Ombudsman's powers, clearly limits the authority of the Ombudsman to protection of citizens' rights.[1250] While the Ombudsman purported to justify his intervention under the proclaimed aim of protection of BD Agro's employees, that justification was plainly disingenuous. Neither the Privatization Agency, nor the Ministry of Economy were tasked to protect the rights of the employees of BD Agro through their supervision on the fulfillment of Article 5.3.4 of the Privatization Agreement. In addition, the termination of the Privatization Agreement could not—and ultimately did not—protect the interests of BD Agro's employees. Quite the opposite: the termination of the Privatization Agreement and the subsequent mismanagement of BD Agro by the Privatization Agency plainly brought BD Agro to bankruptcy.

1272. Accordingly, the Ombudsman's intervention was unlawful, arbitrary, and directly frustrated the Claimants' legitimate expectations to conduct their business in a stable and predictable regulatory framework, free of undue and arbitrary government interference.

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1248 *Merrill and Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 233, **CLA-137**.

1249 *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 December 2013, ¶ 617, **CLA-150**.

1250 *See, e.g.,* 2005 Law on Ombudsman, Article 18(2), **CE-112**.

1273. As a result, Serbia's egregious conduct plainly breached numerous components the FET standard.

## F. Serbia violated the umbrella clause

### 1. Sembi fulfills the conditions of application of the umbrella clause

1274. 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*."[1251] As already demonstrated by the Claimants in their Memorial, the Privatization Agency's breaches of the Share Pledge Agreement and the Privatization Agreement gave rise to Serbia's liability for the breach of the umbrella clause.[1252]

1275. Serbia, however, argues that Sembi cannot avail itself of the umbrella clause under Article 2(2) of the UK-Serbia BIT, because neither Sembi nor Serbia was a party to the Privatization Agreement. Serbia further claims the Privatization Agency's measures did not involve any element of sovereign powers, and are thus outside of the reach of the umbrella clause. Serbia's unsubstantiated objections are refuted in turn below.

1276. *First*, the umbrella clause contained in Article 2(2) of the UK-Serbia BIT does not require that the relevant obligation be entered into by the State *directly* with the investor. Instead, it applies to "*any obligation*" the State has entered into "*with regard to investments of investors*".[1253] Accordingly, as long as the State's obligations were entered into "*with regard to investments*," they are covered by the umbrella clause. As the Claimants demonstrated above, Sembi's investments in Serbia comprise of the Beneficially Owned Shares, and "*all [Mr. Obradović's] right, title and interest in and to [the Privatization Agreement]*."[1254] It is thus obvious that the Privatization Agency had entered into contractual obligations "*with regard*" to Sembi's investment.

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1251 Agreement between UK and Yugoslavia on Reciprocal Promotion and Protection of Investments, Article 2(2), **CLA-014**.

1252 Memorial, ¶¶ 440-446.

1253 Agreement between UK and Yugoslavia on Reciprocal Promotion and Protection of Investments, Article 2(2) (emphasis added) **CLA-014**.

1254 Agreement between Mr. Obradović and Sembi dated 22 February 2008, **CE-29.**

1277. The Claimants' interpretation of the umbrella clause is supported by ample investment authority. The *Continental Causality* tribunal, for example, unequivocally recognized that investors may invoke the protection of an umbrella clause even if the underlying contract had been signed by another entity:

> *For the purpose of determining the type of obligations that Argentina must observe under this umbrella clause,* it is necessary to begin with the analysis of the text of Art. II (2)(c). *The covered obligations must have been entered "with regard to" investments.* Thus they must concern one or more investments and, moreover, must address them with some degree of specificity. They are not limited to obligations based on a contract. Finally, *provided that these obligations have been entered "with regard" to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary such as CNA is not in principle excluded.*[1255]

1278. The *Amto* tribunal similarly held:

> *The so-called 'umbrella clause' of the ECT is of a wide character in that it imposes a duty on the Contracting Parties to "observe any obligations it has entered into with an Investor or an Investment of an Investor of the other Contracting Party"*. This means that the *ECT imposes a duty not only in respect of the investor which is otherwise customary in an investment treaty context, but also vis-a-vis a subsidiary company,* established in the host state. This means that an undertaking by Ukraine of a contractual nature vis-a-vis EYUM-10 could very well bring into effect the umbrella clause. However, in the present case the contractual obligations have been undertaken by a separate legal entity, and so the umbrella clause has no direct application.[1256]

1279. Accordingly, the fact that Sembi was not a party to the Privatization Agreement does not deprive Sembi of the right to bring the umbrella clause based on the Privatization Agency's violation of the same.

1280. *Second*, Serbia asserts that the breaches of the Privatization Agreement are not actionable under the umbrella clause because the Privatization Agreement was entered into by the Privatization Agency, rather than by Serbia. However, it is a basic tenet of international law that a State is liable under international law for actions of separate

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1255 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 297 (emphasis added), **CLA-151**.

1256 *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 110, **RLA-090**.

legal entities, as long as their conduct is attributable to the State. Umbrella clauses are no exception to this fundamental rule.

1281. For example, 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.[1257]

1282. As shown above, all actions of the Privatization Agency are attributable to Serbia. Accordingly, although it is not a party to the Privatization Agreement, Serbia is liable under international law standards—including the umbrella clause—for all wrongful acts attributable to it.

1283. *Third*, Serbia alleges that an umbrella clause may only be violated by State's sovereign acts, and that Serbia committed no such acts in this case. This is wrong on both counts. Umbrella clauses may apply even if no exercise of sovereign power is involved. The *SGS v. Paraguay* tribunal, for example, formulated the principle as follows:

> The 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

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1257 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶¶ 85-86, **CLA-040**.

> longer acts of the State, for which the State may be held internationally responsible.[1258]

1284. Other tribunals endorsed this reasoning.[1259] In any event, the Claimants have conclusively shown above that the Serbia always acted in a sovereign capacity, rather than as an ordinary commercial party. Accordingly, the Privatization Agency's breaches of its contractual obligations fall squarely within the purview of Article 2(2) of the UK-Serbia BIT. The Privatization Agency violated its contractual commitments —and thus engaged Serbia's liability under the umbrella clause—on at least two occasions.

### 2. Serbia violated the umbrella clause by failing to observe its contractual commitments under the Privatization Agreement

1285. *First*, as explained above, 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. Worse yet, the Privatization Agency knew full that this is the case, but refused to release the pledge anyway.

1286. *Second*, as explained above, the Privatization Agency's termination of the Privatization Agreement was manifestly contrary to the plain language of the Privatization Agreement. Again, the Privatization Agency knew full well that a purported violation of Article 5.3.4 could not constitute a lawful ground for termination of the Privatization Agreement. The Privatization Agency also knew that the Privatization Agreement could not be lawfully terminated after Mr. Obradović's full payment of the purchase price on 8 April 2011. Yet, the Privatization Agency chose to turn a blind eye to the unequivocal 2013 Legal Opinion and terminated the Privatization Agreement nevertheless.

1287. The actions of the Privatization Agency thus violated Serbia's obligations the umbrella clause contained in Article 2(2) of the UK-Serbia BIT.

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1258 *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, **CLA-141**.

1259 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 82, **CLA-040**; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 130, **CLA-030**.

## VI. THE CLAIMANTS ARE ENTITLED TO COMPENSATION FOR THEIR LOSSES

### A. The harm suffered by the Claimants was caused by Serbia's breaches of the Treaties

1288. The Claimants fully agree with Serbia that the "*payment of compensation presupposes a causal link between a treaty breach and the injury suffered for which compensation is sought.*"[1260] Such a link clearly exists in this case.

1289. As the Claimants explained above, Serbia directly expropriated the Beneficially Owned Shares by unlawfully declaring the Privatization Agreement terminated and transferring the Beneficially Owned Shares to the Privatization Agency.

1290. Serbia's conduct, however, did not amount only to direct expropriation. It also rendered worthless the Claimants' remaining investment consisting of Mr. Rand's 3.9% indirect shareholding in BD Agro and Mr. Rand's receivables *vis-á-vis* BD Agro. This is because, as explained above, expropriation of the Beneficially Owned Shares and subsequent overtaking of control over BD Agro by the Privatization Agency frustrated the planned reorganization and pushed BD Agro into bankruptcy.

1291. Was it not for Serbia's unlawful actions, BD Agro would have implemented the pre-pack reorganization plan and continued in its operations. The reorganization had been already agreed with and approved by BD Agro's creditors—who believed in BD Agro's potential. Serbia destroyed the agreement between BD Agro and its creditors and caused a collapse of the company.

1292. First of all, by expropriating the Beneficially Owned Shares, the Privatization Agency striped BD Agro of the financial support that was to be provided by Mr. Rand. Quite logically, Mr. Rand was not willing to invest further funds after the Privatization Agency expropriated the Beneficially Owned Shares.

1293. After that—or rather as a result of that—the Privatization Agency managed to lose support of the creditors, who just few months ago had voted in favor of the Amended pre-pack reorganization plan.

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[1260] Counter-Memorial, ¶ 765.

1294. And as the final nail in the coffin—less than a year after the expropriation of the Beneficially Owned Shares—the Privatization Agency pushed BD Agro to bankruptcy. Serbia's destruction of BD Agro was quick and straightforward.

1295. After all, Ms. Mira Kostić—representative of the Privatization Agency—stated already in January 2015 that BD Agro "*should indeed be forced into bankruptcy.*"[1261] The Privatization Agency therefore achieved its—or someone else's—aim.

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

1296. It is undisputed between the Parties that the reparation for breaches of the Treaties should be provided under the full reparation standard,[1262] which entitles an investor to restitutionary damages, including the fair market value of the unlawfully expropriated investment, as well as consequential losses suffered by the investor, and interest.[1263]

1297. The only points of contention between the Parties therefore are: (*i*) the fair market value of BD Agro as of 21 October 2015; and (*ii*) the amount of interest to be paid by Serbia.

## C. Contemporaneous valuations of BD Agro and its assets

1298. BD Agro and its assets were the object of several contemporaneous valuations. As the Claimants explained in their Memorial, there were three key contemporaneous valuations of BD Agro carried out between December 2014 and February 2016. These valuations were:

a. valuation prepared by Mr. Pero Mrgud ("**Mrgud**"), a Serbian licensed expert witness in the area of valuation of construction facilities,[1264] submitted together with the Amended pre-pack reorganization plan (the "**Mrgud Valuation**"). Taking the value of land calculated by Mr. Mrgud, the equity value of BD Agro was more than **EUR 71 million**;[1265]

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1261 Markićević Second WS, ¶ 104.

1262 Memorial, ¶¶ 485-489; Counter-Memorial, ¶ 764.

1263 Memorial, ¶¶ 490-496; Counter-Memorial, ¶¶ 783, 816.

1264 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, pp. 4-5, **CE-175**.

1265 Memorial, ¶ 514.

b. valuation prepared by Confineks d.o.o. Beograd ("**Confineks**") in December 2015 pursuant to the instructions of Ms. Radmila Knežević, the Privatization Agency's representative administering the expropriated 75.87% shareholding in BD Agro (the "**First Confineks Valuation**").[1266] According to the First 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 2014, was **EUR 57.2 million**;[1267] and

c. valuation prepared by Confineks in February 2016 (the "**Second Confineks Valuation**"), according to which 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**.[1268]

1299. The Claimants highlighted these three valuations because the two Confineks valuations were *accepted by Serbia*[1269] and the Mrgud valuation was, as a part of the Amended pre-pack reorganization plan, accepted by BD Agro's creditors who voted for the Amended pre-pack reorganization plan.[1270] All these valuations were therefore contemporaneously recognized as objective and valid valuations of BD Agro.

1300. The credibility of these valuations is further supported by the analysis undertaken by the Claimants' quantum expert, Dr. Richard Hern from NERA Consulting. In his first expert report, Dr. Hern concluded that the equity value of BD Agro as of 21 October 2015 was **EUR 53.3 to EUR 81 million**.[1271] In his second report, Dr. Hern confirms his valuation.[1272] Both valuations prepared by Confineks, as well as the valuation prepared by Mr. Mrgud, are clearly within the range calculated by Dr. Hern.

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1266 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015, **CE-142**.

1267 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015, p. 14 (emphasis added), **CE-142**.

1268 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, January 2016, p. 23, **CE-172**.

1269 Memorial, ¶ 517.

1270 Memorial, ¶ 175.

1271 Hern First ER, ¶ 163.

1272 Hern Second ER, ¶ 41.

1301. The Claimants do not dispute that there were also other valuations of BD Agro assets—some of which are prominently cited by Serbia in its Counter-Memorial.[1273] However, these other valuations were prepared using flawed methodology and therefore do not—and cannot—reflect the fair market value of BD Agro.

1302. Enough to say, none of these flawed valuations received recognition and acceptance similar to that of the Mrgud and Confineks from either Serbia or BD Agro's creditors (or anyone else for that matter).

### 1. The Mrgud Valuation implies an equity value of over EUR 71 million

1303. As the Claimants explained already in their Memorial, the Mrgud Valuation was prepared in December 2014 and submitted by BD Agro together with the Amended pre-pack reorganization plan.[1274] It valued BD Agro's most valuable asset—industrial and commercial land in Dobanovci. A majority of BD Agro creditors approved the plan—and with it, inevitably, the Mrgud Valuation.[1275]

1304. The Mrgud Valuation estimated the market value of the construction land to be **EUR 87 million**.[1276] As explained in the Memorial, this value of construction land implies an equity value of BD Agro of more than **EUR 71 million**.[1277]

1305. The Mrgud Valuation is supported by a valuation of the industrial and commercial land prepared by the Claimants' real estate valuation expert, Mr. Krzysztof Grzesik, a valuation surveyor and property consultant with over 40 years of experience and a consultant involved in development of the valuator licensing system in Serbia.[1278] In his analysis, Mr. Grzesik reviewed evidence from: (*i*) comparable transactions;[1279] (*ii*) contemporaneous valuations by other valuators;[1280] (*iii*) contemporaneous

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1273 Counter-Memorial, ¶¶ 772-778.

1274 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. 6, **CE-175**.

1275 Memorial, ¶ 175.

1276 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. 20, **CE-175**.

1277 Memorial, ¶ 520.

1278 Grzesik ER, ¶¶ 2.1, 2.9.

1279 Grzesik ER, ¶ 6.5.

1280 Grzesik ER, ¶¶ 6.6, 6.10.

valuations of tax authorities;[1281] and (*iv*) valuations prepared by Dr. Hern and Mr. Cowan.[1282] Based on all these inputs, Mr. Grzesik concludes that the value of the commercial and industrial land owned by BD Agro was, as of 21 October 2015, **EUR 85.4 million**.[1283] Mr. Grzesik's valuation is therefore only slighter lower than the Mrgud Valuation.

### 2. Confineks appraised BD Agro's fair market value between EUR 56.4 million and EUR 57.2 million

1306. As the Claimants explained in their Memorial, the First Confineks Valuation was commissioned in November 2015, just days after the expropriation, at the direction of Serbia.

1307. 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 […]*."[1284]

1308. On 6 November 2015, the Privatization Agency appointed Ms. Radmila Knežević as the administrator of the 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*."[1285] As explained by Mr. Markićević, Ms. Knežević was in fact approving all the important decisions made by BD Agro's management.[1286]

1309. On 18 November 2015, Ms. Knežević directed Mr. Markićević to engage Confineks.[1287]

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1281 Grzesik ER, ¶¶ 6.11-6.20.

1282 Grzesik ER, ¶ 3.1.

1283 Grzesik ER, ¶ 6.26.

1284 Letter from the Privatization Agency to BD Agro, 9 November 2015, p. 1, **CE-169**. *See also* Memorial, ¶ 521.

1285 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.

1286 Markićević Second WS, ¶ 202; Markićević Third WS, ¶ 122.

1287 Email communication between I. Markićević and R. Knežević, 18 November 2015, **CE-364**. *See also* Markićević Second WS, ¶ 203.

1310. 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**.[1288]

1311. 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**.[1289]

1312. As the Claimants explained in their Memorial, Serbia demonstrated that it accepted the Confineks valuations on at least three different occasions.

1313. *First*, on 11 January 2016, BD Agro submitted a new pre-pack reorganization plan—*i.e.* the first reorganization plan that was prepared under the sole control of the Privatization Agency ("**2016 pre-pack reorganization plan**"). This plan fully relied on the First Confineks Valuation for the valuation of BD Agro's "*assets, liabilities and capital*."[1290] The 2016 pre-pack reorganization plan was approved by BD Agro shareholders at a General Assembly held on 27 February 2016, during which the Privatization Agency exercised its voting control through its expropriated 75.87% shareholding in the company.[1291]

1314. *Second*, also in 2016, the valuation prepared by Confineks was used to re-value BD Agro's assets in the 2015 annual financial statements.[1292] The financial statements were—same as the 2016 pre-pack reorganization plan—approved by BD Agro shareholders, this time at a General Assembly held on 30 June 2016 whereby the

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1288 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015, p. 14 (emphasis added), **CE-142**.

1289 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, 4 February 2016, p. 23, **CE-172**.

1290 Second pre-pack reorganization plan, 11 January 2016, pp. 24-25, **CE-369**.

1291 Minutes from the General Assembly of BD Agro AD Dobanovci, 27 February 2016, pp. 1, 6-7 (pdf), **CE-370**.

1292 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 First ER, ¶ 59.

Privatization Agency again exercised its voting control through its expropriated 75.87% shareholding in the company.[1293]

1315. The 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.[1294]

1316. *Finally*, 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 that letter, she referred to the 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.[1295]

1317. On the same day, BD Agro wrote to the Commercial Court in Belgrade in response to Imlek's request for initiation of bankruptcy proceedings. BD Agro, under the control of the Privatization Agency, 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.*"[1296]

1318. In its Counter-Memorial, Serbia attempts to downplay the importance of the Confineks valuations. Serbia thus states that the fact that the Privatization Agency: (*i*) ordered the preparation of; and (*ii*) voted for the approval of financial statements of BD Agro which were prepared using and incorporated, the Confineks valuations, does not mean that it

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1293 Minutes from the General Assembly of BD Agro Dobanovci, 30 June 2016, p. 3, **CE-366**.

1294 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 First ER, ¶ 76; Decision of the bankruptcy trustee, 24 February 2017, **CE-367**; Decision of the bankruptcy trustee dated 26 February 2018, **CE-368**.

1295 Letter from R. Knežević to the Ministry of Economy, 17 February 2016, p. 1 (emphasis added), **CE-371**.

1296 Letter from BD Agro to the Commercial Court in Belgrade, 17 February 2016, p. 2, **CE-372**.

accepted the valuations as such.[1297] Serbia's arguments are completely divorced from the reality.

1319. First of all, the Privatization Agency did not merely order BD Agro to engage Confineks. As explained above, Ms. Knežević—the administrator of Agency's shareholding in BD Agro—expressly relied on the Second Confineks Valuation in her letter to the Ministry of Economy of 17 February 2016.[1298] If the Privatization Agency did not accept the Confineks valuation, Ms. Knežević would not have relied on it in her official communication with the Ministry.

1320. Furthermore, Serbia entirely ignores the fact that when BD Agro—under the control of the Privatization Agency—submitted the 2016 pre-pack reorganization plan, it fully relied on the First Confineks Valuation for valuation of BD Agro's "*assets, liabilities and capital*."[1299] Once again, if the Privatization Agency had had any doubts about the First Confineks Valuation, it would not have instructed BD Agro to rely on it in the reorganization plan. Indeed, pursuant to Serbian law, the submission of false information in a pre-pack reorganization plan can constitute a criminal offence.

1321. Finally, Serbia argues that the fact that the Privatization Agency—as BD Agro's majority and controlling shareholder—approved the financial statements prepared based on the Confineks valuations does not mean that the Agency accepted the valuation as such. This argument almost does not warrant a response. Serbia cannot seriously contend that the Privatization Agency approved BD Agro's financial statements while it believed that they seriously overrepresented the value of BD Agro's assets.

### 3. The contemporaneous valuations cited by Serbia do not reflect the fair market value of BD Agro

1322. As the Claimants explained in their Memorial, and again in this submission, they emphasize valuations prepared by Mr. Mrgud and Confineks because the former was reviewed and accepted by BD Agro creditors, and the latter were reviewed and accepted by Serbia itself.

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1297 Counter-Memorial, ¶¶ 777-778.

1298 Letter from R. Knežević to the Ministry of Economy, 17 February 2016, p. 1, **CE-371**.

1299 Second pre-pack reorganization plan, 11 January 2016, pp. 24-25, **CE-369**.

1323. In its Counter-Memorial, Serbia attempts to mischaracterize the Claimants' position. Ignoring the above evidence demonstrating that the Mrgud and Confineks valuations were widely accepted in 2015 and 2016, Serbia suggests that the Claimants rely on these valuations simply because they appraise BD Agro at a high value. Serbia then goes on and claims that the Claimants dismiss—allegedly without sufficient justification—other contemporaneous valuations appraising BD Agro at lower value.[1300] Serbia is wrong.

1324. First of all, as the Claimants explained above, the Mrgud and Confineks valuations are the only contemporaneous valuations that were expressly accepted by BD Agro's creditors and Serbia. No other contemporaneous valuations received such acceptance. This fact clearly makes the Mrgud and Confineks valuations more relevant than the other contemporaneous valuations of BD Agro.

1325. Furthermore, the Claimants do *not* dismiss the remaining contemporaneous valuations "*without sufficient justifications*" as Serbia incorrectly suggests.[1301] To the contrary, Dr. Hern explained in detail in his first expert report why the remaining valuations of BD Agro should be disregarded.[1302] Dr. Hern further expands the explanation in his second report.[1303]

1326. The fact is that while Serbia notes in its Counter-Memorial that "*there were no less than eight valuations of BD Agro's assets or land in the period between November 2014 and March 2017*"[1304] it relies only on *one* of these valuations. Specifically, Serbia relies on the valuation prepared by Jones Lang LaSalle d.o.o. ("**JLL**") in February 2015 (the "**JLL Valuation**").[1305] The JLL valuation, however, is fundamentally flawed.

1327. As explained by Dr. Hern, the JLL Valuation presents a valuation of BD Agro's land of 2 EUR/$m^2$ for the Construction Land in Zone A and 1.5 EUR/$m^2$ for the Construction

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1300 Counter-Memorial, ¶¶ 772-774.

1301 Counter-Memorial, ¶ 774.

1302 Hern First ER, ¶¶ 83-87.

1303 Hern Second ER, ¶¶ 98-115, 223-231.

1304 Counter-Memorial ¶ 773.

1305 Jones Lang LaSalle d.o.o., Report on the Valuation of Immovable Property of BD Agro, located in Dobanovci, Serbia, February 2015, **CE-176**. *See also* Counter-Memorial, ¶¶ 774-775.

land in Zones B and C.[1306] As noted by Dr. Hern, there is no "*evidence from contemporaneous transactions that would justify a valuation of BD Agro's construction land as low as that presented in the [the JLL Valuation]*."[1307] Dr. Hern therefore does not "*not place any weight on [the JLL Valuation] in [his] valuation of BD Agro's land, since the JLL report provided no clear explanation for its valuation, and this valuation was inconsistent with market based evidence on transaction prices for comparable land.*"[1308]

1328. Mr. Grzesik also concludes that the JLL Valuation does not provide any evidence for either its base price, or the arbitrary 50% discount it applies to it.[1309]

1329. Mr. Grzesik also notes that the JLL Valuation relies on and incorporates the so-called concept of "*hope value*". However, as explained by Mr. Grzesik, JLL uses this concept incorrectly. Mr. Grzesik explains that if JLL would have used the hope value properly, it would have arrived at the total value of land equal to EUR 30/$m^2$.

1330. Serbia desperately tries to find support for the JLL Valuation in the fact that it allegedly presents the fair market value of BD Agro as defined under the Royal Institute of Chartered Surveyors ("**RICS**") standards.[1310] This, however, is not the case.

1331. While it is true that the 2015 JLL Report does refer to RICS valuation standards,[1311] that reference is not directly relevant for assessing whether the report reflects a fair market value of BD Agro's land as of the date of expropriation.[1312] As explained by Dr. Hern, the evidence from contemporaneous transactions supports substantially higher valuations than that prepared by JLL.

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1306 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**"). Hern Second ER, ¶ 103.

1307 Hern Second ER, ¶ 103.

1308 Hern Second ER, ¶ 103.

1309 Grzesik ER, ¶¶ 13.5-13.6.

1310 Counter-Memorial, ¶ 775.

1311 Jones Lang LaSalle d.o.o., Report on the Valuation of Immovable Property of BD Agro, located in Dobanovci, Serbia, February 2015, p. 4, **CE-176**.

1312 Hern Second ER, ¶ 107.

1332. Based on all the above reasons, it is clear that the JLL Valuation does *not* reflect the fair market value of BD Agro's Construction land in Zones A, B and C as of the date of expropriation 21 October 2015.

1333. Given the above deficiencies, it indeed begs the question why Serbia decided to rely on this specific valuation. The Claimants will not speculate on this point, but simply note that from "*no less than eight valuations of BD Agro's assets*" mentioned by Serbia, the JLL Valuation arrives at the lowest value of BD Agro's land. The reasons that lead Serbia to rely on this specific valuation thus seem to be clear.

* * *

1334. For the sake of completeness, the Claimants note that Serbia's description of BD Agro's performance between years 2006-2015 is entirely irrelevant.[1313] To the extent that the situation between years 2006-2015 could have affected value of BD Agro, such effect would already be reflected in the contemporaneous valuations of BD Agro.

## D. Dr. Hern estimates the fair market value of BD Agro between EUR 53.3 million and EUR 81 million

### 1. Dr. Hern's calculation of the fair market value of BD Agro

1335. As the Claimants explained in the Memorial, they instructed Dr. Hern from NERA Economic Consulting, a global economics and finance consulting firm, to independently calculate the BD Agro's fair market value as of 21 October 2015.[1314]

1336. For the purposes of his valuation, Dr. Hern divided BD Agro's assets into two categories: (*i*) core assets—being the assets required for BD Agro's dairy production business, such as agricultural land, farm buildings, equipment, herd and other current assets; and (*ii*) non-core assets—being the assets that are not required for dairy production, such as construction land.[1315]

1337. Dr. Hern valued 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

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1313 Counter-Memorial, ¶¶ 766-771.

1314 Memorial, ¶ 531.

1315 Hern First ER, ¶ 43.

value based on contemporaneous market evidence. Where available, Dr. Hern relied on comparable transactions and contemporaneous valuations to estimate the fair market value. Where such data was not available, Dr. Hern relied on BD Agro's 2015 annual accounts, as they represent the closest available information relative to the expropriation date 21 October 2015.[1316]

1338. Dr. Hern valued BD Agro's core assets using a DCF valuation method and also the same adjusted book valuation method as for the non-core assets.[1317]

1339. Using the above methods, Dr. Hern estimated the fair market value of BD Agro between EUR 53.3 million and EUR 81 million. In his second expert report, Dr. Hern confirms that these values are correct.[1318]

### 2. Serbia's criticism of Dr. Hern's approach is without merit

1340. Serbia, relying on an expert report prepared by Mr. Sandy Cowan from Grant Thornton, criticizes Dr. Hern's approach and argues that his report allegedly contains "*a number of methodological flaws.*"[1319] Serbia is wrong. In his second expert report, Dr. Hern reviews the criticism provided by Serbia, respectively by Mr. Cowan, and demonstrates that it is without merit.

#### a. BD Agro should be valued as the going concern

1341. In his first expert report, Dr. Hern valued BD Agro's core assets[1320] using both the DCF valuation method[1321] and the adjusted book value method.[1322] In his DCF valuation, Dr. Hern assumed that BD Agro would "*continue to operate as a going concern after the expropriation date 21 October 2015*."[1323]

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1316 Hern First ER, ¶ 44.

1317 Hern First ER, ¶ 45.

1318 Hern Second ER, ¶ 41.

1319 Counter-Memorial, ¶¶ 779-788.

1320 All BD Agro's assets, with the exception of certain construction land and the castle in Novi Bečej, which are not required for the operation of the dairy farm. Hern First ER, ¶ 124.

1321 Hern First ER, ¶¶ 124-140.

1322 Hern First ER, ¶¶ 142-148.

1323 Hern First ER, ¶ 124.

1342. Serbia, relying on Mr. Cowan, disagrees and claims that BD Agro was not a going concern as of 21 October 2015, because "*it was in situation of illiquidity.*"[1324] Serbia therefore argues that BD Agro should be valued based on "*an asset base approach method*"[1325] that would include a 30% discount reflecting "*bankruptcy scenario.*"[1326] Serbia is wrong.

1343. As explained above, the full reparation principle entitles the Claimants to damages reflecting *the fair market value* of their unlawfully expropriated investment.[1327] The fair market value principle requires the valuation of BD Agro to reflect "*a value at which a willing buyer and willing seller would transact, after proper marketing and where both parties act without compulsion […].*"[1328]

1344. As explained by Dr. Hern "*application of a distress discount is therefore in direct contradiction with the fair market value definition.*"[1329] A distressed sale of assets in a bankruptcy scenario, therefore by definition, cannot reflect BD Agro's market value. As explained by Dr. Hern, "*a distressed sale reflects a transaction between a seller who is acting* ***under pressure/compulsion to sell*** *and does not have sufficient time for proper marketing which would allow the buyers to acquire reasonable knowledge of the facts.*"[1330]

1345. In any case, the evidence clearly demonstrates that BD Agro *was* a going concern.[1331] BD Agro was not in bankruptcy at the time of expropriation of the Beneficially Owned Shares.[1332] To the contrary, BD Agro merely initiated reorganization proceedings, culminating in submission and later approval of the Amended pre-pack reorganization plan. The Amended pre-pack reorganization plan was a credible and feasible plan[1333]

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1324 Counter-Memorial, ¶ 781.

1325 Counter-Memorial, ¶ 792.

1326 Counter-Memorial, ¶¶ 792-793.

1327 Memorial, ¶¶ 490-496.

1328 Hern Second ER, ¶ 64.

1329 Hern Second ER, ¶ 64.

1330 Hern Second ER, ¶ 64 (emphasis added).

1331 Hern Second ER, ¶ 90.

1332 Hern Second ER, ¶ 66.

1333 Hern Second ER, ¶¶ 73-89.

that would have—but for the Serbia's unlawful termination of the Privatization Agreement—allowed BD Agro to continue its business as a going concern.

1346. Serbia also claims that even if BD Agro was a going concern, the DCF valuation method would be inappropriate because as of 21 October 2015, BD Agro was not making any profits and earning any net positive cash flows.[1334] Serbia's argument is misplaced.

1347. As explained by Dr. Hern, the use of a DCF methodology based on the cash-flows in the Amended pre-pack reorganization plan is both reliable and appropriate.[1335] Dr. Hern has undertaken cross-checks of the cash-flows projections included in the Amended pre-pack reorganization plan and confirms "*that they are in line with historical data.*"[1336] The contemporaneous understanding of BD Agro's creditors, which included very experienced companies operating in the dairy industry in Serbia and familiar with BD Agro's business, was clearly the same. Otherwise, they would not have voted for the Amended pre-pack reorganization plan.

1348. Finally, Serbia's argument that the success of the Amended pre-pack reorganization plan was questionable because it "*was similar to two previous plans […] which were unsuccessfully implemented by the company and turned out not to be profitable*"[1337] is both incorrect and irrelevant.

1349. First of all, one of the "*previous plans*" referred to by Serbia—the consolidation plan prepared by WM Equity Partners[1338]—was a plan prepared based on a request from BD Agro's financing banks. BD Agro never undertook any steps to implement this plan.[1339] There was therefore no "*unsuccessful*" implementation of this plan.

1350. As for the second plan referred by Serbia—the 2006 Reorganization Plan[1340]—its success or failure is entirely irrelevant for the assessment of feasibility of the Amended pre-pack reorganization plan. The 2006 Reorganization Plan was prepared under

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1334 Counter-Memorial, ¶ 782.

1335 Hern Second ER, ¶¶ 143-145.

1336 Hern Second ER, ¶ 144.

1337 Counter-Memorial, ¶ 783.

1338 WM Equity Partners, Financial consolidation plan BD Agro ad, Dobanovci, **CE-178**.

1339 Obradović Second WS, ¶ 60; Markićević Third WS, ¶ 16.

1340 BD Agro's Business Plan for the years 2006-2011, 10 March 2006, **CE-020**.

different management, in a completely different time period and was significantly different from the Amended pre-pack reorganization plan. Furthermore, certain obstacles that appeared during the implementation of the 2006 Reorganization Plan, such as an epidemics of the blue tongue disease in Europe, were no longer present in 2015.[1341]

### b. Serbia's criticism of Dr. Hern's valuation of BD Agro's land is utterly unjustified

1351. In his first expert report, Dr. Hern concluded that BD Agro's most valuable asset is its land, which can be divided into the following three categories:

a. Construction land in Zones A, B and C;

b. Additional construction land in Dobanovci and Bečmen (the "**Other construction land**"); and

c. Agricultural land in Ašanja, Deč, Ugrinovci and Dobanovci (the "**Agricultural land**").[1342]

1352. To value the Construction land in Zones A, B and C, Dr. Hern analyzed: (*i*) evidence from comparable transactions; (*ii*) property tax evidence; (*iii*) the First and Second Confineks Valuation; (*iv*) the Mrgud Valuation; and (*v*) other contemporaneous valuation reports.[1343] Based on his analysis, Dr. Hern valued the Construction land in Zones A, B and C at between EUR 62.9 million and EUR 82.9 million.[1344]

1353. To value the Other construction land, Dr. Hern analyzed evidence from comparable transactions and the First and Second Confineks Valuations. Based on his analysis, Dr. Hern estimates the value of this land to be between EUR 1.1 million and EUR 3.4 million.[1345]

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1341 Hern Second ER, ¶¶ 85-89.

1342 Hern First ER, ¶¶ 51-56.

1343 Hern First ER, ¶¶ 62-87.

1344 Hern First ER, ¶ 94.

1345 Hern First ER, ¶¶ 102-103.

1354. Finally, to value the Agriculture land, Dr. Hern again relied on evidence from comparable transactions and the First and Second Confineks Valuations. Using these inputs, Dr. Hern estimated a value of the Agricultural land between EUR 4 million and 15.5 million.[1346]

1355. Mr. Grzesik reviewed the valuation of BD Agro's land prepared by Dr. Hern and concludes that it follows a universally recognized valuation approach and relies on extensive research:

> In reviewing Dr Hern's valuations of […] real estate assets, *I conclude that they have been thoroughly supported on the basis of extensive research* of land values in the various localities. *His valuation has been a classic comparative or market approach universally recognized as the preferred method of valuing real estate as endorsed by International Valuation Standards 2017* pages 30-36 *and European Valuation Standards 2016* pages 313-315.[1347]

1356. Mr. Grzesik therefore concludes that Dr. Hern's valuation can "*be classified as being in line with internationally recognized valuation standards […].*"[1348] The only criticism that Mr. Grzesik has with respect to Dr. Hern's valuation is that "*he has stopped just short of expressing his opinion of the single market value as postulated by the definition of market value.*"[1349]

1357. Mr. Grzesik therefore examined the evidence that Dr. Hern used in his calculations and concludes that it supports a market value of Construction land in Zones A, B and C of at least EUR 30/$m^2$. This translates into a total value of the Construction land in Zones A, B and C equal to EUR 87 million.[1350]

1358. Mr. Grzesik, same as Dr. Hern, concludes that, because it would be necessary to convert the land in the Reals Estate Register from agricultural to industrial, and pay a corresponding conversion fee, the amount of such fee should be deducted from the total value of land. After subtraction of the applicable conversion fee, Mr. Grzesik

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1346 Hern First ER, ¶ 109.

1347 Grzesik ER, ¶ 5.4.

1348 Grzesik ER, ¶ 5.11.

1349 Grzesik ER, ¶ 5.4.

1350 Grzesik ER, ¶ 6.19.

arrives at the total value of **EUR 85.3 million**, which is slightly higher than the EUR 82.9 million upper range calculated by Dr. Hern.[1351]

1359. For the sake of completeness, the Claimants note that Mr. Grzesik values the Other Construction Land owned by BD Agro at **EUR 3.6 million**, which is again slightly higher than the upper range of EUR 3.4 million provided by Dr. Hern.[1352] As for the Agriculture land owned by BD Agro, Mr. Grzesik values it at EUR 10 million, which is around in the middle of the range provided by Dr. Hern.[1353]

1360. Serbia, on the other hand, attempts without success to discredit Dr. Hern's valuation by arguing that:

a. Dr. Hern unjustifiably dismissed evidence from the JLL Valuation;[1354]

b. Dr. Hern ignores "*the evidence that actual sales of BD Agro's land were for the amounts much lower than their estimated value*;"[1355] and

c. Dr. Hern assumed a low conversion fee for conversion of agriculture land to construction land.[1356]

1361. Neither of these allegations has any merits.

1362. *First*, as explained above, the value of BD Agro calculated by JLL is in stark contrast to the evidence from comparable transactions and does not reflect the fair market value of BD Agro. Dr. Hern was therefore fully justified in dismissing the JLL Valuation.

1363. *Second*, Serbia is wrong in its claims that there is "*evidence that actual sales of BD Agro's land were for the amounts much lower than their estimated value*" and that BD Agro "*encountered difficulties when it tried to sell the land in the past.*"[1357]

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1351 Grzesik ER, ¶ 6.26.

1352 Grzesik ER, ¶ 8.3.

1353 Grzesik ER, ¶ 10.2.

1354 Counter-Memorial, ¶ 786.

1355 Counter-Memorial, ¶ 786.

1356 Counter-Memorial, ¶ 787.

1357 Counter-Memorial, ¶ 786.

1364. In its Counter-Memorial, Serbia refers to a single example of an alleged sale of land under its market value—the sale of agriculture land in Novi Bečej in 2012.[1358] This example in reality does not support Serbia's claim.

1365. BD Agro bought the land in Novi Bečej, together with a number of other assets, including a silo, a machine hall, a transformer substation and a building of cultural significance (Dundjerski castle), in 2007 for a total price of EUR 8.5 million. In 2011 and 2012, BD Agro sold only the agricultural land for a price of EUR 8.8 million. BD Agro therefore made a *profit* on the sale of the agriculture land in Novi Bečej.[1359]

1366. Serbia's erroneous reliance on the sale of land in Novi Bečej seems to be based on the value of that land provided in the 2011 consolidation plan prepared by WM Equity Partners. This plan, however, did not explain, let alone provide any evidence of, how the authors calculated the value of land in Novi Bečej.[1360]

1367. Serbia's vague reference to alleged "*difficulties*" that BD Agro supposedly encountered when it "*tried to sell the land in past*" is equally meritless. Dr. Hern confirms that he has "*seen no evidence that BD Agro had difficulties in selling land in the past.*"[1361]

1368. *Finally*, Dr. Hern used the correct conversion fee. As Dr. Hern explained in his first expert report, he has been instructed to use a fee determined as "*50 per cent of the market value of the agriculture land.*"[1362]

1369. Dr. Hern's instructions were fully in line with Serbian law. According to Article 25(1) of the Law on agricultural land applicable as of 21 October 2015, the fee for conversion of agriculture land was indeed "*equal to 50% of market value of arable agricultural land on the day of submission of the request for change of purpose of arable agricultural land.*"[1363]

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1358 Counter-Memorial, ¶ 786.

1359 Hern Second ER, ¶ 119.

1360 Hern Second ER, ¶ 118.

1361 Hern Second ER, ¶ 122.

1362 Hern First ER, ¶ 91.

1363 Law on Agricultural Land, Art. 25, **CE-179**.

1370. The higher fee—equal to 20% of the market value of development land—was paid only if the agriculture land was to be converted in "*general interest.*"[1364] Serbian Law on Public Enterprises provides several examples of areas that include activities that are in "*general interest*", such as mining and energy, management of nuclear facilities, weapon and military industry, etc.[1365] Conversion of agricultural land for the purposes of commercial development clearly does not fall into these categories.

1371. The conversion fee applicable to the conversion of agricultural land motivated by private interest—such as development of land for commercial use—was therefore equal to 50% of market value of *agricultural* land on the day of submission of the request for the change of purpose of the land.[1366]

1372. In fact, Serbia itself does not state that the conversion fee *should* be calculated as 20% of the market value of construction land. Serbia merely states that the conversion fee "*could be as high as*" 20% of the market value of construction land.[1367] Serbia is right, the conversion fee "*could be as high as*" 20% of the market value—in cases of the conversion done in "*general interest.*" That would not have been the case with respect to conversion of BD Agro's land.

1373. For the sake of completeness, the Claimants note that Serbia's allegation that "*[i]n addition, converting the land is a process that could take years*" is entirely irrelevant. As explained by Dr. Hern, the fair market value assumes that the seller would have done everything what is necessary to maximize value of the land—including potential reparcelling:

> [The] fair market value as a concept reflects the hypothetical outcome of a sales process including proper marketing, contacting relevant investors, etc. that allows a knowledgeable seller to maximise his gain. As a result, if a higher value from the land could be derived by selling the land individually in a number of pieces to maximise the value of the land being sold, this should be reflected in the fair market valuation. In a fair market valuation framework of land, there is therefore no basis to

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1364 Law on Agricultural Land, Arts. 23, 25, **CE-784**.

1365 2012 Law on Public Enterprises, Art. 2, **CE-785**; 2016 Law on Public Enterprises, Art. 2, **CE-786**.

1366 Law on Agriculture Land, Art. 25, **CE-179**.

1367 Counter-Memorial, ¶ 787.

take account of a size discount where land does not need to be sold in large chunks, as is the situation in this case.[1368]

### c. The discount rate used by Dr. Hern reflects the relevant risks based on a range of evidence from financial markets data

1374. In his first expert, Dr. Hern explained that he used the weighted average cost of capital ("**WACC**") as the discount rate for discounting BD Agro's future cash flows in his DCF valuation of the core assets.[1369] Dr. Hern also explained that his estimate of the WACC relied on a range of sources and included a justification of why he considered each of those sources to be appropriate for each of the parameters which he used in his overall estimate of the WACC.[1370]

1375. According to Serbia, the discount rate used by Dr. Hern "*seems low*" because it does not "*take into account the risk of investing in a small business in financial difficulty […]*."[1371] Serbia is, once again, wrong. As explained by Dr. Hern in his second report, the potential existence of size premia is a contentious topic in the financial literature and is wholly unsupported by the financial theory.[1372]

### d. The Claimants are unable to verify the amount of applicable taxes due to Serbia's failure to produce relevant documents

1376. As the Claimants explained in their Memorial, given that they no longer have control over BD Agro, they are unable to obtain all documents necessary for the calculation of all applicable taxes that should be reflected in the valuation of BD Agro's assets.[1373]

1377. The Claimants therefore requested the production of relevant documents by Serbia during the document production process.[1374] Serbia produced certain documents requested by the Claimants on 24 September 2019. The Claimants reviewed, with an

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1368 Hern Second ER, ¶ 124.

1369 Hern First ER, ¶ 193.

1370 Hern First ER, Appendix D.

1371 Counter-Memorial, ¶ 784.

1372 Hern Second ER, ¶¶ 152-153.

1373 Memorial, ¶ 554.

1374 Procedural Order No. 4, Annex A, Request No. 76 ("*Tax balances (in Serbian poreski bilansi) of BD Agro for the period between years 2005 and 2015 (including).*").

assistance of Serbian auditors, the documents produced by Serbia and discovered that a number of documents were missing.[1375]

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[1375] The following documents were missing in the pdf produced by Serbia:

**For year 2005**:

1. Form OA – Calculation of depreciation of fixed assets for 2005 for assets in depreciation groups II through V (*Obračun amortizacije stalnih sredstava za 2005. godinu za sredstva iz II do V amortizacione grupe*)
2. Form OA I – Calculation of depreciation of fixed assets for 2005 for assets in depreciation group I (*Obračun amortizacije stalnih sredstava za 2005. godinu za sredstva iz I amortizacione grupe*)
3. Form PK – Tax credit for investments in fixed assets for the period 1 January – 31 December 2005 (*Poreski kredit za ulaganja u osnovna sredstva za period od 01.01. – 31.12.2005. godine*)
4. Form PK 1 – Tax credit for investments in fixed assets in specific activities for the period 1 January – 31 December 2005 (*Poreski kredit za ulaganja u osnovna sredstva u određene delatnosti za period od 01.01. – 31.12.2005. godine*)

**For year 2006**:

1. Form OA – Calculation of depreciation of fixed assets for 2006 for assets in depreciation groups II through V (*Obračun amortizacije stalnih sredstava za 2006. godinu za sredstva iz II do V amortizacione grupe*)
2. Form OA I – Calculation of depreciation of fixed assets for 2006 for assets in depreciation group I (*Obračun amortizacije stalnih sredstava za 2006. godinu za sredstva iz I amortizacione grupe*)

**For year 2007**:

1. Form PK – Tax credit for investments in fixed assets for the period 1 January – 31 December 2007 (*Poreski kredit za ulaganja u osnovna sredstva za period od 01.01. – 31.12.2007. godine*)
2. Form PK 1 – Tax credit for investments in fixed assets in specific activities for the period 1 January – 31 December 2007 (*Poreski kredit za ulaganja u osnovna sredstva u određene delatnosti za period od 01.01. – 31.12.2007. godine*)

**For year 2008**:

1. Form PK – Tax credit for investments in fixed assets for the period 1 January – 31 December 2008 (*Poreski kredit za ulaganja u osnovna sredstva za period od 01.01. – 31.12.2008. godine*)
2. Form PK 1 – Tax credit for investments in fixed assets in specific activities for the period 1 January – 31 December 2008 (*Poreski kredit za ulaganja u osnovna sredstva u određene delatnosti za period od 01.01. – 31.12.2008. godine*)

**For year 2013**:

1. Form PB 1 – Tax balance of the tax payer of corporate income tax for the period 1 January – 31 December 2013 (*Poreski bilans obveznika poreza na dobit pravnih lica za period od 01.01.-31.12.2013. godine*) - Serbia only sent first page of this document.

**For year 2015**:

1. Form OA I – Calculation of depreciation of fixed assets for 2015 for assets in depreciation group I (*Obračun amortizacije stalnih sredstava za 2015. godinu za sredstva iz I amortizacione grupe*)
2. Form PK – Tax credit for investments in fixed assets for the period 1 January – 31 December 2015 (*Poreski kredit za ulaganja u osnovna sredstva za period od 01.01. – 31.12.2015. godine*)
3. Form PK 1 – Tax credit for investments in fixed assets in specific activities for the period 1 January – 31 December 2015 (*Poreski kredit za ulaganja u osnovna sredstva u određene delatnosti za period od 01.01. – 31.12.2015. godine*)

1378. The Claimants trust that Serbia diligently searched its archives and that the documents are missing simply because they are unavailable.

1379. Without the missing documents, the Claimants remain unable to calculate applicable taxes that should be reflected in the valuation of BD Agro's assets. The Claimants therefore continue to rely on the value of deferred tax liabilities reported in BD Agro's 2015 balance sheet as a proxy for the applicable tax obligations.

## E. Mr. Cowan's valuation of BD Agro is fundamentally flawed

1380. As explained above, Serbia relies on a valuation of BD Agro prepared by Mr. Sandy Cowan from Grant Thornton. Mr. Cowan provides four different valuations of BD Agro:

a. "maximum" valuation of EUR 4.4 million based on the net asset value reported in the February 2016 Confineks report, adjusted downwards for a distressed sale of assets and other factors;

b. "alternative" land valuation of zero based on the 2015 JLL Report;

c. "alternative" valuation of EUR 4.4 million based on stock market data; and

d. "alternative" valuation of zero based on the recent auction of BD Agro's assets.[1376]

1381. As Dr. Hern explains in his second expert report, none of these valuations present a correct valuation of BD Agro.[1377]

1382. First of all, Mr. Cowan's "*maximum valuation*" is fundamentally flawed because it applies a number of downward adjustments to the starting value (being the value of assets in the Second Confineks Report) to reflect a distressed sale of assets in his "*bankruptcy scenario*". As already explained above, such approach is entirely inappropriate because: (*i*) the fair market value by definition excludes distressed sale;

[1376] Hern Second ER, ¶ 165.

[1377] Hern Second ER, ¶ 166.

and (*ii*) as of the expropriation date, BD Agro was a going concern and not a bankrupt company.[1378]

1383. If this was not enough, Mr. Cowan also makes a number of other mistakes in his calculation of the alleged "*maximum*" value.[1379]

1384. Mr. Cowan's "*alternative*" valuations fare no better—as explained by Dr. Hern, neither of these valuations reflect the fair market value of BD Agro's equity.[1380]

1385. First of all, the Claimants already explained that the JLL Valuation should be dismissed because it does not refer to any relevant evidence to support its conclusions on the value of BD Agro.

1386. As for the valuation of BD Agro based on the stock market data, Dr. Hern explains that it is inappropriate because:

a. the Serbian stock market is highly illiquid and any share trading information has to be treated with extreme caution;

b. share trading for BD Agro stock had been very infrequent in the past with a very small amount of shares traded and there is no reason to think that such very small transactions would be indicative of whole company valuations; and

c. the share price that Mr. Cowan refers to from the 2015 accounts relates to the last trade of BD Agro's stock, which occurred in 2012 and is therefore dated relative to the valuation date 21 October 2015, and does not reflect the situation of the business as of the date of expropriation.[1381]

1387. Finally, there are two fundamental issues related to Mr. Cowan's valuation based on the sale of BD Agro in the bankruptcy auction on 9 April 2019.

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1378 Hern Second ER, ¶ 168.

1379 Hern Second ER, ¶¶ 170-203.

1380 Hern Second ER, ¶ 205.

1381 Hern Second ER, ¶¶ 207-219.

1388. First, the sale reflected a distressed sale in the context of BD Agro's bankruptcy proceedings and therefore is inconsistent with the fair market value definition.[1382]

1389. Moreover, the sale of BD Agro was conducted in a non-transparent and flawed manner that in no way could have led to BD Agro being sold for its true market value. Indeed, as concluded by Mr. Grzesik, the "*sale process of the BD Agro property carried out under the bankruptcy proceedings could not have been more different than [a] proper marketing process […] and could not have been expected to result in securing anything near market value of the property.*"

1390. The shortcomings of the actual marketing process in the bankruptcy sale of BD Agro are summarized in the below table:[1383]

[1382] Hern Second ER, ¶ 220.

[1383] Grzesik ER, ¶ 16.22.

| Key elements | Actual sale in bankruptcy | Proper marketing | Did sale in bankruptcy constitute proper marketing? |
|---|---|---|---|
| **Selling team** | Trustee | Expert property agents/negotiators, market analysts, financial analysts, graphic artists | No |
| **Time period from announcement to sale** | 32 days | At least 12 months | No |
| **Due diligence period** | Up to 26 days (from date or announcement to deadline for making required deposit) | Up to 3 months | No |
| **Selling agents** | None | One or two international agencies | No |
| **Sales documentation provided to interested parties relating to property** | Valuation of property; relevant extracts from cadastre (mostly outdated); list of property excluded from sale; correspondence between BD Agro and various institutions regarding legal status of land, all in Serbian | Substantive memorandum outlining all essential details of the property prepared by professional selling agents in English | No |
| **Involvement of banks** | None | Put domestic and international banks on notice of sale | No |
| **Marketing jurisdictions** | Serbia only | Serbia and International | No |
| **Method of marketing** | Advertisement in two Serbian newspapers on one day, in Serbian Cyrillic | Domestic and International marketing through web pages of selling agents in English, property journals and dedicated property web sites | No |
| **Targeting of potential buyers** | None | Delivery of flyer to targeted potential buyers setting out basic information of property | No |

## F. Interest

### 1. Interest shall be calculated pursuant to Serbian law

1391. As the Claimants explained in the Memorial, the interest due on the principal amount of their claim 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

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.[1384]

1392. Serbia disputes the Claimants' calculation of interest pursuant to Serbian law, arguing *first*, that Serbian law falls out of the scope of applicable law in the present arbitration;[1385] *second*, that the MFN clause—invoked by Claimants to import a preservation of rights clause from the Qatar-Serbia BIT—is limited in scope;[1386] and *third*, that the preservation of rights clauses do not extend to the issue of compensation for treaty violations.[1387] As explained below, Serbia's case fails on all three grounds.

1393. *First*, Serbia refers to Article 33(1) of the Canada-Serbia BIT and Article 9(4) of the Cyprus-Serbia BIT, asserting that these provisions require the Tribunal to apply only international law.[1388] This position is untenable. This Tribunal, like any other investment arbitration tribunal, will need to apply the host state's domestic law—here Serbian law—in order to decide the case. Nothing in either Treaty prevents the Tribunal from doing so. Therefore, nothing in Article 33(1) of the Canada-Serbia BIT and Article 9(4) of the Cyprus-Serbia BIT prevents the Tribunal from applying the Serbian interest rate.

1394. *Second*, Serbia attempts to prevent Claimants from relying on the MFN clause in the Canada-Serbia BIT, by fabricating purported limitations to the scope of its application.[1389]

1395. As explained above, Serbia completely ignores the abundant case law providing for the importation of additional substantive standards of treatment through an MFN clause.[1390] In support of its erroneous proposition, Serbia cites a sole legal authority of *Hochtief v.*

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1384 Memorial, ¶ 497.

1385 Counter-Memorial, ¶¶ 821-822.

1386 Counter-Memorial, ¶¶ 823-824.

1387 Counter-Memorial, ¶ 831.

1388 Counter-Memorial, ¶¶ 819-820.

1389 Counter-Memorial, ¶¶ 823-824.

1390 *E.g. 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**.

*Argentina*.[1391] In this case, the tribunal, however, dealt with the investor's attempt to bypass the requirement of 18-month litigation before local courts, not substantive provisions of a BIT.[1392] Also, none of the parties disputed the fact that the MFN clause could import substantive standards of investment protection from other BITs.[1393] In this regard, the findings in *Hochtief* rather undermine than support Serbia's position.

1396. Further, with reference to the phrase "*in like circumstances*" in Article 5 of the Canada-Serbia BIT, Serbia implies that the MFN clause is applicable only where Claimants can point to a specific example of an investor of third State whose treatment was allegedly more favorable in comparison.[1394]

1397. Serbia's erroneous reading of the MFN clause in Article 5 of the Canada-Serbia BIT is based on *Ickale v. Turkmenistan* where the tribunal adopted a highly restrictive interpretation of a similar clause in the Turkey-Turkmenistan BIT, prohibiting the importation of additional substantive standards of protection from other BITs due to the absence of any proof of *de facto* discrimination between the claimant and investors of third States "*in similar situations*".[1395]

1398. The reasoning of the tribunal in *Ickale v. Turkmenistan*, however, completely departs from the well-established opinion that phrases such as "*in like circumstances*" or "*in similar situations*" in MFN clauses have qualitatively different meaning depending on the purpose for which such provisions are invoked. While claims for violations of MFN clauses as substantive standards of protection require a detailed factual analysis of "*like circumstances*" of the claimant and a specific investor of a third state, the use of an MFN clause to import more beneficial provisions from other BITs only requires the investor to show the existence of such provisions.[1396]

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1391 Counter-Memorial, ¶ 823.

1392 *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, ¶ 19, **RLA-88**.

1393 *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, ¶ 20 **RLA-88**.

1394 Counter-Memorial, ¶ 824.

1395 *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, ¶¶ 328-329**, RLA-129**.

1396 *E.g. 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**; *ATA Construction, Industrial and*

1399. This distinction was emphasized in *Bayindir v. Pakistan* where the claimant relied on the MFN clause in Pakistan-Turkey BIT—referring to "*like circumstances*" of investors—both to import a provision on fair and equitable treatment from other BITs concluded by Pakistan and, *additionally*, to raise a claim on the breach of the MFN clause as a standard of substantive protection.[1397]

1400. The findings in *Bayindir v. Pakistan* are fully applicable to the case at hand. As the Claimants already made clear in this submission, they do not invoke the MFN clause in Article 5 of the Canada-Serbia BIT as a basis for a treaty violation, but merely to import a preservation of rights clause from Article 13(1) of the Qatar-Serbia BIT. Serbia's restrictive interpretation of the MFN is inapposite when the MFN clause is used for such a purpose.

1401. *Third*, in the last attempt to salvage its case, Serbia argues that even if the Claimants were allowed to rely on the preservation of rights clause in the Qatar-Serbia BIT, such provision is limited to the application of more favorable rules under Serbian law, which are equally enshrined in the Treaties.[1398]

1402. Indeed, this is precisely what the Claimants are seeking to do—to compare the interest rates set out in Article 10(3) of the Canada-Serbia BIT and Article 5(1) of the Cyprus-Serbia BIT on one hand and the interest rates pursuant to Serbian law on the other hand, and apply those which are more favorable to the calculation of Claimants' damages.

1403. Illogically, Serbia objects to such an interpretation, asserting that the Treaties regulate only compensation in case of lawful expropriation but not compensation for the purposes of treaty breaches, which is governed by general international law.[1399] In other words, under Serbia's approach, the Claimants would be entitled to ask for the 8% interest rate pursuant to Serbian law for a lawful expropriation, but would be confined

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*Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, footnote 16, **CLA-077**.

1397 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 148-149, ¶ 412, **RLA-84**.

1398 Counter-Memorial, ¶ 823.

1399 Counter-Memorial, ¶ 831.

to the less favorable interest rate under Article 38 of the ILC Articles[1400] for an unlawful expropriation. This conclusion is absurd and deprives the preservation of rights clauses of any effective meaning.

1404. Based on all the above reasons, the interest rate shall be calculated pursuant to Serbian law. The interest rate applicable in the period since 21 October 2015 is set out in the following table:[1401]

| Start date | End date | Applicable interest rate |
|---|---|---|
| 21 October 2015 | 15 March 2016 | 8.05% |
| 16 March 2016 | 4 October 2019 | 8% |

### 2. Alternatively, the Claimants are entitled to interest equal to 6-month average EURIBOR + 2%, compounded semi-annually

1405. As the Claimants explained in the Memorial, 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.[1402]

1406. Serbia notes in its Counter-Memorial that the Claimants make this alternative claim,[1403] but provides no additional response or comments. The Claimants therefore understand that Serbia does not dispute that if the Tribunal finds that the Claimants cannot claim interest calculated pursuant to Serbian law, the Claimants should be awarded interest calculated at an interest rate equal to 6-month average EURIBOR + 2%, compounded semi-annually.

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1400 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Art. 38(1), **CLA-24**.

1401 Hern First ER, ¶ 172.

1402 Memorial, ¶¶ 508-512.

1403 Counter-Memorial, 817.

## G. The value of the Claimants' interest in BD Agro's equity

1407. To calculate the value of the interest of the 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. The value of Sembi's interest in BD Agro's equity

1408. As the Claimants explained in their Memorial, 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 transfer the Beneficially Owned Shares, or any proceeds from their potential sale, to Sembi or its nominee, free of charge.

1409. 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.[1404] This is also the value of Sembi's loss as of that date.

1410. 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 4 October 2019 amounts to EUR 81 million.[1405]

### 2. Value of the Canadian Claimants' interest in BD Agro's equity

1411. 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, Mr. William Archibald Rand, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand in Sembi and thus, indirectly, the Beneficially Owned Shares.

1412. The claims for damages brought by Rand Investments, Mr. William Archibald Rand, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand on the basis of their interest in the Beneficially Owned Shares are brought in the

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1404 Hern First ER, ¶ 166.

1405 Hern Second ER, ¶ 41.

alternative to Sembi's claim. They need not be considered by the Tribunal if it grants Sembi's claim.

### a. The value of Mr. Rand's Indirect Shareholding

1413. As the Claimants explained in the Memorial, 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.[1406]

1414. Serbia, on the other hand, continues to claim that the bankruptcy was caused by the fact that Mr. Markićević did not comply with the decision of the Commercial Court ordering BD Agro to make certain amendments to the Amended pre-pack reorganization plan.[1407]

1415. As the Claimants already explained, Serbia's claims are incorrect. Mr. Markićević was legally obliged[1408] to seek approval of the Privatization Agency before submitting a new version of the pre-pack reorganization plan.

1416. Furthermore, the Amended pre-pack reorganization plan envisaged additional financing to be provided by Mr. Rand.[1409] After the termination of the Privatization Agreement, Mr. Rand was no longer willing to secure such financing[1410] and no other source of external financing was secured.[1411] Mr. Markićević therefore could not submit a new version of the pre-pack reorganization plan without obtaining information from the Privatization Agency as to how it intended to replace the funds that were to be provided by Mr. Rand.

1417. On 26 October 2015, Mr. Markićević therefore sent a letter to the Privatization Agency, explaining that the Commercial Court had ordered BD Agro to act in accordance with

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1406 Memorial, ¶ 565.

1407 Counter-Memorial, ¶ 803.

1408 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.

1409 Amended pre-pack reorganization plan, pp. 21, 24, 26, **CE-101**.

1410 Email from W. Rand to I. Markićević, 4 November 2015, **CE-569**.

1411 Markićević Third WS, ¶ 118.

instructions from the Commercial Appellate Court and set a 15 days deadline.[1412] The Privatization Agency never responded, and the 15 days deadline for BD Agro's compliance with the court order expired. As a result of the expiry of the period set by the court for correction of the Amended pre-pack reorganization plan, the first instance court rejected the Amended pre-pack reorganization.[1413]

1418. A few months after the Privatization Agency torpedoed the Amended pre-pack reorganization plan—and less than a year after the expropriation of the Beneficially Owned Shares—BD Agro was declared bankrupt.[1414]

1419. It is therefore absolutely clear that Serbia is to be blamed for the bankruptcy of BD Agro. Serbia's attempt to put the blame on Mr. Markićević is just a textbook example of a Government trying to find a scapegoat for its own failures.

1420. Serbia's argument that "*[m]oreover, the company was insolvent for almost 3 years before the bankruptcy proceedings were initiated […] which indicates that MDH doo's shares were deprived of most of their value much earlier*" is equally incorrect.

1421. As explained above, contemporaneous valuations—namely the Mrgud valuation and the Confineks valuations—valued BD Agro between EUR 56.4 million and EUR 71 million. It is therefore clear that Mr. Rand's 3.9% indirect shareholding was not "*deprived of most of their value much earlier*," but only after the expropriation of the Beneficially Owned Shares.

1422. 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 2.7 million as of 21 October 2015.[1415] Uplifted to 4 October 2019, the value of Mr. Rand's Indirect Shareholding equals EUR 3.6 million.[1416]

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1412 Letter from I. Markićević to the Privatization Agency dated 26 October 2015, **CE-360**. *See also* Markićević Third WS, ¶ 120.

1413 Decision of the Commercial Court in Belgrade dated 8 December 2015, p. 1, **CE-361**. *See also* Markićević Third WS, ¶ 121.

1414 Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro, 30 August 2016, **CE-109**.

1415 Hern First ER, ¶ 169.

1416 Hern Second ER, ¶ 41.

### b. The value of Rand Investments' indirect interest in BD Agro's equity

1423. 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.

1424. As the Claimants explained in the Memorial, 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 of the preferable shares held by Rand Investments, which was EUR 11,201,890 as of 21 October 2015.[1417] Uplifted to 4 October 2019, the value of Rand Investments' indirect interest in BD Agro's equity equals to EUR 14.7 million.[1418]

### c. The value of Mr. Rand's indirect interest in BD Agro's equity

1425. 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.

1426. In case that the Tribunal decides—as it should—that it has jurisdiction over the claims brought by both Mr. Rand and Rand Investments, the value of Rand Investments' indirect interest should only be awarded to Rand Investments.

1427. However, if the Tribunal decides that it only has jurisdiction over claims brought by Mr. Rand, and not claims brought by Rand Investments, the value of Rand Investments' indirect interest in BD Agro's equity should be awarded to Mr. Rand.

### d. The 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

1428. Sembi's second owner is the Ahola Family Trust, which owns 1000 ordinary shares with a nominal value of EUR 1.[1419] Under Sembi's distribution rules, there is no restriction on payment of dividends or other form of distribution on the ordinary shares.[1420]

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1417 Memorial, ¶ 572.

1418 Hern Second ER, ¶ 41.

1419 Certificate of Shareholders of Sembi, 8 June 2017, **CE-006**.

1420 Resolution of the sole shareholder, 25 June 2008, Art. 2.2, **CE-189**.

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.

1429. As of 21 October 2015, 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 of less the EUR 11,201,890 redemption price owed to Rand Investments. 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 Agro's equity, was approximately EUR 50.3 million.

1430. 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.[1421]

1431. This amount, however, again needs to be uplifted to its present value. Dr. Hern calculates the present value at EUR 22 million.[1422]

#### e. Tax gross-up for Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand

1432. 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.

1433. With respect to Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand, this is because no Canadian tax would have been due if they had received distribution of capital from the Ahola Family Trust.[1423]

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1421 Hern First ER, ¶ 168.

1422 Hern Second ER, ¶ 41.

1423 Memorial, ¶ 581.

1434. 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%

1435. 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.[1424]

1436. Serbia does not dispute the Claimant's interpretation of Canadian tax law or calculation of the tax gross-up.[1425] Serbia's only response is that "*the whole structure Canadian-Claimants – Ahola Family Trust (Bermuda) – Sembi (Cyprus) was set up in order to avoid paying Canadian taxes*" and that this structure is allegedly "*unworthy of support and legitimization.*"[1426] Serbia's argument is, yet again, completely off.

1437. First of all, Serbia itself does not claim that the structure that the Claimants have in place would be illegal.[1427] Indeed, it is not. There is nothing wrong with creating an ownership structure that allows an owner to minimize its tax obligations. This was expressly confirmed by the Supreme Court of Canada:

> This court has made it clear in more recent decisions that, absent a specific provision to the contrary, is not the court's role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way… Unless the Act provides otherwise, a taxpayer is entitled to be taxed on what it actually did, not based on what it could have done and certainly not based on what a less sophisticated taxpayer might have done.[1428]

1438. The position of the Supreme Court of Canada followed the familiar principle set down by the House of Lords in *Inland Revenue Commissioners v. Duke of Westminster,* which stated that:

> Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.

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1424 Memorial, ¶ 591.

1425 Counter-Memorial, ¶¶ 807-810.

1426 Counter-Memorial, ¶ 809.

1427 Counter-Memorial, ¶ 809.

1428. *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622, ¶ 45, **CE-787**.

> If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or is fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.[1429]

1439. The principle espoused in the Duke of Westminster case is a principle that continues to resonate in Canadian tax law. In the case of *Farm Credit Canada v. Canada*, the Federal Court of Appeal stated:

> An organization is entitled to plan its affairs in response to the law as it stands (Inland Revenue Commissioners versus Duke of Westminster (1936) A.C.1). If an organization accurately reports what business it has undertaken during the year, it will be taxed accordingly. If that regime allows for organizations to plan their affairs in a way that avoids paying taxes, that is a problem for Parliament to address.[1430]

1440. In short, a structure to avoid taxes is not, for Canadian tax purposes, based on a free floating standard of morality but on whether the structure complies with the applicable statutes and is not a misuse or abuse of those provisions. Structuring by the Claimants of their beneficial ownership complies with Canadian law and should not be considered a misuse or abuse of the law.

1441. Finally, Serbia asserts that the claim for gross-up is based on a scenario that assumes the sale of BD Agro, which according to Serbia is "*absolutely unrealistic*", because "*there was no realistic prospect of selling BD Agro at the price sought by Claimants or at any price that would result in their net cash gain.*"[1431] Serbia's argument is misplaced.

1442. The fair market valuations does not require a specific sale prospect. To the contrary, it *assumes* there is a willing seller and a willing buyer. It is therefore entirely irrelevant whether, as of 21 October 2015, any sale prospects existed.

### 3. The loss resulting from Mr. Rand's receivables against BD Agro being rendered worthless

1443. 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

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1429 *IRC v Duke of Westminster* [1936] AC1 (HL), pp. 19-20, **CE-788**.

1430. *Farm Credit Canada v. R.*, [2017] FCA 244, ¶ 42, **CE-789**.

1431 Counter-Memorial, ¶ 810.

the amount of EUR 2,177,903 and a short-term loan to BD Agro in the amount of EUR 219,000.[1432]

1444. In their Memorial, the Claimants explained that, due to the well-known problems with bankruptcy proceedings in Serbia, the BD Agro bankruptcy proceedings appear to be stalled, with no realistic chance that Mr. Rand's claims would ever be satisfied therein.[1433] Since the submission of the Memorial, the bankruptcy moved forward and the trustee organized a sale of BD Agro, including approximately 70% of its land. As explained above, due to serious flaws in the sale process, BD Agro was sold deeply under its real value—for approximately EUR 13 million. As also explained above, this amount is almost exactly sufficient to settle the secured receivable of Agrounija—a company that is one of the three members of BD Agro's board of creditors and that itself bought BD Agro in the auction. Given that the secured receivables are settled prior to the unsecured ones, it is clear that the proceeds from the sale of BD Agro will be distributed only to the secured creditors.

1445. Serbia's allegation that the bankruptcy proceedings are not stalled and that Mr. Rand "*should be directed to satisfy its claim in the bankruptcy proceedings*" from the proceeds of the sale of the company is therefore, at best, disingenuous.[1434] Serbia knows very well that Mr. Rand's receivables will not be satisfied in the bankruptcy proceedings.

1446. Serbia's argument that Mr. Rand's receivables were "*deprived of their value much earlier, as they remained unpaid for seven years before the bankruptcy*"[1435] is equally wrong. It is quite understandable that Mr. Rand did not want to enforce receivables against BD Agro—his own company—during the time it was going through restructuring. This, however, in no way mean that he would waive the receivables, or—as Serbia claims—that these receivables have lost their value.

1447. To the contrary, it was only as a result of the expropriation of the Beneficially Owned Shares and resulting bankruptcy of BD Agro that rendered the shares worthless.

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1432 Memorial, ¶ 592.

1433 Memorial, ¶ 593.

1434 Counter-Memorial, ¶ 813.

1435 Counter-Memorial, ¶ 814.

1448. Mr. Rand thus 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 4 October 2019, this amount equals approximately EUR 3.2 million.

1449. 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.

## VII. REQUEST FOR RELIEF

1450. The Claimants request that the Tribunal issues 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 81 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 14.7 million;

(ii) Ms. Kathleen Elizabeth Rand of no less than EUR 22 million, plus a gross-up of 33.2% on that amount;

(iii) Ms. Allison Ruth Rand of no less than EUR 22 million, plus a gross-up of 33.2% on that amount; and

(iv) Mr. Robert Harry Leander Rand of no less than EUR 22 million, plus a gross-up of 33.2% on that amount;

e. in the alternative to request d.(i) above, ordering Serbia to pay compensation to Mr. William Rand of no less than EUR 14.7 million.

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

(i) no less than EUR 3.6 million for loss of value of Mr. Rand's Indirect Shareholding; and

(ii) no less than EUR 3.2 million for loss of value of Mr. Rand's receivables against BD Agro;

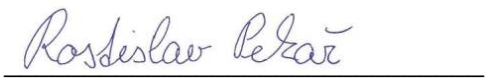
g. ordering Serbia to pay interest on any amounts awarded at the rate of Serbian statutory default interest rate (currently 8%) from 4 October 2019 until payment in full;

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

i. ordering such other relief as the Tribunal may deem appropriate in the circumstances.

1451. 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



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