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

CLAIMANTS' FIRST POST-HEARING BRIEF

27 September 2021

SQUIRE PATTON BOGGS

nstlaw/Stankovic & Partners

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I. INTRODUCTION

1. The hearing in The Hague ("**Hearing**")[1] confirmed beyond any doubt what the Claimants have argued from the beginning: Serbia unlawfully expropriated BD Agro in bad faith, in complete disregard for Claimants' due process rights and in breach of both Serbian and public international law.[2]

2. As the undisputed testimony at the Hearing made clear, upon its privatization in 2005, BD Agro was in a dilapidated state. Most of its approximately 1,000 cows had leucosis. The approximately 350 employees had not been paid wages for several years and did not have basic clothing. And the facilities were flooded and lacked heat throughout the long winter.

3. Everything changed after the Claimants made their investment in Serbia. Over the course of the next five years, the farm—including its buildings, fields, employee facilities, machinery, and other equipment—were transformed into one of the largest, most successful dairy farms in the Balkans. The leucosis cows were culled in compliance with an order of the Serbian Government and replaced by a superior breed imported from Canada; the animals were healthy, free moving, and the most productive in the country.

4. The success of BD Agro was publicly recognized. The farm received numerous awards, and the Prime Minister of Serbia, the Ministers of Economy and Agriculture and a delegation of senior parliamentary officials from Canada all visited the farm personally in recognition of Claimants' investment as a model example of the privatization process.

5. The Hearing also confirmed that, despite this operational excellence, the most valuable part of BD Agro was the land it owned in the vicinity of the City of Belgrade. The land had significant value independent of the farm because of its close proximity to the international airport and the E70 highway connecting Serbia (and thus also Bulgaria, Northern Macedonia, Greece and Turkey) to Croatia, Slovenia, Austria, Italy and

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[1] Capitalized terms that are not defined in this submission have the same meaning as in the Claimants' previous submissions.

[2] This Post-Hearing Brief focuses on evidence adduced during the Hearing. For the avoidance of doubt, Claimants do not waive any previous positions taken in these proceedings.

Western Europe. Hundreds of hectares of BD Agro's fields and pastures were re-zoned for commercial and industrial use, dramatically increasing their value.[3]

6. With equal force, the Hearing showed that Serbia manufactured a pretext to expropriate the Claimants' investment. Serbia seized on an alleged minor instance of non-compliance (which immediately became moot when the full purchase price was paid in 2011) as the basis for taking the strongest possible action against the Claimants—complete expropriation of their assets. Although the reasons for Serbia's unlawful actions are unknown, the evidence suggests that a local tycoon wished to acquire the valuable land and, to do so, instrumentalized a few employees, nostalgic of socialist-times overemployment and collective ownership, to lodge complaints with the Privatization Agency ("**Agency**") and the Ombudsman, which ultimately led to Serbia expropriating the Claimants' investment.

7. This unlawful seizure was a tragedy for the Serbian agricultural industry. Within a year under the Agency's control, BD Agro was declared bankrupt and abandoned all of its agricultural operations. All employees lost their jobs and livelihoods. Several years later, all of BD Agro's land ended up in the hands of that same Serbian tycoon for a fraction of the EUR 56.4 million net asset value that the Agency *itself* determined BD Agro was worth when it expropriated the investment in 2015.[4]

8. The Hearing also showed that the Agency's actions were divorced from any lawful justification. Under cross-examination, Serbia's own witnesses, Ms. Radović-Janković and Ms. Vučković, admitted that the culling of cows (ordered by Serbia) represented a case of *force majeure* and thus was not a breach of the Privatization Agreement.[5] Even more damning, Serbia's witnesses admitted that the Agency's trusted outside counsel—the law firm Radović & Ratković—had informed the Agency that its actions were unlawful and that there was no breach of Article 5.3.3. Despite these facts, the Agency inexplicably continued to demand evidence of compliance with Article 5.3.3 until the moment it terminated the Privatization Agreement.

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3 Memorial, ¶ 533; Reply, ¶ 1336.

4 *E.g.* Reply, ¶¶ 1306-1321.

5 Tr., Day 3, 150:1-6 (Radović-Janković); Tr., Day 4, 56:8-11 (Vučković).

9. Serbia's claim related to an alleged breach of Article 5.3.4 of the Privatization Agreement fared no better at the Hearing. According to Serbia, this provision was breached because BD Agro used a part of the funds acquired in 2010 under a loan secured by pledges over its land to repay a debt assumed from Crveni Signal and provide a loan to Inex. The Hearing showed this alleged breach to be baseless. Whether or not Article 5.3.4 was breached at the end of 2010, it could not justify termination of the Privatization Agreement in 2015. As the Hearing confirmed, if there even was a breach, it was only a minor breach of an accessary obligation. Furthermore, it was not listed among the grounds for termination under Article 7.1 of the Privatization Agreement. This alone means that Serbia could not terminate the Privatization Agreement on that basis.

10. In any event, BD Agro had repaid the 2010 loan secured by the allegedly non-compliant pledges on BD Agro's land by 2012. The pledges remained registered after the repayment only because the state-run Nova Agrobanka arbitrarily refused to issue a confirmation necessary for their deletion.[6] Thus, as there was no longer an underlying loan, Nova Agrobanka could not exercise the pledges and, as such, they were not detrimental to BD Agro (or Serbia) in any manner when Serbia decided to terminate the Privatization Agreement and seize the Beneficially Owned Shares in 2015.

11. The remainder of the purchase price of BD Agro was paid in 2011—and all obligations under Article 5.3.4 thereby expired. As the Hearing made clear, Serbia could not lawfully terminate the Privatization Agreement in 2015 for allegedly non-compliant pledges when, and this is undisputed, BD Agro had been free to pledge all of its land without any limitations since 2011.

12. Indeed, Serbia's witnesses were utterly unable to answer the President's questions about how the termination furthered the goals of the privatization process. That is not surprising. Serbia's measures not only failed to *foster* the goals of privatization, it directly *undermined* them. In the end, the Agency's own advisors confirmed in 2013 that such termination was not *legally* justified, and the Ministry of Economy stated in 2012 that such termination was not *economically* justified.

13. Serbia has had a fair opportunity to defend its actions. The evidence is now overwhelming that it has failed to do so. The Tribunal should have little hesitation to

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6 Tr., Day 3, 46:1-13 (Markićević).

find Serbia liable for its breaches of the Canada-Serbia BIT and Serbia-Cyprus BIT ("**Treaties**" or individually "**Treaty**") and to award Claimants the damages they suffered as a result of Serbia's violations.

II. THE TRIBUNAL HAS JURISDICTION OVER THE ENTIRETY OF THE CLAIMANTS' CLAIMS

A. The Tribunal has jurisdiction *ratione materiae* under the Canada-Serbia BIT and Serbia-Cyprus BIT

14. The Claimants' investments are protected in three distinct capacities: (*i*) their *beneficial ownership* over the Beneficially Owned Shares, (*ii*) their *control* over BD Agro, and (*iii*) their interest in Sembi's rights under the Sembi Agreement.[7] Even one would be sufficient to trigger the protections of the BITs. As shown below, the Hearing confirmed that all three of them are present here.

15. At the time of Serbia's expropriation of BD Agro, the Claimants' investment in BD Agro derived from the Sembi Agreement. Serbia now alleges that the Sembi Agreement was void *ab initio* under Cypriot law. Serbia only raised this argument for the first time in its Rejoinder—*two years* after this arbitration commenced.[8] In support of this belated position, Serbia put forward a new Cypriot law expert, Professor Emilianides, with its Rejoinder. (Apparently, the Cyprus expert that Serbia had already introduced with its Statement of Defense, Dr. Papadopoulos, was unwilling to support this new position.)

16. Two introductory remarks bear mention. First, by failing to raise this jurisdictional objection in its Statement of Defense, Serbia waived it under Article 41 of the ICSID Arbitration Rules. Second, it is now undisputed that Professor Emilianides based his report on the wrong law.[9] The Claimants' Cypriot law expert, Mr. Georgiades, pointed out this error,[10] and Professor Emilianides was forced to admit his mistake at the Hearing.[11]

17. These are the dubious beginnings of Serbia's "voidness" argument under Cypriot law. The content of Professor Emilianides' report is even more troubling. Professor

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7 *E.g.* Rejoinder on Jurisdiction, § III.A.

8 Rejoinder, ¶¶ 660 *et seq*.

9 Agis Georgiades Third Expert Report dated 5 March 2020, ¶¶ 2.2-2.4.

10 *Ibid.*

11 Tr., Hearing on Jurisdiction and Merits, Day 6, 176:4-15 (Emilianides).

Emilianides suggests, but is careful never to outright say, that the Sembi Agreement is void *ab initio*. He instead carefully couches his report with ambivalent language, such as: "***if** assignment is precluded by statute [...], then it would be void*"[12] and that this "***may** suggest that an equitable assignment of the rights of Mr. Obradović to Sembi is not possible[…]*."[13]

18. These equivocations are of little help. The real question is: what did the Sembi Agreement purport to achieve and is such an outcome permitted under Cypriot law? To answer this question, it is imperative that, whenever one refers to an "assignment" of a right or asset under Cypriot law, one must immediately clarify whether the reference is to the assignment of: (*i*) legal title; or (*ii*) beneficial ownership. Regrettably, however, Professor Emilianides' testimony is overflowing with instances in which he is unclear.[14] The distinction, however, makes all the difference.

19. One final preliminary point. As Mr. Georgiades explained, the term "assignment" under Cypriot law denotes an agreement "*by which the two parties agreed to sell certain things. The effect of this agreement on some of these things was that they were assigned from one party to the other, so […] it is both a sale agreement and an assignment agreement*."[15] Thus, under Cypriot law, "*assignment*" includes a *sale* of rights and assets under the Sembi Agreement. Under Serbian law, the definition of the term "assignment" is much narrower: it denotes an agreement by which an assignee replaces an assignor as the subject to contractual rights and obligations.[16] The Serbian definition, unlike the Cypriot one, therefore does *not* include a sale of assets and shares and it only refers to transfer of *legal title*.

1. Cypriot law fully recognizes beneficial ownership, and there are no formalities

20. At the Hearing, Professor Emilianides admitted that the relationship between Mr. Obradović and Sembi under the Sembi Agreement is governed by Cypriot law.[17] He

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12 Achilles C. Emilianides Expert Report dated 23 January 2020, ¶ 31.

13 *Id.*, ¶ 36.

14 *See generally, id.*, § C.

15 Tr., Hearing on Jurisdiction and Merits, Day 6, 140:25-141:5 (Georgiades).

16 Law on Obligations, Art. 145, **CE-462**. *See also* Miloš Milošević Second Expert Report dated 3 October 2019, ¶ 203.

17 Tr., Hearing on Jurisdiction and Merits, Day 6, 182:3-9 (Emilianides).

further acknowledged that the "bedrock" of the Cyprus legal system is the common law,[18] and that the most authoritative text on Cyprus equity law is the English-law treatise Snell's Equity.[19]

21. Having acknowledged these common law roots, Professor Emilianides then admitted that Cyprus "*fully recognizes beneficial ownership*", that there are no formalities to assign beneficial ownership, and there is no requirement to notify the debtor.[20]

22. As Professor Emilianides admitted, where there is a beneficial-ownership arrangement, the assignee holds the asset in trust for the benefit of the assignor.[21] Further, under Cyprus law, the rights acquired by the equitable assignee (*i.e.*, Sembi) are not merely contractual in nature, but proprietary, and they can be enforced against third parties.[22]

2. The Sembi Agreement transferred rights in three distinct types of assets

23. Applying these principles, Mr. Georgiades explained that the Sembi Agreement is valid and enforceable.[23] With respect to assets that could be transferred to Sembi on the date of that agreement without the need to sign additional documents, legal title to those assets transferred immediately.[24] With respect to assets for which additional steps must be taken for legal title to transfer, the beneficial ownership to those assets transferred immediately.[25]

24. The key provision of the Sembi Agreement is Article 4, which states that Mr. Obradović transferred to Sembi "*the Contract together with any other assets whatsoever held by Mr. Obradović which are related to the business of BD Agro*":[26]

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18 *Id.*, 183:4-14 (Emilianides).

19 *Id.*, 184:17-23 (Emilianides).

20 *Id.*, 184:24-185:17 (Emilianides).

21 *Id.*, 185:3-7 (Emilianides).

22 Georgiades Third ER, ¶ 2.10.

23 Agis Georgiades Second Expert Report dated 3 October 2019, ¶¶ 3.9-3.11.

24 *Id.*, ¶ 3.12.

25 *Id.*, ¶ 3.13.

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

> 4. Mr. Obradović, in consideration for the Purchaser assuming such obligations, has agreed to transfer to the Purchaser all his right, title and interest in and to the Contract. Mr. Obradović agrees to sign any such documents and do all such things as may be necessary to effect the transfer to the Purchaser of the Contract together with any other assets whatsoever held by Mr. Obradović which are related to the business of BD Agro.

25. In addition to: (*i*) "*the Contract*" (*i.e.*, the Privatization Agreement), the other assets held by Mr. Obradović relating to BD Agro were: (*ii*) the Beneficially Owned Shares; and (*iii*) EUR 4.7 million in receivables that BD Agro owed to Mr. Obradović. We address each of the three assets in turn. For ease of organization, we start with the receivables.

a. Mr. Obradović transferred legal title to EUR 4.7 million in receivables

26. One of the assets that Mr. Obradović sold under the Sembi Agreement was legal title to USD 4.7 million in receivables, which were amounts owed by BD Agro to Mr. Obradović.[27] Serbia does not contest that legal title to the receivables transferred from Mr. Obradović to Sembi upon the signing of the Sembi Agreement.

27. This issue is important. It alone proves that the Sembi Agreement is not void. Even if some other aspect of the Sembi Agreement was incapable of being performed (as Serbia alleges), the rest of the Sembi Agreement—including the transfer of legal title to the receivables—would survive under the Cypriot doctrine of severability.[28]

28. Serbia does not contest this. Indeed, Professor Emilianides admitted that he did not even consider the issue[29] (despite Mr. Georgiades having addressed it in his expert report[30]). Consequently, this fact is undisputed—and it alone shows that the Sembi Agreement was not void *ab initio*.

b. The Beneficially Owned Shares

29. For purposes of this arbitration, the Beneficially Owned Shares are the most important asset in which beneficial ownership was transferred under the Sembi Agreement. As explained below:

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27 Rejoinder on Jurisdiction, § II.I.1.

28 Tr., Hearing on Jurisdiction and Merits, Day 6, 156:8-157:24 (Georgiades).

29 *Id.*, 201:5-10 (Emilianides).

30 Georgiades Second ER, ¶¶ 3.17, 3.23.

(i) both the terms of the Sembi Agreement and the parties' subsequent conduct confirm that they understood that Article 4 covered the Beneficially Owned Shares;

(ii) Cypriot law, not Serbian law, governs the assignment of beneficial ownership in the Beneficially Owned Shares;

(iii) Article 41ž of the Law on Privatization does not restrict the transfer of beneficial ownership in the Beneficially Owned Shares;

(iv) the transfer of beneficial ownership in the Beneficially Owned Shares was not void *ab initio* simply because future steps had to be taken to transfer legal title;

(v) Serbia's expert admitted that, even for a "personal" contract, the economic benefit can be assigned to a third party without the consent of the debtor; and

(vi) in any event, Serbian law allows for beneficial ownership as well.

i. Both the terms of the Sembi Agreement and the parties' conduct confirm that they understood that Article 4 covered the Beneficially Owned Shares

30. The language of Article 4 of the Sembi Agreement clearly covers also the Beneficially Owned Shares. The shares are indisputably "*assets whatsoever held by Mr. Obradović which are related to the business of BD Agro*".[31] This language is clear and unambiguous. As such, there is no need to look beyond the plain words of the Sembi Agreement to ascertain the parties' intent.

31. Nevertheless, if the Tribunal determines that Article 4 of the Sembi Agreement is ambiguous,[32] two facts confirm this interpretation. *First*, both parties to the Sembi Agreement have testified that, by operation of Article 4, they intended to transfer beneficial ownership in the Beneficially Owned Shares.[33] It is strange, to say the least, that despite both parties to a contract agreeing to what they intended, a third party who

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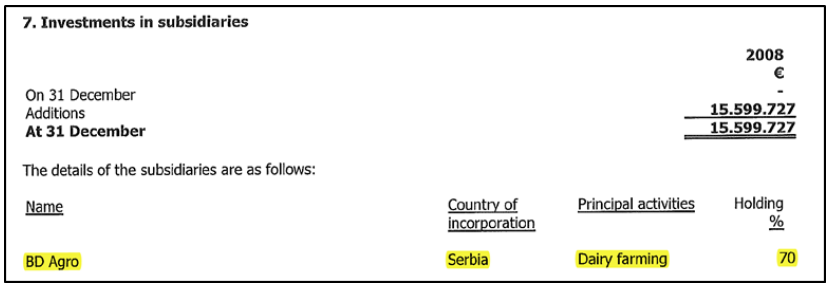
31 Agreement between Mr. Obradović and Sembi, 22 February 2008, Art. 4, **CE-029**.

32 *Ibid*.

33 *E.g.* Djura Obradović First Witness Statement dated 20 September 2017, ¶ 19; William Archibald Rand First Witness Statement dated 5 February 2018, ¶ 31.

was not a party to the contract (here Serbia) would try to argue that the parties intended something else.

32. *Second*, the parties to the Sembi Agreement engaged in subsequent conduct that confirms their stated understanding of Article 4. Immediately after signing the Sembi Agreement, Sembi became involved in the affairs of BD Agro and discussed those affairs at its Board of Directors meetings (Mr. Rand was one of the Sembi Directors).[34] Sembi also recorded its beneficial ownership of the Beneficially Owned Shares in its 2008 financial statements:[35]



7. Investments in subsidiaries

	2008 €
On 31 December	-
Additions	15.599.727
At 31 December	15.599.727

The details of the subsidiaries are as follows:

Name	Country of incorporation	Principal activities	Holding %
BD Agro	Serbia	Dairy farming	70

33. At no point in this arbitration had Serbia challenged the authenticity of Sembi's 2008 financial statements and, particularly, the date of creation of the document on the record as CE-420. It did so only in its letters to the Tribunal of 27 August and 23 September 2021. In these letters, Serbia seems to argue that CE-420 was not prepared contemporaneously because it was not filed with the Cyprus Registrar of Companies at all, or in any event not until August 2014.[36] This is not the case.

34. The stamp on the Greek version of Sembi's 2008 financial statements filed with the Cyprus Registrar of Companies—which the Tribunal admitted into the record on 27 September 2021—confirms that the financial statements were indeed filed on 8 August 2014. The Greek version also includes a confirmation that "*the audited*

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34 *E.g.* Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, p. 1, **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**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 7 May 2010, p. 1, **CE-427**.

35 Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, **CE-420**.

36 *E.g.* Letter from Serbia to Tribunal, 27 August 2021, ¶¶ 16-17; Letter from Serbia to Tribunal, 23 September 2021, ¶¶ 9, 18.

financial statements" submitted to the Registrar were "*presented before the Annual General Meeting [of Sembi] that took place on January 4, 2010*"[37]

35. Thus, Sembi's 2008 financial statements are a contemporaneous document showing that Sembi owned the equitable rights in and to the Beneficially Owned Shares as of 31 December 2008.

36. Had Serbia raised its new argument regarding the authenticity of Sembi's 2008 financial statements in its written submissions, as the procedural rules require, the Claimants would have responded by submitting documents corroborating the contemporaneousness of Sembi's 2008 financial statements filed as CE-420 with their Rejoinder on Jurisdiction. Serbia's belated introduction of its new argument deprived the Claimants of an opportunity to do so.

ii. Cypriot law, not Serbian law, governs the assignment of beneficial ownership in the Beneficially Owned Shares

37. The Hearing also showed that Cypriot law, rather than Serbia law, governs the assignment of beneficial ownership in the Beneficially Owned Shares.

38. It is common ground that Serbian law is relevant to the transfer of legal title to the Beneficially Owned Shares. To effectuate the transfer of legal title to shares in Serbia, the name of the new owner of the shares must be registered by the Central Securities Depository. It is equally common ground that that did not happen here.

39. Again, however, the question in this arbitration is different: whether beneficial ownership to the Beneficially Owned Shares transferred to the Claimants. Cypriot law, not Serbian law, governs that issue. On cross-examination, Professor Emilianides agreed that the parties to the Sembi Agreement were free to choose the law that would apply to their contract,[38] that they chose Cypriot law,[39] and that Cypriot law governs their relationship.[40] Under cross-examination, Mr. Georgiades agreed, explaining that Cypriot law governs the transfer of beneficial ownership in the Beneficially Owned Shares:

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37 Stamped copy of Sembi's 2008 financial statements, p. 2 (pdf), **CE-909**.

38 Tr., Hearing on Jurisdiction and Merits, Day 6, 181:24-182:2 (Emilianides).

39 Emilianides ER, ¶ 17.

40 Tr., Hearing on Jurisdiction and Merits, Day 6, 182:5-9 (Emilianides).

> The President: Can I just ask a clarification? When you speak of transferability, what do you mean? Do you mean whether the property is transferred, or what exactly do you have in mind?
>
> Mr. Georgiades: What I have in mind are the formalities that will be required at the situs of the shares for them to be considered as legally transferred.
>
> The President: And what about the ownership?
>
> Mr. Georgiades: Well, the ownership of the shares, under Cyprus law would have moved to the assignee. That is what equitable assignment is all about.[41]

40. Thus, Serbian law, while relevant to the transfer of legal title in the Beneficially Owned Shares, is irrelevant to the transfer of beneficial ownership. Cypriot law governs that issue.

iii. Article 41ž of the Law on Privatization does not restrict the transfer of beneficial ownership in the Beneficially Owned Shares

41. It is common ground that while Article 41ž of the Law on Privatization required the Agency's prior approval before the *Privatization Agreement* could be assigned, it said nothing about the *shares*. This should be the end of the matter, but Serbia concocted a theory that Article 41ž of the Law on Privatization still applied to the transfer of beneficial ownership in the Beneficially Owned Shares because the Beneficially Owned Shares could not be alienated from the Privatization Agreement.

42. Serbia's theory falls short for a number of reasons. *First*, Serbia simply cannot rewrite Article 41ž. That provision says absolutely nothing about prior consent for the transfer of shares. Rather, the Beneficially Owned Shares were subject to different restrictions: (*i*) a two-year lock-up period following their sale to Mr. Obradović in 2005;[42] and (*ii*) the Agency's pledge on the shares that was agreed to last "*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.*"[43]

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41 Tr., Hearing on Jurisdiction and Merits, Day 6, 155:22-156:7 (Georgiades).

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

43 *Id.*, Schedule 1: Share Pledge Agreement, Art. 2.

43. The two-year lock-up period only prevented Mr. Obradović from transferring legal title to the Beneficially Owned Shares. This is because under Serbian law, a sale of shares means the transfer of legal title, and the transfer of beneficial ownership is not a "sale."[44]

44. Following the expiration of that period in 2007, the only thing that prevented Mr. Obradović from transferring legal title to the shares was the Agency's pledge on them.

45. As the Hearing demonstrated, however, the Agency's right to lawfully hold the pledge expired when the Claimants paid the last installment of the purchase price on 8 April 2011. As of that moment, Mr. Obradović was entitled to transfer legal title to the shares to whomever he wished. It was only because of Serbia's unlawful conduct that Mr. Obradović could not transfer legal title to the shares to the Claimants.

46. *Second,* Serbia's witnesses confirmed at the Hearing that the Beneficially Owned Shares could be transferred without a parallel assignment of the Privatization Agreement. Ms. Julijana Vučković admitted that the shares can indeed be "*alienated*" (her word) from the Privatization Agreement and, moreover, that was why the Agency unlawfully continued to hold the pledge over the Beneficially Owned Shares—*i.e.*, to prevent precisely that alienation:

> Mr. Misetic: Ms Vučković, the transcript says you said: "... we had as a clear omission in our agreements ... where we allowed disposal of capital during the validity of the agreement, we generally allowed shares to be alienated and we were still monitoring the agreement which was a substantial problem." That's what you told the Commission, correct?
>
> Ms. Vučković: Yes, that's correct. It had to do exactly with this. *You allow alienation of the shares by removing the pledge, and you allow the buyer to dispose of the shares, while the agreement is in force, and it's not been honoured, so you have no further influence when it comes to the privatization agreement.*[45]

47. The importance of this admission cannot be overstated. Serbia's theory that the Beneficially Owned Shares could have been transferred only together with the assignment of the Privatization Agreement is now dead. And it has the following

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44 Milošević Second ER, ¶ 188.

45 Tr., Hearing on Jurisdiction and Merits, Day 4, 65:10-22 (Vučković) (emphasis added).

important consequence: even if, *arguendo*, beneficial ownership in the *Privatization Agreement* was not assigned because the Agency's prior consent was not obtained under Article 41ž (as discussed below), nothing precluded beneficial ownership in the *Beneficially Owned Shares* from being transferred to the Claimants (because Article 41ž requires no prior approval for transfer of shares).

iv. Serbia's expert admitted that, even in the context of a "personal" contract, the economic benefit can be assigned to a third party without the consent of the debtor

48. Yet another key moment at the Hearing was Serbia's expert's admission that, even in the context of a "personal" contract, the economic benefit of the contract can be assigned to a third party without the consent of the debtor. Prior to the Hearing, Serbia had argued that rights cannot be assigned to a third party when the identity of the party from the original contract is of particular importance.[46] The Hearing confirmed that this argument is misplaced, both factually and legally.

49. Factually, the Claimants have shown that Serbia was well aware, from the very beginning, that Mr. Rand was the ultimate beneficial owner of BD Agro, and that did not change when the Sembi Agreement superseded the MDH Agreement. Mr. Rand shared beneficial ownership with his children, but at all times remained in control. Therefore, the identity of the ultimate owner in control did not change—and could not be a basis for denying the transfer of beneficial ownership.

50. Legally, Professor Emilianides gave that point away under cross-examination:

> Mr. Anway: Let me give you a few examples. I could give you an example of a famous painter who has been hired to paint a portrait, or a famous architect to design a luxury villa, or a famous soprano being hired to sing at a festival. I understand your point to be that the soprano, the architect, the painter can't assign the contract for someone else to perform, because they were hired because of their own personal identity, do I understand correctly?
>
> Prof. Emilianides: Yes, this is correct.
>
> Mr. Anway: *But you wouldn't dispute that those same assignees would certainly be able to assign the*

[46] Emilianides ER, ¶ 35; Mirjana Radović First Expert Report dated 19 April 2019, ¶ 89.

proceeds, the money under the contract, to, for example, a family relative?

Prof. Emilianides: You mean the payment would assign—you mean the money he would receive under the contract, right?

Mr. Anway: Correct.

Prof. Emilianides: Yes, he would.

Mr. Anway: *He would be allowed to do that*?

Prof. Emilianides: *Yes. Unless there was something precluding it, of course, in the contract or otherwise, but in principle he would*.[47]

51. This testimony comports with Mr. Georgiades's evidence at the Hearing:

Prof. Djundic: You have an assignor, and because of his personal characteristics, such as his nationality, he was provided with the right to pay the purchase price in instalments, and he wants now to assign the contract to the assignee who does not have those characteristics, personal characteristics. So would you say that it would be correct to say that the assignor's identity is important in that case to the original contracting party?

Mr. Georgiades: Under Cyprus law, in respect of the validity of the assignment vis-à-vis assignor and assignee, this is probably irrelevant.[48]

52. Hence, it is common ground that, even where there is a contract in which the identity of the party to the contract is important, the economic benefit of the contract can be assigned to a third party. And that is *precisely* what happened in the Sembi Agreement with regard to the Beneficially Owned Shares.

v. In any event, Serbian law permits assignment of beneficial ownership

53. Finally, even if, for the sake of argument, Serbian law, rather than Cypriot law, applied to the transfer of <u>beneficial ownership</u> in the shares (it does not), *Serbian law permits <u>beneficial ownership</u> in shares as well.* Numerous Serbian statutes explicitly recognize

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47 Tr., Hearing on Jurisdiction and Merits, Day 6, 206:20-207:15 (Emilianides) (emphasis added).

48 *Id.*, 150:5-16 (Georgiades).

beneficial ownership of shares, including the Serbian Law on Beneficial Owners, the Law on Capital Markets and the Law on the Prevention of Money Laundering:

- Law on Beneficial Owners: Article 3(3) defines "Beneficial Owners" extremely broadly.[49] As Mr. Milošević explained, "*the recognition of beneficial ownership under the Law on Beneficial Owners is very broad and covers all instances of beneficial ownership, including, the beneficial ownership of a beneficiary of a trust or any other person under a foreign law […]*."[50]

- Law on Prevention of Money Laundering: Article 3(11)(1) and (2) defines the "*beneficial owner of a company*" to mean "*a natural person who owns […] voting rights or other rights, based on which they participate in controlling the legal person*" and "*a natural person who has provided or provides funds to a company in an indirect manner, which entitles him to influence significantly the decisions made by the managing bodies of the company concerning its financing and business operations […]*."[51]

- Law on Capital Markets: Article 2(34) provides that a "*beneficial owner* means *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 […]*."[52]

54. More generally, there was no provision of Serbian law—*none*—stating that the assignment of shares was subject to the Agency's prior consent. Nor was there any provision of Serbian law stating that the Sembi Agreement, by which Mr. Obradović agreed to "*do all such things as may be necessary to effect the transfer [of the Beneficially Owned Shares]*",[53] violated any provision of Serbian law.

55. Further, the Agency was accustomed to companies owning the shares of privatized companies through beneficial ownership and control structures. As discussed at the Hearing, the Agency issued an invitation in 2003 (well before the tender for BD Agro) to bid for the Serbian company Duvanska Industrija "Vranje", and the invitation expressly

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49 Law on Centralized Records of Beneficial Owners, Art. 3(3), **CE-729**.

50 Miloš Milošević Third Expert Report dated 5 March 2020, ¶ 29.

51 Law on the Prevention of Money Laundering and the Financing of Terrorism, Arts. 3(11)(1) and 3(11)(2) **CE-867**.

52 2011 Law on Capital Markets, Art. 2(34), **CE-728**.

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

contemplated that the bidder could own the privatized company through a "*beneficial […] ownership and control structure*":[54]

> 4. An interested legal entity (hereinafter "**interested party**") shall be entitled to purchase the Tender Documents if it fulfills the following criteria:
>
> (iii) it has the ability to evidence, with full transparency, its actual and beneficial (as the case may be) ownership and control structure, as well as that of its parent companies and related companies.

56. In the Vranje invitation, the Agency expressly asked for the disclosure of beneficial ownership structures:[55]

> 5. An interested party's Tender Documents Request must include the following documents, submitted in the English language and certified as authentic by one of its duly authorized representatives:
>
> (iv) an outline of the ownership and control structure as well as an identification of the ultimate parent company and/or controlling entity, including a summary of any beneficial ownership interests, nominee shareholdings and/or contractual rights granting the power to vote in or otherwise control such entity, as well as confirmation that all such beneficial ownership relations and/or control rights have been fully disclosed;

57. Nor was this an isolated case. Also in 2003, the Agency issued an invitation to bid on the Serbian company Beopetrol a.d. and again contemplated that a bidder could own the privatized company through a "*beneficial ownership and control structure*":[56]

> 5. The right to purchase the Tender Documents and thus become a Tender Participant shall be limited to those legal entities that have submitted the documentation required under Section 7 and fulfil all of the following criteria (hereinafter the "Eligibility Criteria"):
>
> (iv) Have demonstrated actual and beneficial ownership and control structure of the interested party and of its parent company(ies), if any.

58. The Beopetrol invitation likewise requested disclosure of beneficial ownership:[57]

> 7. In order to aid in the assessment of whether an interested party fulfils the criteria set out in Section 5 above, an interested party's Tender Documents Request must include, in addition to all other
>
> information deemed necessary by the interested party in assessing the criteria set out in Section 5, at a minimum, the following documents:

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54 Public Invitation for participation in a public tender process for the sale of socially owned capital of Duvanska industrija "Vranje" a.d., p. 2 (pdf)(emphasis added), **CE-890**.

55 *Ibid*.

56 Public Invitation for participation in a public tender process for the acquisition of a controlling interest in Beopetrol a.d. Beograd., p. 2 (pdf)(emphasis added), **CE-891**.

57 *Id.*, pp. 2-3 (pdf)(emphasis added).

> (iii) an outline of the ownership and control structure of the interested party which shall include an identification of the ultimate parent company and/or controlling entity, including a summary of any beneficial ownership interests, nominee shareholdings and/or contractual rights granting the power to vote in or otherwise control such entity, as well as confirmation that all such beneficial ownership relations and/or control rights have been fully disclosed;

59. The Beopetrol invitation also acknowledged that, in certain circumstances, there may be limitations on the ability to identify the beneficial ownership and, in those instances, the beneficial ownership need not be disclosed:[58]

> In the case of companies that are publicly traded on an internationally recognised stock exchange, reasonable limitations on the ability to identify beneficial ownership are recognised by the Agency and may be exempted.

60. In the case of BD Agro, by contrast, the Agency's invitation contained no requirement to disclose beneficial ownership and control structures. Nevertheless, as the Hearing made clear, Serbia was perfectly aware that Mr. Rand was a beneficial owner of BD Agro.

61. In sum, although Cypriot law, not Serbian law, governs this issue, Serbian law permits beneficial ownership of shares in any event, and the Agency was accepting of privatized companies being owned through beneficial ownership and control structures. Thus, although legal title to the shares did not transfer, beneficial ownership did—and that beneficial ownership was permissible, even if Serbian law applied.

* * *

62. Serbia has run out of arguments. It is crystal clear that Mr. Obradović transferred beneficial ownership in the Beneficially Owned Shares to Sembi (and thus to Mr. Rand and his children) when the parties signed the Sembi Agreement. That is hardly surprising, since the Sembi Agreement superseded the MDH Agreement, under which Mr. Rand also had ultimate beneficial ownership of the Beneficially Owned Shares.

c. Mr. Obradović transferred beneficial ownership in the Privatization Agreement

63. The Privatization Agreement is the third asset in which rights were transferred. Here, proper interpretation of Article 41ž of the Serbian Law on Privatization and its interplay with Cyprus law become important.

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[58] *Id.*, p. 3 (pdf)(emphasis added).

64. Under Article 41ž of the Serbian Law on Privatization, the Agency had to provide its consent before legal title to the Privatization Agreement could be assigned. No such consent was obtained. Therefore, both Parties agree that legal title to the Privatization Agreement was not assigned.

65. The issue in this arbitration, however, is different: whether the Claimants obtained beneficial ownership to, control over, and/or contractual rights in the Privatization Agreement under the Sembi Agreement. In his expert reports, Mr. Georgiades explains that beneficial ownership to the Privatization Agreement transferred from Mr. Obradović to Sembi immediately upon the signing of the Sembi Agreement.[59]

66. Professor Emilianides, by contrast, takes the opposite view based on an instruction. According to Professor Emilianides, Serbia asked him to *assume* that Article 41ž of the Serbian Law on Privatization "*precludes*" a transfer of the Privatization Agreement.[60] Applying that assumption, Professor Emilianides states that "*if assignment is precluded by statute, in this case Article 41ž of Serbian Law on Privatization, then it would be void [...]*."[61]

67. Serbia's instruction to Professor Emilianides, however, is based on an incorrect reading of Article 41ž. Not only does Article 41ž not "*preclude*" the assignment of legal title to the Privatization Agreement, *it expressly authorizes it* when prior consent is obtained:[62]

> **1.5. Assignment of Agreement on Sale of the Capital or Property**
>
> **Article 41ž**
>
> Subject to prior consent of the Agency, the buyer of the capital (hereinafter: assignor) may assign the agreement on sale of the capital or property to a third party (hereinafter: assignee) under the conditions stipulated by this law and the law on obligations.

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59 *E.g.* Georgiades Second ER, ¶¶ 3.12-3.13.

60 Emilianides ER, ¶ 23 ("*I am not a Serbian law expert and will therefore not express any opinion on the restrictions of Serbian law that have been drawn to my attention.* ***I have been advised that Serbian law provides for prohibitions or restrictions regarding the assignment of the Privatization Agreement, which apply in the present case****. More particularly, under the provisions of Article 41ž of the Serbian Law on Privatization, it follows that the transfer of the rights and obligations in the Privatization Agreement from the buyer to a third party is preconditioned by the authorization of the Privatization Agency, which was not obtained in the present case before assignment. Taking this position as granted and without expressing any opinion on its correctness […].*") (emphasis added).

61 Emilianides ER, ¶ 30.

62 Law on Privatization, Art. 41ž, **CE-220**.

68. Article 4 of the Sembi Agreement is entirely consistent with Article 41ž. Article 4 requires Mr. Obradović to do "*all such things as may be necessary to effect the transfer*" of the Privatization Contract:[63]

> 4. Mr. Obradović, in consideration for the Purchaser assuming such obligations, has agreed to transfer to the Purchaser all his right, title and interest in and to the Contract. Mr. Obradović agrees to sign any such documents and do all such things as may be necessary to effect the transfer to the Purchaser of the Contract together with any other assets whatsoever held by Mr. Obradović which are related to the business of BD Agro.

69. One of the "*things [that was] necessary to effect the transfer*" of legal title to the Privatization Agreement was for Mr. Obradović to obtain the Agency's prior consent. Until that happened, legal title to the Privatization Agreement did not transfer and there was no violation of Article 41ž of the Law on Privatization.[64] In other words, Article 4 of the Sembi Agreement was not a *violation* of Article 41ž; instead, it ensured *compliance* with it. Thus, the Sembi Agreement is not void *ab initio* by operation of Article 41ž.

70. As to the transfer of beneficial ownership, Cypriot law—rather than Serbian law—applies. Both Professor Radović[65] and Professor Emilianides admitted that the relationship between Mr. Obradović and Sembi under the Sembi Agreement is governed by Cypriot law.[66] Mr. Georgiades reached the same conclusion, stating that "*Cyprus law determines whether the Sembi Agreement is a valid contract between Mr Obradović and Sembi, what their rights are under it, and the remedies that may be available to each one of them against the other*."[67]

71. For this reason, even if Article 41ž is a mandatory provision of Serbian law, it would not impact the transfer of beneficial ownership to the Privatization Agreement:

> Mr. Georgiades: As I explained in my reports, and especially in my third report, I have read the provision of 41ž, and I think that it is irrelevant to the issue of validity of the equitable assignment vis-à-vis the assignor and the assignee.[68]

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

64 Milošević Third ER, ¶¶ 204-206.

65 Radović First ER, ¶¶ 90, 93.

66 Tr., Hearing on Jurisdiction and Merits, Day 6, 182:3-9 (Emilianides).

67 Georgiades Second ER, ¶ 3.7.

68 Tr., Hearing on Jurisdiction and Merits, Day 6, 139:8-20 (Georgiades).

72. This is because, as Mr. Georgiades confirmed under cross-examination, *even if* an assignment is not effective as against the debtor (Serbia), *it is* effective as between the assignee (the Claimants) and the assignor (Mr. Obradović):

> Mr. Georgiades: No, you are reading the authority in the wrong way. I am not disagreeing with the authority. What the authority says is that the assignment in relation to the debtor may be ineffective, *but the equitable assignment vis-à-vis assignor and assignee, as is stressed in 19-045 of Chitty, actually survives*.[69]

73. In sum, Article 41ž of the Law on Privatization is irrelevant to Mr. Obradović's assignment of beneficial ownership in the Privatization Agreement for two independent reasons. *First*, Cypriot law governs and recognizes the transfer of beneficial ownership as valid and enforceable. *Second*, under Serbian law—including Article 41 ž—'assignment' is defined more narrowly than under Cypriot law and only denotes transfer of legal title.[70] Since the transfer of beneficial ownership did not qualify as an assignment under Serbian law, it did not trigger the application of Article 41ž nor require the Agency's prior approval.

d. The transfer of beneficial ownership is not void *ab initio* because future steps had to be taken to transfer legal title

74. Under Cypriot law, the Sembi Agreement was not void *ab initio* simply because future steps were required to transfer legal title to the Beneficially Owned Shares and the Privatization Agreement. Under cross-examination, Mr. Georgiades cited dispositive Cypriot case law to that effect:

> Mr. Georgiades: A prohibition can be a statutory prohibition and can be a contractual prohibition. The effect on equitable assignment is the same. The only exception would be if, for example, there was a statutory prohibition which rendered the assignment a criminal offence, or offended public policy. That could be a different case, but the prohibition in the sense of an enabling provision, like 41ž, is exactly the same thing, it's just a requirement that the assignee or the assignor must comply with the provision in order to proceed with performance of the contract, and actually, there is a Cypriot case, a Cypriot judgment exactly on that point, I will refer you to it.

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69 *Id.*, 151:19-24 (Georgiades) (emphasis added).

70 Milošević Third ER, ¶ 37; Tr., Hearing on Jurisdiction and Merits, Day 6, 100:6-22 (Radović).

> Prof. Djundic: Mr Georgiades, is it on the record, that case?
>
> Mr. Georgiades: Yes, it is. It is the case of Arsiotis […]. It is a contract where for the performance, it was required that the particular licence would be obtained, and the Cyprus Supreme Court held that this was not an invalid contract because it was just a matter of applying to obtain that licence before carrying on the performance, so it was a perfectly valid contract.[71]

75. *Arsiotis* is precisely on point. There, the Supreme Court of Cyprus held that contracts in which performance is conditioned upon future consent from the government (such as the transfer of legal title to the Privatization Agreement) are not void *ab initio*:[72]

> The case of an illegal contract for the provision of services by a contractor who is not registered, where public interest demands strict compliance with the Law, is distinguished from the case where the statutory provisions do not render the entering of a contract illegal but require the fulfilment of a certain formality or precondition before it can be performed, where the contract is not illegal… According to case law, there is a clear "distinction between contracts that are void ab initio and contracts that are to be performed in a future time (executory) where the law does not render such contract impossible but the contract is potentially executable if the required consent is given by the appropriate state authority…

76. In this vein, the Claimants asked Professor Emilianides a series of hypotheticals during his cross-examination, and his responses confirmed the point:

a. Hypothetical #1: A seller agrees to sell a car to a buyer in Cyprus for some amount of money, say €10,000. [The parties] sign the contract, the buyer pays the full price to the seller, the buyer obtains insurance, the buyer takes the keys, and starts driving the car. Legal title to the car is not transferred until some months afterwards. My question is: during that intervening time, under Cypriot law, isn't it true that the seller is the legal owner, but the buyer is the beneficial owner of the car?[73]

   - Professor Emilianides' answer: "*The buyer is considered to have a beneficial right […].*"[74]

b. Hypothetical #2: Party A owns a private company with shares and wishes to transfer the shares to Party B. Party B pays Party A the purchase price, and the

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71 Tr., Hearing on Jurisdiction and Merits, Day 6, 146:1-147:11 (Georgiades).

72 *Arsiotis and others v. Highway Gardens*, Civil Appeal No.106/12, Judgment, 18 April 2018, p.11 (p. 1 PDF) (emphasis added), **CE-841**.

73 Tr., Hearing on Jurisdiction and Merits, Day 6, 186:4-12 (Anway).

74 *Id.*, 186:19 (Emilianides).

parties sign a share transfer form, which states that Party B has paid the money to Party A. Party A transfers the shares to Party B. 30 days later, Party A submits the relevant forms with the company register and obtains a share certificate showing that the shares belong to the buyer, Party B. The question is: Was beneficial ownership to the shares transferred to Party B when the parties signed the share transfer form?[75]

- Professor Emilianides' answer: "*the answer is yes [...]*."[76]

c. Hypothetical #3: A Cyprus company owns intellectual property rights—trademarks and copyrights—in various jurisdictions around the world. The Cyprus company signs a contract transferring all of its rights in the intellectual property to another Cyprus company. The contract states that the seller will take the required steps to have the rights registered in the name of the buyer in all the different jurisdictions. Based on these facts, would you describe this contract as void *ab initio*?[77]

- Professor Emilianides' answer: "*Simply on the facts that you have given me, no, I would not*."[78]

77. This last admission bears particular emphasis. The Tribunal will recall that Professor Emilianides readily answered the first two hypotheticals, but when asked the third—the correct answer to which he knew would undermine his position—he became evasive.[79] Nevertheless, after the Claimants pressed him on the matter, and the President of the Tribunal intervened,[80] Professor Emilianides finally admitted the point (as shown above). And his admission *directly undermines* Serbia's position.

78. To understand why Professor Emilianides' admission is so important, recall that Serbia argued that, because the Agency's consent was required under Article 41ž, "*the Sembi Agreements are null and void ab initio and could not affect the ownership of BD Agro's shares in any way*."[81] The third hypothetical above, however, matches the relevant facts here—*i.e.* a contract that purports to transfer legal title only after approval by the government. Professor Emilianides admitted that those facts do ***not*** make the contract void *ab initio*.

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75 *Id.*, 187:21-188:7 (Anway).

76 *Id.*, 188:19 (Emilianides).

77 *Id.*, 188:21-189:9, 193:2-3 (Anway).

78 *Id.*, 193:5-6 (Emilianides).

79 *Id.*, 189:10-15 (Emilianides).

80 *Id.*, 191:20-24 (The President).

81 Counter-Memorial, ¶ 295.

79. This is hardly surprising. It is inconceivable that, simply because a contract requires future government consent to transfer legal title, the contract is void *ab initio*. To further demonstrate the point, the Claimants closed their cross-examination of Professor Emilianides by asking him to compare two situations: one where Mr. Obradović had received the Agency's approval *one day before* he signed the Sembi Agreement, and one where he received consent *one day after* he signed the Sembi Agreement.[82] Professor Emilianides acknowledged that his position would lead to the bizarre result in which the former situation would mean the Sembi Agreement was valid and enforceable, whereas the latter situation would mean that the Sembi Agreement was "*not necessarily*" valid.[83] The Cyprus Supreme Court confirmed in *Arsiotis* that this is, of course, not the law.[84]

3. The Claimants' beneficial ownership is protected under international law

a. Investment law jurisprudence protects beneficial ownership

80. The protection of beneficial ownership is a general principle of international law. Canvassing the history of protecting beneficial ownership under international law, leading commentators have observed: "*The notion that the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court may be justly considered a general principle of international law*."[85]

81. Numerous ICSID tribunals confirmed that public international law and investment treaties protect beneficial ownership. As the ICSID Annulment Committee in *Occidental v. Ecuador* concluded, "*[n]either the international law principles nor the Committee's decision imply that investors holding beneficial ownership are left unprotected from interferences by host States. Such investors will enjoy protection granted under the treaties which benefit their nationality*."[86]

82. The *Occidental* annulment decision is particularly instructive. In that case, Occidental, a US company, signed a participation agreement with Ecuador to exploit an area of the

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82 Tr., Hearing on Jurisdiction and Merits, Day 6, 212:23-213:20 (Emilianides).

83 *Id.*, 212:23-213:9 (Emilianides).

84 *Arsiotis and others v. Highway Gardens*, Civil Appeal No.106/12, Judgment, 18 April 2018, **CE-841**.

85 David J. Bederman, "*Beneficial Ownership of International Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 936, **CLA-078**.

86 *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶¶ 262, 272, **CLA-005**.

Ecuadorian amazon for oil. Unbeknownst to the government, Occidental entered into a contract with the Canadian entity Encana, which transferred the beneficial rights (but not legal title) to 40% of the participation agreement. Occidental thereafter sought to claim for 100% of the damages under the US-Ecuador BIT. The Annulment Committee—chaired by Professor Juan Armesto—held that Occidental could only claim for the 60% of the interest in which it was the beneficial owner, and Encana could sue for the remaining 40% under an investment treaty in which its nationality was protected (which was not the US-Ecuador BIT). In so doing, the Committee not only recognized that beneficial owners are protected under investment treaties, *but that beneficial owners are to be given priority over the nominal (legal title) owners.*[87] Other ICSID tribunals are in accord.[88]

83. The protection of beneficial ownership under international law does not depend on its enforceability against third parties under the domestic law of the host state. As the tribunal held in *Saghi v. Iran*, "*[t]he 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-à-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*.'"[89]

84. Furthermore, international law protects both rights *in rem* and rights *in personam.* The ICSID tribunal in *Magyar Farming v. Hungar*y explained the principle as follows:

> While the dichotomy between *in rem* and *in personam* rights has its place in determining the rights and obligations of private parties vis-à-vis one another, the prohibition of uncompensated expropriation is a rule restricting the State authority towards private parties. Because of the

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87 *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶ 265 ("*The Committee has already verified that with regard to the 40% interest in the Farmout Property title is split, beneficial ownership and control being held by AEC/Andes, with OEPC acting as nominee on behalf of the beneficial owner. **It has also concluded that in situations like this international law provides that only the beneficial owner, AEC/Andes, can claim for interference with its interest, while the nominee, OEPC, lacks standing to claim in the name of the beneficial owner***") (emphasis added), **CLA-005**.

88 *Kim and others v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 320, **CLA-154**; *Al-Bahloul v. Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 145, **CLA-153**.

89 *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran*, IUSCT Case No. 298, Award, 22 January 1993, ¶¶ 25-26, **CLA-080**.

> different legal functions involved, the civil law dichotomy should not be mechanically transposed into public law. Indeed, it would be excessively formalistic and not consonant with economic reality, if the BIT protected a usufruct-holder from an uncompensated taking, while at the same time withholding that protection from a lessee with a pre-lease right for the sole fact that such right is not *in rem*.[90]

85. Investment tribunals further confirm that "control" comprises both *de facto* and legal control.[91] As a NAFTA tribunal found, "*[t]he Tribunal does not follow Mexico's proposition that Article 1117 of the NAFTA requires a showing of legal control. The term 'control' is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or 'de facto' control is, in the Tribunal's view, sufficient […]*."[92]

86. The NAFTA tribunal went on: "*It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how and authoritative reputation*."[93]

87. Finally, the Tribunal held: "*In the Tribunal's view, it is clear from the record that without the consistent and significant initiative, driving force and decision making of Thunderbird, the investment in Mexico could not have materialized. Accordingly, the Tribunal finds that Thunderbird exercised control over the Minority EDM Entities for the purpose of Article 1117 of the NAFTA, in a manner sufficient to entitle it to bring a claim on behalf of those entities under said provision*."[94]

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90 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungar*y, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 359, **CLA-156**.

91 *E.g. International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶ 106, **CLA-095**. *See also*, Claimant's Rejoinder on Jurisdiction, ¶¶ 420-424.

92 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶ 106, **CLA-095**.

93 *Id.*, ¶ 108.

94 *Id.*, ¶ 110.

b. Application of international law

88. Applying these principles, the Claimants are protected "investors" under the Serbia-Cyprus and the Canada-Serbia BITs in three distinct capacities: (*i*) their *beneficial ownership* of BD Agro; (*ii*) their *control* over BD Agro; and (*iii*) their interest in Sembi's rights under the Sembi Agreement.[95] The foregoing showed that the Sembi Agreement is enforceable as between Mr. Obradović and the Claimants under the Sembi Agreement. It is irrelevant whether the Claimants could enforce the rights it acquired under the Sembi Agreement against Serbia—and for three independent reasons.

89. First, as the *Saghi* tribunal made clear, the protection of beneficial ownership under *international law* does not depend on its enforceability against third parties under *domestic law*.[96] In terms of beneficial ownership as a special category of ownership, the Annulment Committee in *Occidental* held that the participation agreement did not give EnCana any rights enforceable against Ecuador, yet the Committee concluded that EnCana was the beneficial owner of the respective percentage of the Contract and that this beneficial ownership could be protected under the respective BIT.[97]

90. Second, leaving aside beneficial ownership as a special category of ownership (*i.e.*, leaving aside the *Occidential* annulment decision), the Sembi Agreement created enforceable rights against Mr. Obradović under Cypriot law (regardless of whether they are labelled as an assignment of beneficial ownership of the Beneficially Owned Shares or not). Those rights constitute an "*investment*" under Art. 1(c) of the Serbia-Cyprus BIT because they give rise to claims for performance having economic value (and Mr. Obradović is Serbian). It matters not that the rights are only enforceable against Mr. Obradović; this is indeed normal for all contractual rights. From the perspective of the Canada-Serbia BIT, the same rights would also create an indirectly owned/held interest in BD Agro under Articles (f) and (h)(ii) of the definition of "investment" in Article 1 of the Canada-Serbia BIT.

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95 *E.g.* Rejoinder on Jurisdiction, § III.A.

96 *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran*, IUSCT Case No. 298, Award, 22 January 1993, ¶¶ 25-26, **CLA-080**.

97 *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶ 272, **CLA-005**.

91. Also critically important, even if the Tribunal concluded that Sembi was not an "investor" under the Serbia-Cyprus BIT, the Canadian Claimants would still be protected under the Canada-Serbia BIT standing alone. Article 1 of the Canada-Serbia BIT defines "investment" very broadly to include assets, such as "shares", that are "*owned or controlled, directly or indirectly*."[98] The Canada-Serbia BIT closely follows the model treaty prepared by Canada (a common law jurisdiction), and expressly contemplates beneficial ownership. For example, Article 1 of the Canada-Serbia BIT defines "*enterprise*" to include "*trust*."

92. In addition, the term "owned" in the definition of "covered investment" in the Canada-Serbia BIT relates not only to rights *in rem*, but also to rights *in personam*. The equally authoritative French version of the Canada-Serbia BIT employs the term "held" ("*détenu*") instead of "owned." An investor may clearly "hold" an investment on the basis of a contractual right. The term "owned" defines the link between the covered investor and all categories of assets listed under the definition of investment. The reference to ownership elsewhere in the Canada-Serbia BIT confirms that the BIT encompasses both rights *in rem* and contractual rights. Beneficially owned shares constitute a covered "investment" under the Canada-Serbia BIT.

93. Further, subsection 1(f) of the Canada-Serbia BIT defines "investment" to include "*an interest in an enterprise that entitles the owner to share in income or profits of the enterprise*". Under this definition, it is irrelevant that Sembi never acquired legal title to Mr. Obradović's shares. The protection of "an interest in an enterprise" is not contingent on the acquisition of any legal title to ownership of shares, it equally applies to both legal title and beneficial ownership.

94. Finally, subsection 1(h) of the Canada-Serbia BIT states that "investment" includes "*an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory*". Sembi committed capital in Serbia by repaying the loans of Mr. Obradović to the Lundin Family for the acquisition of shares in, and further investment to, BD Agro. The funds for repaying such loans were provided to Sembi and, thus, ultimately committed by Mr. Rand.

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98 Canada-Serbia BIT, Art. 1, **CLA-001**.

95. In sum, precisely because Mr. Rand (and from 2008 also his children) beneficially owned BD Agro, even if indirectly, the Canadian Claimants squarely fall within the definition of an "investor" under the Canada-Serbia BIT—even if the Serbia-Cyprus BIT does not apply (which it does).

96. Third, even if the Sembi Agreement were null and void (*quod non*), it would not deprive Mr. Rand of his standing. This is because Mr. Rand's *de facto* control over the Beneficially Owned Shares in BD Agro did not depend on the validity of the Sembi Agreement and is protected under the Canada-Serbia BIT, independent of his beneficial ownership.

97. Mr. Rand controlled BD Agro since 2005 until the expropriation of the Beneficially Owned Shares in 2015. Mr. Rand regularly instructed Mr. Obradović on BD Agro matters—both during regular telephone conferences and, exceptionally, in writing:

> Mr. Rand: I talked to Mr Obradovic at least once, sometimes two or three times a week, to discuss the affairs at the farm.
>
> Mr. Rand: [Document CE-428 is] an email I sent to Mr Obradovic as President, BD Agro, and to Ljuba Jovanovic and to Igor Markicevic. It had instructions as to certain things I wanted done. [99]

98. Mr. Rand's additional qualifying investments—including the 3.9% shareholding in BD Agro indirectly held through MDH Serbia and his direct payments to BD Agro's suppliers and loans for the benefit of BD Agro—do not stem from the Sembi Agreement, and would also be unaffected by its purported nullity.

99. The purported nullity of the Sembi Agreement could only affect the beneficial ownership of Mr. Rand's children, which is channeled through Sembi and the Ahola Family Trust. If the Tribunal concludes that their beneficial ownership was not established because the Sembi Agreement was null—*quod non*—Mr. Rand would then be the sole beneficial owner of the Beneficially Owned Shares and would be entitled to the totality of damages stemming from their expropriation and other violations of the Serbia-Canada BIT.

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[99] Tr., Hearing on Jurisdiction and Merits, Day 2, 6:10-7:13 (Rand). Mr. Rand confirmed that he sent instructions by email to Mr. Obradović's address president@bdagro.com.

B. The Tribunal has jurisdiction *ratione materiae* under the ICSID Convention

100. Serbia's objection that the Claimants' investments do not qualify for protection under Article 25(1) of the ICSID Convention fails for a number of reasons, which the Claimants explained in their written submissions.[100]

101. Suffice it to say that the Claimants' investments complied even with the broadest of tests put forth by any tribunal. As the Claimants demonstrated, they have made long-term and substantial contributions to BD Agro and, in turn, the Serbian economy, including: (*i*) the EUR 5,549,000 purchase price for the Beneficially Owned Shares; (*ii*) the EUR 2 million additional investment in BD Agro; (*iii*) the EUR 0.2 million purchase price for Mr. Rand's additional 3.9% shareholding in BD Agro, held indirectly by MDH Serbia; and (*iv*) 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.

102. During the Hearing, Mr. Rand further explained the impact of his investments and contributions to the farm and its operations. Upon privatization, the farm was in a catastrophic condition and required significant investment.[101] Mr. Rand made the required investments and BD Agro became one of the most modern dairy farms in Europe, at the time.[102] Mr. Rand also confirmed that he was paying for salaries of BD Agro's managers[103] and financed the operations of BD Agro throughout its existence, including shortly before its expropriation.[104]

103. Mr. Rand's testimony thus confirmed what was already obvious from the Claimants' previous submissions – that the Claimants' investments were significant in terms of size, duration and the importance for Serbia's economy, and thus squarely qualify for protection under Article 25(1) of the ICSID Convention.

C. The Tribunal has jurisdiction *ratione voluntatis* over the Claimants' claims

104. In its Reply, Serbia alleges that the Claimants violated Serbian law by: (*i*) concluding the MDH Agreement and Sembi Agreement in contravention of Serbian

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100 Memorial, § IV.B; Reply, § III.C; Rejoinder on Jurisdiction, § III.C.

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

102 *Id.*, 4:18-5:9 (Rand).

103 *Id.*, 16:8-19 (Rand).

104 *Id.*, 19:3-25 (Rand).

legislation on trading with securities ("**Securities Law Objection**"); (*ii*) failing to disclose Mr. Rand's beneficial ownership to the Agency (the "**Non-Disclosure Objection**"); (*iii*) misappropriating funds from BD Agro's bank accounts (the "**Siphoning Objection**"); and (*iv*) disposing illegally with BD Agro's land (the "**Land Machination Objection**").

105. All of these objections, except for the Securities Law Objection, should be dismissed *in limine*, as: (i) they are inadmissible under Article 41(1) of the ICSID Convention, being raised only in Serbia's Reply; and (*ii*) they do not relate to the making of the Claimants' investment and, thus, fall outside the scope of the legality requirement under the BITs. Further, and in any event, all of Serbia's illegality objections are also meritless, as shown below.

1. Non-Disclosure Objection

106. Serbia's Non-Disclosure Objection must fail because the Claimants disclosed their beneficial ownership to Serbian authorities, despite being under no obligation to do so.

107. As held, for example, by the tribunal in *Krederi v. Ukraine*, absent any express language to the effect in the applicable BIT, "[t]*here is no need for a host State to be aware of specific investments made by investors of the other contracting party*."[105] The tribunal in *Kim v. Uzbekistan* similarly concluded that whether or not the Uzbek authorities had been aware of investor's investment was jurisdictionally irrelevant, since the tribunal "*[did] not find any support in the BIT or in the ICSID Convention for the argument that there exists an 'awareness requirement' for an investment to benefit from the protection of the BIT*."[106] Like the BITs in *Krederi* and *Kim*, the Canada-Serbia BIT and Serbia-Cyprus BIT do not require that an investment be disclosed to the host State.

108. Serbia's objection fares no better under Serbian law. The only source of the Claimants' alleged disclosure obligation cited by Serbia is the principle of "transparency" of privatization, enshrined in Article 2 of the Law on Privatization. However, as

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105 *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 249, **CLA-157**.

106 *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 348, **CLA-154**.

Mr. Milošević explained, this principle only applies to the conduct of the public entities involved in the privatization process, and not to the buyers.[107]

109. While the Agency did require the disclosure of beneficial ownership and control structures in other privatizations (including the "Vranje" and Beopetrol privatizations as described above), it made no such request in the BD Agro privatization. It is thus evident that neither the Claimants nor Mr. Obradović were required to disclose Mr. Rand's beneficial ownership.

110. In any event, Mr. Rand's beneficial ownership of BD Agro was common knowledge in Serbia, and was regularly disclosed by him and his representatives to BD Agro's business partners and third parties.[108] Mr. Rand's investment in BD Agro was even actively encouraged by the-then Minister of Economy, Mr. Predrag Bubalo—which alone disposes of Serbia's Non-Disclosure Objection—and it was always disclosed to Serbian authorities, including the Agency.[109]

111. The meetings relating to Coropi's request for assignment of the Privatization Agreement confirmed that both the Agency and the Ministry of Economy were perfectly aware that Mr. Rand was the beneficial owner and Mr. Obradović only the nominal owner. In fact, Mr. Broshko explained this fact to the Agency during a meeting held on 30 January 2014. The minutes from this meeting reflect this fact, noting that Mr. Broshko "*stated that William Rand was not satisfied with the work and management by the man to whom business of purchasing the company was entrusted*."[110]

112. Ms. Vučković (the former head of the Center for Control) confirmed on cross-examination that Mr. Broshko made clear during the 30 January 2014 meeting that he was present not only as a representative of Coropi, but also that of Rand Investments and Mr. Rand:

> Mr. Misetic: In this letter that we're looking at, you're now saying that Mr Broshko was introduced to you as the director of the company owned by William Rand, and that his means

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107 Tr., Hearing on Jurisdiction and Merits, Day 5, 81:16-82:04 (Milošević).

108 William Archibald Rand Second Witness Statement dated 3 October 2019, ¶¶ 45-51.

109 Tr., Hearing on Jurisdiction and Merits, Day 2, 53:1-15 (Rand); Tr., Hearing on Jurisdiction and Merits, Day 3, 92:22-93:13 (Broshko).

110 Minutes of the meeting at the Privatization Agency, 30 January 2014, **RE-028**.

were used to finance the entire process of privatization of BD Agro; correct?

Ms. Vučković: That's what it says here. Mr Broshko, as you can see for yourselves, at these meetings that you are focusing on, he introduced himself in different ways, and this is what these texts say. This is not a confirmation that the Agency felt this was true. These are statements that were presented to us at the meetings we held, and there is a huge difference between the two.[111]

113. Moreover, Ms. Vučković, Ms. Branka Radović-Janković (the former legal advisor of the Agency's director and President of the Commission of Control) and Mr. Stevanović (State Secretary at the Ministry of Economy) all confirmed that they had no recollection of Mr. Obradović being present at any meeting regarding assignment of the Privatization Agreement in either 2014 or 2015.[112] It is simply inconceivable that the Ministry of Economy and the Agency would hold meetings on the assignment of the Privatization Agreement without Mr. Obradović's presence, had they not known that he was only a nominal owner, ready to implement instructions given to him by Mr. Rand, as the beneficial owner. Consistent with that understanding, the Government officials even went so far as to ask Mr. Obradović to leave a meeting held at the Ministry of Economy on 15 December 2014 when Mr. Broshko told the Ministry and the Agency that Mr. Obradović cannot attend.[113]

114. Moreover, the fact that the minutes from the 15 December 2014 meeting referred to the "representatives" of BD Agro[114] *in plural* further confirms that the Ministry considered not only Mr. Markićević, but also Mr. Broshko, to represent BD Agro. Since Mr. Broshko did not hold any official function in BD Agro, it is evident that he only could have been considered by the Ministry as BD Agro's "representative" by virtue of representing Rand Investments and Mr. Rand, as BD Agro's beneficial owners.

115. In sum, although not required to do so either under public international law or Serbian law, the Claimants clearly and repeatedly disclosed their beneficial ownership to Serbian authorities.

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111 Tr., Hearing on Jurisdiction and Merits, Day 4, 25:6-22 (Vučković).

112 Tr., Hearing on Jurisdiction and Merits, Day 4, 7:19-22 (Vučković); Tr., Hearing on Jurisdiction and Merits, Day 4, 160:3-6 (Stevanović).

113 Tr., Hearing on Jurisdiction and Merits, Day 3, 65:16-66:23 (Markićević).

114 Tr., Hearing on Jurisdiction and Merits, Day 4, 12:2-17 (Vučković).

2. Securities Objection

116. Serbia claims that the MDH Agreement and the Sembi Agreement conflicted with certain provisions of Serbian law—namely, Article 59 of the 2001 Law on Privatization, Article 52(1) of the 2002 Law on Capital Markets and its equivalent Article 52(2) of the 2006 Law on Capital Markets—requiring that the sale of shares in listed companies be executed on the Belgrade Stock Exchange ("**BSE**").

117. However, these provisions do not apply to transfer of beneficial ownership and only relate to transfer of legal title to shares of public companies. This is because under Serbian law, there can be no sale without the transfer of legal title.[115] Since it is undisputed that the legal title to the Beneficially Owned Shares was never transferred to the Claimants, and remained with Mr. Obradović until their expropriation by Serbia, the legal restrictions on trading with shares of public companies are irrelevant to the Tribunal's jurisdiction.

118. Moreover, had the Agency lifted the pledge (as it was legally required to do after its receipt of the full payment of the purchase price), the transfer of legal title to the Beneficially Owned Shares, as contemplated under the MDH Agreement and the Sembi Agreement, could have been lawfully effectuated by any of the following three methods.

119. *First*, the Beneficially Owned Shares could have been transferred through a block trade transaction on the BSE. As Professor Radović confirmed on cross-examination, the Serbian government itself has used block trades to exercise on the BSE options agreements regarding publicly traded shares, which were obviously agreed outside the BSE:

> Mr. Pekař: Now another question: does Serbian law allow put and/or call option agreements regarding shares traded on the Belgrade Stock Exchange?
>
> Prof. Radović: Put and call options are allowed.
>
> Mr. Pekař: Professor Radovic, are you aware or are you not that the Serbian Government has used the block trade procedure to effectuate transfer of shares in Serbia under terms agreed with foreign investors outside of the stock exchange?

[115] Milošević Second ER, ¶ 188.

> Prof. Radović: Yes, but to my understanding, in such cases the option was exercised through the stock exchange.[116]

120. Moreover, while block trades are generally allowed only if the agreed price does not deviate for more than 20% from the average price of the transferred shares during the previous three trading days, the Board of Directors of the BSE had—and regularly used—the discretionary power to allow for a greater price deviation.[117] As explained by Ms. Tomić-Brkušanin, such discretion was "complete" and unrestricted by any guidelines or other limitations.[118]

121. *Second*, the Beneficially Owned Shares could have been invested as in-kind contribution into a limited liability company, the shares of which could then have been freely transferred outside the BSE. Professor Radović confirmed that such a transaction would not be subject to any capital market regulation. [119]

122. *Third*, after 3 January 2008, BD Agro could have been delisted from the BSE and its shares subsequently transferred outside the BSE.

123. Accordingly, the Hearing confirmed that the MDH Agreement and Sembi Agreement did not conflict with any provision of Serbian law, and that the Securities Objection should be dismissed accordingly.

3. Land Machination Objection

124. In their written submissions, the Claimants demonstrated that all transactions with BD Agro's land impugned by Serbia in this arbitration were legitimate and in line with the Privatization Agreement.[120] During the Hearing, the Claimants explained that Serbian courts recently confirmed this fact—as the appellate court upheld Mr. Obradović's acquittal in the so-called land swap case.[121]

125. Moreover, even under Serbia's own characterization, the impugned transactions would only relate to the performance of the Privatization Agreement, rather than to the

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116 Tr., Hearing on Jurisdiction and Merits, Day 6, 91:10-20 (Radović).

117 Bojana Tomić-Brkušanin Second Expert Report dated 5 March 2020, ¶¶ 51-53.

118 Tr., Hearing on Jurisdiction and Merits, Day 4, 195:14-196:2 (Tomić-Brkušanin).

119 Tr., Hearing on Jurisdiction and Merits, Day 6, 96:14-20 (Radović).

120 Rejoinder on Jurisdiction, ¶¶ 242-260, 544-546.

121 Tr., Hearing on Jurisdiction and Merits, Day 8, 1:5-14 (Pekař). *See also* Decision of the Court of Appeal in Belgrade, 26 May 2021, **CE-907**.

conclusion thereof—which represents making of the investment. Given that the impugned transactions do not relate to the making of the investment, the alleged Land Machination Objection is plainly incapable to affect the Tribunal's jurisdiction.

4. Siphoning Objection

126. In its Rejoinder, Serbia for the first time raised a claim that Mr. Obradović allegedly siphoned money out of BD Agro and, thus, committed a fraud.[122] In their Rejoinder on Jurisdiction, the Claimants demonstrated that Serbia's claim lacks any merit because all transactions between BD Agro, Mr. Obradović and other Serbian companies owned by Mr. Rand and his children were completely legitimate.[123]

127. The Claimants further demonstrated that, contrary to Serbia's claims in this arbitration,[124] if all relevant transactions are taken into consideration, the net balance of payments between BD Agro, on one side, and Mr. Obradović together with Mr. Rand and his Serbian companies, on the other side, was actually materially favorable to BD Agro. In other words, rather than any siphoning of funds, there was an actual financial benefit for BD Agro.[125]

128. The Claimants also explained in their submissions that some of the transactions that created this financial benefit for BD Agro, were conducted in such a way that they were not reflected on BD Agro's bank accounts. These included, for example, payments that Mr. Obradović made on behalf of BD Agro directly to its creditors, and the purchase of BD Agro's debt by Inex.[126]

129. During the Hearing, Mr. Cowan—on whom Serbia relied with respect to its analysis of the alleged siphoning of funds—admitted that his analysis does not reflect such transactions—even though they are clearly relevant.[127]

130. Mr. Cowan also admitted during his cross-examination that his analysis was based on descriptions of transactions included in BD Agro's bank statements. These description

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122 Rejoinder, ¶¶ 330-341, 834-836, 841-844.

123 Rejoinder on Jurisdiction, ¶¶ 220-241, 542-543.

124 Rejoinder, ¶ 336.

125 Rejoinder on Jurisdiction, ¶ 236.

126 *Id.*, ¶¶ 230-236.

127 Tr., Hearing on Jurisdiction and Merits, Day 8, 164:11-165:10 (Cowan).

are supposed to state the purpose of each transfer of funds—such as "provision of investment", "shareholder loans", "purchase of goods", etc. However, as Mr. Cowan rightly confirmed, these descriptions are not compulsory and can be incorrect or inconclusive.[128]

131. This admission makes Mr. Cowan's analysis absolutely unreliable. As the Claimants explained already in their Rejoinder on Jurisdiction, descriptions of the purpose of a number of payments included in BD Agro's bank statements analyzed by Mr. Cowan were often clearly incorrect. For example, many transactions labelled as purchase of goods in reality represented shareholder loans. As a result, Mr. Cowan's analysis ignores a significant number of transactions that represented money inflows to BD Agro.[129]

D. The Tribunal has jurisdiction *ratione personae* under Serbia-Cyprus BIT, because Sembi qualifies as "investor" under Article 1(3)(b)

132. The Hearing established that Sembi is an "investor" under Article 1(3)(b) of the Cyprus-Serbia BIT. To qualify as an "investor" under Article 1(3), an investor must have its "seat" in the territory of the home State. Prior to the Hearing, Serbia disputed that Sembi had a "seat" in Cyprus and, thus, argued that Sembi was not an "investor" under the BIT. That theory collapsed at the Hearing.

1. By its terms, Article 1(3) of the Serbia-Cyprus BIT does not impose requirements of 'effective management and financial control and where it carries out its business activities'

133. In determining the meaning of the word "*seat*" in Article 1(3) of the Serbia-Cyprus BIT. In accordance with Article 31 of the Vienna Convention on the Law of Treaties, the term "*seat*" is to be given its ordinary meaning in context and in view of the Serbia-Cyprus BIT's object and purpose.[130]

134. The specific context of the Serbia-Cyprus BIT is clear: Article 1(3)(b) of the BIT requires an investor to have its "seat" in the home State, without any conditions attached to it; it contains no express requirement for an investor to have its "effective management and financial control" in that jurisdiction. The absence of this language stands in sharp

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128 *Id.*, 163:13-164:6 (Cowan).

129 Rejoinder on Jurisdiction, ¶¶ 225-226.

130 Vienna Convention on the Law of Treaties, signed 23 May 1969, Art. 31(1), **RLA-044**.

contrast with other investment treaties, which qualify the term "seat" with other adjectives, such as 'real' seat, 'effective control' or 'substantial business activities'.

135. The drafters of the Serbia-Cyprus BIT included no such language, and this Tribunal should not do so on its own initiative. The only conceivable basis for grafting additional requirements onto the word "seat" is if the investor is from a jurisdiction where notions of "real seat" form an integral part of national corporate law. As explained below, Cyprus is not such a jurisdiction.

2. The term "*seat*" under Cypriot law means only 'registered office' or 'statutory seat'

136. Common law jurisdictions, such as Cyprus, adopt an 'incorporation' approach, such that a company is 'seated' in that jurisdiction if it is incorporated, and maintains a registered office, in that jurisdiction. In contrast, some civil law jurisdictions, such as France and Germany, include the concept of *siège social* and 'real or effective seat'.

137. The 2012 Brussels Regulation[131] is instructive in this regard. In determining where a company is domiciled, Article 63 effectively distinguishes between the civil law and common law jurisdictions within the EU. Article 63 states that, for the common law jurisdictions (*i.e.*, Ireland, Cyprus, and the United Kingdom) "'*statutory seat' means the registered office […]*."[132] The Brussels Regulation fully supports the position advanced by the Claimants' Cypriot law expert in this arbitration, Mr. Georgiades.

138. Mr. Georgiades testified that Cyprus is a common law jurisdiction, that its Companies Law is based on the English Companies Act of 1948, and that Cyprus, therefore, applies the 'incorporation' test in establishing the seat of a company.[133] As Mr. Georgiades explained, the term "seat" is used in six different provisions in the Cyprus Companies Law and, in each instance, it is used interchangeably with, and has the same meaning as, 'registered office.'[134]

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131 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Brussels Regulation**"), **CE-850**.

132 Brussels Regulation, Art. 63, **CE-850**.

133 Agis Georgiades First Expert Report dated 16 January 2019, ¶¶ 2.1-2.3; Georgiades Third ER, ¶ 3.3.

134 Georgiades First ER, ¶¶ 2.2-2.3.

139. Upon cross-examination, Serbia systematically avoided questioning Mr. Georgiades on this evidence. Rather, Serbia's counsel spent almost its entire cross-examination on other matters, only stating at the end that he had "*only two questions left for you. Both of those questions concern the issue of seat […]*."[135] In response to those two questions, Mr. Georgiades convincingly explained why his position is correct and that any other interpretation of the word "seat" is untenable.[136]

140. In response, Serbia's Cypriot law expert, Dr. Thomas Papadopoulos, agrees with Mr. Georgiades that the Cyprus Companies Law is based on a common law approach (*i.e.*, the English Companies Act of 1948) and that Cyprus applies the 'incorporation' test in establishing the seat of a company.[137] However, Dr. Papadopoulos also argues that Cypriot law has recently evolved such that the term "seat" now should be interpreted to mean "*the place where a legal entity is [1] effectively managed and [2] financially controlled and [3] where it carries out its business activities[.]*"[138] According to Dr. Papadopoulos, this newfound, three-part test reflects a distinction between so-called "*substantive companies law issues"* and "*procedural companies law issues*."[139]

141. None of Dr. Papadopoulos's theories have any support in Cypriot law. At the Hearing, Dr. Papadopoulos admitted that his new, three-part test is unsupported by any Cypriot law authorities:

> Mr. Anway: I would like to turn to my last topic now, which is what Claimants' legal expert has described as a lack of support for your position. […] I just want to be clear, you acknowledge that you have no authorities saying that Cyprus law distinguishes between "seat" and "registered office", correct?
>
> Dr. Papadopoulos: With regard to this specific issue […] *there are no papers as far as I know which scrutinise this issue and provide an answer*.
>
> Mr. Anway: You admit that you have no authorities saying that Cyprus law distinguishes between

135 Tr., Hearing on Jurisdiction and Merits, Day 6, 160:20-22 (Serbia's counsel).

136 *Id.*, pp. 160:20-164:5 (Georgiades).

137 Thomas Papadopoulos First Expert Report dated 18 April 2019, ¶ 8.

138 *Id.*, ¶ 10.

139 *Id.*, ¶ 13.

	procedural and substantive company law, correct?
Dr. Papadopoulos:	It is an inherent — *yes, I agree that there are no authorities supporting this* […].
Mr. Anway:	You have no authorities saying that Cyprus law defines seat as the place of effective management and control, correct?
Dr. Papadopoulos:	I used, of course, some — because *there are no specific doctrinal works which provide an answer to this specific issue with regard specifically to Cyprus law* […].
Mr. Anway:	And you have no authority saying that Cyprus law applies the real seat test either, do you?
Dr. Papadopoulos:	*No, I don't have any authorities* […].
Mr. Anway:	Mme President, I have no further questions.[140]

142. Thus, Dr. Papadopoulos admits that he has *no* Cypriot law authority to support his conclusion: *no* court decisions; *no* legislative history*; no* academic writings; *not even* a blog post. This uncanny silence from the entire Cypriot legal community—on what would be a radical change to the Cyprus Companies Law—speaks volumes.

143. Not only is his position unsupported by any Cypriot legal authorities, Dr. Papadopoulos also admitted that the authorities that *do* exist conflict with his position. On cross-examination, the Claimants put to Dr. Papadopoulos a 2016 final report published by the European Commission ("**EC**"), titled "*Study on the Law Applicable to Companies*" (the "**EC Final Report**"). The EC Final Report canvassed the requirements of each EU Member State on their "*pureness*" of incorporation law. [141] Dr. Papadopoulos admitted that he himself contributed to the study.[142]

144. The findings in the EC Final Report are striking. Starting on page 55, the EC Final Report codes the level of "*pureness*" of the incorporation law in each EU Member State as follows:[143]

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140 Tr., Hearing on Jurisdiction and Merits, Day 7, 45:9-47:13 (Papadopoulos) (emphasis added).

141 European Commission, Study on the Law Applicable to Companies, Final Report, 2016, pp. 14, 56 ("**EC Final Report**") **RE-452**.

142 Tr., Hearing on Jurisdiction and Merits, Day 7, 26:4-7 (Papadopoulos).

143 EC Final Report, pp. 55-56, **RE-452**.

> *A country gets '1' if a connecting factor based upon the incorporation theory is clearly formulated in legislation or through judge-made law (i.e. in a way that everyone, even non-experts, can grasp it) and no exceptions are provided (i.e. no additional connecting factors based upon the location of a company's real seat). The score '2/3' denotes either (i) the situation that a connecting factor based upon the incorporation theory is clearly formulated but that this criterion is subject to exceptions, or (ii) that legal experts can identify that the country follows a connecting factor based upon the incorporation theory and no exceptions are provided, but non-experts are uncertain about this position. The score '1/3' refers to the previous scenario (ii) but exceptions to the incorporation theory clearly exist. Finally, '0' is about to the scenario where even legal experts cannot identify that the country follows a connecting factor based upon the incorporation theory.*

145. The EC Final Report further states that, in some Member States, rules of substantive company law contain requirements for companies to establish or maintain a specific connection to the territory of the Member State. This analysis was coded as follows:[144]

> *A country gets '1' if domestically incorporated companies do not have to have their headquarters or any other fact-based criteria on the domestic territory; a country gets 1/2 if domestic companies should have some factors on the domestic territory but this rule is uncertain; it gets '0' otherwise.*

146. Applying these criteria, Cyprus was awarded "1" for both the "*pureness of its incorporation theory*" and "1" for its substantive law being free from "*real seat elements*". This finding can be contrasted with Greece, a civil law country:[145]

Table 6: Country classifications in private international and substantive company law

(1) 'Pureness' of incorporation theory under private international law (max. 1) (2) Substantive company law free from 'real seat elements' (max. 1)					
	(1)	(2)		(1)	(2)
Austria	2/3	0	*Italy*	2/3	1
Belgium	2/3	0	*Latvia*	1/3	0
Bulgaria	1	1	*Lithuania*	1	0
Croatia	2/3	1	*Luxembourg*	1/3	0
Cyprus	1	1	*Malta*	1	1
Czech Republic	1	1	*Netherlands*	1	1
Denmark	1/3	1	*Poland*	0	1/2
Estonia	2/3	0	*Portugal*	0	1
Finland	1	1	*Romania*	2/3	1
France	2/3	0	*Slovakia*	1	1
Germany	2/3	1	*Slovenia*	2/3	0
Greece	1/3	0	*Spain*	2/3	0
Hungary	1	1	*Sweden*	1	1
Ireland	1	1	*United Kingdom*	1	1

144 *Id.*, p. 56.

145 *Id.*, p. 56.

147. This objective, third-party evidence directly contradicts Dr. Papadopoulos' testimony in this arbitration. When confronted with it on cross-examination, Dr. Papadopoulos did not dispute that the EC Final Report findings are inconsistent with his current position, stating "*I disagree with this position*."[146]

148. Other findings in the EC Final Report are equally damaging to Dr. Papadopoulos' position. On page 107, the EC Final Report analyzed: (*i*) the effective residence requirements in Member States, understood as any requirement ranging from a mere business address to the principal place of business of the company; and (*ii*) the consequences if these requirements are not fulfilled. Applying these criteria, the EC Final Report found that Cyprus had "*no*" requirements for "*residence/real seat*", other than having a registered office.[147] Again, Cyprus stands in sharp contrast to Greece:[148]

Country	Residence/real seat requirement for national companies	If yes, details of substantive requirements	Consequences if requirements no longer met	Regularly scrutinised (on incorporation/ongoing)
Cyprus	No. Other than the registered office, there are no additional requirements of a physical connection between the company's operations and Cyprus.	N/A	N/A	N/A
Greece	Real seat relevant for most companies (i.e. the traditional private and public company forms). Registered office for the newly introduced company form of company (IKE-PC), introduced with Law 4072/2012	For the 'traditional' companies: real seat, defined as the place of meetings of the board of directors and/or the shareholders. Some exceptions apply.	Not entirely clear, but no automatic nullity/dissolution of company	No scrutiny

149. Under cross-examination, Dr. Papadopoulos admitted that this finding, too, conflicts with his evidence in this arbitration:

> Mr. Anway: Professor Papadopoulos, this report reflects none of the arguments that you're making in your expert reports to this Tribunal, correct?
>
> Dr. Papadopoulos: Correct, because I disagree with these findings […].[149]

150. In sum, Dr. Papadopoulos not only admitted that he has no supporting Cypriot legal authorities for his theories, but that the EC Final Report—an inherently credible, study in which he himself participated—expressly took the exact opposite position.

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146 Tr., Hearing on Jurisdiction and Merits, Day 7, 30:5, 31:25, 32:4-5 (Papadopoulos).

147 EC Final Report, pp. 107-109, **RE-452**.

148 *Id.*, p. 109.

149 Tr., Hearing on Jurisdiction and Merits, Day 7, 33:21-24 (Papadopoulos).

3. The references to "*seat*" in the Cyprus Companies Law and Cyprus court decisions make clear that it means the same thing as 'registered office' or 'statutory seat'

151. Unable to reconcile his position with either the EC Final Report or the 2016 Brussels Regulation, Dr. Papadopoulos nonetheless argues that Cyprus has quietly (beyond the notice of all the Cypriot legal authorities) transformed from a pure 'incorporation' jurisdiction into a 'real seat' jurisdiction. The starting point for this argument is important to his conclusion: Dr. Papadopoulos claims repeatedly[150] that this transformation started in 2000, when the Cyprus Parliament began using the word "*seat*" as part of Cyprus' "*pre-accession harmonization of Cyprus law with Community acquis*"[151] (despite there being no such requirement in joining the EU and the fact that other EU Member States—notably Ireland and the United Kingdom—do not adopt a 'real seat' approach).

152. Dr. Papadopoulos' theory is built on a false premise. In fact, the word "seat" did *not* start to appear in the Cyprus Companies Law in 2000 or even as part of Cyprus' planned accession to the EU. Rather, it first appeared a year earlier—in 1999—and it had absolutely nothing to do with Cyprus' planned accession to the EU.

153. The term "seat" first appeared in Section 2 of amending law 149(I)/1999, which created certain exemptions related to registration of companies that became dormant and inactive as a result of the Turkish occupation of Cyprus in 1974. Under this provision, a company is entitled to the exemptions if: (*i*) it was incorporated before 1974; (*ii*) it had its seat (*i.e.*, registered office) or place of business or its whole property in parts of Cyprus that are now occupied; and (*iii*) it is not active in the free parts of Cyprus.[152] As Mr. Georgiades explained under cross-examination, it would make no sense for the term "*seat*" in this provision to refer to a company's 'effective management and financial control and where it carries out its business activities'. Cyprus legislation would obviously never refer to the occupied territory as another country.[153]

154. The Cypriot Parliament's later inclusions of the word "seat" into the Cyprus Companies Law is perfectly consistent with its meaning in this original provision. The Parliament

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150 Papadopoulos First ER, ¶¶ 18, 19; Thomas Papadopoulos Second Expert Report dated 24 January 2020, ¶¶ 10, 28.

151 Papadopoulos First ER, ¶ 18.

152 Georgiades Second ER, ¶ 2.20.

153 Tr., Hearing on Jurisdiction and Merits, Day 6, 162:4-163:2 (Georgiades).

subsequently used the word "seat" in five other provisions in the Cyprus Companies Law.[154] We invite the Tribunal to review each of those provisions and to simply substitute the words 'registered office' or 'statutory seat' for the term "seat". The Tribunal will see that, through this simple exercise, the provisions make perfect sense with that alternative wording.

155. By contrast, the provisions do not make sense when one substitutes the words 'effective management and financial control and where it carries out its business activities' for the word "seat". For example, Section 354K(c) refers to the obligation of a company to state the date on which it purports to establish a 'seat' abroad.[155] But the general title for this section is "*Transfer of Registered Office of Companies to and from the Republic*".[156] In other words, *the heading of the section uses the word "seat", while the provision to which the heading relates uses the words "registered office".* This shows, beyond any doubt, that the Cypriot Parliament used the two terms interchangeably.

156. Moreover, Section 57B(1)(d), which relates to the same matter, refers to transferring abroad the company's 'seat'. If Dr. Papadopoulos's definition were correct, one would expect the Registrar of Companies to keep a record of *both* the registered office and the 'real seat' of each company.[157] Of course, the Registrar does not do so. Instead, it records only the 'registered office'. In respect of companies that transfer their registered office outside Cyprus, the Registrar maintains a distinct record in accordance with Section 354P, which does not require information about their 'seat'.[158]

157. But that is not all. Not only did the Cypriot Parliament refer to the word "seat" prior to 2000, the Cypriot courts did so as well. Six years earlier, in 1994, the Supreme Court of Cyprus used the word "seat" interchangeably with "registered office" in the *Albatros* case.[159] As Mr. Georgiades explained at the Hearing:

> Mr. Georgiades: Five years earlier, in one of the cases which I cite in my first report, CE-121, there is

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154 2004 Law on Companies, Arts. 57B(1)(d), 142(1)(cA), 347(1)(a)(ii), 354K(c), 365B(2)(k), and 391A, **CE-120**.

155 *Id.*, Art. 354K(c).

156 2004 Law on Companies, **CE-499**.

157 Georgiades Second ER, ¶¶ 2.7, 2.8.

158 *Ibid*.

159 *Albatros* [1994] 4B A.A.D. 756, p. 757, **CE-121**.

> reference by a Supreme Court judge to a seat. There is only one explanation for that, because at that time, there was no issue of transferring seats, such a thing was unknown to the Cypriot legal order. There was no law stating anything about the company having a seat. The only possible explanation is that in the Albatros case, CE-121, which I have cited before, the judge used the Greek word edra which means seat as something meaning exactly the same as registered office. And the subsequent use of the word "seat" in case law, textbooks and the amending laws were inserted with exactly the same purposing.[160]

158. Other Cyprus court decisions confirm this interpretation.[161] So, too, do EU institutions, which use the terms 'seat' and 'registered office' interchangeably when referring to transferring a company from one Member State to another.[162]

159. In sum, the references to "seat" in the Cyprus Companies Law and Cyprus court decisions make clear that the term means the same thing as "registered office" or "statutory seat".

4. Other investment treaty tribunals have rejected Dr. Papadopoulos' position

160. This is not the first time that Dr. Papadopoulos has offered his position before an investment treaty tribunal. As he admitted on cross-examination, he offered the same opinion in *Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2), and the arbitral tribunal unanimously rejected it.[163]

161. The tribunal in Mera—comprised of Dr. Georg von Segesser, Dr. Bernardo Cremades, and L. Yves Fortier—concluded: "*The Arbitral Tribunal finds it difficult to accept the Respondent's position that the term 'seat' is ordinarily understood in international law to convey the place of effective management, i.e. where decisions are effectively made. Absent from the wording of Article 1(3)(b) of the BIT is language requiring that there be*

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160 Tr., Hearing on Jurisdiction and Merits, Day 6, 161:13-162:1 (Georgiades).

161 *E.g.*, *Bank of Cypru*s [1999] 1B A.A.Δ. 1010, pp.1012 & 1018, **CE-122**; *Karakannas v. Republic* [2002] 3 A.A.D. 456, p. 457, **CE-123**; *Sartas v. Maroulli* [2003] 1C A.A.D. 1446, p.1459, **CE-124**; *Lapertas v. Zarvou* [2004] 1B A.A.D. 1261, p.1263, **CE-125**; *Omas (Cyprus) v. Republic*, Judicial Review Application No.906/03, Judgment of 09/09/05, p.6, **CE-126**; *Thoma v. Eliadi* [2006] 1B A.A.D. 1263, p.1274, **CE-127**; *Investylia v. Tampouri* [2006] 1B A.A.D. 1325, p.1329, **CE-128**.

162 *E.g.* European Parliament Briefing on Cross-Border Transfer of Company Seats, **CE-503**.

163 Tr., Hearing on Jurisdiction and Merits, Day 7, 18:4-19:13 (Papadopoulos).

a substantive link between the company and the country in which it is organized."[164] Rejecting Dr. Papadopoulos' expert testimony, the tribunal concluded that the concept of 'real seat' is alien to Cypriot law and that the term "seat", as used in the Serbia-Cyprus BIT, means a company's 'registered office'.[165]

162. This holding *precisely* matches Mr. Georgiades' expert opinion in this arbitration.

163. The *Mera* tribunal also cited, with approval, Professor William Park's separate opinion in an earlier case involving the same issue, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8.[166] There, the tribunal likewise concluded that the term "seat" in the BIT meant 'registered office.' The majority of the tribunal, however, concluded that, to determine whether there *is* a registered office, various factors should be considered.[167]

164. Professor Park dissented, stating that the majority's "*elaborate test of a registered office, hemmed by a half dozen conditions*" is not based on any text in the BIT.[168] Rather, according to Professor Park, "*no evidence supports the position that constant accessibility constitutes a precondition to a registered office, or that inability to remain open triggers disregard of the office by the Register. Defective compliance with corporate obligations (such as name plate, ledgers and accessibility) may result in fines, but does not make the office disappear*."[169]

165. In this case, the Tribunal need not choose between the *Mera* tribunal's approach, on the one hand, and the majority of the *CEAC* tribunal's approach, on the other hand. *It is undisputed that the Claimants satisfy both tests.* That is, it is undoubtedly true that the Claimants have a 'registered office' as the *Mera* tribunal understood that concept. But it is equally true that the Claimants also satisfy the five conditions identified by the *CEAC* tribunal.

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164 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 87, **CLA-022**.

165 *Id.*, ¶¶ 90-91.

166 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, **CLA-021**.

167 *Id.*, ¶ 171.

168 *Id.*, ¶ 6.

169 *Id.*, ¶¶ 9-10.

166. Through his unannounced site visit, Mr. Georgiades confirmed that Sembi has physical premises in Cyprus; that the company uses those premises; that the premises are accessible to the public, that the books and registers that Sembi is required to maintain are held at its registered office; and that Sembi's name is affixed on the outside of the office in a conspicuous position, in letters easily legible.[170]

167. Serbia has never questioned any of the above facts. Indeed, Dr. Papadopoulos affirmatively acknowledged during cross-examination that Sembi was validly incorporated, and had a registered office, in Cyprus.[171]

168. Thus, Serbia does not attempt to challenge Sembi's seat in Cyprus by disputing the facts that the *Mera* and *CEAC* tribunals found relevant. Instead, Serbia attempts to challenge Sembi's seat in Cyprus through a different route: by insisting on a brand new test, invented by Dr. Papadopoulos, that *neither* the *Mera* nor the *CEAC* tribunal adopted. For the reasons explained above, there is no merit to Dr. Papadopoulos' invented test.

169. In sum, it is undisputed that the Claimants satisfy *both* the test adopted by the tribunal in *Mera* and the test adopted by the majority in *CEAC*. Consequently, Sembi has a "seat" in Cyprus and thus is a protected investor under the Serbia-Cyprus BIT.

III. ACTIONS OF THE AGENCY ARE ATTRIBUTABLE TO SERBIA

170. It is undisputed that the Ministry of Economy and the Ombudsman are organs of Serbian state, and that their conduct is, thus, attributable to Serbia under public international law. The Hearing further confirmed that the conduct of the Agency is, too, attributable to Serbia under Article 4, 5 and 8 of the ILC Articles.

A. The Agency was a *de facto* organ of Serbia under Article 4 of the ILC Articles

171. Although the Agency was not explicitly described as a State organ under Serbian law, the Hearing confirmed that it was structurally and functionally part of the Serbian state administration and, thus, represented a *de facto* organ of Serbia under Article 4 of the ILC Articles.

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170 Georgiades First ER, ¶ 2.14.

171 *E.g.* Tr., Hearing on Jurisdiction and Merits, Day 7, 14:21-17:25 (Papadopoulos).

172. *First*, Mr. Cvetković confirmed that the Serbian Government appointed the Agency's Board of Directors, Management Board as well as the Director of the Agency.[172] He further confirmed that the Commission for Control—the body that decided upon termination of the Privatization Agreement—was established by the Ministry of Economy.[173]

173. *Second*, Serbia's witnesses confirmed that the Agency was supervised by the Ministry of Economy and the Serbian Government:

a. Ms. Radović-Janković confirmed that the entire privatization process was supervised by the Ministry of Economy and the Council of Ministers;[174]

b. Mr. Cvetković explained that the Ministry of Economy not only supervised the legality of the Agency's work, but also acted as a "*second-instance authority in case of complaints against the work of the Agency, for instance concerning an auction process, or some other process conducted by the Agency […]*";[175] and

c. Mr. Cvetković further confirmed that the Agency also had to regularly report to the Ministry of Economy at least twice a year.[176]

174. *Third*, Mr. Cvetković confirmed that "*most of the money*" earned by the Agency from the sale of privatized assets was forwarded to state budget.[177] As further explained by Mr. Milošević, such funds were used in accordance with Government strategies and the national investment plan.[178]

175. *Fourth*, given all the above, it comes as no surprise that the European Court for Human Rights repeatedly and unequivocally confirmed that the Agency was a "*state body*".[179] These findings clearly confirm that the Agency materially qualifies as an organ of the

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172 Tr., Hearing on Jurisdiction and Merits, Day 4, 113:13-25, 114:16-22 (Cvetković).

173 Tr., Hearing on Jurisdiction and Merits, Day 4, 116:23-117:7 (Cvetković).

174 Tr., Hearing on Jurisdiction and Merits, Day 3, 139:23-140:7 (Radović-Janković).

175 Tr., Hearing on Jurisdiction and Merits, Day 4, 102:17-103:4 (Cvetković).

176 *Id.*, 117:8-18 (Cvetković).

177 *Id.*, 131:24-132:6 (Cvetković).

178 Tr., Hearing on Jurisdiction and Merits, Day 5, 12:13-13:1 (Milošević).

179 *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**.

Serbian state, and its conduct is, thus, attributable to Serbia under Article 4 of the ILC Articles.

B. The conduct of the Agency is attributable to Serbia also under Article 5 of the ILC Articles

176. The Agency exercised elements of governmental authority, and its conduct is, thus, attributable to Serbia also under Article 5 of the ILC Articles.

177. *First*, it is undisputed that privatization agreements are not ordinary commercial agreements. Instead, they are considered by Serbian courts as *sui generis* contracts pursuing a specific aim of promoting the economic development and social security.[180] Professor Radović equally confirmed that the terms of a privatization agreement are non-negotiable and impose on buyers various obligations to safeguard economic interests of the Republic of Serbia.[181]

178. *Second*, it is also undisputed that the Agency was a "*holder of public powers*."[182] Moreover, the Agency exercised such public powers when concluding, performing and terminating the Privatization Agreement.

179. In fact, the Ministry of Economy justified its supervision of the work of the Agency relating to BD Agro—primarily relating to the issue of the Agency's control of Mr. Obradović's compliance with the Privatization Agreement, and the termination thereof—by reference to Article 46 of the Law on State Administration.[183] This provision entitled the Ministry of Economy to supervise "*holders of public authorities while performing delegated state administration tasks*."[184] Accordingly, the Agency's performance and termination of the Privatization Agreement were "*delegated state administration tasks."*

180. The same conclusions also stems from the fact that the Ombudsman, who reviewed the Agency's conduct relating to the termination of the Privatization Agreement—and issued

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180 Judgment of the Supreme Court of Cassation of the Republic Serbia, Prev 104/2013, 19 June 2014, p. 3 (pdf), **CE-253**.

181 Radović First ER, ¶ 27; Mirjana Radović Second Expert Report dated 24 January 2020, ¶ 27.

182 Tr., Hearing on Jurisdiction and Merits, Day 6, 70:17-19 (Radović).

183 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 2 (pdf), **CE-098**.

184 *Ibid*.

his "Recommendations" relating thereto—can only review activities "*where the public authority acts as an authority*":

> Mr. Pekař: I am sorry, I don't -- maybe you answered my question and I did not realise that. My question was: is the Ombudsman authorised to review all activities of holders of public authority, or only their activities that constitute delegated state administration tasks?
>
> Prof. Radović: Not all activities, only activities where the public authority acts as an authority.[185]

181. Moreover, the Agency itself confirmed in the *Uniworld* arbitration that in performing privatization agreements, and controlling the buyer's compliance therewith, the Agency "*actually performs its lawful duty – not to act as a contract party, but as the holder of public powers*."[186]

182. *Third*, Mr. Milošević explained that the notice of termination and the decision on transfer of the capital have all characteristics of administrative acts.[187] The unilateral seizure and transfer of the Beneficially Owned Shares was an exercise of governmental authority. No private party could have done so. Serbia does not argue otherwise.

183. *Finally*, the Serbian courts consider the notice of termination to be an act that "*represents the state's will to terminate the contract*" and constitutes the 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 […]*."[188]

184. Thus, the Agency was vested with governmental authority and exercised such authority during the entire privatization process of BD Agro and for the termination of the Privatization Agreement and seizure of the Beneficially Owned Shares.

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185 Tr., Hearing on Jurisdiction and Merits, Day 6, 78:20-79:1 (Radović).

186 *Uniworld v. Privatization Agency and Srbija-Turist A.D.*, ICC Case No. 14361/AVB/CCO/JRF/GZ, Award, 30 May 2011, ¶ 295, **CE-252**.

187 Miloš Milošević First Expert Report dated 16 January 2019, ¶ 115.

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

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

185. The conduct of the Agency is also attributable to Serbia under Article 8 of the ILC Articles because the Agency in fact acted both "*on the instructions*" of Serbia and "*under the direction or control*" of Serbia.

186. *First*, Serbian witnesses confirmed during the Hearing that the Agency was acting pursuant to binding instructions of the Ministry of Economy:

a. Ms. Vučković confirmed that the Agency sought "*instructions*" from the Ministry of Economy with respect to the BD Agro case:

> Mr. Misetic: Do you see that? The Privatization Agency was asking for instructions from the Ministry, correct?
>
> Ms. Vučković: That's what it says here, and yes, that's what we were asking for.[189]

b. Ms. Vučković also confirmed during her cross-examination that the 7 April 2015 letter from the Ministry of Economy represented an order, binding upon the Agency:

> Ms. Vučković: Well, if the transcript says that this is what I said, then it must be true. My understanding of all the decisions issued by the line ministry were that they are generally speaking binding on the Privatization Agency, and this is how we acted in all privatization proceedings where oversight was conducted over the Agency, and there were quite a few before this case and after this case as well.[190]

187. In fact, the officials of the Agency repeatedly referred to instructions from the Ministry of Economy as "*orders*".[191]

188. The binding nature of the Ministry's instructions is further confirmed by the Agency's refusal to make any decisions regarding BD Agro's privatization agreement before it received Ministry's conclusions from the supervision procedure.[192]

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189 Tr., Hearing on Jurisdiction and Merits, Day 4, 42:10-13 (Vučković).

190 *Id.*, 78:1-79:4 (Vučković).

191 Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, **CE-768**; Claimants' Opening Statement Presentation, slide 141.

192 Tr., Hearing on Jurisdiction and Merits, Day 4, 52:1-17 (Vučković).

189. When the Agency finally received the instructions from the Ministry, it followed them. As the Agency made clear in the Notice of Termination, the Agency terminated the Privatization Agreement "*in line with the Report of the Ministry of Economy*".[193]

190. Serbia controlled and directed the actions of the Agency during the privatization process of BD Agro and, most importantly, the termination of the Privatization Agreement. On this basis, the conduct of the Agency is attributable to Respondent also in accordance with Article 8 of the ILC Articles.

IV. SERBIA VIOLATED ITS OBLIGATIONS UNDER THE TREATIES

A. Serbia violated the Treaties in exercise of its sovereign powers

191. Serbia's primary defense against the clear evidence of Serbia's violation of the Treaties is that the Agency purportedly acted as a regular commercial party and its conduct, therefore, could not violate international law. This is clearly not the case, as shown above in the context of the analysis of attribution under Article 5 of the ILC Articles—and the argument even starts from a number of wrong legal premises.

192. *First*, there is no firm requirement that any Treaty breach involve exercise of sovereign powers. As held by tribunal *SGS v. Paraguay*, "*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*."[194]

193. Similarly, the tribunals in *Eureko v. Poland* and *Ampal v. Egypt* found breaches of contract by the state or its instrumentality to violate international law, without inquiring whether such breach occurred in the state's "*commercial*" or "*sovereign*" capacity.[195] Indeed, there is no reason to allow a state to escape its liability under an investment treaty merely because its relationship with a protected investor is formally contractual.

194. *Second*, investment arbitration authority confirms that privatization *per se* has a governmental, and not a commercial, character. For example, in *AWDI v. Romania*, the

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193 Notice of Termination of the Privatization Agreement, 28 September 2015, p. 3, **CE-050**.

194 *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**.

195 *Eureko B.V. v. Republic of Poland,* UNCITRAL, Partial Award, 19 August 2005, ¶¶ 240-241, **CLA-030**; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶¶ 345-348, **CLA-031**.

tribunal held that the State's signing of a privatization contract containing buyers' obligations underlying the public interest inherent in the privatization process, such as an obligation to maintain for a given period the current number of employees or to further invest in the privatized company, is an exercise of a State's sovereign powers.[196] Like in *Awdi*, the public policy goals underlying the privatization process of BD Agro transpire from the text of the Privatization Agreement. No ordinary share purchase agreement would require the buyer to invest in the target company, maintain its business operations and set forth a comprehensive social program, as the Privatization Agreement did.

195. Moreover, it does not matter that certain aspects of the Privatization Agreements were governed by private law. The tribunal in *Bosca v. Lithuania* held that "*the applicability of the Civil Code to certain aspects of the [State Property Funds'] work does not change the governmental nature of the acts adopted in the process of privatization*."[197]

196. The actions of Serbia's organs tasked with carrying out the privatization process—including the Agency's execution, performance and termination of privatization agreements—thus qualify as sovereign acts.

197. *Third*, the Agency was vested with—and exercised—sovereign powers unavailable to any commercial party. No commercial seller could seize shares from the buyer without first securing its consent or prevailing in litigation before a competent court or tribunal. The termination of the Privatization Agreement and the subsequent seizure of the Beneficially Owned Shares were sovereign acts *par excellence.*

198. The sovereign nature of the termination of the Privatization Agreement is confirmed by the fact that, even under Serbian law, the conduct of the Agency in connection with the performance and termination of the Privatization Agreement was the conduct of "*holders of public authorities while performing delegated state administration tasks*"[198] within the meaning of Article 46 of the Law on State Administration.[199] The Serbian courts themselves consider that the Agency's uses "*its legal power, obtained by the transfer of*

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196 *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**.

197 *Luigiterzo Bosca v. Lithuania*, UNCITRAL, Award, 17 May 2013, ¶ 127, **CLA-042**.

198 Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 2 (pdf), **CE-098**.

199 *Ibid*.

authority under public law from the state to terminate the agreement that did not achieve the legal goal and the social purpose of privatization."[200]

199. *Fourth*, the termination of the Privatization Agreement and the seizure of the Beneficially Owned Shares were sovereign acts also because they were not motivated by any commercial consideration. Serbia's witnesses expressly confirmed this fact during the Hearing.[201]

200. *Fifth*, the termination and seizure also resulted from, and implemented, the Ombudsman's unlawful investigation and "Recommendations"—themselves obviously sovereign acts. In *Caratube v. Kazakhstan*, the tribunal concluded that a termination of a contract involved State's sovereign powers, because it was based intervention of a State body.[202]

201. In sum, Serbia unquestionably violated the Treaties in the exercise of its sovereign powers.

B. Serbia expropriated the Claimants' investment

202. Serbia's termination of the Privatization Agreement and the seizure of the Beneficially Owned Shares are a textbook direct expropriation: they have deprived the Claimants of both the legal title and the economic enjoyment of the Beneficially Owned Shares. Moreover, such an expropriation was clearly unlawful, because it did not involve any due process, was not carried out for public purpose and was not accompanied by payment of *any* compensation to Claimants. Not even the purchase price for the Beneficially Owned Shares was returned to Claimants.

203. In addition, by seizing the Beneficially Owned Shares, Serbia also deprived of any value, and thus indirectly expropriated, Mr. Rand's 3.9% shareholding in BD Agro, indirectly held by Mr. Rand through MDH Serbia.

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200 Judgment of the Higher Commercial Court, Pž. 6463/2007, 8 December 2008, **RE-164**.

201 *E.g.* Tr., Hearing on Jurisdiction and Merits, Day 3, 144:24-145:6 (Radović-Janković); Tr., Hearing on Jurisdiction and Merits, Day 4, 41:16-20 (Vučković).

202 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 935, **CLA-028**.

1. Termination of the Privatization Agreement and the transfer of Beneficially Owned Shares were unlawful under Serbian law

204. Serbia's key defense of its seizure of the Claimants' investment is that the termination of the Privatization Agreement was lawful under Serbian law, and thus could not qualify as expropriation under public international law. Serbia's argument is a non-starter, because a state cannot rely on domestic law to excuse its violation of international law.[203] Moreover, the Hearing unequivocally confirmed that the termination of the Privatization Agreement and the seizure of the Beneficially Owned Shares were manifestly unlawful under Serbian law.

205. The Claimants will demonstrate in turn below that: (*i*) Mr. Obradović did not violate Article 5.3.3 or 5.3.4 of the Privatization Agreement; (*ii*) the purported breach of Article 5.3.4 did not represent a ground for termination of the Privatization Agreement; and (*iii*) the termination was, in any event, a disproportionate response to the purported breach, and, thus, unlawful under both Serbian law and international law.

a. There was no breach of the Privatization Agreement

i. Mr. Obradović did not breach Article 5.3.3

206. In their written submissions, the Claimants demonstrated that Mr. Obradović did not breach Article 5.3.3 of the Privatization Agreement because the alleged breach of this provision—the culling of cows ordered by Serbia: (*i*) does not represent a disposition with property; and (*ii*) in any case, clearly represented *force majeure*.[204]

207. The external law firm engaged by the Agency—Radović & Ratković law firm—also concluded in its memorandum dated 11 June 2013 that the alleged breach of Article 5.3.3 was, in fact, a *force majeure* event.[205] The Agency also had a confirmation from an auditor engaged by Mr. Obradović that Article 5.3.3 of the Privatization Agreement had not been breached[206] and recognized this fact during an internal meeting.[207]

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203 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Article 3, **CLA-24**.

204 *E.g.* Memorial, ¶¶ 101-106; Reply, ¶¶ 160-163.

205 Tr., Hearing on Jurisdiction and Merits, Day 3, 150:1-6 (Radović-Janković); Radović & Ratković legal opinion, 11 June 2013, **CE-034**.

206 Tr., Hearing on Jurisdiction and Merits, Day 4, 56:8-11 (Vučković).

207 Reply, ¶¶ 295-297.

208. Despite these facts, the Agency continuously requested from Mr. Obradović additional evidence that he had complied with Article 5.3.3—even after it acknowledged during an internal meeting that the alleged breach represented *force majeure*. The Agency dropped its allegation of the alleged breach of Article 5.3.3 only when it declared the Privatization Agreement terminated.

ii. Mr. Obradović did not breach Article 5.3.4

209. The Claimants demonstrated in their written submissions that for a number of reasons, Mr. Obradović did not breach Article 5.3.4 of the Privatization Agreement when BD Agro took a loan of approximately EUR 2 million, secured it with a pledge on its land and re-loaned a part of the funds to Crveni Signal and Inex. In this submission, the Claimants will focus on the one reason more amply discussed during the Hearing.[208]

210. The only aspect of the transaction that the Agency claimed to violate Article 5.3.4 was the conjunction of the: (*i*) pledge over BD Agro's land; and (*ii*) re-loaning of a part of the funds received under the loan to third parties. It is undisputed that the Privatization Agreement did not prevent BD Agro from pledging its land to obtain funds for its own use and from loaning funds to third parties.

211. Mr. Milošević confirmed during his cross-examination that re-loaning of money originally loaned by BD Agro represents a use of such funds by BD Agro and, therefore, does not violate Article 5.3.4.[209] The regularity of such use of BD Agro's funds is also evident from the fact that the beneficiaries, Crveni Signal and Inex, partially repaid their debts to BD Agro,[210] which Serbia completely ignored in its opening statement.[211]

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208 The reasons developed in the Claimants' written submissions, but not discussed at the Hearing include, without limitation, (*i*) that Article 5.3.4 of the Privatization Agreement imposed obligations solely on Mr. Obradović while the pledge that, according to the Privatization Agency, violated Article 5.3.4. was established by BD Agro; and (ii) that Article 5.3.4 only precluded Mr. Obradović from pledging BD Agro's assets as a security for loans taken by third parties while in the present case, BD Agro pledged its land to secure the loan it itself took and, to a significant extent, used for the operation of the farm. *See* Memorial, ¶ 109; Reply, ¶¶ 167-172, 389.

209 Tr., Hearing on Jurisdiction and Merits, Day 5, 64:8-14 (Milošević).

210 Tr., Hearing on Jurisdiction and Merits, Day 3, 47:19-49:11 (Markićević).

211 Serbia's opening presenetation, slide 42.

212. Therefore, it is unsurprising that neither Mr. Broshko nor Mr. Markićević had ever stated in their discussions with the Agency that the use of BD Agro's funds for the benefit of Inex or Crveni Signal was a breach of the Privatization Agreement.[212]

b. The alleged breach of Article 5.3.4 in any case did not represent a valid ground for termination of the Privatization Agreement

i. The Privatization Agreement does not give Serbia the right to terminate for breach of Article 5.3.4, nor does Article 41a(3) of the Privatization Law

213. It is undisputed that Article 5.3.4 is not among the grounds for termination enumerated 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 would not be a valid ground for termination of the Privatization Agreement.

214. Serbia, however, 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(3) of the Law on Privatization.[213] Serbia's interpretation is clearly incorrect because it would make Article 7.1 of the Privatization Agreement redundant. Serbia did not present any reason why the Agency—the sole drafter of the Privatization Agreement and a body with a detailed knowledge of the Law on Privatization—would include an entirely meaningless provision in the Privatization Agreement.[214]

215. Moreover, Serbia's theory misinterprets Article 41a of the Law on Privatization. Article 41a(3) of the Law on Privatization—which purportedly justified the termination of the Privatization Agreement—provides that a privatization agreement shall be deemed terminated if, even within an additional granted term, the buyer "*disposes of the property of the subject of privatization contrary to provisions of the agreement.*"[215] Accordingly, as Mr. Milošević explained, Article 41a(3) cannot be read in isolation, but instead must be read together with a particular privatization agreement:

> Mr. Milošević: What is the proper meaning of item (3)? The important words are "contrary to provisions of the agreement".

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212 Tr., Hearing on Jurisdiction and Merits, Day 3, 74:6-76:13 (Broshko).

213 *E.g.* Counter-Memorial, ¶ 119; Rejoinder, ¶¶ 201 *et seq.*

214 Tr., Hearing on Jurisdiction and Merits, Day 6, 35:2-36:7 (Radović).

215 2001 Law on Privatization, Article 41a(3), **CE-220**.

> The legislator provided the parties to give specific meaning to this provision, which means they cannot replace, they cannot avoid this provision, but they can stipulate specific meaning to this provision, which they did in particular privatization agreements. We have article 5.3.3, which treats disposal of the property in some limits which are provided; and we have article 5.3.4, which is not under article 7, and that is the will of the parties, which is where the legislator provided them to do so. So they are not excluding this provision, they are just giving specific meaning to this provision.[216]

216. Accordingly, Article 41a(3) of the Law on Privatization in no way purports to override the decision of the parties—or rather the Agency, as the sole drafting party—not to include breach of Article 5.3.4 among the grounds for termination under Article 7 of the Privatization Agreement. As a result, and contrary to Serbia's argument, not *every* disposition contrary to the Privatization Agreement was sanctioned by termination:

> Mr. Milošević: [I]f you go back to paragraph (3), it doesn't forbid all disposition of the property. It establishes grounds for termination only for dispositions which are contrary to the agreement.
>
> Mr. Djerić: Exactly.
>
> Mr. Milošević: And if we look into article 7 where the parties stipulate which are the main obligations which are sanctioned by termination, we will not find article 5.3.4. We will find article 5.3.3, but we will not find article 5.3.4. So not any disposition is sanctioned with the termination.[217]

217. Mr. Milošević's findings are consistent with those of the Radović & Ratković law firm, the Agency's external counsel. As Ms. Radović-Janković confirmed during the Hearing, the Radović & Ratković law firm considered whether the Agency had the right to terminate the Privatization Agreement pursuant to Article 7 of the Privatization Agreement and Article 41a of the Law on Privatization for the alleged breach of Article 5.3.4—and it unequivocally concluded that it did *not*.[218]

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216 Tr., Hearing on Jurisdiction and Merits, Day 5, 18:1-14 (Milošević).

217 *Id.*, 19:11-20:3 (Milošević).

218 Tr., Hearing on Jurisdiction and Merits, Day 3, 147:18-148:3 (Radović-Janković).

ii. Article 5.3.4 was not an essential obligation, and its purported breach was only minor

218. Another, independent, reason why the 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 violation of an essential—and not an accessory—obligation, and only if the breach of such an essential obligation was not minor.[219] Mr. Milošević explained at the Hearing that this proper interpretation of Article 131 stems directly from the writings of Professor Vizner—one of the drafters of the Law on Obligations.[220]

219. The purported breach of Article 5.3.4 did not meet either of the conditions set forth under Article 131 of the Law on Obligations. *First*, Article 5.3.4 did not lay out an essential obligation. Instead, the limitation on encumbering BD Agro's assets set out therein has an accessory character, as it only secures the buyer's performance of his other obligations. As Mr. Milošević explained, an obligation is non-essential (accessory) when the violation of such obligation "*does not endanger the achievement of the main goal, the main purpose of the [contract]*."[221] Mr. Milošević explained that this is exactly the character of the limitation in Article 5.3.4 because it did not directly relate to the overall purpose of the privatization of BD Agro.[222] The accessory character of Article 5.3.4 is further confirmed by the fact that the breach of this provision is not listed in Article 7 as a ground for termination.

220. *Second*, even if Article 5.3.4 imposed an essential obligation (*quod non*), its alleged violation would only be minor. The funds borrowed under the 2010 Loan Agreement and allegedly used in a manner non-compliant with Article 5.3.4 represented an insignificant part of the value of BD Agro's assets. 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 Privatization Agreement as, only four months later, the full purchase price was paid in full and the Privatization Agreement was consummated.

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219 Milošević Second ER, ¶ 94; Tr., Hearing on Jurisdiction and Merits, Day 5, 20-4-20 (Milošević).

220 Tr., Hearing on Jurisdiction and Merits, Day 5, 23:11-26:23 (Milošević).

221 *Id.*, 35:25-36:1 (Milošević).

222 *Id.*, 41:15-42:14 (Milošević).

iii. The Privatization Agreement could not be terminated after the full payment of the purchase price

221. Further, and independently from the above, the Privatization Agreement could not be terminated for the alleged violation of Article 5.3.4 after the obligations under Article 5.3.4 had expired on their own terms. Article 5.3.4 of the Privatization Agreement limited encumbrance of BD Agro's property "*during the term of the [Privatization] Agreement*". The term of the Privatization Agreement expired upon the payment of the last installment of the purchase price on 8 April 2011.

222. Indeed, Ms. Radović-Janković confirmed that, according to the Agency's own internal report, the term of the Privatization Agreement expired upon the payment of the purchase price.[223]

223. Similarly, Professor Radović confirmed that, in its Report on Supervision of the Agency (**CE-098**), the Ministry of Economy instructed the Agency that all of the buyer's obligations under Article 5.3.4 ceased to apply on 8 April 2011:[224]

> Mr. Pekař: Do you agree with me, Professor Radovic, that the Ministry of Economy instructs the Privatization Agency that limitations from article 5.3.4 should be considered concluding or concluded with 8th April 2011?
>
> Prof. Radović: Yes, this was interpretation of how the law should be applied.
>
> Mr. Pekař. And the Ministry's reasoning seems to focus on three things. First, the text of article 5.3.4, right? Then the fact that the longest deadline from the Privatization Agreement was for the payment of the purchase price. And then third, the fact that that payment was made on 8th April 2011, correct?
>
> Prof. Radović: Yes.[225]

224. Professor Radović conceded that, after 8 April 2011, Mr. Obradović could not commit new breaches of the Privatization Agreement.[226] She nevertheless maintained that even after 8 April 2011, Mr. Obradović was required to remedy the alleged breach that had

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223 Tr., Hearing on Jurisdiction and Merits, Day 3, 129:25-130:5 (Radović-Janković).

224 Tr., Hearing on Jurisdiction and Merits, Day 6, 61:13-62:16 (Radović).

225 *Id.*, 50:8-50:20 (Radović)

226 *Id.*, 115:8-13 (Radović).

occurred prior to that date.[227] However, this conclusion stems from a fundamentally incorrect reading and translation of Article 41a of the Law on Privatization.

225. As Professor Radović admitted during her cross-examination, Serbia's translation of the *chapeau* of Article 41a of the Law on Privatization incorrectly included the phrase "*fails to remedy his breach of contract regarding* [...]". As the interpreters confirmed—and Professor Radović[228] conceded—the Serbian original simply does not contain this phrase:

> The President: Would you mind if we asked the interpreters to just look at the Serbian original and give us their interpretation?
>
> The Interpreter: I am now looking at Article 41a in Serbian. The article says:
>
> "An agreement on sale of capital or property shall be deemed terminated for non-performance if, within the additionally granted deadline for performance, the buyer" and then a colon, and then it lists the reasons.
>
> The President: Can you translate reason (3)?
>
> The Interpreter: "Disposes of the assets of the privatization entity contrary to provisions of the agreement".[229]

226. Prof. Radović confirmed that before the Agency could terminate an agreement, it had to: (*i*) determine that a certain obligation under the Privatization Agreement was not fulfilled; and (*ii*) grant the buyer an additional term to fulfil such an obligation.[230]

227. While Professor Radović argued that after the second step, the Agency should satisfy itself that a buyer "*actually remedied*" an alleged breach, she admitted that this is not what the text of Article 41a of the Law on Privatization required:

> Mr. Pekař: In the second step, at the end of that period the Agency must look whether (1), (2), (3), (4), (5), (6) of Article 41a is met with respect to the situation which it previously identified as a potential breach of the Privatization Agreement or the provisions of the Law on Privatization.

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227 *Id.*, 29:1-9 (Radović).

228 *Id.*, 23:21-24 (Radović).

229 *Id.*, 21:7-19 (Radović).

230 *Id.*, 24:15-23 (Radović).

> Prof. Radović: After this first step, the Agency would have to satisfy itself that the buyer actually remedied the breach within this additionally granted term.
>
> Mr. Pekař: Does Article 41a use the word "remedy" in any of its terms?
>
> Prof. Radović: No […].[231]

228. Professor Radović then conceded that all that the Agency could do at the end of the additional period was to check whether the alleged breach was "still present":

> Mr. Pekař: Would you agree with me, Professor Radović, that what Article 41a requires the Privatization Agency to do is to check at the end of the additional term whether the reason for termination identified in the Privatization Agency's notice granting that additional term is still present, correct?
>
> Prof. Radović: Whether the breach established during the term of the contract was remedied?
>
> Mr. Pekař: No, is still present.
>
> Prof. Radović: Is still present. Yes, this is what the Agency should determine.[232]

229. The determination whether a breach is still present is different from the determination of whether the breach has been remedied. This is because a party ceases to be in breach of an obligation not only when it remedies the breach, but also when the breached obligation no longer applies. This is exactly what happened in 2011—the obligations stemming from Article 5.3.4 ceased to apply with the payment of the full purchase price for the BD Agro shares. Therefore, the Privatization Agreement could not be terminated for an alleged continuing violation of Article 5.3.4 in 2015.

230. In other words, the Privatization Agreement could only have been terminated for conduct which constituted a breach not only when the Agency first ascertained it, but also at the end of the additionally granted period. Since Mr. Obradović had no obligations under the Privatization Agreement after 8 April 2011, the Privatization Agreement could not be terminated after that date.

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231 *Id.*, 24:24-25:10 (Radović).

232 *Id.*, 28:10-20 (Radović).

231. The contrary position advanced by Professor Radović—that the buyer's duty to remedy a pre-existing breach of an obligation survives the expiration of such an obligation—finds no support under Article 41a of the Law on Privatization. Moreover, it necessarily leads to absurd results:

> The President: The question is simple. If we look at the Privatization Agreement and the Privatization Law, and not at other provisions of the Law of Companies or otherwise, can BD Agro take a new loan, for that give security, then give this loan to Crveni Signal and Inex, for them to use this money to repay the loan that was deemed a breach prior to the term of the agreement?
>
> Prof. Radović: Okay, thank you. Just by looking at the privatization process, that would be possible.[233]

232. In other words, if Professor Radović was correct, the buyer would have the obligation to remedy a pre-existing breach, yet—at the same time—would be able to again undertake the very same conduct that led to the alleged breach in the first place (because the obligation that had been breached expired). This is an absurd interpretation.

233. In sum, the Privatization Agreement could not have been terminated after the full payment of the purchase price.

iv. In any event, the purported breach had been cured before the termination

234. Mr. Markićević confirmed that the loan taken by BD Agro—a part of which BD Agro used to repay the debt assumed from Crveni Signal and to provide a loan to Inex—was in any case repaid long before the Agency terminated the Privatization Agreement. While the underlying pledges remained registered in the cadaster, this was only because the state-controlled and managed Nova Agrobanka arbitrarily refused to issue a confirmation necessary for their deletion:

> Mr. Markićević: [T]here were other pledges that remained, but underlying loans were settled long before that, and the auditor found that, as he said, obligations have been settled and conditions have been met to delete the pledge on this basis, and the only reason why the pledges still existed is because Nova Agrobanka, which was government-controlled bank at the time, would not issue. So for deletion of the pledge in the

[233] *Id.*, 69:15-23 (Radović).

> cadaster, the cadaster requires notice from the creditor that the debt has been settled, and that they agree with the deletion of the pledge, and Nova Agrobanka refused to issue such notice, even though the loan was settled a long time ago.[234]

235. Mr. Milošević confirmed that the purely formal continuing existence of the registration of the pledges was not a valid ground for termination of the Privatization Agreement.[235]

v. The Agency's requests for remedies were unjustified and unlawful

236. The Agency based its unlawful decision to terminate the Privatization Agreement on the wrong ground that Mr. Obradović did not comply with the specific remedies requested by the Agency—rather than on an analysis of whether Mr. Obradović was still in breach of the Privatization Agreement at the end of the additionally granted term. This approach was incorrect because the Agency was only entitled to monitor the buyer's compliance with its obligations under the Privatization Agreement, rather than request any remedies that it deemed appropriate. Furthermore, the Agency's specific requests for remedies were absolutely unjustified and unlawful.

237. For example, in April 2015, the Agency requested Mr. Obradović to fulfill its purported obligations under *both* Article 5.3.4 and 5.3.3 and to show his compliance by submitting a number of documents on several issues that the Agency deemed necessary for such fulfilment. By so doing, the Agency was imposing specific remedies—which it was not entitled to do:

> Mr. Misetic: Looking at your letter, could you please explain – let me first say, it says:
>
> "... the Buyer needs to do the following:
>
> "Fulfil the obligation from Articles 5.3.3 and 5.3.4 of the Agreement ..."
>
> Right? That was the one that was contained in the notice of -- sorry:
>
> "Fulfil the obligations [contained in] Articles 5.3.3 and 5.3.4 of the Agreement ... [and] submit evidence that: all payments from the sale of

234 Tr., Hearing on Jurisdiction and Merits, Day 3, 43:11-44:7 (Markićević).

235 *E.g.* Milošević Second ER, ¶¶ 61-65.

fixed assets have been received and used for the needs of the Subject; all burdens have been removed and all other security instruments for third parties have been returned; all burdens registered on no grounds have been removed, and all loans have been returned that were given by the Subject to third parties from credit resources secured by burdens on the Subject's assets."

Do you see that? You were writing to Mr Obradovic saying that all of those things needed to be done in order to be in compliance, correct?

Ms. Radović-Janković: Yes, I can see that. I signed this as the President of the Commission, this was the conclusion of the Commission following the meeting held on 23rd April 2015.[236]

238. Such a request, as well as the Agency's previous requests requiring Mr. Obradović to remedy alleged breaches of the Privatization Agreement, were unlawful for a number of reasons. *First*, as explained by Mr. Rand, the purported breach of Article 5.3.3 could not have been remedied—the culled cows could not be risen from the dead:

Arbitrator Vasani: Thank you. Counsel for Claimants anticipated one question I had, which was in relation to cure. I think you were in the room yesterday when counsel for Respondent indicated that the cure for the alleged breach would have been return of the funds from Inex and CS back to BD Agro, and I think your answer to counsel for Claimants' question was, had your understanding been that that was the cure, you would have done it. In which case, my question is this: what was your understanding of the cure, what the Government was asking BD Agro to do in order to cure the alleged breach?

Mr. Rand: I don't think there was any cure. There was no way I could satisfy their allegations about the violation of 5.3.3. 5.3.4 probably could have been resolved, but 5.3.3 couldn't be fixed.[237]

239. *Second*, 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. Professor Radović confirmed that the fulfillment of either would be sufficient to cure the

236 Tr., Hearing on Jurisdiction and Merits, Day 3, 179:2-25 (Radović-Janković).

237 Tr., Hearing on Jurisdiction and Merits, Day 2, 43:9-44:7 (Rand).

alleged breach of Article 5.3.4.[238] The Agency's request that Mr. Obradović perform both of these actions was thus unlawful.

240. *Third*, the Agency's insistence that the pledge be deleted from the Cadaster served no purpose, because Nova Agrobanka could not have exercised any pledge rights given that the secured loan had already been repaid in 2012. Moreover, Nova Agrobanka was controlled by the Serbian government and Mr. Obradović could not be held accountable for Nova Agrobanka's failure to issue the written confirmation required by the Cadaster for the deletion of the pledge.

241. Serbia now argues that, contrary to the plethora of demands made by the Privatization Agency in its notices to Mr. Obradović, all that the Claimants had to do to resolve all issues with the Privatization Agency was to have Inex and Crveni Signal simply repay the funds owing to BD Agro.[239] However, this clearly is a made-for-arbitration argument, belied by contemporaneous documentary evidence and testimonies of both the Claimants' and Serbia's witnesses:

a. Mr. Cvetković confirmed that it would not be even possible for the Agency to tell Mr. Obradović that all that needed to be done was for Inex and Crveni Signal to repay the funds they owed to BD Agro:

> Mr. Anway: Mr Cvetkovic, I have four or five other letters, I think we can just skip them all with a simple answer to this question. Did you ever tell the buyer that if it only returned the money given to Inex or Crveni Signal, then the agreement would not be terminated, and all these other conditions didn't need to be satisfied, did you ever tell the buyer that?
>
> Mr. Cvetković: I can't say I did not say so to the buyer. I don't think something of this kind could be communicated to the buyer by anyone from the Agency, and the reason for this is that all communication with the buyer happened through formal letters. So I don't think one failure to -- I think that one breach was ever posed as the only condition for the termination. I don't think this was possible.[240]

238 Radović Second ER, ¶ 25.

239 Tr., Hearing on Jurisdiction and Merits, Day 1, 225:12 (Mihaj).

240 Tr., Hearing on Jurisdiction and Merits, Day 4, 153:1-15 (Cvetković).

b. Ms. Radović-Janković confirmed during her cross-examination that from the Agency's perspective, all of the actions requested by the Agency had to be done to achieve compliance and avoid termination:

> Mr. Misetic: The next bullet point there of what Mr Obradovic was being asked to do:
>
> "Provide a statement on performance of the obligations ... referred to in ... 5.3.4 ... and confirm that all encumbrances were deleted and all other 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 the Subject to third persons from the loan assets secured by encumbrances on the property of the Subject are returned."
>
> Correct?
>
> Ms. Radović-Janković: Yes.
>
> Mr. Misetic: That meant all of those things had to be done in order to be in compliance with the agreement from the Agency's perspective, correct?
>
> Ms. Radović-Janković: Yes, of course. […][241]

c. Messrs. Rand,[242] Markićević[243] and Broshko[244] all confirmed that they were never informed that the alleged breaches of the Privatization Agreement could have been cured simply by having Crveni Signal and Inex return the funds to BD Agro. As explained by both Messrs. Broshko and Markićević, had the Claimants been informed of this, the Claimants would have happily complied.[245]

242. *Fourth*, the Agency simply repeated all of its requests, again and again, without engaging, with a few very minor exceptions, with the factual evidence and legal reasoning repeatedly provided to explain that no breach had occurred, that if there was a breach it had in any event been cured, and that the Agency was not entitled to terminate the Privatization Agreement. This created a situation where the Agency repeatedly requested

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241 Tr., Hearing on Jurisdiction and Merits, Day 3, 182:2-18 (Radović-Janković).

242 Tr., Hearing on Jurisdiction and Merits, Day 2, 37:9-16 (Rand).

243 Tr. Hearing on Jurisdiction and Merits, Day 3, 9:2-22 (Markićević).

244 *Id.*, 73:17-24 (Broshko).

245 *Id.*, 75:6-14 (Broshko); *Id.*, 9:7-22 (Markićević).

the same information, the information was provided, and then the Agency requested it again.

243. In sum, the remedies requested by the Agency were unjustified and unlawful.

2. The Agency acted in bad faith in terminating the Privatization Agreement

244. As the Claimants explained in their written submissions, the Agency clearly acted in bad faith when it terminated the Privatization Agreement. The 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—but it proceeded with the termination nonetheless.[246]

245. The Hearing not only confirmed this fact, but also brought to light additional facts that further confirmed that Agency acted in bad faith.

246. *First*, the Agency acted in bad faith when it kept the Claimants in limbo for years—refusing to finalize BD Agro's privatization—and made several requests that it must have known were unlawful and could not be fulfilled. For example, in April 2015, the Agency requested that Mr. Obradović submit evidence he had fulfilled obligations under Article 5.3.3 and 5.3.4 "*no later than*" 8 April 2011. This was expressly confirmed by the interpreters at the Hearing upon a specific request by the Tribunal.[247]

247. This request was unlawful because, as shown above, Article 41a of the Law on Privatization only entitles the Agency to verify compliance at the end of the additional term for compliance, not in the past. The Agency also knew full well that the request could not be complied with because the cows had been culled long before 8 April 2011 and the pledges existed as of that same date.

248. Professor Radović actually confirmed during her cross-examination that the wording of this request was "*completely illogical and insane*":

> Mr. Pekař: If you focus now on the first part:
>
> "Fulfil the obligation from Articles 5.3.3 and 5.3.4 of the Agreement not later than April 8th 2011 ..."

246 Memorial, ¶¶ 434-435; Reply, ¶¶ 1090-1094, 1241-1243.

247 Tr., Hearing on Jurisdiction and Merits, Day 6, 58:6-59:11 (Radović).

What does that mean?

Prof. Radović: As I said again, if you are looking just word by word, it sounds completely illogical and insane.[248]

249. Professor Radović then tried to argue that the Claimants were somehow expected to figure out that precisely because the plain wording was "*illogical and insane*," the Agency must have meant something else.[249] This is absolutely incorrect. Instructions from a public body, in this case the Agency, must make sense in their plain wording.

250. *Second*, as explained above, the very fact that the Agency continued to request evidence that Mr. Obradović had fulfilled obligations under Article 5.3.3 was in fact bad faith. This is because the Agency knew that the alleged breach of Article 5.3.3—*i.e.* the culling of cows ordered by Serbia—in reality represented *force majeure.* The Agency expressly acknowledged this fact during its internal meetings.[250]

251. Furthermore, even if the culling of cows could represent a breach of the Privatization Agreement (and it did not), it obviously could not have been cured. As the Claimants explained in their opening statement: "*one cannot raise cows from the dead.*"[251]

252. *Third*, the Agency's conduct was procedurally abusive. For example, as Ms. Vučković confirmed, in the last notice sent to Mr. Obradović, the Agency asked for completion of a number of obligations within an impossible five-day deadline.[252]

253. *Fourth*, Ms. Radović-Janković confirmed that when the Agency eventually proceeded to terminate the Privatization Agreement, it did so even though it had opinions from the Ministry of Economy and its trusted law firm Radović & Ratković that there was no economical or legal justification for termination:

Mr. Misetic: So as of 11th June 2013, the Agency was in possession of an opinion from the Ministry that there was no economic justification and an opinion from the law firm of Radovic & Ratkovic that there was no legal justification for termination, correct?

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248 *Id.*, 56:14-19 (Radović).

249 *Id.*, 56:20-23 (Radović).

250 Reply, ¶¶ 295-297.

251 Tr., Hearing on Jurisdiction and Merits, Day 1, 48:3-7 (Anway).

252 Tr., Hearing on Jurisdiction and Merits, Day 4, 83:23-84:24 (Vučković).

Ms. Radović-Janković: Yes, correct.[253]

254. *Fifth*, the Agency was only able to expropriate the Beneficially Owned Shares because it kept the pledge on these shares after the payment of the purchase price. However, as explained in more detail in Section IV.C.1 below, Serbia's witnesses made clear during the Hearing that the Agency knew that the pledge should have been lifted after the payment of the purchase price.

3. Serbia's expropriation of the Claimants' investment was unlawful under public international law

255. Serbia's termination of the Privatization Agreement—and the subsequent transfer of the Beneficially Owned Shares—was clearly unlawful under Serbian law. These measures also patently fail each element of the test for a lawful expropriation under international investment law as they: (*i*) did not pursue any public purpose; (*ii*) plainly lacked due process; and (*iii*) were not followed by a payment of any compensation. Moreover, even if these acts were otherwise lawful, they were completely disproportionate under both Serbian law and public international law.

256. Under Serbian law, the principle of proportionality stems from the Serbian Constitution.[254] It requires the Agency, as a holder of public power, to consider whether the termination of the Privatization Agreement is a proportionate and necessary measure. Even if one were to disregard the administrative character of the notice of termination and analyze it on a purely contractual basis (*quod non*), the Agency's 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.

257. The principle of proportionality is also part of public international law and is being applied by investment tribunals with an increasing frequency. In *Occidental v. Ecuador*, the tribunal noted that there was "*a growing body of arbitral law, particularly in the context of ICSID arbitrations, which holds that the principle of proportionality is applicable to potential breaches of bilateral investment treaty obligations*."[255] More

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253 Tr., Hearing on Jurisdiction and Merits, Day 3, 150:25-151:5 (Radović-Janković). *Similarly* Tr., Hearing on Jurisdiction and Merits, Day 4, 48:19-49:1 (Vučković).

254 Milošević Second ER, ¶¶ 106-107; Serbian Constitution, Art. 20(3), **CE-222**.

255 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 416, **CLA-075**.

recently, the tribunal in *Ampal v. Egypt* noted that "*it is well settled that the "irreparable cessation" of an investment activity caused by the disproportionate act of a State is tantamount to an expropriation*".[256]

258. The *Occidental* tribunal explained that the principle of proportionality means that even if the investor violates its legal duty, "*any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences*."[257] There, the investor transferred part of its rights under this contract to a third party (by means of a so-called Farmout Agreement) without Ecuador's consent and in violation of the terms of the contract and Ecuadorian law. While the contract expressly contemplated termination as a potential sanction for an unapproved assignment, the Tribunal nevertheless decided that the termination of the contract was disproportionate.

259. The termination of the Privatization Agreement was clearly a disproportionate response to the purported breach of Article 5.3.4. The pledge caused no damage and did no harm to anyone. Indeed, as the Claimants explained in their opening statement, the existence of the pledge had no impact on BD Agro's value.[258] The disproportionality of Serbia's action is glaring given that the Privatization Agreement was terminated, and the Beneficially Owned Shares seized, more than four years after the full payment of the purchase price.

260. Tellingly, neither Serbia nor Professor Radović even attempted to argue that the Agency's draconic measures were a proportionate response to Mr. Obradović's alleged breach of Article 5.3.4. While Professor Radović alleged that the Agency could not waive the breach of Article 5.3.4, she did not cite any authority for that proposition. The Agency could have waived any breach of the Privatization Agreement. There is nothing in the Law on Contracts and Torts, the Law on Privatization or the Privatization Agreement limiting the Agency's right to waive any breach. Moreover, since the Agency could give to the buyer its prior consent to any disposition that would otherwise violate Article 5.3.4,

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256 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 346, **CLA-031**.

257 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 416, **CLA-075**.

258 Claimants' opening presentation, slide 94; Tr., Hearing on Jurisdiction and Merits, Day 1, 37:19-25 (Anway).

there is no reason why the Agency would lack the authority to subsequently waive any breach based on such disposition.

* * *

261. To sum up, by terminating the Privatization Agreement and seizing the Beneficially Owned Shares, Serbia committed an unlawful expropriation of the Claimants' investment under the Treaties. The same conduct also violated the FET standard, the non-impairment standard and other standards of protection as set out in the Claimants' written submissions.[259]

C. Serbia violated the FET standard, non-impairment provision and the umbrella clause by the Agency's refusals to release the pledge and allow for an assignment of the Privatization Agreement

262. In addition to the direct expropriation of the Beneficially Owned Shares and the indirect expropriation of Mr. Rand's Indirect Shareholding, Serbia also committed further breaches of the BITs, described in detail in Claimant's previous submissions.[260] These included breaches of the FET standard, non-impairment standard and umbrella clause by the Agency's: (*i*) refusal to release the pledge; and (*ii*) refusal to allow for an assignment of the Privatization Agreement.

1. The Agency's refusal to release the pledge was arbitrary and unreasonable

263. As Article 2 of the Share Pledge Agreement makes clear, the Agency was only allowed 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."[261] Accordingly, the Agency was required to release the pledge immediately after Mr. Obradović's full payment of the purchase price on 8 April 2011.

264. Serbia, however, argued—in reliance on Professor Radović's report—that the 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. The Hearing confirmed that Serbia's position is untenable.

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259 Memorial, §§ VI.B-VI.D; Reply, §§ V.D-V.F.

260 Memorial, §§ VI.B. VI.C and VI.D; Reply, §§ V.D, V.E, V.F.

261 Privatization Agreement, Schedule 1: Share Pledge Agreement, Art. 2, **CE-017**.

265. *First*, upon cross-examination, Professor Radović conceded that: (*i*) under the primary rule of interpretation set forth in Article 99(1) of the Law on Obligations, "*the provisions of the agreement shall apply as worded*";[262] (*ii*) the terms "*for the period of 5 years"* and "*until final payment of sale and purchase price*" are clear terms, free of ambiguity;[263] and (*iii*) any ambiguity of Article 2 would have to be interpreted in favor of Mr. Obradović, as the non-drafting party of the Privatization Agreement. [264]

266. Furthermore, the buyer's only obligation mentioned in the context of the pledge over BD Agro's shares—in Article 2 and Article 3.1.2 of the Share Pledge Agreement—is the payment of the purchase price. Accordingly, it is evident that the pledge was tied to, and had to be released upon, the payment of the purchase price.

267. *Second,* Serbia's witnesses made clear that the Agency knew full-well that it was legally obligated to release the pledge over the Beneficially Owned Shares upon the payment of the purchase price:

a. Ms. Radović-Janković admitted that the Agency understood that it was required to release the pledge after the payment of the full purchase price [265] and that she acknowledged this fact during the meeting of the Commission for Control on 23 April 2015:

> Mr. Misetic: Ms Radovic Jankovic, it's a fact that at this meeting, you acknowledged that the buyer was entitled to have the pledge deleted contractually, correct?
>
> Ms. Radović-Janković: According to the agreement, according to addendum 1 of the agreement governing the pledge, the buyer had the right to have the pledge returned to him after five years or after the pay-out of the price. Those are the facts. Practice is something else, however.[266]

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262 Tr., Hearing on Jurisdiction and Merits, Day 6, 104:20 - 105:10 (Radović).

263 *Id.*, 103:15-104:9 (Radović).

264 *Id.*, 105:11-106:15 (Radović).

265 Tr., Hearing on Jurisdiction and Merits, Day 3, 131:6-24 (Radović-Janković).

266 *Id.*, 165:5-13 (Radović-Janković).

b. Ms. Radović-Janković also confirmed that she did not dispute Ms. Vučković's statement at the same 23 April meeting that the pledge did not secure any contractual obligations beside the payment of the purchase price.[267]

c. Ms. Vučković repeated during the Hearing that the pledge should have been removed after the payment of the full purchase price:

> Mr. Misetic: The pledge on shares was only supposed to be in place until the complete sale and purchase price had been paid, is that correct?
>
> Ms. Vučković: Yes, that's correct. That's clearly stated in our agreement.[268]

d. Ms. Vučković also confirmed that, the Agency willfully breached the Privatization Agreement by not releasing the pledge:

> The President: The question was: you say here in paragraph 28 of the English version of your witness statement that the only right thing was to keep the pledge on shares. And the question was whether you were thereby saying that the only right thing was to breach the pledge agreement. You can say yes or no. If you have then to explain, you can. But I think it's important here that we try to focus on the questions.
>
> Ms. Vučković: I apologise for trying to give a broad explanation, but these facts are important in order to understand this decision of the Agency. A brief answer would be yes, the position of the Agency was that this was the only possibility, given that the buyer had not met his contractual obligations, and so the Agency for Privatization did not meet its contractual obligation either.[269]

268. The conduct of the Agency by refusing to release the pledge clearly violated public international law. It was not only unlawful under Serbian law, but also arbitrary and unreasonable.

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267 *Id.*, 168:4-10 (Radović-Janković).

268 Tr., Hearing on Jurisdiction and Merits, Day 4, 33:6-10 (Vučković).

269 *Id.*, 68:24-69:14 (Vučković).

2. The Agency's refusal to allow for the assignment of the Privatization Agreement was arbitrary and unreasonable

269. As the Claimants explained in their written submissions, the Agency's refusal to allow for the assignment of the Privatization Agreement was also arbitrary and unreasonable. This is because the Agency refused to approve the assignment even though Mr. Obradović and Coropi provided all documents initially requested by the Agency.[270]

270. During the Hearing, Serbia tried to argue that Coropi failed to provide one specific confirmation requested by the Agency. However, as Mr. Markićević confirmed during his cross-examination, this document simply could not have been provided because a foreign country would never issue a confirmation referring to compliance with Article 12 of the Serbian Law on Privatization. It was therefore replaced by an affidavit—as was a common practice in Serbia.[271]

271. Mr. Broshko also confirmed that Serbia's sudden additional request for a bank guarantee in January 2015, a year and a half after the Agency's consent to the assignment was first sought, was very surprising and, in any case, entirely unreasonable.[272] The purchase price had been paid in full and the Agency was not entitled to any further payments that the guarantee would secure.

272. Mr. Broshko's testimony confirms what the Claimants explained already in their written pleadings—the Agency engaged in the protracted negotiations regarding the assignment in bad faith, knowing full well it would never accept the request. Tellingly, as Mr. Rand confirmed during the Hearing, Serbia had no problems with approving of assignment of privatization agreements for other companies he acquired in Serbia.[273] The fact that the Agency refused to do so in the case of BD Agro thus clearly demonstrates the arbitrariness of its conduct. The Agency's refusal to allow for the assignment of the Privatization Agreement was arbitrary and unreasonable and violated the FET standard and the non-impairment standard.

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270 *E.g.* Reply, ¶¶ 1177-1180.

271 Tr., Hearing on Jurisdiction and Merits, Day 3, 26:19-27:15 (Markićević).

272 *Id.*, 102:1-103:15 (Broshko).

273 Tr., Hearing on Jurisdiction and Merits, Day 2, 27:9-14 (Rand).

V. THE CLAIMANTS ARE ENTITLED TO COMPENSATION FOR THEIR LOSSES

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

273. It is undisputed between the Parties that: (*i*) in case of a breach, Serbia is obliged to provide the full reparation to the Claimants;[274] (*ii*) the full reparation standard 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;[275] and (*iii*) the full reparation standard requires payment of interest.[276]

274. The interest due on the principal amount of their claim shall be calculated pursuant to Serbian law.[277] The Claimants further explained that if the Tribunal finds that the Claimants cannot 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.[278]

B. The Claimants' EUR 78.2 million valuation of BD Agro reflects the fair market value of the company as of 21 October 2015

275. The Claimants' valuation relies on the calculation of BD Agro's fair market value as of 21 October 2015 prepared by Dr. Hern from NERA Economic consulting.[279] As the Claimants explained in their previous submissions, for the purposes of his valuation, Dr. Hern divided BD Agro's assets into two categories: (*i*) core assets required for BD Agro's dairy production business, such as agricultural land, farm buildings, equipment, herd and other current assets; and (ii) non-core assets, such as BD Agro's commercial and industrial land in Dobanovci, regulated under the General Regulation Plan for BD Agro Complex Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin (the General Regulation Plan being, the "**GRP Dobanovci**", and the Complex Zones A, B and C being, the "**Construction Land in Zones A, B and C**").[280]

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274 Reply, ¶ 1296; Counter-Memorial, ¶ 764.

275 Reply, ¶ 1296; Counter-Memorial, ¶ 783.

276 Reply, ¶ 1296; Counter-Memorial, ¶ 816.

277 Memorial, ¶ 497; Reply, ¶¶ 1391-1404.

278 Memorial, ¶¶ 508-512; Reply, ¶¶ 1405-1406.

279 Memorial, ¶ 531; Reply, ¶ 1335.

280 Memorial, ¶ 533; Reply, ¶ 1336.

276. Dr. Hern valued BD Agro's non-core assets using the adjusted book value valuation method, adjusting the value of its assets reported in the 2015 financial accounts to their fair market value based on contemporaneous market evidence.[281] Using this method, Dr. Hern estimated the value (pre-tax) of the non-core assets represented by the Construction Land in Zones A, B and C at EUR 60.7 to 80.1 million, and of the other non-core assets (including other construction land and land in Novi Bečej) at EUR 1.9 to 4.3 million.[282] Dr. Hern's upper bound is supported by the valuation of the Claimants' real estate expert, Mr. Grzesik, who values the Construction Land in Zones A, B and C at EUR 85.4 million and the other construction land at EUR 3.6 million.[283]

277. Dr. Hern valued BD Agro's core assets using a DCF valuation method and also by the same adjusted book value valuation method used for the non-core assets.[284] Using the DCF valuation method, Dr. Hern arrived at a value of the core assets between EUR 31.5 and 36.9 million.[285] Using the adjusted book value valuation method, Dr. Hern estimated the total value (pre-tax) of core assets between EUR 31 and 42.5 million, as follows:[286]

Assets	Value
Agriculture land	EUR 4 to 15.5 million
Buildings	EUR 16.8 million
Equipment	EUR 2.4 million
Herd	EUR 0.4 million
Other current and non-current assets	EUR 7.4 million
Total value	**EUR 31 to 42.5 million**

278. Combining Dr. Hern's valuation of core and non-core assets, the Claimants calculate the total pre-tax value of BD Agro's assets to be **EUR 121.2 million**. The Claimants arrive at this number by combining Dr. Hern's: (*i*) upper bound adjusted book value of non-core assets of EUR 84.3 million; and (*ii*) upper bound DCF valuation of core assets of EUR 36.9 million.[287] If the Claimants used the upper bound of the adjusted book value

281 Memorial, ¶¶ 534-535; Reply, ¶¶ 1337-1338.

282 Updated Hern analysis, **CE-908**.

283 Krzysztof Grzesik Expert Report dated 3 October 2019, ¶ 11.1.

284 Memorial, ¶¶ 534-535; Reply, ¶¶ 1337-1338.

285 Updated Hern analysis, **CE-908**.

286 *Ibid*.

287 *Ibid*.

of the core assets, which is EUR 42.5 million, their valuation would be higher by EUR 5.6 million.[288]

279. To arrive at the final equity value of BD Agro as of 21 October 2015, the Claimants then subtract from the total value of BD Agro's assets the value of its liabilities of EUR 40 million reported in the 2015 annual accounts and capital gain tax of EUR 3 million.[289] The Claimants, thus, arrive at the total equity value of BD Agro as of 21 October 2015 of **EUR 78.2 million**.[290]

280. Of course, the value of BD Agro in 2015 is not dependent upon the price paid by Mr. Rand in the 2005 privatization of BD Agro. This is due to two main reasons: *first*, the Claimants' investments transformed a decrepit socially-owned farm into the most modern dairy operation in the Balkans; and, *second*, and most importantly, the GRP Dobanovci adopted in 2008 transformed hundreds of hectares of BD Agro's agricultural fields into very valuable industrial and construction land, strategically located in the vicinity of the Belgrade Airport and a major highway.[291]

1. The value of the Construction Land in Zones A, B and C is EUR 80.1 million

281. The most valuable part of BD Agro was its commercial and industrial land in Dobanovci. The Claimants value the land at EUR 80.1 million. Serbia, conversely, argues that its value does not exceed EUR 23.7 million.[292] However, Serbia's valuation is clearly unreasonable because it artificially reduces both the size of the land and the price per meter squared, as the Claimants will show below.

a. The Claimants' and Serbia's experts agree that the size of the Construction Land in Zones A, B and C is 279.4 ha

282. During the Hearing, both Dr. Hern and Mr. Grzesik updated their valuations to reflect their acceptance of the area of the Construction Land in Zones A, B and C calculated by Ms. Ilić in her first expert report, being 279.4 ha.[293] Ms. Ilić confirmed during the

288 *Ibid*.

289 *Ibid*.

290 *Ibid*.

291 Tr., Hearing on Jurisdiction and Merits, Day 8, 112:24-114:5 (Hern).

292 Danijela Ilic Second Expert Report dated 16 March 2020, p. 52.

293 Mr. Grzesik's presentation, slide 4; Dr. Hern's presentation, slide 4; Tr., Hearing on Jurisdiction and Merits, Day 7, 57:8-10 (Grzesik); Tr., Hearing on Jurisdiction and Merits, Day 8, 5:11-15 (Hern).

Hearing that she maintains her calculation.[294] Thus, all experts agree the Construction Land in Zones A, B and C to be 279.4 ha, which is also the basis for the Claimants' valuation.

283. In a very transparent effort to artificially reduce the value of BD Agro, Serbia argues that the size of the land should be based only upon the area of BD Agro's land included in the bankruptcy sale of BD Agro on 9 April 2019.[295] Serbia also instructed Ms. Ilić and Mr. Cowan to prepare alternative valuations based on this area.[296] As the Claimants demonstrated in their written submissions[297] and during the Hearing, Serbia's approach lacks any justification because there is no reason to exclude from BD Agro's valuation any of the land that was excluded from the bankruptcy sale.

284. *First*, the biggest part of the total land area that Serbia proposes to exclude—183ha out of 394ha—represents land that was subject to a court dispute with [ZZ] Buducnost Dobanovci.[298] The claim in that dispute was *filed on 8 June 2018* (almost three years after the valuation date) and it was *rejected by the court on 21 December 2018*.[299]

285. This fact, on its own, is sufficient to conclude that no land shall be excluded from BD Agro's valuation based on this dispute. As Ms. Ilić confirmed during her cross-examination, only reasons existing at the time of the valuation could represent a potential reason for exclusion of any land from the valuation.[300]

286. Even more importantly, while the bankruptcy trustee excluded the land subject to the dispute with [ZZ] Buducnost Dobanovci in the first bankruptcy sale, the trustee subsequently sold this land in the second sale that took place on 27 January 2021.[301] This confirms there is no reason to exclude this land from BD Agro's valuation.

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294 Tr., Hearing on Jurisdiction and Merits, Day 7, 144:11-145:4 (Ilić).

295 *E.g.* Rejoinder, ¶ 1408(iii), 1412-1413.

296 *E.g.* Rejoinder, ¶ 1416; Ilic Second ER, p. 50; Sandy Cowan Third Expert Report dated 16 March 2020, ¶ 3.6.

297 Rejoinder on Jurisdiction, ¶¶ 712-750; Claimants' Opening presentation, slides 274-281. *See also* Tr., Hearing on Jurisdiction and Merits, Day 1, 113:22-115:7 (Pekař).

298 Rejoinder on Jurisdiction, ¶¶ 719-725; Claimants' Opening presentation, slide 275. *See also* Tr., Hearing on Jurisdiction and Merits, Day 1, 114:9-17 (Pekař).

299 Letter from Serbia to Tribunal, 22 April 2021, ¶ 29; Rejoinder on Jurisdiction, ¶ 720; Claimants' Opening presentation, slide 275. *See also* Tr., Hearing on Jurisdiction and Merits, Day 1, 114:9-17 (Pekař).

300 Tr., Hearing on Jurisdiction and Merits, Day 7, 145:5-17 (Ilić).

301 Letter from Claimants to Tribunal, 9 February 2021, p. 2.

287. *Second,* no land shall be excluded from BD Agro's valuation based on the court dispute between BD Agro and Serbia related to the land swapped between Serbia and BD Agro. This is because the court proceedings related to the land swap agreement are still pending; the courts did not render a final decision on the land plots that should be exchanged between BD Agro and Serbia as a result of the invalidity of the land swap; and if Serbia is unable to return some land plots due to their restitution, it should instead provide monetary compensation reflecting the value of the land.[302] Thus, BD Agro will either receive back the land that was subject to the swap or, in case that would not be possible, be compensated for the value of this land. In either event, neither of these two scenarios will have any effect on the value of BD Agro.

288. *Third*, no land shall be excluded from BD Agro's valuation based on the court dispute initiated by Inter Kop in 2018. This dispute—same as the dispute initiated by [ZZ] Buducnost Dobanovci—is irrelevant because it was commenced only several years *after* the valuation date.[303] Furthermore, according to Serbia, Inter Kop acquired the land subject to this dispute in exchange of certain services provided to BD Agro.[304] However, the fact is that Inter Kop did not provide the agreed services—and therefore did not acquire any rights to the land. This conclusion is confirmed by the fact that Inter Kop never attempted to register its alleged ownership over the land. On the contrary, BD Agro has been continuously using the allegedly disputed land and Inter Kop even voted in favor of the pre-pack reorganization plan which included the allegedly disputed land as an asset of BD Agro.[305]

289. *Fourth*, no land shall be excluded from BD Agro's valuation based on the court dispute with Eko Elektrofrigo. This is because Ms. Ilić already excluded all of this land from her calculation of BD Agro's Construction Land in Zones A, B and C in her first report.[306] As explained above, Dr. Hern and Mr. Grzesik accepted Ms. Ilić's calculation of the size of the Construction Land in Zones A, B and C and, therefore, there is no reason to exclude this land again.

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302 Rejoinder on Jurisdiction, ¶¶ 726-729; Claimants' Opening presentation, slide 276. *See also* Tr., Hearing on Jurisdiction and Merits, Day 1, 114:18-115:1 (Pekař).

303 Rejoinder on Jurisdiction, ¶¶ 730-733.

304 Serbia's Additional Submission on Quantum, ¶ 34.

305 Rejoinder on Jurisdiction, ¶¶ 730-733; Claimants' Opening presentation, slide 277.

306 Claimants' Opening presentation, slide 278.

290. *Fifth*, no land shall be excluded from BD Agro's valuation based on alleged restitution claims. The Serbian Restitution Agency expressly confirmed that there were no restitution requests submitted with respect to BD Agro's land.[307] Furthermore, even if there were any restitution claims (*quod non*), they could not lead to restitution of BD Agro's land because, as a private entity, BD Agro did not have a duty to restitute property.[308]

291. *Sixth*, no additional land should be excluded from BD Agro's valuation based on the agreement with Hypo Park. This is because BD Agro owned the excluded land at the time of the expropriation, as confirmed by Ms. Ilić's calculation of the total area of BD Agro's land in her first report.[309]

292. *Finally*, as the Claimants explained during the Hearing, there is no reason to exclude any additional land for any other reasons because:

a. it remains unclear what were the actual rights obtained by employees under the agreements through which BD Agro allegedly "*distributed*" land to them and which land plots were subject to these agreements;

b. it remains unclear why land plots owned by BD Agro and labelled as "*Public roads, green areas*" should be excluded;

c. it remains unclear why land plots with a note "*Not in RGO - request for correction of mistake M. Jovanovic*" should be excluded;

d. the expropriation that allegedly took place in 1991 was not carried out and BD Agro continued to use the allegedly expropriated land plots; and

e. the list of land plots excluded from the bankruptcy sale contains several land plots that were not included in Ms. Ilic's valuation in the first place.[310]

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307 Response from the Serbian Restitution Agency, 28 February 2020, **CE-859**.

308 Rejoinder on Jurisdiction, ¶ 742.

309 Claimants' Opening presentation, slide 280; Danijela Ilic First Expert Report dated 23 January 2020, p. 153 (pdf).

310 These include land plots Nos. 1281/2, 1281/3, 1281/4, 1281/5, 1281/6, 1281/8, 1281/9, 1281/10, 1281/11, 1281/12, 1281/13, 1281/14, 1281/15, 1281/16, 1281/17, 1281/18, 4054. Claimants' Opening presentation, slide 281.

293. Tellingly, while Ms. Ilić accepted the instruction from Serbia to exclude, in her alternative valuation, all the land that was not included in the first bankruptcy sale, she confirmed that she did not assess whether this instruction was reasonable.[311]

b. The fair market price of the Construction Land in Zones A, B and C is EUR 30 per m^2

294. As the Claimants explained in their written pleadings[312] and further demonstrated during the Hearing,[313] their EUR 30 price per m^2 of the Construction Land in Zones A, B and C is supported by contemporaneous market evidence, such as contemporaneous evidence of transactions for BD Agro's own and comparable land and contemporaneous valuations by the Serbian Tax Authority in the same location (which valuations by the Serbian Tax Authority are based on comparable market transactions).[314]

295. Based on his review of all available evidence, the Claimants' valuation expert, Dr. Hern, valued the Construction Land in Zones A, B and C between EUR 22 and 30 per m^2. This price range leads to the total value of the Construction Land in Zones A, B and C being EUR 61 to 80 million.[315]

296. The correct valuation is at the upper end of the range and is confirmed by Mr. Grzesik's valuation of the Construction Land in Zones A, B and C at EUR 85.4 million.[316] This is fundamentally because, as was conclusively shown at the Hearing, the best, most comparable, evidence are the expropriations of land in Batajnica and the sales of land plots in Dobanovci itself[317]—which Dr. Ilić inexplicably excluded from her valuation.

i. The Batajnica transactions show that the Claimants' EUR 30 per m^2 price is, in fact, conservative

297. The Batajnica transactions show that in 2013 and 2016, Serbia expropriated land intended for development of a logistics center in Batajnica for EUR 27 (in 2013) and for EUR 28

311 Tr., Hearing on Jurisdiction and Merits, Day 7, 145:5-17 (Ilić).

312 Memorial, ¶¶ 542-543; Reply, ¶ 1357.

313 Claimants' Opening presentation, slides 283-285.

314 Dr. Hern's presentation, slides 7-8; Tr., Hearing on Jurisdiction and Merits, Day 8, 7:18-9:7 (Hern).

315 Dr. Hern's presentation, slides 7-8; Tr., Hearing on Jurisdiction and Merits, Day 8, 7:18-9:7 (Hern).

316 Grzesik Second ER, ¶ 6.26.

317 Mr. Grzesik's presentation, slide 5; Dr. Hern's presentation, slide 9; Tr., Hearing on Jurisdiction and Merits, Day 7, 59:3-61:1 (Grzesik); Tr., Hearing on Jurisdiction and Merits, Day 8, 10:7-11:5 (Hern).

to 37 per m^2 (in 2016).[318] The Batajnica land plots are comparable to land plots in the Construction Land in Zones A, B and C because they:

a. are a similar distance from Belgrade and the Belgrade airport;

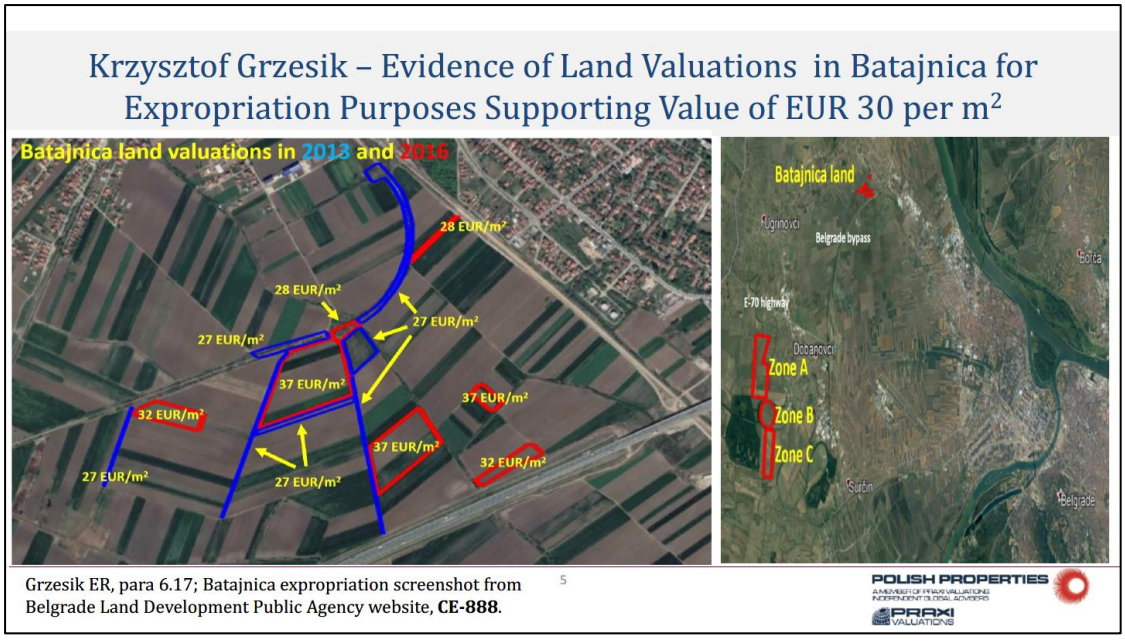
b. are close to a railway;

c. have a similar intended use;

d. have a similar development potential; and

e. have not been developed yet and are still used as arable land.[319]

298. The following aerial map of Batajnica shows that the land plots that were expropriated for EUR 27 (in 2013) and for EUR 28 to 37 per m^2 (in 2016), at that time and until today, lacked direct access to any roads. It was enough that they were close to a highway (*i.e.* E75, which connects Serbia with Hungary, Slovakia, Poland and Scandinavia) and Serbia had plans to build a road to connect them to that highway.



299. This is exactly the status of the Construction Land in Zones A, B and C upon expropriation of the Claimants' interest in BD Agro in October 2015. BD Agro's land is

318 Mr. Grzesik's presentation, slide 5; Grzesik ER, ¶ 6.16; Richard Hern Third Expert Report dated 6 March 2020, ¶ 70.

319 Richard Hern First Expert Report dated 16 January 2019, ¶ 69; Grzesik ER, ¶¶ 6.14-6.17. *See also* Tr., Hearing on Jurisdiction and Merits, Day 8, 10:7-11:5 (Hern).

in the vicinity of a major highway (*i.e.* E70, which connects Serbia to Croatia, Slovenia, Austria, Italy and Western Europe) and Serbia had plans to build the Sremska gazela road to connect it to that highway.

300. The prices that Serbia paid for the Batajnica expropriations represent the fair market value of the expropriated land.[320] During the Hearing, Mr. Grzesik explained that Serbian tax authorities indeed value expropriated land at its market value:

> Mr. Djerić: Yes, but you would do as an independent valuer, and this is Serbian Tax Authorities that makes their assessment, and do we know how do they make their assessments?
>
> Mr. Grzesik: *Well, they are obliged to arrive at the market value, that's stated in the law.*
>
> Mr. Djerić: *Exactly*.[321]

301. During the Hearing, Serbia tried to argue that the development potential of the Batajnica land and the development potential of the Construction Land in Zones A, B and C are different because there is a detailed regulation plan for land in Batajnica, while there is only a general regulation plan for the Construction Land in Zones A, B and C.[322]

302. This argument was disproved by Serbia's own expert, Ms. Ilić, who confirmed during her cross-examination that the detailed regulation plan was *not* required for the development of the Construction Land in Zones A, B and C.[323] This land can be developed directly based on the existing general regulation plan. The fact that there is a detailed regulation plan for Batajnica is, therefore, irrelevant, because both the general regulation plan applicable to the Construction Land in Zones A, B and C, and the detailed regulation plan applicable to Batajnica, allow for the development of these sites.

303. Furthermore, at the Hearing Mr. Grzesik explained that the detailed regulation plan for Batajnica land was adopted only *after* the 2013 expropriation (made at the price of EUR 27 per m^2).[324] At the time of the first, 2013 expropriations at EUR 27 per m^2, the land in

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320 Hern First ER, ¶ 191; Hern Third ER, ¶¶ 69-72.

321 Tr., Hearing on Jurisdiction and Merits, Day 7, 98:3-8 (Grzesik) (emphasis added).

322 *Id.*, 84:9-89:1 (Grzesik).

323 *Id.*, 137:14-25 (Ilić).

324 *Id.*, 105:16-106:6 (Grzesik).

Batajnica did not have either the general regulation plan[325] nor the detailed regulation plan and, therefore, actually had a lower development potential that the Construction Land in Zones A, B and C. The Batajnica land acquired a higher development potential associated with the issuance of a regulation plan only in 2015, which translated into the EUR 28 - 37 per m^2 price for the expropriations in 2016. The Claimants' valuation of the Construction Land in Zones A, B and C at EUR 30 per m^2 is, in fact, conservative.

304. Dr. Hern further explained that the question of whether the Batajnica land would be developed using public or private capital equally has no effect on whether this land can be considered comparable or not:

> The President: That is a more specific question. You remember the discussion about the development of Batajnica -- I always abbreviate Bata, so I don't know how it looks later! But the development of this land was funded by public budget, this was an assumption, and the A, B, C land was funded privately.
>
> And then you said that this makes no difference in terms of the market value, because what you are trying to establish is the market value of A, B, C, for that you look for comparative valuations of similar land, and the Batajnica documents refer to market value, and so you thought, "I can take this", but of course, the question that in my mind still remains is: what about the market -- you have looked at the market value of the Batajnica land and you thought, this I can use, but the fact that then the A, B, C land must be developed at the cost of the buyer, does that not mean that you cannot transpose this market value -- or you can transpose this market value, but afterwards somehow you need to account for the fact that the development cost comes in deduction for the A, B, C land?
>
> Dr. Hern: No, because *the Batajnica land also needs the same development costs associated with it, so that's also agricultural land that was purchased, with a regulation plan, and after that point, there still needs to be development costs to convert that land into whatever industrial use or commercial use it's going to be used for.*
>
> So for that reason, assuming a market price was paid for that land, which it should have been, that makes it comparable in my view to the market value of the A, B, C land, because both land is in exactly the same state at

[325] There is no general regulation plan applicable to land in Batajnica, only the detailed regulation plan adopted in 2015. *See* Tr., Hearing on Jurisdiction and Merits, Day 7, 105:16-106:6 (Grzesik).

> that point in time. Ie the purchase price that has been paid for by the public authority does not include any investment costs associated with it, it's just the purchase price for the land.[326]

305. Indeed, it does not make any difference whether the land is being bought by the state, which will then use public money to develop it, or a private investor, who will then use its own funds for the development. In both cases, the buyer (being the state in Batajnica and a private entity in Dobanovci) would face the same additional costs, which would be reflected in the price. This was again confirmed by Dr. Hern during the Hearing:

> The President: Let me ask my question. It may sound silly to you, but if I buy a house and there's no access to the road, I have to build the road, so to me the market value of this house is diminished by the cost I have to build the road.
>
> Dr. Hern: Absolutely, absolutely.
>
> The President: So why does it not apply here?
>
> Dr. Hern: So the same is true for Batajnica and BD Agro's land. Batajnica is also land that is, when it was expropriated, land that did not have full connection, roads --
>
> The President: And therefore it has the same deduction --
>
> Dr. Hern: It has the same issue, exactly right.
>
> The President: -- when the state buys it.
>
> Dr. Hern: Yes, that's right. At a high level my view is both land is primarily agricultural land -- it is agricultural land, with a development plan to build the road, to do infrastructure, to have an urban development plan, but the land in its current state is the same.
>
> The President: So if the state expropriates my house, it will pay a reduced market value by the fact that I have not built the road?
>
> Dr. Hern: Absolutely.
>
> The President: That is clear, thank you.[327]

306. To repeat, the Batajnica land is comparable to the Construction Land in Zones A, B and C precisely because neither of them was connected to a road leading to the major highway proximate to each location. Therefore, the price of EUR 27 – 37 per m^2 that Serbia paid

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326 Tr., Hearing on Jurisdiction and Merits, Day 8, 120:9-121:19 (Hern).

327 *Id.*, 124:18-125:16 (Hern).

for the Batajnica land defines also the fair market value of the Construction Land in Zones A, B and C. Had the Batajnica land been connected to a road, its expropriation price would most certainly have been higher than EUR 27 – 37 per m^2, and, when establishing the value of the Construction Land in Zones A, B and C, the difference—*i.e.* the premium for a road connection at Batajnica—would need to be deducted. Since the Batajnica land did not have a road connection, that premium was not paid and nothing needs to be deducted from the Batajnica prices in valuing the Construction Land in Zones A, B and C.

307. Importantly, the fact that the Batajnica land was expropriated for EUR 27 per m^2 before the June 2015 regulation plan for Batajnica was approved, and expropriated for a higher price of EUR 28 to 37 per m^2 after the approval of the plan, shows that the Construction Land in Zones A, B and C, which had an approved regulation plan at the moment of expropriation, should be valued at the upper end of the Batajnica expropriations. The Claimants' valuation at EUR 30 per m^2 is, therefore, conservative.

ii. The Dobanovci transactions also support the Claimants' EUR 30 per m^2 valuation

308. The Claimants' valuation at EUR 30 per m^2 is also supported by contemporaneous market transactions in Dobanovci, involving, among others, a land plot located approximately 50 meters from BD Agro's farm, which was sold in 2015 at the price of EUR 28.4 per m^2, and a land plot located at the other side of the village, which occurred in 2015, at the price of EUR 34 per m^2.[328]

309. Curiously, the Dobanovci transactions were identified—and then unjustifiably disregarded—by Serbia's expert, Ms. Ilić. In her reports, Ms. Ilić claimed that she excluded these two transactions because they were allegedly close to a residential area.[329] However, during her cross-examination, Ms. Ilić admitted that the land subject to one of these transactions was actually right next to the land on which BD Agro's farm is located[330] and that there were no residential buildings next to it.[331]

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328 RGA records on transaction KO Dobanovci - construction land, p. 2, **RE-540**.

329 Ilic First ER, ¶ 9.90.

330 And which Ms. Ilić values at the same price as the Construction Land in Zones A, B and C. *See* Ilic First ER, ¶ 9.80.

331 Tr., Hearing on Jurisdiction and Merits, Day 7, 149:25-150:21 (Ilić).

310. Probably aware that her position was untenable, Ms. Ilić changed her position and argued during the Hearing that the land plot next to BD Agro's farm was allegedly not comparable to the Construction Land in Zones A, B and C because it was connected to a small municipal road.[332] However, Ms. Ilić eventually conceded that the very same road actually extends also to Zones B and C:

> Mr. Pekař: *Are you aware, Ms Ilic actually, that this asphalt road, which is here named as Ulica Ive Lole Ribara, then extends to Zones B and C?*
>
> Ms. Ilić: *Yes,* it does not extend to the entire zones. It goes partly through the farmland, but not until the end of the plot.[333]

311. More importantly, Ms. Ilić confirmed that, while the land plot right next to the BD Agro farm that she excluded from her valuation had access to a small municipal road, the Construction Land in Zones A, B and C will be connected to Sremska Gazela, a major road providing much better accessibility.[334]

312. As a result—and as explained by Dr. Hern—the EUR 28.4 per m^2 price for the land plot in the immediate vicinity of BD Agro shows that the market price for the Construction Land in Zones A, B and C should be even higher because the latter will be connected to a major road with direct access to the E70 highway.[335]

iii. Serbia experts' reliance of asking prices is deeply flawed

313. Serbia's flawed valuation of the Construction Land in Zones A, B and C is based on Ms. Ilić's reports, which relies on so-called "asking prices"—*i.e.* prices published in sale advertisements—for land that Ms. Ilić did not even bother to locate on a map.[336]

314. The fact that Ms. Ilić failed to investigate and disclose the exact location of the land plots subject to the asking prices that she relies upon means that her valuation does not comply

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332 *Id.*, 149:16-24 (Ilić).

333 *Id.*, 156:15-20 (Ilić) (emphasis added).

334 *Id.*, 155:13-22 (Ilić).

335 Tr., Hearing on Jurisdiction and Merits, Day 8, 16:2-18 (Hern). *See also* Tr., Hearing on Jurisdiction and Merits, Day 7, 61:25-62:10 (Grzesik) ("*What is particularly relevant here is item 2 is a site which is actually adjacent to the BD Agro land, and therefore I can't understand why this comparable transaction was rejected. I would have thought it's highly relevant, it's right next to the BD Agro farm.*").

336 Tr., Hearing on Jurisdiction and Merits, Day 7, 151:24-152:7 (Ilić).

with international valuation standards, which—as Ms. Ilić admitted—allow the use of asking prices only if their relevance "*is clearly established and critically analysed*."[337]

315. Without knowing where the land was located, Serbia's experts obviously could not have satisfied themselves that the land was comparable. One wonders how they could prepare their reports without doing so.

316. Serbia experts' cavalier approach to their task became absolutely evident during the cross-examination of Mr. Cowan, Serbia's primary quantum expert, who relied on Ms. Ilić's land valuation. When asked to identify the location of the allegedly comparable land plots indicated by Ms. Ilić, he was simply making the answer up on the spot and stated that one of the transactions was located on the place of the red dot in the advertisement. . Unfortunately for Mr. Cowen, this red dot signified the very center of Belgrade, not the property in question:

> Mr. Pekař: So we will scroll it down for you. This is the first one, can you see the location of the land plot here?
>
> Mr. Cowan: Yes.
>
> Mr. Pekař: Where is the location of the land plot?
>
> Mr. Cowan: I assume it's your red dot.
>
> Mr. Pekař: Mr Cowan, have you been to Belgrade?
>
> Mr. Cowan: No, I haven't.
>
> Mr. Pekař: This is in the centre of Belgrade.[338]

317. Mr. Cowan's admission that he has actually never even been in Belgrade[339] is another serious problem because under the 2013 International Valuation Standards a valuation expert is expected to visit the valued property.[340] Mr. Cowan simply ignored that best practice.

318. On the other hand, both the Claimants' experts, Mr. Grzesik and Dr. Hern, did visit BD Agro's land and the relevant areas where the comparable land is located. Mr. Grzesik

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337 *Id.*, 157:12-24 (Ilić).

338 Tr., Hearing on Jurisdiction and Merits, Day 8, 144:8-146:18 (Cowan).

339 *Id.*, 144:14-15 (Cowan).

340 International Valuation Standards 2013, July 2013, Section IVS 102 Implementation, p.32, **CE-516**. *See also* Ilic First ER, p. 16; Ilic Second ER, ¶ 2.103.

confirmed this fact in his report and Dr. Hern during his testimony at the Hearing. Following the Hearing and at the invitation of Serbia, the Claimants also provided ample documentary evidence of Dr. Hern's visit, including pictures of Dr. Hearn's helicopter tour of BD Agro and the surrounding area.[341]

iv. Ms. Ilić's 30% discount is unjustified

319. In her expert reports, Ms. Ilić applied a 30% discount to her estimated price of the Construction Land in Zones A, B and C due to its size:[342]

> 9.1 When comparing construction land sale transactions with construction land in Dobanovci, owned by BD Agro, I use representative (median) transacted size and median price (eur/m2). Given that median size of BD Agro construction land cadastral parcels in Dobanovci is 17,372m2[263] and median transacted size of construction land is 30,000m2 m2 with a median price of 21eur/m2. I apply downward adjustment of 30% as a reflection of my experience in valuation of land.

320. In their written submissions, the Claimants explained that there was no reason for any discount based on the size. This is because BD Agro would be able to divide its land into smaller plots or join the land into bigger plots before their sale—depending on which approach would attract a higher price.[343] Ms. Ilić confirmed during the Hearing that BD Agro would indeed be able to re-parcel its land before its sale, allowing for the sale of smaller or bigger land plots, as the case warranted.[344]

321. Furthermore, Mr. Grzesik explained during the Hearing that the size of BD Agro's land would in fact attract a premium, rather than a discount:

> Mr. Grzesik: *Such a large area of land would undoubtedly in my view attract top end developers, they would be seeking economies of scale, they would have financial muscle, they would prove attractive to the financing banks who are only too ready -- on the lookout for large chunks of property to lend upon.*
>
> *Indeed, there is a justification for saying with such a readily available large site there may be justification for*

341 Grzesik ER, ¶ 4.1; Tr., Hearing on Jurisdiction and Merits, Day 8, Hearing on Jurisdiction and Merits, 23:1-17 (Hern); Photographs from Dr. Hern's helicopter visit of the Construction land in Zones A, B, and C in Dobanovci, 31 October 2018, **CE-904**; Travel documents of Dr. Hern, **CE-905**; Mr. Broshko's tweet about Dr. Hern's helicopter visit of the Construction land in Zones A, B, and C in Dobanovci, 31 October 2018, **CE-906**.

342 Ilic First ER, p. 115, ¶ 9.1 (emphasis added).

343 Reply, ¶ 1373.

344 Tr., Hearing on Jurisdiction and Merits, Day 7, 139:14-24 (Ilić).

> *a premium.* I have taken the conservative approach, I have not speculated about the size of such a premium, but what I am absolutely sure about is that there is no justification for a 30% deduction […].[345]

322. Aware of the fact that the explanation of the discount proposed in her reports cannot be defended, Ms. Ilić once again changed her position during the Hearing. For the first time in this arbitration, Ms. Ilić claimed that the 30% discount was not for the size of the land, but rather due to "*the existence of infrastructure and access road*" on the land plots subject to the asking prices relied upon by Ms. Ilić.[346]

323. This sudden change of position changes nothing to the fact that the 30% discount should not be applied. As explained above, Ms. Ilić failed to disclose the exact location of the allegedly comparable land plots. It is, therefore, impossible to assess whether these land plots have "*infrastructure and access road*" that would make them incomparable to BD Agro's land and, thus, requiring a discount. Furthermore, the 30% discount is clearly arbitrary—Ms. Ilić did not provide any explanation, much less analysis, for the proposed percentage. The proposed discount is simply not serious—and should be disregarded.

2. The fair market value of BD Agro's other assets was EUR 41.2 million

324. The Claimants value BD Agro's assets other than the Construction Land in Zones A, B and C at EUR 41.2 million.[347] This number stems from the upper bound of Dr. Hern's DCF valuation of the core assets (*i.e.* the farm, buildings, equipment, herd and other current and non-current assets) of EUR 36.9 million and the adjusted book value of BD Agro's other construction land and land in Bečej of EUR 4.3 million.[348] As already explained above, the Claimants use this approach even though the valuation using the adjusted book value of these assets would lead to a higher value of EUR 46.8 million.[349]

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345 *Id.*, 62:11-64:12 (Grzesik) (emphasis added).

346 *Id.*, 165:1-23 (Ilić).

347 Updated Hern analysis, **CE-908**.

348 *Ibid*.

349 *Ibid*.

3. BD Agro's liabilities were equal to EUR 40 million

325. The value of BD Agro's equity is the difference between the (post-tax)[350] value of BD Agro's assets[351] and BD Agro's liabilities of EUR 40 million reported in the 2015 annual accounts (closest to the expropriation date 21 October 2015).[352] Serbia's calculations use higher liabilities ranging between EUR 49.6 and EUR 57.1 million.[353] As the Claimants explained, Mr. Cowan arrives at these higher liabilities as a result of his incorrect inclusion of several items.

326. *First*, Mr. Cowan includes in his valuation a EUR 200,000 provision for pending court proceedings. The Claimants demonstrated in their previous submissions that there is no reason for inclusion of this provision.[354]

327. *Second*, Mr. Cowan overstates the capital gains tax. This is because Mr. Cowan calculates capital gains tax without regard to any deductions. Indeed, he actually admits that he "*did not have enough information to calculate CGT [capital gains tax] accurately*."[355]

328. *Third*, Mr. Cowan includes in his valuation inapplicable redundancy payments. As the Claimants previously demonstrated, Mr. Cowan bases his calculation on redundancy costs included in the January 2016 Reorganization plan, prepared by BD Agro's government appointed management after BD Agro was expropriated. These costs represented a *voluntary* redundancy program adopted and financed by Serbia. There is, therefore, no reason to include any such costs in the fair market valuation of BD Agro.[356]

329. *Finally*, Mr. Cowan includes in his valuation inapplicable (and, in any case, overstated) bankruptcy costs. The Claimants address this point in detail in Section V.B.4.d below.

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350 Dr. Hern arrives to post-tax value by subtracting from the value of assets, as described above, the deferred tax liabilities reported in BD Agro's 2015 annual accounts amounting to EUR 3.1 million. *See* Hern First ER, ¶ 34; Updated Hern analysis, **CE-908**.

351 Hern First ER, ¶ 35; Updated Hern analysis, **CE-908**.

352 Updated Hern analysis, **CE-908**.

353 Mr. Cowan's presentation, slide 4.

354 Rejoinder on Jurisdiction, ¶¶ 751-759.

355 Sandy Cowan Second Expert Report dated 24 January 2020, ¶ 6.11.

356 Richard Hern Second Expert Report dated 3 October 2019, ¶¶ 181-183.

4. No further discounts and deductions are justified

330. In its written submissions, Serbia argued that a discount should be applied to the valuation of BD Agro because it was not a going concern as of the valuation date.[357] The Claimants, on the other hand, explained that no distress discount is applicable because any distress discount would be inconsistent with the definition of fair market value[358] under international valuation standards and BD Agro was, in any event, a going concern as of the valuation date.[359] The Hearing confirmed that the Claimants are correct.

a. BD Agro was a going concern at the time of the privatization

331. Mr. Cowan confirmed during his cross-examination that the Agency itself recognized that BD Agro was a going concern in 2015:

> Mr. Pekař: Would it be fair to say that the Privatization Agency agreed that BD Agro was a going concern at the end of 2015?
>
> Mr. Cowan: I believe it's more the preparation of the statements, that's probably fair to say, yes. I would agree with that.
>
> Mr. Pekař: I don't understand. I believe that the financial statements of a company need to be approved by the shareholders, is that your understanding?
>
> Mr. Cowan: Yes, prepared by management and approved by the shareholders.
>
> Mr. Pekař: If a shareholder does not believe that a company is a going concern, why would the shareholder approve the financial statements?
>
> Mr. Cowan: I agree.[360]

332. Serbia's position in this arbitration is therefore directly contradicted by the Agency's contemporaneous views immediately after BD Agro's expropriation.

333. Dr. Hern confirmed at the Hearing that BD Agro should be valued as a going concern because it was not bankrupt and had a credible reorganization plan that had been approved by the required majority of its creditors:

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357 *E.g.* Rejoinder, ¶¶ 1468-1469.

358 As explained above, it is undisputed that a potential compensation should reflect the fair market value.

359 *E.g.* Reply, ¶¶ 1341-1350.

360 Tr., Hearing on Jurisdiction and Merits, Day 8, 159:24-161:4 (Cowan).

> Dr. Hern: Moving to the second issue of disagreement, which is: *should BD Agro be valued as a going concern? In summary, I think it should be, it was not bankrupt at the time of expropriation [slide 19], the reorganization plan in my view is credible.* I don't think it's relevant to look at the previous performance of the business, because it's been affected obviously by the amount of investment that's been undertaken, and there are obvious issues with Serbia's potential involvement with those investment incentives.
>
> But basically, as I said, a business is only worth the cashflows that it will generate, and there's no reason not to consider a DCF approach.
>
> *BD Agro's creditors, as I note on slide 20, the majority of them did approve the reorganisation plan, and believed that that plan was credible, and I notice that some of those creditors are very knowledgeable creditors involved in the dairy business in Serbia, Imlek in particular is the biggest producer of dairy products, so if Imlek didn't think the reorganization plan was credible, there's big question marks about why it decided to approve it.*[361]

334. Dr. Hern showed at the Hearing that the majority of creditors required for approval of the reorganization plan would have been reached even if BD Agro's land pledged to secure loans from Banka Intesa and Nova Agrobanka had been valued at the amount estimated by Serbia's experts, Mr. Cowan and Ms. Ilic, rather than the value estimated for the purposes of the reorganization by Mr. Mrgud. Banka Intesa, which opposed the reorganization plan, had higher priority pledges, but a smaller claim than Nova Agrobanka, which supported the plan. Even the artificially low value of BD Agro's land determined by Serbia's experts in this arbitration would have been sufficient for the totality of Nova Agrobanka's claims to be considered as secured, giving Nova Agrobanka the power to outvote Banka Intesa in the class of secured creditors.[362]

335. However, Dr. Hern did not rely on the pre-pack reorganization plan simply because it was accepted by the required majority of BD Agro's creditors. Dr. Hern and his team independently scrutinized the pre-pack reorganization plan in detail and found it to be reasonable.[363]

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361 *Id.*, 17:3-24 (Hern) (emphasis added).

362 *Id.*, 105:6-107:20 (Hern).

363 *Id.*, 114:7-117:17 (Hern).

b. In any event, the Claimants' asset-based determination of the fair market value of BD Agro does not depend on whether BD Agro was a going concern or not

336. Even assuming that BD Agro had not been a going concern at the time of its expropriation (and it was a going concern), no distress discount would be applicable to the Claimants' valuation. As Dr. Hern explained during his cross-examination, even if the pre-pack reorganization plan ended up being unsuccessful, BD Agro could still be valued using the asset-based valuation:

> Dr. Hern: Clearly it's possible that the plan didn't work, it's possible, of course, and that's actually why -- by the way, that's possible for any business, right? Any business has a plan, it's possible that that plan doesn't work. That doesn't mean that the business is not valuable at a point in time, all it's saying is in the future, it's possible the business could go bankrupt, right? So that's possible for any business.
>
> But just to maybe elaborate on that answer here, that I think *is also important why the asset-based valuation approach is relevant, because what the asset-based valuation approach is essentially saying is even if you valued this business on its parts, on its agricultural land, on the value of the buildings, the value of the equipment, the value of the herd, you're not actually assuming that the business is going to operate, you're just valuing the business on its components, what valuation would that produce?*
>
> *And that's the second approach that I talked you through, which effectively assumes that the business sells off the agricultural land, it sells off the herd, and it sells off the buildings and the equipment, and on that basis, that is the fallback option that this business has.* It's probably fortunate compared to many other businesses that if it doesn't work, it can just sell the land and the herd.
>
> So you actually have two different ways of valuing this business that are complementary; one assumes it continues and it becomes a profitable going concern, and the other valuation assumes actually the business just decides to sell off the land and the herd and the value comes from those sales.[364]

[364] *Id.*, 58:9-59:20 (Hern) (emphasis added).

337. Mr. Cowan admitted during his cross-examination that if the assets of a company are valued individually—such as in the asset-based approach—there is no reason to apply any discount for a bankruptcy sale:

> Mr. Pekař: The assets can be sold individually to obtain cash, which will then be distributed to shareholders; that's perfectly possible, is it not?
>
> Mr. Cowan: Yes.
>
> Mr. Pekař: And if they are sold individually, the 50% discount will not apply, will it?
>
> Mr. Cowan: In that scenario, no.[365]

338. In other words, Mr. Cowan confirmed that no distress discount should apply in an asset-based valuation:

> Mr. Pekař: *Would you agree with me that the asset-based approach is exactly the one where you do not apply any discounts for bankruptcy? If you want to determine fair market value.*
>
> Mr. Cowan: Again, it comes back to -- it depends, the answer.
>
> Going back to your earlier point, *if you are going to sell on an asset by asset basis, I would agree*.[366]

339. Therefore, even if BD Agro had not been a going concern (and, again, it was a going concern), it would be able to sell its assets individually without a discount in order to avoid any distress discounts and, thus, realize the maximum possible value.

340. This is exactly the scenario used in the Claimants' valuation. Dr. Hern has always valued the Construction Land in Zones A, B and C using the asset based approach, which yields (before tax) value between EUR 60.7 and 80.1 million.[367] Dr. Hern's asset-based approach to the rest of BD Agro's assets—represented by the farm facilities, herd and the land necessary to operate the farm—gives a value between EUR 31 million and 42.5 million.[368] Thus, given Mr. Cowan's admissions at the Hearing, there is no reason

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365 *Id.*, 159:5-11 (Cowan).

366 *Id.*, 161:11-16 (Cowan) (emphasis added).

367 Hern First ER, ¶¶ 43-44.

368 Updated Hern analysis, **CE-908**.

whatsoever to apply any distress discount to Dr. Hern's valuation of the Construction Land in Zones A, B and C.

c. The absence of any discounts is also consistent with the definition of fair market value

341. The same conclusion stems from the very definition of fair market value used by Mr. Cowen and according to which the market value represents "*the estimated amount for which an asset or liability should exchange on the valuation date between* ***a willing buyer and a willing seller*** *in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.*"[369]

342. The use of an indefinite article before the terms "*willing buyer*" and "*willing seller*" confirms that this definition does *not* envisage taking into account any circumstances specific to the actual owner of the valued assets. The alleged bankruptcy of BD Agro would be such a specific circumstance and, thus, it cannot be reflected in the valuation.

343. The same conclusion stems from the "*without compulsion*" language in the definition. The use of the alleged bankruptcy discount models a purported "fire sale" of the bankrupt company's assets at a discounted value. This is inconsistent with the definition of fair market value, both because competition among willing buyers would normally prevent such a scenario,[370] and because the scenario assumes that the bankrupt company is compelled to sell its assets.

344. Therefore, even if BD Agro had been in bankruptcy as of the valuation date, which it was not, the bankruptcy would need to be disregarded for the purposes of determining the fair market value of BD Agro's assets.

d. The bankruptcy costs proposed by Mr. Cowan are divorced from reality

345. Serbia's flawed bankruptcy scenario also incorrectly assumes, based on Mr. Cowan's reports, that the bankruptcy costs should be calculated as "*20% of BD Agro's discounted asset value, on the basis of a Doing Business report by the World Bank.*"[371] This point

369 Sandy Cowan First Expert Report dated 19 April 2019, ¶ 17.6 (emphasis added).

370 Tr., Hearing on Jurisdiction and Merits, Day 8, 150:1-153:11 (Cowan).

371 *E.g.* Rejoinder, ¶ 1468.

is largely irrelevant because BD Agro was not in bankruptcy. However, it again illustrates Mr. Cowan's unreliability.

346. The latest estimate of Mr. Cowan's bankruptcy costs was between EUR 5.4 and 7.4 million. As the Claimants demonstrated during the Hearing, the actual bankruptcy costs as of 30 June 2020 were EUR 179,000. Even if the actual bankruptcy costs end up being double that incurred as of 30 June 2020, it would result in Mr. Cowan's *lower* estimate being inflated by over 1,400%.[372]

* * *

347. Simply put, Serbia's valuation of BD Agro is unreliable, lacks justification and is divorced from reality. It relies on expert reports wrought with a myriad of basic methodological mistakes—and also on experts prone to try their luck and simply make up an answer on the spot rather than concede their mistakes. The Claimants respectfully submit that such expert reports—and experts—should not be given weight in this arbitration.

C. Value of the Claimants' interest in BD Agro's equity

348. To calculate the value of the individual Claimants' interest 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 78.2 million.[373] Using this value, the Claimants then calculate the value of the individual Claimants' interest in BD Agro's equity based on their interest in BD Agro's equity as of 21 October 2015. The Claimants explained their calculations in detail in their previous submissions.[374]

349. Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand also claim for a tax gross-up for the Canadian tax they will have to pay on any amounts received as compensation for damages that may be awarded by this Tribunal. This is because no Canadian tax would have been due if they had received distribution of capital from the Ahola Family Trust.[375]

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372 Claimants' Opening presentation, slide 294. *See also* Tr., Hearing on Jurisdiction and Merits, Day 1, 116:20-25 (Pekař).

373 Updated Hern analysis, **CE-908**.

374 Memorial, ¶¶ 559-580; Reply, ¶¶ 1407-1431.

375 Memorial, ¶¶ 581-591; Reply, ¶¶ 1432-1442.

350. Should the Tribunal conclude that, for any reason, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand are not beneficial owners of the respective interests in the Beneficially Owned Shares, then their beneficial owner is solely Mr. Rand. As a result, Mr. Rand has—and asserts—an alternative claim to be compensated for the entire value of the Beneficially Owned Shares.

351. The Claimants also explained that a part of Mr. Rand's investment in BD Agro is represented by his receivables against BD Agro that were rendered worthless due to BD Agro's bankruptcy. At the start of this arbitration, the value of these receivables, without interest, was EUR 2,396,903 million.[376]

352. However, as the Claimants explained during the Hearing, the bankruptcy trustee now agreed to repay approximately EUR 89,000 of this amount. The Claimants therefore lower their claim by this amount to EUR 2,307,903.[377] Uplifted to 27 September 2021, this amount equal approximately EUR 3.4 million.

VI. REQUEST FOR RELIEF

353. The Claimants request that the Tribunal issues an award:

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

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

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

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

(i) Rand Investments of no less than EUR 16.5 million;

(ii) Ms. Kathleen Elizabeth Rand of no less than EUR 23.7 million, plus a gross-up of 33.2% on that amount;

(iii) Ms. Allison Ruth Rand of no less than EUR 23.7 million, plus a gross-up of 33.2% on that amount; and

376 Memorial, ¶¶ 592-596; Reply, ¶¶ 1443-1449.

377 Tr., Hearing on Jurisdiction and Merits, Day 1, 107:11-17 (Pekař).

(iv) Mr. Robert Harry Leander Rand of no less than EUR 23.7 million, plus a gross-up of 33.2% on that amount;

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

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

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

(i) no less than EUR 3.9 million for loss of value of Mr. Rand's Indirect Shareholding; and

(ii) no less than EUR 3.4 million for loss of value of Mr. Rand's receivables against BD Agro;

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

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

j. ordering such other relief as the Tribunal may deem appropriate in the circumstances.

354. 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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SQUIRE PATTON BOGGS

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