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' SECOND POST-HEARING BRIEF

22 October 2021

SQUIRE PATTON BOGGS

nstlaw/Stankovic & Partners

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I. INTRODUCTION

> "If you're weak on the facts and strong on the law, pound the law. If you're weak on the law and strong on the facts, pound the facts. If you're weak on both, pound the table."
>
> — Oliver Wendell Holmes, 1946

1. This adage has never been truer than in Serbia's first post-hearing brief ("**PHB**"). The Hearing showed that Serbia is weak on both the facts and the law. In its PHB, Serbia therefore resorts to 'pounding the table'—making outlandish accusations of wrongdoing and thinly-veiled threats of "*prison sentence[s]*"[1] for Claimants' witnesses. Serbia makes these sensationalist allegations to distract the Tribunal from the key points that emerged from the Hearing, as well as the arguments that Serbia has now abandoned in its PHB:

Jurisdiction and Admissibility

(a) Serbia no longer argues in its PHB that Sembi did not have its "seat" in Cyprus;

(b) Serbia's expert on Cypriot law, Professor Emilianides, admitted that beneficial ownership in shares can be transferred under Cypriot law without formalities, meaning that beneficial ownership in the Beneficially Owned Shares transferred to Sembi immediately upon conclusion of the Sembi Agreement;[2]

(c) Professor Emilianides admitted 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*, meaning that the Sembi Agreement was not void on the basis that the assignment of the Privatization Agreement was conditioned upon the consent of the Agency;[3]

(d) Serbia's witnesses confirmed that the Beneficially Owned Shares could be transferred without a parallel assignment of the Privatization Agreement,[4] meaning that Article 41ž does not apply to the Beneficially Owned Shares at all (as that provision only refers to the transfer of privatization agreements);

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1 Respondent's PHB, ¶ 370.

2 Tr., Hearing on Jurisdiction and Merits, Day 6, 184:24-185:25 (Emilianides).

3 Tr., Hearing on Jurisdiction and Merits, Day 6, 186:5-13, 186:20,187:22-188:8; 188:20, 188:22-189:10, 193:3-5, 193:6-7. *See also* Claimants' PHB, ¶ 76.

4 Tr., Hearing on Jurisdiction and Merits, Day 4, 66:17-67:4 (Vučković). *See also* Claimants' PHB, ¶ 46.

Merits

(e) Serbia's witnesses confirmed that the Privatization Agency (the "**Agency**") recognized that the alleged breach of Article 5.3.3 of the Privatization Agreement was not a breach at all but, rather, represented *force majeure* due to the government mandated culling of the cows;[5]

(f) Serbia's expert on Serbian law, Professor Radović, confirmed that, according to the Ministry of Economy's binding instructions to the Agency, all of the buyer's obligations under Article 5.3.4 ceased to apply on 8 April 2011,[6] meaning that Mr. Obradović could not have been in breach of this provision after this date;

(g) Serbia's witnesses confirmed that, contrary to assertions by Serbia's counsel made for the first time at the Hearing, the Agency required Mr. Obradović to comply with *all* requests raised in Agency's letters to avoid termination of the Privatization Agreement—it was not enough to simply repay funds owed to BD Agro by Inex and Crveni Signal;[7]

(h) Professor Radović conceded that the Agency could not require a buyer to remedy an alleged breach at all; it could only check whether the alleged breach was "*still present*" at the end of the additional period given to a buyer,[8] meaning that even if Mr. Obradović did breach Article 5.3.4 in 2010 (*quad non*), he was no longer in breach of this provision after 8 April 2011, when it ceased to apply;

(i) Serbia's witness, Ms. Radović-Janković, confirmed that the Agency proceeded to terminate the Privatization Agreement 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;[9]

(j) 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

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5 Tr., Hearing on Jurisdiction and Merits, Day 3, 150:10-16 (Radović-Janković); Tr., Hearing on Jurisdiction and Merits, Day 4, 57:12-15 (Vučković). *See also* Claimants' PHB, ¶¶ 206-207.

6 Tr., Hearing on Jurisdiction and Merits, Day 6, 50:9-50:21 (Radović). *See also* Claimants' PHB, ¶ 223.

7 Tr., Hearing on Jurisdiction and Merits, Day 4, 155:16-156:7 (Cvetković); Tr., Hearing on Jurisdiction and Merits, Day 3, 179:17-180:15, 182:18-183:19 (Radović-Janković).

8 Tr., Hearing on Jurisdiction and Merits, Day 6, 28:11-21 (Radović). *See also* Claimants' PHB, ¶¶ 226-233.

9 Tr., Hearing on Jurisdiction and Merits, Day 3, 151:10-15 (Radović-Janković). *Similarly* Tr., Hearing on Jurisdiction and Merits, Day 4, 49:16-23 (Vučković). *See also* Claimants' PHB, ¶ 253.

payment of the purchase price, but decided to retain the pledge as it intended to expropriate the shares. Had Serbia complied with its clear obligations under the Pledge Agreement, the nominal ownership of the Beneficially Owned Shares could have transferred to Coropi or another entity of Mr. Rand's choosing as early as 2011, and Serbia would have never been able to expropriate the shares;[10]

Damages

(k) Serbia's damages expert, Mr. Cowan, confirmed that the Agency considered BD Agro to be a going concern at the time of the expropriation,[11] meaning there is no reason to apply any distress discounts to BD Agro's valuation; and

(l) Mr. Cowan also confirmed that Claimants' asset-based determination of the fair market value of BD Agro in any case does not depend on whether BD Agro was a going concern or not,[12] meaning that, even if BD Agro was not a going concern at the time of its expropriation (and it was), no distress discount would be applicable to Claimants' valuation.

2. Simply put, the Hearing showed that Claimants had a protected investment in BD Agro, that Serbia's expropriation of Claimants' investment in BD Agro is the archetypal situation that the Treaties were meant to protect against, and that Claimants are entitled to the damages they claim as compensation for Serbia's wrongdoings.

3. Serbia's PHB is little more than an attempt to distract the Tribunal from that reality. For example, Serbia's new leading argument—that Claimants' investment in the Beneficially Owned Shares is just an ex-post fabrication designed to have Serbia pay for Mr. Obradović's EUR 2.7 million debt to Sembi[13] is easily disproved by the following facts, each of which are supported by contemporaneous documentary evidence:

(m) Mr. Rand's company, Marine Drive Holding Inc. ("**MDH**"), and Mr. Obradović concluded an agreement on 19 September 2005 whereby Mr. Obradović

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10 Tr., Hearing on Jurisdiction and Merits, Day 3, 165:16-24 (Radović-Janković). *See also* Claimants' PHB, ¶ 267.

11 Tr., Hearing on Jurisdiction and Merits, Day 8, 159:24-161:4 (Cowan). *See also* Claimants' PHB, ¶ 331.

12 Tr., Hearing on Jurisdiction and Merits, Day 8, 159:5-11, 161:11-16 (Cowan). *See also* Claimants' PHB, ¶¶ 337-338.

13 Representing a part of Mr. Obradović's receivables against BD Agro that were assigned to Sembi under the Sembi Agreement but collected by Mr. Obradović.

transferred beneficial ownership and control over BD Agro to MDH immediately after BD Agro's privatization ("**MDH Agreement**").[14] The signature of a third-party witness, Mr. Dragoljub Janković (a lawyer and former Serbian Minister of Justice from 1998 to 2000), and a facsimile timestamp visible on the top of the document, confirm that Mr. Obradović signed the MDH Agreement and faxed it to Mr. Rand on 21 September 2005;

The undisputed existence of the MDH Agreement is fatal to Serbia's argument that Claimants' investment in the Beneficially Owned Shares is a made-for arbitration fabrication. It shows that, even prior to the public auction for BD Agro's shares, Mr. Rand and Mr. Obradović both intended for Mr. Rand to become the beneficial owner of BD Agro immediately upon its privatization;

(n) On 29 September 2005, Mr. Obradović submitted the winning bid in the public auction. Mr. Jovanović, the Deputy Minister of Economy, sent an email to Mr. Rand, noting that "*you all succeeded in farm acquisition*."[15] The email shows that Mr. Jovanović knew that Mr. Rand was to become the beneficial owner of BD Agro upon its privatization;

(o) On 22 February 2008, the Lundin Family, who originally financed the project, Mr. Rand, Sembi and Mr. Obradović concluded the four-party Lundins Agreement, and Mr. Obradović and Sembi concluded the Sembi Agreement.[16] Both these agreements, signed by Messrs. Rand (for himself and Sembi), Lundin, and Obradović, document that Sembi became a beneficial owner of BD Agro on that date;

(p) Later in 2008, Mr. Rand paid EUR 2.2. million directly to Canadian suppliers and vendors for the purchase and transport of high quality heifers from Canada to BD Agro.[17] Mr. Rand would not have made these payments if he (together with Sembi and his children) had not been the beneficial owner of BD Agro;

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

15 E-mail from L. Jovanović to W. Rand, 29 September 2005, **CE-016**.

16 Lundins Agreement, 22 February 2008, **CE-028**; Sembi Agreement, 22 February 2008, **CE-029**.

17 Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 607, 759.00 executed on 21 October 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 460,216.00 executed on 24 December 2008 **CE-021**; Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 695,030.90 executed on 21 October 2008; Confirmation of wire

(q) In 2008 - 2010, Mr. Rand forwarded to Sembi the funds that Sembi used for partial repayment of its debts under the Lundins Agreement.[18] There would have been no reason for Mr. Rand and Sembi to make those transfers in 2008 – 2010 if they were not the beneficial owners of BD Agro;

(r) Sembi's EUR 2.7 million receivable against Mr. Obradović is a purely accounting matter. Under the Sembi Agreement, Sembi also acquired receivables against BD Agro totaling EUR 4.7 million, arising under loans that Mr. Obradović had granted to BD Agro from the Lundins' funds. BD Agro later repaid these loans to Mr. Obradović. Sembi directed Mr. Obradović to use EUR 2 million for the last two installments of the purchase price for BD Agro to the Agency. The remaining EUR 2.7 million were used for other purposes, unrelated to BD Agro. Under accounting rules, Sembi records these amounts as owed by Mr. Obradović.

4. A multitude of other evidence confirming Mr. Rand's and Sembi's beneficial ownership was filed with Claimants' prior submissions and summarized below. This evidence also corroborates the written and oral testimony of Claimants' six fact witnesses—Messrs. Rand, Obradović, Azrak, Jennings, Markićević and Broshko—all of whom confirm the existence of Mr. Rand and Sembi's beneficial ownership of BD Agro.

5. The facts and law of this case inexorably lead to only one reasonable conclusion: Claimants beneficially owned the Beneficially Owned Shares and their investment was protected under the Treaties. Serbia violated the Treaties and should be held accountable for the damages caused to Claimants.

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transfer from W. Rand to Sea Air International Forwarders of CAD 124,100 executed on 9 December 2008, Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 309,415 executed on 22 December 2008, **CE-022**; Confirmation of wire transfer from W. Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-023**; Confirmation of wire transfer from W. Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-024**.

[18] *E.g.* Memorial, ¶ 93; Confirmation of EUR 3,610,000.00 wire transfer from W. Rand to Sembi executed on 3 August 2008, **CE-060**; Confirmation of EUR 2.001.000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-061**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-056**; Register of Directors of Indonesian Developments Co. Ltd., **CE-075**; Confirmation of wire transfer from Sembi to I. Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-057**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-058**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-059**; W. Rand WS, ¶ 33; Azrac WS, ¶ 16.

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

A. Claimants' ownership and control over BD Agro

6. Mr. Rand was a beneficial owner of BD Agro and had control over the company from its privatization in 2005 to its expropriation in 2015.[19] In 2008, Mr. Rand restructured his beneficial ownership to involve Sembi and his children (rather than MDH) as beneficial owners. Serbia's attempts to deny the existence and lawfulness of the beneficial ownership structure in this arbitration are disingenuous because, as the Hearing confirmed, Serbia was well aware of Mr. Rand's ownership and control—and did not raise any objections at the time.

7. Claimants' beneficial ownership is protected under the Treaties regardless of whether it is classified as: (*i*) an investment in "*shares*" under Art. 1(b) of the Canada-Serbia BIT and Art. 1(1)(b) of the Cyprus-Serbia BIT; or (*ii*) an "*interest in an enterprise*" under Art. 1(f) of the Canada-Serbia BIT and "*claims to […] any other performance under contract*" under Art. 1(1)(c) of the Cyprus-Serbia BIT.

1. In 2005, Mr. Rand acquired beneficial ownership and control over BD Agro

a. Mr. Rand's beneficial ownership and control

8. Mr. Rand acquired his beneficial ownership and control over BD Agro under the MDH Agreement.[20] Mr. Deane, Claimants' British Columbia law expert, confirmed that the MDH Agreement established Mr. Rand's beneficial ownership—and Serbia did not ask any questions on this conclusion during Mr. Deane's ten-minute cross-examination.[21] Moreover, Serbia did not put forward its own expert in British Columbia law.

9. Claimants and their experts also demonstrated that the MDH Agreement was valid under its governing law of British Columbia and the agreement did not breach any overriding mandatory rules of Serbian law.[22] Specifically, the MDH Agreement complied with Serbian rules on trading of shares in listed privatized companies.[23] It was also consistent

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19 Memorial, §§ III.B-III.D, III.H, IV.A.2; Reply, §§ II.A, II.C, II.D, II.F, II.T, III.A, III.B; Rejoinder on Jurisdiction, §§ II.A, II.D, II.F, II.G, II.H, II.J, II.K, III.A. III.B.

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

21 Expert Report of Robert J. C. Deane dated 3 October 2019, § V.B.

22 Reply, § II.B; Rejoinder on Jurisdiction, § II.D.2; Deane ER, § V.C.

23 Reply, ¶¶ 58-67; Rejoinder on Jurisdiction, ¶¶ 76-88; Claimants' PHB, ¶¶ 116-123.

with Article 295 of the 2004 Law on Companies[24] and with Articles 5.3.1 and 5.2.1 of the Privatization Agreement.[25] The non-existence of BD Agro share certificates capable of endorsement does not make it invalid or unenforceable.[26]

10. The main documentary evidence confirming that Mr. Rand indeed became a beneficial owner of BD Agro and had control over the company includes the following:

a. Mr. Rand's correspondence and in-person discussions, recorded in Mr. Rand's diary,[27] with Minister of Economy Bubalo and Deputy Minister of Economy Jovanović, regarding Mr. Rand's interest in acquiring BD Agro.[28] This shows that Mr. Rand informed Serbia of his involvement in BD Agro's privatization;

b. Deputy Minister Jovanović's email to Mr. Rand on 29 September 2005 noting that Mr. Rand "*succeeded in farm acquisition*";[29]

c. Contemporaneous correspondence between Mr. Rand and his business partners, in which Mr. Rand announced his purchase of BD Agro;[30]

d. Mr. Jovanović's correspondence, after he became BD Agro's CEO, with several Serbian governmental officials, OECD officials and others, informing them that BD Agro was a Canadian investment.[31] BD Agro proudly announced this fact also by flying the Canadian flag at its entrance;[32]

e. Mr. Jovanović's correspondence with BD Agro's business partners in which he confirmed that Mr. Rand owned BD Agro.[33] Serbia disingenuously disregards this correspondence, as well as the documents referred in points a., b. and d. above, when it erroneously submits that the "*only statement from Mr. Jovanovic*

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24 Rejoinder on Jurisdiction, ¶¶ 98-104.

25 Reply, ¶¶ 68-70; Rejoinder on Jurisdiction, ¶¶ 89-97.

26 Reply, ¶¶ 71-76.

27 Excerpt from Mr. Rand's diary, 23 March 2006, **CE-582**.

28 Email from W. Rand to P. Bubalo, 4 June 2005, **CE-014**; Email from L. Jovanović to W. Rand, 13 May 2005, **CE-816**; Email from L. Jovanović to W. Rand, 16 May 2005, **CE-013**; E-mail from L. Jovanović to W. Rand, 29 September 2005, **CE-016**.

29 E-mail from L. Jovanović to W. Rand, 29 September 2005, **CE-016**.

30 Email from G. Wells to W. Rand, 29 September 2005, **CE-583**.

31 Email from L. Jovanović to W. Rand et al., 9 February 2006, **CE-597**.

32 Rejoinder on Jurisdiction, ¶¶ 129-130.

33 Email from L. Jovanović to M. Marković, 3 December 2007, **CE-650**; Email communication between L. Jovanović and T. Smith, 23 October 2007, **CE-651**.

on record is his testimony in the criminal proceedings" and fails to acknowledge that both Mr. Jovanović and Mr. Obradović were found innocent in these proceedings;[34]

f. Mr. Rand's correspondence with BD Agro's management and employees on a great variety of issues, such as conclusion of agreements by BD Agro, BD Agro's financial results, Mr. Rand's personal visits to BD Agro's premises and even Mr. Rand's payment for heart surgery for a child of an employee of BD Agro.[35]

11. All this evidence leads to only one reasonable conclusion: Mr. Rand was a beneficial owner of BD Agro and always had control over the company.

b. Mr. Obradović's role

12. Mr. Obradović was merely a nominal owner who assisted Mr. Rand in managing BD Agro. As Mr. Rand explained in his witness statements,[36] and confirmed during the Hearing,[37] he decided to appoint Mr. Obradović as a nominal owner of his investments in Serbia (including BD Agro), because he then had very limited experience investing in

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34 Respondent's PHB, ¶ 121.

35 *E.g.* Email from BD Agro to W. Rand, 10 January 2008, **CE-598**; Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, **CE-608**; Email from Marine Drive Holdings Inc. to W. Rand, 10 January 2008, **CE-609**; Email from W. Rand to Marine Drive Holdings Inc, 15 February 2006, **CE-610**; Email communication between W. Rand and BD Agro, 26 July 2006, **CE-611**; Email communication between W. Rand and A. Jorga, 10 August 2006, **CE-605**; Email from Marine Drive Holdings Inc. to W. Rand re Sokolac, 10 January 2008, **CE-612**; Email from L. Jovanović to W. Rand, 27 February 2006, **CE-613**; Email from L. Jovanović to W. Rand, 1 June 2006, **CE-601**; Email from A. Jorga to W. Rand, 1 August 2006, **CE-614**; Email from A. Jorga to W. Rand, 30 June 2006, **CE-620**; Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, **CE-608**; Email from Marine Drive Holdings Inc. to W. Rand, 23 March 2007, CE-622; Email from A. Jorga (BD Agro) to W. Rand et al., 2 November 2006, **CE-623**; Email from A. Jorga (BD Agro) to W. Rand et al., 26 July 2006, **CE-624**; Email from Marine Drive Holdings Inc. to W. Rand, 24 October 2007, **CE-625**; Email from A. Jorga (BD Agro) to W. Rand, 20 October 2006, **CE-626**; Email from Marine Drive Holdings Inc. to W. Rand, 6 July 2007, **CE-627**; Email from Marine Drive Holdings Inc. to W. Rand, 26 November 2007, **CE-628**; Email from Marine Drive Holdings Inc. to W. Rand and P. Bagnara, 29 December 2006, **CE-443**; Email communication between W. Rand and BD Agro, 26 July 2006, **CE-611**; Email from W. Rand to A. Jorga, 2 May 2006, **CE-629**; Email from W. Rand to A. Jorga, 7 July 2006, **CE-630**; Email from W. Rand to L. Jovanović, 13 April 2006, CE-631; Email from K. Lutz to D. Obradović, 16 November 2006, **CE-413**; Email communication between W. Rand and S. Marčetić, 5 July 2006, **CE-632;** Email from W. Rand to BD Agro, 3 May 2006, **CE-633;** Email from W. Rand to L. Jovanović, 7 February 2006, **CE-634;** Email communication between W. Rand and Marine Drive Holdings Inc., 29 July 2006, **CE-635;** Email from K. Lutz to L. Jovanović, 4 December 2008, **CE-636;** Email from L. Jovanović to W. Rand, 17 August 2006, **CE-637**; Email communication between W. Rand and L. Jovanović, 31 March 2006, **CE-638**; Email from W. Rand to D. Obradović et al., 1 September 2006, **CE-414**; Email communication between K. Lutz and A. Janičić, 29 August 2006, **CE-639**; Photographs from Mr. Rand's visit of BD Agro in July 2008, **CE-415**; Email from K. Lutz to A. Janičić, 5 March 2008, **CE-640**.

36 Rand Third WS, ¶¶ 11-14.

37 Tr., Hearing on Jurisdiction and Merits, Day 2, 53:16-55:20 (Rand).

Serbia, did not know local managers who could assist him and understood that such arrangement would allow him to run his investments more efficiently, without the need for additional trips to Serbia. Only many years later, in 2013, when Mr. Rand had acquired enough experience doing business in Serbia, was he comfortable in changing to a structure not involving Mr. Obradović's nominal ownership.[38]

13. In its PHB, Serbia simply ignores all of the above evidence and claims that Mr. Rand did not control BD Agro because Mr. Obradović concluded certain transactions without his knowledge.[39] Serbia's argument is not serious. A controlling owner certainly does not have to be informed of, let alone give a prior approval for, each and every transaction concluded by the controlled company's management.

14. The ultimate proof of Mr. Rand's control over BD Agro is his instruction for Mr. Obradović to step down from the management of BD Agro and transfer his nominal ownership to Coropi. Mr. Obradović's immediate compliance with these instructions is clear evidence that Mr. Rand owned and had control over BD Agro.

15. Mr. Obradović also complied with Mr. Rand's instruction to appoint Messrs. Wood and Markićević to BD Agro's Management Board, as communicated in no uncertain terms to Mr. Obradović in Mr. Rand's email of 10 April 2013.[40] Serbia claims that the email does not represent instructions; instead, according to Serbia, this email is merely "*a reminder of a meeting agenda that was 'agreed' after joint discussions between Mr. Rand and other board members.*"[41] Mr. Rand, however, was not a Board member at the time because he had left BD Agro's Management Board *nine months earlier*, on 9 July 2012.[42] The only conclusion, therefore, is that Mr. Rand sent these instructions as the beneficial owner.

16. Mr. Obradović's motivation to act as a nominal owner of BD Agro, questioned by Serbia,[43] is entirely irrelevant for the existence of Mr. Rand's and then Sembi's beneficial

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38 Tr., Hearing on Jurisdiction and Merits, Day 2, 54:21-55:20 (Rand).

39 Respondent's PHB, ¶¶ 104-107.

40 Email from Mr. Rand to Mr. Obradović, 10 April 2013, **CE-428**; Tr., Hearing on Jurisdiction and Merits, Day 2, 7:1-13 (Rand).

41 Respondent's PHB, ¶ 110.

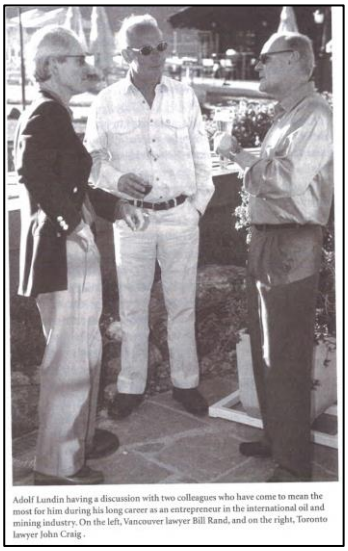
42 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, 23 August 2017, p. 4 (pdf), **CE-072**.

43 Respondent's PHB, ¶ 20.

ownership of and control over BD Agro. In any event, Messrs. Rand and Obradović both explained that Mr. Obradović worked for Mr. Rand based on a success fee to be paid if Mr. Rand's investments became profitable. Mr. Rand also advanced funds to Mr. Obradović to cover his personal expenses, including, among other things, the purchase of an apartment in Belgrade and his daughter's tuition fees in the United States.[44]

c. Mr. Rand obtained funds for BD Agro's privatization from his long-term business partners and friends, the Lundin family

17. Mr. Rand secured funds used for the privatization and modernization of BD Agro from the Lundin family—his long-time business associates and close personal friends. In 2003, a biography of Mr. Adolf Lundin, the founder of the Lundin empire, expressly mentioned Mr. Rand as "*one of [Mr. Lundin's] most trusted legal advisors*"[45] and one of the people who "*have come to mean the most for him during his long career as an entrepreneur in the international oil and mining industry*":[46]



Adolf Lundin having a discussion with two colleagues who have come to mean the most for him during his long career as an entrepreneur in the international oil and mining industry. On the left, Vancouver lawyer Bill Rand, and on the right, Toronto lawyer John Craig .

18. At the time of publication of the biography in 2003, Mr. Rand had already worked with the Lundins for decades and was a long-term board member of their companies.[47] Mr.

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44 Rand First WS, ¶ 17; Rand Third WS, ¶ 15; Tr., Hearing on Jurisdiction and Merits, Day 2, 14:12-25 (Rand); Obradović First WS, ¶ 7; Obradović Second WS, ¶ 7; Obradović Third WS, ¶ 8; Tr., Hearing on Jurisdiction and Merits, Day 2, 85:21-86:21 (Obradović).

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

46 Robert Eriksson, Adolf Lundin: No Guts No Glory, Affars Information Ehrenblad Editions AB, 2003, p. 128, **CE-374**.

47 Robert Eriksson, Adolf Lundin: No Guts No Glory, Affars Information Ehrenblad Editions AB, 2003, p. 113, **CE-374**.

Rand was also instrumental in helping the Lundins close some of their most important business ventures with transaction values totaling tens of US$ billions.[48]

19. The business relationship between Messrs. Rand and Lundin gradually evolved into a strong friendship, to a point where their families would vacation together. Mr. Rand also has an enduring and close relationship with Mr. Adolf Lundin's sons and grandsons.[49]

20. One must look at the Lundins' funding of Mr. Rand's investment through the optics of this decades-long close business and personal relationship—and the immense wealth of the Lundin family. The Lundins provided the funds informally and without any written loan agreement, as long time personal friends—not as a regulated credit institution.

21. Serbia resorts to unsupported—and clearly incorrect—speculations about the role of the Lundin family in BD Agro's privatization. For example, Serbia implies that it was unusual that the Lundins were provided with financial results of the company.[50] This allegation is again based on Serbia's disregard of the evidentiary record in this arbitration.

22. On 9 December 2005, Mr. Rand and Mr. Lukas Lundin became members of BD Agro's Management Board.[51] There was no reason for Mr. Rand, a wealthy Canadian businessman, and Mr. Lundin, a second-generation billionaire, to be on BD Agro's Management Board other than Mr. Rand's beneficial ownership and the Lundins' financing of the acquisition, with an option to convert their receivables into equity.[52] As a member of the Board, Mr. Lundin obviously needed BD Agro's financial information.

23. The Lundins' option also explains why Mr. Obradović mischaracterized during his cross-examination the Lundins as beneficial owners of BD Agro at the time of the 2007 visit of the Serbian Prime Minister, Vojislav Koštunica.[53]

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48 Tr., Hearing on Jurisdiction and Merits, Day 2, 34:6-35:8 (Rand). *See also* Rand First WS, ¶ 7.

49 Tr., Hearing on Jurisdiction and Merits, Day 2, 33:6-35:8 (Rand).

50 Respondent's PHB, ¶ 44.

51 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, 23 August 2017, p. 4 (pdf), **CE-072**.

52 *E.g.* Tr., Hearing on Jurisdiction and Merits, Day 2, 65:5-12 (Azrac). *See also* Azrac WS, ¶ 13; Rand First WS, ¶ 16; Rand Second WS, ¶ 13.

53 Tr., Hearing on Jurisdiction and Merits, Day 2, 112:13-21 (Obradović).

24. The Lundins' involvement with BD Agro ended with the Sembi Agreement and the lapse in early 2013 of the five-year period for the Lundins' earn-out from Mr. Rand's potential sale of BD Agro. In connection with the earn-out, Mr. Lukas Lundin remained on the Management Board of BD Agro until 2012.[54]

25. Serbia also claims in its PHB—for the first time in this arbitration—that it is unclear whether the Lundins even sent the funds provided for privatization and modernization of BD Agro to Serbian bank accounts.[55] This argument is again disingenuous. The payment confirmations obviously identify the accounts to which the funds were sent, and this identification shows in which countries the accounts were located. One example for all, in paragraph 156 of its PHB, Serbia argues that it "*does not follow*" from the transfer confirmation in exhibit CE-384 that the payment was received in Serbia.[56] However, the confirmation identifies the SWIFT code of the receiving bank: "EKBECSBGXXX".[57] "EKBE" is the code of a specific bank in Serbia, "CS" was the SWIFT country code for Serbia and Montenegro, "BG" means Belgrade and "XXX" is a branch code. It is therefore perfectly clear that this payment was made to an account in Serbia.

26. Another incorrect—and irrelevant—argument made by Serbia is that the Lundins allegedly had no "*apparent commercial motives*" to lend funds for the privatization and modernization of BD Agro.[58] Once again, this argument entirely ignores the evidence on the record because Mr. Azrac explained in his witness statement that the Lundins had been investing into the agriculture sector since 1998 and their portfolio included major farming companies in Argentina and Russia.[59] The fact that the Lundins provided funds for the privatization of BD Agro—which could be either repaid or converted into equity—was therefore entirely in line with their general investment strategy.

27. Finally, Serbia also claims that the Lundins allegedly "*suddenly decided to completely abandon*" the project in 2008 and later waived part of their receivables under the Lundins

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54 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, 23 August 2017, p. 4 (pdf), **CE-072**.

55 *E.g.* Respondent's PHB, ¶ 156.

56 Respondent's PHB, ¶ 156.

57 Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, **CE-384**.

58 Respondent's PHB, ¶ 24.

59 Azrac WS, ¶¶ 10-12.

Agreement without "*any reasonable explanation for doing so.*"[60] These statements, once again, demonstrate that Serbia simply ignores any evidence that does not support its misinterpretations. Mr. Rand had repeatedly explained that the Lundins waived a part of his debt out of their "*lifelong friendship*" with Mr. Rand.[61] Similarly, Mr. Azrac explained that the Lundins decided to exit from the BD Agro project as a result of severe challenges they had faced in other Eastern European countries in the preceding years—based on which they turned their attention to agricultural investments in other parts of the world.[62] Thus, the Lundins' decisions were explained again and again.

28. In any event, the Lundins exited the project in 2008. If the Lundins, and not Claimants, were the beneficial owners of BD Agro, as Serbia seems to claim,[63] nothing would have prevented them from initiating the current arbitration themselves. Messrs. Lundin both have Swedish nationality—and could rely on the Serbia-Sweden BIT.[64]

2. In 2008, Mr. Rand restructured his beneficial ownership to involve Sembi

29. After the Lundins decided to exit BD Agro, Mr. Rand agreed to replace the funds originally provided by the Lundins and their investment bank, 1875 Finance S.A., with his own. Mr. Rand used this opportunity to restructure his beneficial ownership to include Sembi and the remaining Claimants. This arrangement was formalized in the Lundins Agreement[65] and the Sembi Agreement,[66] both concluded on 22 February 2008.

30. Mr. Rand has controlled Sembi at all times since February 2008. Sembi's two shareholders are Rand Investments Ltd., a company solely owned by Mr. Rand, and the Ahola Family Trust,[67] the beneficiaries of which are Mr. Rand's children.[68] Mr. Rand

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60 Respondent's PHB, ¶¶ 24, 35.

61 Rand Second WS, ¶ 59. *Similarly* also Rand First WS, ¶ 33.

62 Azrac WS, ¶ 14.

63 *E.g.* Respondent's PHB, ¶¶ 27, 44.

64 *See* https://investmentpolicy.unctad.org/international-investment-agreements/countries/187/serbia. The Lundins have experience with investment arbitration, as one of their companies filed an investment claim against Tunisia: https://www.italaw.com/cases/2268.

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

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

67 Certificate of Shareholders of Sembi dated 8 June 2017, **CE-6**; Extract from the Company Register regarding Sembi dated 7 June 2017, **CE-053**.

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

has had an oral control agreement with Mr. Jennings, the trustee of the Ahola Family Trust and a close, personal friend of Mr. Rand's for over thirty years. Mr. Rand has also had oral and written control agreements with the remaining directors of Sembi.[69]

31. Serbia claims in its PHB, for the first time in this arbitration, that Mr. Rand did not control the Ahola Trust, since the control agreement between Mr. Rand and Mr. Jennings was not written, but only oral.[70] However, Serbia does not provide any reason why an oral control agreement should not be valid—and there is none.

32. Moreover, Serbia does not even deny that Mr. Rand has controlled Sembi. In its Rejoinder, Serbia argued that Sembi cannot be deemed to have a "seat" in Cyprus because "*it was unequivocally admitted by Claimants that Sembi was always under full control of Mr. Rand*."[71] While the legal conclusion drawn by Serbia is incorrect—because the place of residence of a controlling person is irrelevant for determining seat under the Cyprus-Serbia BIT[72]—Mr. Rand's control over Sembi is undisputed by Serbia and, in any event, conclusively established by evidence.

33. Sembi's beneficial ownership of and control over BD Agro is evident from the following facts, each supported by contemporaneous documentary evidence:

a. In 2008 to 2010, Sembi's directors repeatedly recorded discussions of BD Agro matters in the minutes of their meetings ("**Board Minutes**").[73] The Board Minutes record that BD Agro's management: (*i*) reported to Sembi's directors on important issues, such as the progress on farm construction works and the status of BD Agro's herd and crops;[74] and (*ii*) submitted for approval, and Sembi

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69 Instructions Letter from Rand Investments to HLB Axfentiou Limited, 31 December 2007, **CE-007**; Obradović Second WS, ¶ 39; Markićević Second WS, ¶ 12.

70 Respondent's PBH, ¶ 111.

71 Rejoinder, ¶ 1001.

72 Reply, III.E.

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

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

approved, strategic decisions, such as sales of BD Agro's land, acquisition of the Sokolac farm, its reconstruction and the reconstruction of BD Agro's premises.[75] The Board Minutes conclusively confirm that Sembi beneficially owned the Beneficially Owned Shares and channeled the beneficial ownership of the Canadian Claimants and Mr. Rand's control over BD Agro;

b. In 2008 to 2010, Mr. Rand forwarded to Sembi certain funds that Sembi subsequently used for partial repayment of its debts under the Lundins Agreement.[76] There would have been no reason for Mr. Rand and Sembi to make those transfers if they were not direct and indirect beneficial owners of BD Agro;

c. Mr. Rand's direct payment to Canadian suppliers and vendors of approximately EUR 2.2 million for the purchase and transport of high quality heifers from Canada to BD Agro throughout 2008.[77] Mr. Rand would not have had any reason to incur these expenses if Claimants were not beneficial owners of BD Agro;

d. On 10 December 2009, Sembi's auditors confirmed the veracity of Sembi's 2008 financial statements, which recorded and confirmed Sembi's acquisition of beneficial ownership of BD Agro pursuant to the Sembi Agreement.[78] The financial statements were prepared in English, which was—and still is—Sembi's

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

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

76 *E.g.* Memorial, ¶ 93; Confirmation of EUR 3,610,000.00 wire transfer from W. Rand to Sembi executed on 3 August 2008, **CE-060**; Confirmation of EUR 2.001.000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-061**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-056**; Register of Directors of Indonesian Developments Co. Ltd., **CE-075**.

77 Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 607, 759.00 executed on 21 October 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 460,216.00 executed on 24 December 2008 **CE-021**; Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 695,030.90 executed on 21 October 2008; Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 124,100 executed on 9 December 2008, Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 309,415 executed on 22 December 2008, **CE-022**; Confirmation of wire transfer from W. Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-023**; Confirmation of wire transfer from W. Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-024**.

78 Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, p. 4, **CE-420**.

internal communication language because Mr. Rand does not speak Greek. Sembi's local directors were responsible for filing the Greek version of the financial statements with the Cyprus Corporate Registry. Messrs. Rand and Obradović believed that they did so in 2009 and learned only during this arbitration that the filing was made only in 2014.[79] The belated filing, however, does not change the fact that the financial statements were audited on 10 December 2009. The timing of the audit is confirmed by, among other evidence, the pdf file with the penultimate version of the audited financial statements, which expressly sets out Sembi's beneficial ownership of BD Agro and only minimally differs from the final version.[80] The metadata confirms that the pdf document was created on 9 December 2009.[81]

e. On 7 June 2010, Sembi filed with the Cyprus Income Tax Office its Income Declaration for 2008. This declaration clearly stated that, as of 31 December 2008, Sembi recorded "*investments in subsidiaries*" in the amount of EUR 15,599,727.[82] This is exactly the amount reported as Sembi's investment in BD Agro in the 2008 audited financial statements filed as exhibits CE-420 and CE-909.[83] If Sembi had not been a beneficial owner of BD Agro in 2008, Sembi's Cypriot director and auditors who submitted the Income Declaration would have committed a criminal offense by filing a false tax declaration;[84] and

f. Mr. Rand's instructions to Mr. Obradović on matters involving BD Agro.[85] As Mr. Rand explained during the Hearing, he generally communicated with Mr. Obradović by telephone, and only rarely in writing.[86] Nevertheless, he also gave instructions to Mr. Obradović in emails, such as:

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

80 The differences are: correction in the name of the company secretary; correction of the registered office; three non-material revisions in the reported financial information that are unrelated to Sembi's ownership in BD Agro; change in director signatory; and the addition of the date of audit and signing, being 10 December 2009.

81 Draft of Sembi's financial statements for the year 2008 (a pdf file including metadata), 9 December 2009, **CE-910**.

82 Sembi's Income Declaration for 2008 filed with Cyprus Income Tax Office, 7 June 2010, **CE-911**.

83 *E.g.* Claimants' Application to Tribunal, 8 October 2021, ¶ 24.

84 *E.g.* Claimants' Application to Tribunal, 8 October 2021, ¶ 25.

85 E-mail from Mr. Rand to Messrs. Markićević, Jovanović, Broshko, and Obradović, 10 April 2013, **CE-428**; E-mail from Mr. Rand to BD Agro, 10 April 2013, **CE-429**.

86 Tr., Hearing on Jurisdiction and Merits, Day 2, 6:18-25 (Rand).

- In an e-mail dated 29 March 2013 (**CE-429**), Mr. Rand informed Messrs. Obradović, Jovanović, Markićević and Broshko that Mr. Wood would be arriving to Belgrade in the upcoming week "*to take over supervision of cattle and farm operations and assist* [Mr. Jovanović] *with all other farm issues*" and asked them to make appropriate logistical arrangements; and

- In an e-mail dated 10 April 2013 (**CE-428**), Mr. Rand provided Messrs. Obradović, Jovanović, Markićević andWood with the agenda for an upcoming meeting of BD Agro's Management Board, which included such important matters as the appointment of Mr. Wood as a member of BD Agro's Management Board and Mr. Igor Markićević as its Chairman.

  Serbia argues in its PHB that this e-mail is "*nothing more than a reminder that Mr. Rand sent as a member of the Board of Directors of BD Agro to other board members*."[87] As noted above, this is obviously incorrect because Mr. Rand had resigned from BD Agro's Management Board already on 9 July 2012, *i.e.* nine months before he sent that e-mail.

  Serbia's insistence that the e-mail was not an instruction, but rather only a reminder of a previously "agreed" agenda is similarly misplaced. Mr. Rand had personally selected Messrs. Markićević and Wood, without seeking input from Mr. Obradović.[88] Their appointment to BD Agro's Management Board was a result of Mr. Rand's decision and instruction rather than a collective agreement of BD Agro's Management Board.

34. In sum, the documentary evidence on the record unequivocally demonstrates that Mr. Rand, now with his children and Sembi, continued to beneficially own and control BD Agro also after conclusion of the Sembi Agreement on 22 February 2008. Claimants' ownership and control lasted until 21 October 2015, when Serbia expropriated BD Agro. That documentary evidence is, moreover, corroborated by witness testimonies of Messrs. Rand, Obradović, Azrac, Jennings, Markićević and Broshko.

3. The Sembi Agreement was valid and enforceable under Cypriot law and did not conflict with any provision of Serbian law

35. Serbia claims that the Sembi Agreement is null and void under Cypriot law because it violated Article 41ž of the Law on Privatization.[89] Claimants already refuted this assertion in detail.[90] This section only focuses on three key premises of Serbia's objection, each of which is false.

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87 Respondent's PHB, ¶ 109.

88 Rand First WS, ¶ 39; Broshko First WS, ¶ 17

89 Respondent's PHB, ¶ 71.

90 Reply, ¶¶ 116-122; Rejoinder on Jurisdiction, ¶¶ 153-162; Claimant's PHB, ¶¶ 41-47.

36. *First*, Serbia asserts that Article 41ž "*prohibits every unauthorized assignment of rights and obligations from the Privatization Agreement, regardless of whether it is only partial or beneficial*."[91] This is a serious misinterpretation because the provision does not apply to beneficial assignment.

37. Serbia does not dispute that: (*i*) "assignment" under Serbian law cannot occur without the transfer of legal title[92]; and (*ii*) equitable assignment under Cypriot law, by definition, occurs when legal title is not transferred.[93] Serbia merely claims, without any support, that not to extend the reach of Article 41ž to equitable assignments would be "*plainly absurd*", "*downright preposterous*", would make a "*mockery of Article 41ž*" and render it "*virtually meaningless*."[94] Again, pounding the table is not a legal argument.

38. Claimants' and their experts' interpretation of Article 41ž is supported by the plain text of the provision and the Serbian rules on interpretation,[95] including the principle that provisions restricting rights of private parties must be interpreted narrowly.[96]

39. Further, Serbia is simply wrong that Article 41ž would be meaningless without prohibiting equitable assignments. Unlike an assignment within the meaning of Serbian law, which replaces the assignor with the assignee as the Agency's contractual counterparty, the equitable assignment under Cypriot law had no impact on the Agency's rights because Mr. Obradović remained the Agency's sole counterparty and the Agency could still hold him liable for any purported breaches of the Privatization Agreement.

40. Indeed, as Ms. Vučković explained, this is precisely why the Agency did not take any interest in the relationship between Mr. Obradović and Mr. Rand:

> THE PRESIDENT: Thank you. Mrs Vučković, when you were discussing with counsel the fact that for you, Mr Obradović was the owner of BD Agro, and you went through the different documents, so where you had other people attending the meetings, you said that whatever financial arrangements or relationships existed between Mr Obradović

91 Respondent's PBH, ¶ 69.

92 Respondent's PBH, ¶ 66.

93 Georgiades Second ER, ¶¶ 3.12-3.16; Georigades Third ER, ¶ 2.8

94 Respondent's PBH, p. 18.

95 Milošević Third ER, ¶ 56; Grušić Second ER, ¶ 33.

96 Milošević Third ER, ¶ 57; Grušić Second ER, ¶ 33.

and Mr Rand, this was completely irrelevant to you, because what counted for you was who signed the Privatization Agreement; did I understand this correctly?

Ms. Vučković: (Interpreted) Yes, you have, fully.[97]

41. Accordingly, since the Sembi Agreement did not result in an assignment within the meaning of Serbian law, and since Article 41ž did not apply to equitable assignment, Serbia's objection based on Article 41ž of the Law on Privatization Agreement fails.

42. *Second,* Serbia argues that Article 41ž "*unequivocally prohibits and invalidates any contract on assignment* ***concluded*** *without prior authorization by the Agency*."[98] Thus, Serbia argues that the buyer needs to secure the Agency's consent before an assignment agreement is entered into. This is incorrect.

43. The plain text of Article 41ž shows that the provisions does not operate as Serbia purports to argue. Article 41ž says nothing about assignment agreements, but only provides that the actual assignment—i.e. the replacement of the assignor with the assignee as the Agency's contractual counterparty—cannot occur without the Agency's prior approval.

44. This interpretation of Article 41ž is in line with the Agency's 2014 Rulebook on Undertaking of Measures ("**Rulebook**"), which provides that the Agency "*shall make a decision on giving prior consent to the Buyer for the assignment of [privatization agreement] under condition that Buyer has delivered*" certain documents listed in that provision. One of such documents is an "*agreement on assignment,* ***signed and notarized***."[99] Accordingly, the Agency required assignment agreements to be drafted, signed, notarized and presented by the buyer to the Agency *before* the Agency' consent.

45. The Rulebook is consistent with the Agency's prior practice: in June 2013, when Claimants first started to explore the possibility of assignment of the Privatization Agreement to Coropi, the Agency required them to provide a "*request for issuance of [the Agency's] consent*" and a "*signed assignment agreement*".[100]

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97 Tr., Hearing on Jurisdiction and Merits, Day 4, 95:21-96:6 (Vučković).

98 Respondent's PBH, ¶ 78.

99 Rulebook on Undertaking of Measures, 7 April 2014, **RE-93**.

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

46. *Third*, Serbia continues to claim that Mr. Obradović could transfer the Beneficially Owned Shares only upon assignment of the Privatization Agreement.[101] That theory, however, collapsed when Ms. Vučković confirmed that the Beneficially Owned Shares could be transferred without a parallel assignment of the Privatization Agreement.[102]

47. In sum, Article 41ž of the Law on Privatization does not prevent equitable assignments. It did not affect the *conclusion*, and thus the validity of the Sembi Agreement, but only conditioned on the Agency's consent the *performance* of Mr. Obradović's obligation to assign the legal title to the Privatization Agreement. In any event, Article 41ž did not relate to the transfer of the Beneficially Owned Shares in any manner.

4. Serbia was aware of Claimants' beneficial ownership and control

48. Serbia was always aware that Mr. Rand controlled and owned BD Agro, from the time of the privatization through MDH and from 2008 onwards through Sembi and together with his children.[103] This fact is demonstrated, among other things, by the following evidence:

a. Correspondence with senior Serbian officials, beginning prior to the privatization of BD Agro, including specifically informing the Minister of Economy of Mr. Rand's ownership in December 2013;[104]

b. The Agency's internal minutes and letter confirming that the Agency understood that Mr. Rand had "*entrusted*" Mr. Obradović with buying BD Agro;[105]

c. The Ministry of Economy asking Mr. Obradović to leave a meeting with the Ministry of Economy and the Privatization Agency related to BD Agro that took place on 15 December 2014 (while only Messrs. Broshko and Markićević stayed);

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101 Respondent's PBH, ¶ 89.

102 Tr., Hearing on Jurisdiction and Merits, Day 4, 66:17-69:4 (Vučković).

103 *E.g.* Reply, ¶¶ 501-507; Rejoinder on Jurisdiction, §§ II.G, II.K

104 Email from W. Rand to P. Bubalo, 4 June 2005, **CE-014**; Email from L. Jovanović to W. Rand, 13 May 2005, **CE-816**; Email from L. Jovanović to W. Rand, 16 May 2005, **CE-013**; E-mail from L. Jovanović to W. Rand, 29 September 2005, **CE-016**; Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, pp. 1-3, **CE-769**.

105 Minutes of the meeting at the Privatization Agency, 30 January 2014, **RE-028**; Letter from the Privatization Agency to BD Agro, 21 August 2014, p. 2, **CE-317**.

d. Correspondence with the Deposit Insurance Agency noting that "*Representative [i.e. Mr. Broshko] of the owner from Canada [will be] arriving in Belgrade*";[106]

e. Testimonies of Messrs. Rand, Obradović, Markićević and Broshko.

49. Once again, Serbia's only response is that it simply ignores this evidence. For example, Serbia ignores the fact that the Privatization Agency *repeatedly* recognized that Mr. Obradović was "*entrusted*" to purchase the BD Agro shares for Mr. Rand:

Minutes of the meeting at the Privatization Agency, 30 January 2014, p. 1, RE-028:

> Brief description of the meeting:
>
> The reason for the meeting was the Buyer's request dated 1 August 2013, for issuing the prior approval for assigning the Sale Purchase Agreement of Capital.
> Director of the Entity, Igor Markicevic, introduced Erinn Broshko, director of Rand Investments Ltd Vancouver, Canada, company owned by William Rand, for whom he stated that privatization of BD Agro Dobanovci was carried out by his funds.
> Erinn Broshko stated that he represented the company which provided funds invested in the Entity, and that such practice is common in Canada. He stated that Willian Rand was not satisfied with the work and management by the man to whom business of purchasing the company was entrusted, and that he was interested to finish the assignment as soon as possible.

Letter from the Privatization Agency to BD Agro, 21 August 2014, p. 2, CE-317:

> At the meeting, you introduced Erinn Broshko, director of "Rand Investments" ltd. Vancouver, Canada, company owned by William Rand, and you stated that that his means were used to finance the entire process of privatization of "BD Agro" Dobanovci.
> Erinn Broshko noted that he presented the company, which had given the means invested in the Subject, and that such practice was common in Canada. He said that William Rand was not pleased by the work and management of the person they had entrusted purchase of the company and that he was interested in fast completion of the assignment process.

50. Serbia also ignores the fact that the Serbian Minister of Economy was expressly informed of the fact that Mr. Rand was the owner of BD Agro:

[106] Email from Mr. Markićević to Mr. Ristović, 22 April 2014, **CE-289**.

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

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

51. Serbia's knowledge of Mr. Obradović being a mere nominal owner entrusted to hold the Beneficially Owned Shares also explains why the Ministry of Economy and the Agency asked Mr. Obradović to leave the 15 December 2014 meeting regarding BD Agro.[107]

52. The Agency's minutes confirm that the meeting related to Mr. Obradović's alleged violations of the Privatization Agreement.[108] Despite this fact, Mr. Obradović was asked to leave—based on a request from Mr. Broshko—before the meeting even began.

53. The minutes also make it clear that Serbia understood both Messrs. Broshko and Markićević attended the meeting as "representatives" (plural) of BD Agro—not as representatives of Coropi or Mr. Obradović.[109] Mr. Broshko's listing in that capacity expressly confirms Serbia's understanding that Mr. Rand and his companies (including Rand Investments, where Mr. Broshko serves as a director) controlled and beneficially owned BD Agro. Mr. Broshko would have had no link to BD Agro otherwise.

54. *Third*, Serbia's discussion of the alleged violations of the Privatization Agreement with Messrs. Markićević and Broshko confirms that Serbia understood its actual counterparty in these discussions was Mr. Rand and his companies rather than Mr. Obradović.

55. The meeting confirms that Serbia was fully aware that, as already explained above, Mr. Obradović had no role in BD Agro after 2013, when Mr. Rand replaced him with Messrs. Broshko and Markićević. The replacement also explains why Messrs. Broshko and Markićević started to appear before the Agency and the Ministry of Economy as Mr.

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107 Reply, ¶¶ 253-255; Rejoinder on Jurisdiction, ¶¶ 206-209.

108 Minutes of the meeting at the Ministry of Economy, 15 December 2014, p. 1, **RE-038**.

109 Minutes of the meeting at the Ministry of Economy, 15 December 2014, p. 1, **RE-038**; Tr., Hearing on Jurisdiction and Merits, Day 4, 12:9-24.

Rand's representatives only in 2013.[110] Up to that point, it was Mr. Obradović who acted as Mr. Rand's representative in Serbia and there was no reason for any other representatives to appear before the Agency and the Ministry.

5. Claimants' investment in BD Agro is protected under the Treaties

56. Claimants' beneficial ownership of the Beneficially Owned Shares is protected under the Treaties in at least three capacities: (*i*) as ownership of "shares"; (*ii*) as an "*interest in an enterprise*"; and (*iii*) as a bundle of contractual rights, all of which Sembi holds directly and the Canadian Claimants hold indirectly. Indeed, as noted by the *Saghi* tribunal, "*beneficial ownership is both a method of exercising control over property and a compensable property interest in its own right*".[111]

57. *First*, the Beneficially Owned Shares are "shares" and thus an "investment" under the definition in Article 1 of the Canada-Serbia BIT[112] and Article 1(1)(b) of the Cyprus-Serbia BIT.[113] Claimants have already demonstrated that public international law, in general, and the Treaties, in particular, recognize and protect beneficial ownership.[114]

58. In its PHB, Serbia merely repeats its argument that international law only protects rights already existing under municipal law and that, *therefore*, the question whether Claimants owned the Beneficially Owned Shares within the meaning of the Treaties falls to be decided exclusively under Serbian law.[115] This is obviously incorrect because the Treaties are to be interpreted autonomously and they prevail over Serbian law.

59. Thus, contrary to Serbia's arguments, the protection of beneficial ownership under public international law does not require that the beneficial owner have any right *in rem* to the beneficially owned asset under Serbian law, nor does it require that the bundle of rights

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110 Respondent's PHB, ¶ 45(iv).

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

112 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "investment," item (b), **CLA-001**.

113 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 1(1), **CLA-002**.

114 Memorial, ¶¶ 303-305; Reply, § III.A.1; Rejoinder on Jurisdiction, § III.A.1; Claimants' PHB, ¶¶ 80-95.

115 Respondent's PHB, ¶¶ 91-93.

creating beneficial ownership be enforceable against anyone other than the nominal owner.[116] Serbia adduced no authority to the contrary.

60. In any event, although it has no bearing on the autonomous notion of beneficial ownership under international law, Claimants have already demonstrated that Serbian law recognizes the existence of beneficial ownership both in name and in substance.[117]

61. *Second*, Sembi's rights from the Sembi Agreement are protected under the Cyprus-Serbia BIT pursuant to the category of "*claims to money or to any performance under contract having economic value*."[118] Similarly, the Canadian Claimants' indirect interest in the Sembi Agreement is protected as "*an interest in an enterprise that entitles the owner to share in income or profits of the enterprise*"[119] and as "*an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory*"[120] All of such categories cover contractual rights and Serbia does not argue otherwise. Other than repeating the already refuted arguments concerning its purported nullity, Serbia does not explain why the Sembi Agreement would not qualify under all of these categories. It plainly does.

62. Serbia, however, asserts that Claimants' contractual rights fall outside Article 2(1) of the Canada-Serbia BIT, which requires that the impugned measures "relate to" the covered investment and covered investor.[121] Serbia's objection is not serious. The termination of the Privatization Agreement and the seizure of the Beneficially Owned shares obviously not only *related to*, but *ipso facto* destroyed, the object and value of Claimants' rights

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116 *E.g.* James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran, IUSCT Case No. 298, Award, ¶¶ 25-26, **CLA-080**; Trust Co. v. Hungary (U.S. For. Cl. Settlement Comm'n 1957), **CLA-004**; David J. Bederman, "Beneficial Ownership of international Claims," International and Comparative Law Quarterly, Vol. 38, 1989, p. 936, **CLA-078**; Robert Jennings and Arthur Watts eds., Oppenheim's International Law – Volume 1, 9th ed., Oxford University Press 2008, p. 514, **CLA-079**; *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶ 265, **CLA-075**; *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**.

117 Milošević Second ER, ¶ 174; 2011 Law on Capital Markets, Arts. 2(33) and (34), **CE-728**; Law on Centralized Records of Beneficial Owners, Art. 3, **CE-729**.

118 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 1(1), **CLA-002**.

119 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "investment," item (f), **CLA-001**.

120 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "investment," item (h), **CLA-001**.

121 Respondent's PHB, ¶ 113.

under the Sembi Agreement and their beneficial ownership of both the Privatization Agreement and the Beneficially Owned Shares.

63. Serbia's assertion that "*the Agency had absolutely no reason to believe that its measures could relate to the Canadian Claimants*"[122] is both legally irrelevant and factually incorrect. Article 2 of the Canada-Serbia BIT does not require that the host state be aware of the investor and its investment. Moreover, Claimants have amply demonstrated that the Agency was fully aware of their beneficial ownership.

6. Mr. Rand's control of BD Agro is protected under the Canada-Serbia BIT

64. The Canada-Serbia BIT expressly applies also to investments directly or indirectly controlled by Canadian nationals.[123] Mr. Rand's control over BD Agro is, thus, protected independent of his beneficial ownership and that of the remaining Claimants.

65. Claimants demonstrated in their submissions that "control" encompasses not only legal control, but also de facto control.[124] The distinction between "de facto" control and "legal capacity to control" is, however, unnecessary and artificial in this case because Mr. Rand had both. For ten years, Mr. Rand directed Mr. Obradović and BD Agro's management on all important matters. Serbia's attempts to *ex post facto* challenge the validity of the MDH Agreement and Sembi Agreement cannot change this reality.

66. Nor can Serbia discard the mountain of evidence demonstrating Mr. Rand's control by relying on several decisions regarding BD Agro which Mr. Obradović took without first consulting Mr. Rand, such as the land assignment transaction or the loans to Inex and Crveni Signal.[125] Indeed, a controlling shareholder ordinarily does not make, nor is consulted on, every decision regarding the company, but instead delegates the decision-making to the company's management. Mr. Obradović's testimony that he had *"a lot of*

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122 Respondent's PHB, ¶ 118.

123 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "Covered Investment," **CLA-001**.

124 *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 264, **RLA-010**; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, ¶ 254, **CLA-016;** *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶ 106, **CLA-095**.

125 Respondent's PBH, ¶ 104-105 et seq.

leeway from Mr. Rand"[126] actually confirms Mr. Rand's control—otherwise, Mr. Rand would not have been able to decide on the degree of "*leeway*" given to Mr. Obradović.

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

67. In its PHB, Serbia raised yet another iteration of its argument that Mr. Obradović was required to disclose Mr. Rand's beneficial ownership, but failed to do so.[127] For the first time, Serbia purports to ground its objection in Article 19 of the Decree on Sale of Capital and Assets by Public Auction (the "**Public Auction Regulation**"). This provision, however, states nothing more than that a participant in an auction *may*, by a court certified power of attorney, "*empower person who […] is responsible for participant's bid and fulfillment of all obligations towards the [auction commission]*."[128]

68. Article 19 of the Public Auction Regulation clearly does not impose any duty of disclosure of beneficial ownership. In fact, it does not impose *any* obligation and does not relate to beneficial ownership at all. Article 19 of the Public Auction Regulation simply did not apply to the relationship between Mr. Obradović and Mr. Rand.

69. Serbia's allegation that Claimants improperly took advantage of Mr. Obradović's right to pay the purchase price in installments is similarly misplaced.[129] Applicable Serbian law, as well as the auction rules, regarded potential beneficial ownership as irrelevant. As Claimants repeatedly emphasized, Serbia was aware that beneficial ownership structures were commonplace and expressly required their disclosure in certain earlier privatizations.[130] Serbia did not do so in the privatization of BD Agro.

70. In any event, Serbia's accusations lack any factual basis. To begin with, Mr. Rand's investment was actively solicited by Minister Bubalo, who was fully aware that Mr. Rand would become the beneficial owner.[131] Mr. Rand also repeatedly disclosed his beneficial

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126 Respondent's PBH, ¶ 107.

127 Respondent's PBH, ¶¶ 138-139.

128 Regulation on the Sale of Capital and Property at a Public auction, Article 19, **RE-218.**

129 Respondent's PBH, ¶ 140.

130 Public Invitation for participation in a public tender process for the sale of socially owned capital of Duvanska industrija "Vranje" a.d., p. 2, **CE-890**; Public Invitation for participation in a public tender process for the acquisition of a controlling interest in Beopetrol a.d. Beograd, pp. 1-2, **CE-891**. *See also* Rejoinder on Jurisdiction, ¶¶ 10-13, 115-119.

131 Email from W. Rand to P. Bubalo, 4 June 2005, **CE-014**. See also Rand Second WS, ¶ 11; Rand Third WS, ¶¶ 24-25; Claimants' Rejoinder, § II.A.

ownership to the most senior of Serbian ministers and representatives of the Serbian government, including the Agency. Yet, as Ms. Vučković confirmed on cross-examination, the Agency was simply not interested in the ownership arrangement between Mr. Obradović and Claimants.[132]

71. Thus, even if Serbian law required a formal disclosure of beneficial ownership (*quod non*), and even if the beneficial ownership was not disclosed, Serbia is estopped from relying on such a lack of disclosure due to the Agency's acquiescence to, and apparent lack of interest in, Claimants' beneficial ownership of BD Agro.

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

72. Serbia continues to allege in the PHB that the Tribunal lacks jurisdiction under the ICSID Convention, because Claimants: (*i*) failed to make a substantial contribution; and (*ii*) lack standing under the ICSID Convention. Both arguments fail.

73. *First*, Claimants have explained that Article 25(1) of the ICSID Convention does not impose any jurisdictional requirements in addition to those stipulated in the Treaties.

74. Moreover, Claimants have made significant contributions, as shown in their previous submissions.[133] Serbia's objections against these contributions are misplaced. Most importantly, Sembi's assumption of Mr. Obradović's EUR 13.8 million debt to the Lundins and its subsequent partial repayment (up to EUR 5.6 million) do count as a contribution. This is because, contrary to Serbia's insistence, there is simply no requirement that every contribution results in an "*injection of a new capital*" in the target company (here BD Agro).[134] On that theory, an investor buying an existing investment would never be able to satisfy the "contribution" criterion of the Salini test.

75. Serbia also cannot seriously claim that this contribution, made by Sembi with funds provided by Mr. Rand, cannot count for both Sembi and its owners.[135] It is entirely commonplace that investments are channeled through holding companies, such as Sembi, and the contribution made by the holding company also counts as a contribution by all of

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132 Tr., Day 4, 95:21-96:6 (Vučković).

133 Reply, ¶¶ 673-682; Rejoinder on Jurisdiction, ¶¶ 473-487; Claimants' PHB, ¶ 101.

134 Respondent's PBH, ¶ 157.

135 Respondent's PBH, ¶ 159.

its shareholders, such as the Canadian Claimants. Similarly, Mr. Rand's children can rely on the contribution made by their father.[136]

76. *Second*, Claimants do not "*lack standing under the ICSID Convention*" because they were not the signatories to the Privatization Agreement.[137] The ICSID Convention does not require the investor to be a party to all contracts which are relevant for its dispute—and Claimants obviously invoke breaches of the Privatization Agreement only to the extent they constitute and/or evidence a breach of the Treaties.

D. Claimants' claims do not represent abuse of process

77. Serbia argues in its PHB that Claimants' claims represent an abuse of process, because: (*i*) they are motivated by an attempt to collect a EUR 2.7 million receivable against Mr. Obradović; and (*ii*) Claimants attempted to deceive and manipulate the Tribunal by claiming that Sembi's 2008 Financial Statements were filed in 2009.[138]

78. Respectfully, Serbia appears not to understand what constitutes an abuse of process. An abuse of process may occur when a claim is based on fictitious transactions or if the investment is purposefully restructured only after the impugned breach. The two issues invoked by Serbia are incapable of constituting an abuse of process.

79. Serbia's speculations about the motivations for Claimants' claims are completely absurd. Claimants filed their claims because Serbia violated the Treaties, not because Sembi records a receivable against Mr. Obradović—and in any event, an investor's motivation for bringing an investment claim is irrelevant.

80. The misunderstanding regarding the timing of the filing of Sembi's 2008 financial statements was explained in Claimants' earlier submissions and above.[139] Such a misunderstanding does not constitute an abuse of process.

81. Finally, both objections are inadmissible because they were raised belatedly. Under Arbitration Rule 41(1), objections to jurisdiction must be filed as early as possible—and

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136 See e.g. *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 154, **CLA-091**.

137 Respondent's PBH, ¶¶ 162-166.

138 Respondent's PBH, ¶¶ 167-169.

139 *See also* Claimant's PBH, ¶¶ 32-36; Claimants' Application, 8 October 2021, ¶¶ 10-12.

Serbia failed to do so. Serbia became aware of Sembi's recorded receivable against Mr. Obradović on 12 July 2019, when Claimants produced Sembi's financial statements for the years 2009 to 2017[140] and Mr. Obradović's confirmation of the balance of his accounts with Sembi (not in the record). The Cypriot Business Registry informed Serbia on 24 June 2020 that Sembi's 2008 financial statements were filed with the Cypriot Business Registry in 2014.[141] Yet, Serbia raised its objections only on 27 September 2021, *two years and one year later*, respectively.

III. SERBIA VIOLATED ITS OBLIGATIONS UNDER THE TREATIES

A. Serbia expropriated Claimants' investment

1. There was no breach of the Privatization Agreement

82. Claimants have demonstrated that: (*i*) at the time when the Agency terminated the Privatization Agreement, Mr. Obradović was not in breach of any provisions of this agreement;[142] and (*ii*) the alleged breach of Article 5.3.4—the only breach invoked by the Agency when it terminated the Privatization Agreement—in any case did not represent a valid ground for termination of the Privatization Agreement.[143]

83. In its PBH, Serbia mainly repeats the arguments that it already made in its written submissions, which Claimants have already rebutted.[144] Claimants therefore focus only on new arguments, made for the first time in Serbia's PHB.

a. Article 5.3.4 of the Privatization Agreement

84. Through this arbitration, Serbia claimed that Mr. Obradović breached Article 5.3.4 of the Privatization Agreement when BD Agro took a loan of approximately EUR 2 million in December 2010, secured it with certain pledges on its land and used a part of the funds

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140 Report and financial statements of Sembi Investment Limited as of 31 December 2009, p. 15, **CE-656;** Report and financial statements of Sembi Investment Limited as of 31 December 2010, p. 14, **CE-657;** Report and financial statements of Sembi Investment Limited as of 31 December 2011, p. 14, **CE-658;** Report and financial statements of Sembi Investment Limited as of 31 December 2012, p. 14, **CE-659;** Report and financial statements of Sembi Investment Limited as of 31 December 2013, p. 14, **CE-660;** Report and financial statements of Sembi Investment Limited as of 31 December 2014, p. 14, **CE-661;** Report and financial statements of Sembi Investment Limited as of 31 December 2015, p. 14, **CE-662;** Report and financial statements of Sembi Investment Limited as of 31 December 2016, p. 15, **CE-663;** Report and financial statements of Sembi Investment Limited as of 31 December 2017, p. 15, **CE-664**.

141 Letter from Serbia to Tribunal, 23 September 2021, fn. 2.

142 Claimants' PHB, § IV.B.1.a and all documents cited therein.

143 Claimants' PHB, § IV.B.1.b and all documents cited therein.

144 Memorial, ¶¶ 226-260; Reply, ¶¶ 371-439; Claimants' PHB, ¶¶ 204-254.

to provide a loan to Inex and to repay a debt assumed from Crveni Signal.[145] This is also the *only* alleged breach invoked in the Agency's Notice on Termination.[146]

85. Claimants have demonstrated that the above did not—and could not—represent a breach of Article of Article 5.3.4 because:

a. Article 5.3.4 of the Privatization Agreement imposed obligations solely on Mr. Obradović. However, the pledge that, according to the Privatization Agency, violated Article 5.3.4 was established by BD Agro—and not Mr. Obradović;

b. Article 5.3.4 only precluded Mr. Obradović from pledging BD Agro's assets as security for loans taken by third parties. In this case, BD Agro pledged its land to secure a loan that it itself took and used mainly for its agriculture operations;

c. BD Agro re-loaning a part of the funds to Inex and using another part to repay the debt assumed from Crveni Signal both represented a use of money by BD Agro—which was expressly allowed under Article 5.3.4.[147] Furthermore, these were genuine transactions and not mere "*transfers*" of money;[148] and

d. The EUR 2 million loan was repaid in 2012, which made the pledges unenforceable. The pledges were not deleted only because Nova Agrobanka, a bank controlled by the Government of Serbia, failed to provide the necessary confirmation that was to be submitted to the land registry Cadaster.[149]

86. In its PHB, Serbia argues—for the first time in this arbitration—that Mr. Obradović breached Article 5.3.4 also because BD Agro had pledged its assets as security for a EUR 0.6 million loan taken by Crveni Signal on 2 June 2010.[150]

87. Serbia also claims for the first time that the Agency's request for a confirmation that "*all encumbrances were deleted and all other security instruments for the obligations of third persons were returned*" referred to a single pledge securing the June 2010 loan, rather

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145 Counter-Memorial, ¶¶ 19-84; Rejoinder, ¶¶ 95-96.

146 Notice on Termination of the Privatization Agreement, 28 September 2015, **CE-050**.

147 Memorial, ¶¶ 107-110; Reply, ¶¶ 164-172; Claimants' PHB, ¶¶ 209-212.

148 *E.g.* Respondent's PHB, ¶ 182.

149 Claimants' PHB, ¶¶ 234-235.

150 Respondent's PHB, ¶ 193. Serbia refers to several other transactions as purported breaches of Article 5.3.4, but almost immediately concedes that all alleged issues related to these transactions were actually remedied years before the termination of the Privatization Agreement. *See* Respondent's PHB, ¶¶ 186-191.

than the multiple pledges securing the EUR 2 million loan from December 2010.[151]

88. These new allegations are disingenuous. To begin with, they lack any relevance because there is no reference to the June 2010 loan and pledge in the Notice on Termination. Further, the Agency requested in its letters that "*all encumbrance**s** [plural] were deleted and all other security instruments for the obligations of third persons were returned*". However, the June 2010 loan was secured by one pledge on one land plot.[152] The Agency's use of plural shows that it referred to the multiple pledges (plural) securing the EUR 2 million loan, rather than the one pledge (singular) securing the June 2010 loan.

89. Finally, Serbia admits that Crveni Signal's June 2010 loan was repaid on 29 December 2010.[153] The pledge securing this loan remained registered thereafter—again due to the state-controlled Nova Agrobanka's failure to provide the confirmations—but it was no longer enforceable and could not represent a breach of the Privatization Agreement.

90. Thus, Serbia's argument that the pledge securing Crveni Signal's June 2010 loan allegedly violated the Privatization Agreement is irrelevant, baseless and belated.

b. Other provisions of the Privatization Agreement invoked by Serbia

91. Claimants amply refuted Serbia's argument that Claimants could have avoided termination simply by having Inex and Crveni Signal repay the funds owed to BD Agro.[154] This was never the Agency's position. On the contrary, the Agency continuously requested both repayment and deletion of pledges, invoked also other breaches and requested evidence of compliance with Articles 5.2.1 and 5.3.3. Serbia's own witnesses confirmed at the Hearing that Mr. Obradović was supposed to comply with *all* of these demands—including demands related to Articles 5.2.1 and 5.3.3—if he wanted to avoid the termination or the Privatization Agreement.[155]

92. However, the Agency's additional demands were impossible to meet. For example, the alleged breach of Article 5.3.3 was caused by the culling of BD Agro's cows ordered by

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151 Respondent's PHB, ¶ 199.

152 Short Term Loan Agreement No. 181/10-00, 2 June 2010, Art. 7, **RE-004**.

153 Respondent's PHB, ¶ 194.

154 Tr., Hearing on Jurisdiction and Merits, Day 1, 225:13 (Mihaj).

155 Claimants' PHB, ¶¶ 241-242.

Serbia. The culling obviously could not be remedied because the culled cows could not be risen from the dead.[156]

93. Worse yet, the Agency continued to make these additional requests even though it was well aware that there was no breach of Articles 5.2.1 and 5.3.3. The Agency itself confirmed already in October 2006 (based on auditor reports provided by Mr. Obradović) that Article 5.2.1—requiring additional investments into BD Agro of approximately EUR 2 million—was fulfilled.[157] However, it continued to request evidence of compliance with this provision until the termination of the Privatization Agreement *nine years later*.

94. The same happened with the alleged non-compliance with Article 5.3.3: (*i*) an auditor engaged by Mr. Obradović confirmed that Article 5.3.3 had not been breached; (*ii*) the Agency recognized this fact in its internal meeting; and (*iii*) the Agency's external legal advisor confirmed that the alleged breach, in any case, represented *force majeure*.[158] Despite these facts, the Agency continued to request evidence of compliance with Article 5.3.3 until the very termination of the Privatization Agreement.

95. In its PHB, Serbia tries to downplay the Agency's obvious bad faith and argues that the Agency's requests for evidence of compliance with Articles 5.2.1 and 5.3.3 "*obviously did not mean that the Agency was claiming some new breaches.*"[159] If this is true, it is in fact yet another confirmation of the Agency's bad faith. If the Agency was not claiming breach of these provisions, it had no reason to request additional evidence of compliance.

96. The facts are clear: the Agency continued to claim non-compliance with Articles 5.2.1 and 5.3.3 and to request evidence of compliance—as well as additional documents unrelated to provisions of the Privatization Agreement[160]—even though it was aware that neither of these provisions was violated. This is a textbook example of bad faith.

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156 *E.g.* Claimants' PHB, ¶ 238.

157 Confirmation of the Privatization Agency of the Completion of Investment dated 10 October 2006, **CE-018**. *See also* Memorial, ¶ 78.

158 Claimants' PHB, ¶ 207.

159 Respondent's PHB, ¶ 231.

160 *E.g.* Reply, ¶ 356.

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

97. Contrary to Serbia's insistence, the purported breach of Article 5.3.4 did not represent a valid ground for termination of the Privatization Agreement.[161]

98. *First*, Article 5.3.4 is not included in the exhaustive list of grounds for termination under Article 7.1 of the Privatization Agreement.[162] Accordingly, as the Agency's external counsel, Radović & Ratković, literally underlined for emphasis in its opinion to the Agency: "*[a]s per [the Privatization Agreement] and the Law on Privatization, violation of this obligation is not sanctioned by termination of [the Privatization Agreement]*."[163] The existence of Article 7.1 also refutes Serbia's allegation that the Agency could terminate the Privatization Agreement for any breach.[164] This interpretation would make Article 7.1 entirely redundant.

99. Article 41a(1)(3) of the Law on Privatization does not change the conclusion.[165] Serbia concedes that this provision operates only in conjunction with the provisions of the Privatization Agreement.[166] It also concedes that the Agency was free to conclude privatization agreements that did not impose any additional restrictions on the buyer's disposition with assets (such as Article 5.3.4).[167] Therefore, Article 41a(1)(3) cannot be interpreted as imposing termination for any breach of any such additional restriction, regardless of the other provisions of the Privatization Agreement.[168] Since the Agency is free to require additional restrictions or not, it must also be free to require additional restrictions that are not sanctioned by termination. This is what the Agency did when it inserted Article 5.3.4 in the Privatization Agreement, but explicitly chose not to include it in Article 7.1.

100. Moreover, Serbia's interpretation is contrary to the wording of Article 41a(1)(3) of the Law on Privatization, which refers to compliance with the "provisions" (in plural) of a

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161 Respondent's PHB, § III.D.

162 Privatization Agreement, 4 October 2005, Art. 7.1, **CE-017**.

163 The 2013 Legal Opinion, 11 June 2013, p. 3 (emphasis in original), **CE-034**.

164 Respondent's PHB, ¶ 241 *et seq*.

165 Respondent's PHB, ¶ 243.

166 Respondent's PHB, ¶ 244.

167 Respondent's PHB, ¶ 244.

168 Respondent's PHB, ¶ 244.

privatization agreement.[169] Thus, Article 41a(1)(3) refers to both Article 5.3.4 and Article 7.1 of the Privatization Agreement—and Serbia cannot disregard Article 7.1.

101. The *Betonjerka* judgment also fails to support Serbia's case. Serbia claims that the Commercial Appellate Court in Belgrade confirmed that privatization agreements could be terminated even if the violated provision is not listed among the grounds for termination.[170] However, this issue was not specifically addressed by the court.[171]

102. *Second*, as Claimants' Serbian law expert, Mr. Milošević, explained, after payment of the purchase price on 8 April 2011, all essential obligations were performed, the term of the Privatization Agreement lapsed, and the obligations under Article 5.3.4 expired on their own because they were to last only "*during the term of the [Privatization] Agreement*."[172] Thus, the Privatization Agreement could not be terminated after 8 April 2011.[173]

103. This is confirmed in the Ministry of Economy's binding instruction to the Agency[174] and its letter to the Ombudsman, stating that "*[the] limitations from [Article 5.3.4] should be considered concluded on April 8, 2011*."[175] Thus, the Ministry correctly determined that all of the buyer's obligations under Article 5.3.4 ceased to apply on 8 April 2011, and Mr. Obradović, thus, could not have been in breach of this provision after this date.[176]

104. Serbia's last line of defense—that pre-existing breaches justify termination after Article 5.3.4 ceased to apply—also fell during the Hearing. Professor Radović conceded that the Agency could not require a buyer to remedy an alleged breach, but could only check whether the alleged breach was "*still present*" at the end of the additional period granted to a buyer.[177] Given that Article 5.3.4 ceased to apply after the payment of purchase price, no breach of that Article could be "*still present*" after 8 April 2011.

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

170 Respondent's PHB, ¶ 245.

171 Judgment of the Commercial Appellate Court, No. Pž 8687/2011, 18 December 2012, **CE-722**.

172 Milošević Second ER, ¶ 70; Privatization Agreement, 4 October 2005, Art. 5.3.4, **CE-017**.

173 Milošević Second ER, ¶ 70.

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

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

176 Tr., Hearing on Jurisdiction and Merits, Day 6, 50:9-50:21 (Radović). *See also* Claimants' PHB, ¶ 223.

177 Tr., Hearing on Jurisdiction and Merits, Day 6, 28:11-21 (Radović). *See also* Claimants' PHB, ¶¶ 226-233.

105. *Third*, Serbia claims that the Agency had to terminate the Privatization Agreement because it had no alternative remedy.[178] In particular, Serbia claims that the Agency did not suffer any damages. The absence of any loss, however, militates against, and not in favor of, termination. Serbia also failed to explain why it would be impossible for the Agency to include a contractual penalty for breach of Article 5.3.4. The Agency's failure to do so cannot justify the unlawful termination of the Privatization Agreement.

106. Moreover, Professor Radović is absolutely incorrect in claiming that "*there was no possibility to waive [the breach of Article 5.3.4] – either the privatization was successful, and all obligations have been completed, or not*".[179] This is because:

a. Professor Radović accepted that privatization agreements cannot be terminated for minor breaches.[180] Accordingly, the Agency is required to waive minor breaches of privatization agreements. Claimants have already established that purported breach of Article 5.3.4 was, in any event, only minor;

b. Professor Radović: (i) repeatedly confirmed that the Law on Contract and Torts governs "*all the contractual issues that are not explicitly differently regulated within the Law on Privatization*";[181] (*ii*) accepted that the Law on Contract and Torts allows parties to waive breaches;[182] and (*iii*) did not cite to any provision of the Law on Privatization, or any other law, that would restrict the Agency's ability to waive breaches of privatization agreements (and there is none); and

c. the Agency is legally required to pursue "*the mere proclaimed goal of privatization – that social capital becomes private*."[183] This leading goal of privatization would clearly have been better served had the Agency waived the breach, rather than seized the Beneficially Owned Shares.

107. In sum, even if Mr. Obradović had breached Article 5.3.4 of the Privatization Agreement, and he did not, the Agency's termination of the same would still be unlawful.

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178 Respondent's PHB, ¶¶ 258-262.

179 Tr., Hearing on Jurisdiction and Merits, Day 6, 131:8-10 (Radović).

180 Radović First ER, ¶ 34.

181 Tr., Hearing on Jurisdiction and Merits, Day 6, 117:18-20 (Radović).

182 Tr., Hearing on Jurisdiction and Merits, Day 6, 30:6-19 (Radović).

183 Judgment of the Higher Commercial Court, Pz. 5907/2007, 11 December 2007, **CE-721**.

B. Serbia's expropriation of Claimants' investment was disproportionate and violated the Treaties

108. Claimants will demonstrate below that (*i*) Claimants raised their proportionality claim timely; and (*ii*) the termination of the Privatization Agreement and expropriation of the Beneficially Owned Shares was disproportionate and unlawful under the Treaties.

1. Claimants raised their proportionality claim timely

109. In its PHB, Serbia argues that Claimants' claim that Serbia's conduct was disproportionate under the Treaties is belated because it was purportedly first raised only at the Hearing.[184] Serbia requests the Tribunal to disregard it and reserves the right to make a further submission on proportionality, accompanied by new evidence.[185]

110. Serbia's request is meritless. Claimants have argued from the outset of this arbitration—already in their Memorial, in the section on Serbia's breaches of the Treaties—that the termination of the Privatization Agreement and expropriation of the Beneficially Owned Shares "*was taken in bad faith and was grossly unfair, disproportionate and lacking in due process and, therefore, violative of the FET standard*."[186]

111. Claimants have also repeatedly referred to the award in *Ampal v. Egypt*, concerning a disproportionate termination of Gas Sale Purchase Agreement ("**GSPA**") by the State-owned Egyptian General Petroleum Company ("**EGPC**"). Claimants expressly cited[187] the portion of the *Ampal* award, where the tribunal found that *"[i]t is well settled that the 'irreparable cessation' of an investment activity caused by the disproportionate act of a State is tantamount to an expropriation*."[188]

112. Claimants thus raised the proportionality claim timely. Moreover, even if the claim had been raised only at the Hearing, as Serbia erroneously agues, Serbia would still suffer no prejudice as a result. The two post-hearing briefs gave Serbia ample opportunity to address the claim, and Serbia in fact did so in its PHB.[189] Moreover, the proportionality

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184 Respondent's PHB, ¶¶ 273-277.

185 Respondent's PHB, ¶ 277.

186 Memorial, ¶ 434.

187 Memorial, ¶ 410.

188 *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**.

189 Respondent's PHB, § IV.A.

claim is not based on any new facts. It refers to two investment awards, *Occidental*[190] and *Ampal,*[191] both of which were timely filed on the record. The *Ampal* award was cited already in the Memorial precisely for its analysis of proportionality under public international law. Serbia's request thus should be dismissed.

2. The termination of the Privatization Agreement was disproportionate and unlawful under the Treaties

113. Serbia's termination of the Privatization Agreement and the subsequent seizure of the Beneficially Owned Shares were clearly disproportionate under both Serbian law and the Treaties because the sanction imposed cannot be justified by the—inexistent—harm caused by the purported breach of the Privatization Agreement.

114. The Ministry of Economy recognized this lack of proportionality and legitimate purpose when it admitted already in 2012 that there was no economic justification for terminating the Privatization Agreement because, *inter alia,* the buyer already paid the purchase price and the stated encumbrances did not threaten the continuity of BD Agro's business.[192]

115. In its PHB, Serbia submits that the Privatization Agreement was terminated because the Privatization Agency needed to send "*a message to thousands of other buyers that non-compliance has not been and will not be tolerated."*[193] Thus, Serbia admits that the Agency purposefully failed to weigh the gravity of the alleged breach, and the harm caused thereby, against the significance of the sanction. It simply imposed an exemplary punishment. This is the antithesis of proportionality.

116. Serbia also cannot seriously allege that that the requested remedies were meant to "*protect the well-being of BD Agro*", which was purportedly *"endangered by the mismanagement of the Buyer*."[194] Claimants deny Serbia's baseless assertion that they mismanaged BD Agro. On the contrary, they turned a dilapidated socialist operation into one of the largest and most modern farms in Europe despite the enforced slaughter of the

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190 *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**.

191 *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**.

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

193 Respondent's PHB, ¶ 264.

194 Respondent's PHB, ¶ 280.

original heard, the ban on imports of cows from other countries in Europe due to the blue tongue disease and the severe drought in 2012. Moreover, as Professor Radović confirmed, after the payment of the purchase price on 11 April 2011, BD Agro's assets could be pledged without any restrictions under the Privatization Agreement and the Law on Privatization.[195] Thus, the remedies requested by the Agency were entirely pointless.

117. Finally, Serbia argues that the principle of proportionality under international law "*applies only to administrative acts, not to contractual behavior*."[196] However, in *Occidental*, to which Serbia refers, neither the tribunal nor the Annulment Committee suggested that the proportionality principle should only apply to administrative acts.

118. Moreover, the *Ampal* tribunal applied the proportionality analysis to the termination of the GSPA, which was undisputedly a purely contractual measure. Conversely, Claimants already demonstrated that the Agency's Notice on Termination and Decision on Transfer of Capital have all the characteristics of an administrative act.[197]

119. In short, the termination of the Privatization Agreement and expropriation of the Beneficially Owned Shares were disproportionate acts, giving rise to Serbia's liability under the Treaties for unlawful expropriation of Claimants' investment, violation of the FET standard, the non-impairment standard and other standards of protection, as set out in Claimants' written submissions.[198]

IV. CLAIMANTS ARE ENTITLED TO COMPENSATION

120. In their post-hearing brief, Claimants demonstrated that they are entitled to full reparation for damages caused by Serbia's breaches of the Treaties, which is equal to fair market value of their interests in BD Agro.[199] Claimants have also demonstrated the following specific points regarding valuation of their interest as of 21 October 2015:

a. The fair market value of BD Agro's equity was EUR 78.2 million;[200]

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195 Tr., Hearing on Jurisdiction and Merits, Day 6, 40:25-42:17 (Radović).

196 Respondent's PHB, ¶ 283.

197 Reply, ¶ 441; Milošević First ER, ¶ 115; Milošević Second ER, ¶¶ 41, 112-132.

198 Memorial, §§ VI.A-VI.D; Reply, §§ V.C-V.F.

199 Claimants' PHB, § V.

200 Claimants' PHB, § V.B.

b. The most valuable part of BD Agro was its commercial and industrial land in Dobanovci. Based on available market evidence, including the Batajnica expropriations and the sales of land in Dobanovci identified by Ms. Ilić, its fair market value was EUR 80.1 million;[201]

c. Ms. Ilić's valuation, based on asking prices, is flawed because it is impossible to assess whether the prices relate to land plots comparable to BD Agro's land;[202]

d. the 30% discount applied by Ms. Ilić to her valuation of BD Agro's commercial and industrial land in Dobanovci is unjustified;[203]

e. Mr. Cowan confirmed that BD Agro was a going concern;[204] and

f. Mr. Cowan confirmed that Claimants' asset-based valuation, in any case, does not depend on whether BD Agro was a going concern or not.[205]

121. Serbia utterly failed to engage with the vast majority of Claimants' arguments on quantum raised in their previous submissions, as well as with the evidence adduced at the Hearing. On mere *five pages* of its PHB, Serbia only addresses two distinct issues.

122. *First*, Serbia claims that the testimony of Mr. Grzesik allegedly undermines several sources that Dr. Hern uses for his upper and lower bound prices of BD Agro's commercial and industrial land in Dobanovci.[206] This is not the case. Mr. Grzesik expressly confirmed in his report that Dr. Hern's valuation has been "*thoroughly supported on the basis of extensive research of land values in the various localities*" and that Dr. Hern's valuation represents "*a classic comparative or market approach universally recognized as the preferred method of valuing real estate.*"[207]

123. Mr. Grzesik disregarded some of the evidence relied upon by Dr. Hern simply because, while Dr. Hern provided his valuation as a range, Mr. Grzesik provided a single market

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201 Claimants' PHB, § V.B.1.

202 Claimants' PHB, § V.B.1.b.iii.

203 Claimants' PHB, § V.B.1.b.iv.

204 Claimants' PHB, § V.B.4.a.

205 Claimants' PHB, § V.B.4.b.

206 Respondent's PHB, ¶¶ 332-339.

207 Grzesik ER, ¶ 5.4.

value.[208] Thus, Mr. Grzesik reviewed all sources used by Dr. Hern, but relied only on those that best reflected the value of BD Agro's land—the Batajnica expropriations.[209]

124. *Second*, Serbia claims that the Batajnica expropriations do not represent comparable evidence and, therefore, should not be used to value BD Agro's commercial and industrial land in Dobanovci.[210] Serbia is wrong also on this point. As Claimants demonstrated in their post-hearing brief, the Batajnica land plots are comparable to the land plots in the Construction Land in Zones A, B and C because they:

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

b. are also 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.[211]

125. Claimants also demonstrated that the Batajnica expropriations were concluded at the market value of the respective land plots. This was confirmed by Serbia's counsel.[212]

V. REQUEST FOR RELIEF

126. Claimants reiterate the Request for Relief set out in their First Post-Hearing Brief.

Submitted on behalf of Claimants

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208 Grzesik ER, ¶ 5.4.

209 Grzesik ER, § 6.

210 Respondent's PHB, ¶¶ 340-350.

211 Claimants' PHB, ¶¶ 297 *et seq*.

212 Claimants' PHB, ¶ 300.