

IN THE MATTER OF ARBITRATION BEFORE THE INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID Case No. ARB/18/8)

BETWEEN

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

AND

SEMBI INVESTMENT LIMITED
(CYPRUS)
("Claimants")

- and -

THE REPUBLIC OF SERBIA
("Respondent")

Respondent's Rejoinder

24 January 2020

BEFORE:

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Baiju S. Vasani, Arbitrator
Prof. Marcelo G. Kohen, Arbitrator

Secretary of the Tribunal
Ms. Marisa Planells-Valero

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DEFINITIONS

2013 Attorney's Opinion	Legal opinion prepared by the Attorney Violeta Mitrovic on 11 June 2013 (Exhibit CE-34)
2001 Law on Privatization	Law on Privatization (" <i>Official Gazette of the Republic of Serbia</i> " No. 38/2001, 18/2003, 45/2005, 123/2007, 123/2007 - other law, 30/2010 - other Law, 93/2012, 119/2012, 51/2014 and 52/2014 – decision of the CC) (Exhibit CE-220)
2014 Law on Privatization	Law on Privatization (" <i>Official Gazette of the Republic of Serbia</i> ", no. 83/2014 and 46/2015) (Exhibit CE-223)
221 Million Agreement	Short Term Loan Agreement no. K-571/10-00 concluded by BD Agro and Agrobanka on 22 December 2010 (Exhibit RE-6)
221 Million Loan	Funds loaned to BD Agro by Agrobanka under Short Term Loan Agreement no. K-571/10-00 of 22 December 2010 (Exhibit RE-6)
221 Million Pledge	Pledge registered on BD Agro's real estate as security for funds acquired by BD Agro from Agrobanka under the Short Term Loan Agreement no. K-571/10-00 of 22 December 2010
Agency	Privatization Agency of the Republic of Serbia
Adventis	Adventis Real Estate Management doo
Amended plan	Amended pre-pack reorganization plan of BD Agro, dated 6 March 2015 (Exhibit CE-101).
April 2015 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 27 April 2015 (Exhibit CE-348)
Article 5.3.4.	Article 5.3.4. of the Privatization Agreement (Exhibit RE-12)
Audit Reports	Audit reports prepared by Auditor doo in April 2011, July 2011, November 2011, February 2012, December 2012, and two audit reports prepared by Prva Revizija doo in January 2015 (Exhibits RE-13, RE-14, RE-17, RE-18, RE-19, RE-105, CE-327)
August 2012 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 3 August 2012 (Exhibit CE-78)
Buyer	Mr. Djura Obradovic, buyer of the socially-owned capital from the Privatization Agreement
Center for Control	Center for Control of Performance of Privatization Agreements within the Privatization Agency
Commission for Control	Commission for Control of Performance of Obligations of Buyers, that is Strategic Investors from Agreements Concluded in the Process of Privatization, within the Privatization Agency
Coropi	Coropi Holdings Limited
Crveni Signal	Crveni Signal ad Beograd, a Serbian joint-stock company owned by Mr. Obradovic

December 2011 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 27 December 2011 (Exhibit CE-32)
February 2011 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 25 February 2011 (Exhibit CE-31)
Grant Thornton Report or Expert Report of Sandy Cowan	Expert Report of Sandy Cowan dated 19 April 2019
Second Expert Report of Sandy Cowan	Expert Report of Sandy Cowan dated 24 January 2020
Imlek	AD Industrija mleka i mlecnih proizvoda Imlek Padinska Skela, Industrijsko naselje bb
Inex	Inex ad Nova Varos, a Serbian joint-stock company owned by Mr. Obradovic
JLL	Jones Lang LaSalle d.o.o.
June 2011 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 24 June 2011 (Exhibit CE-96)
June 2012 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 22 June 2012 (Exhibit RE-15)
MDH doo	Marine drive holding doo, a Serbian limited liability company owned by Mr. Rand
Ministry's 2012 Letter	Letter sent by the Ministry of Economy on 30 May 2012 to the Privatization Agency (Exhibit CE-33)
Ministry's Report	Report of the Ministry of Economy on concluded Supervision Proceedings over the Privatization Agency of 7 April 2015 (Exhibit CE-98)
Notice on Termination	Privatization Agency's Notice of 1 October 2015 informing Mr. Obradovic of termination of the Privatization Agreement (Exhibit CE-50)
Nova Agrobanka	Nova Agrobanka ad Beograd (in bankruptcy)
November 2012 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 9 November 2012 (Exhibit CE-79)
October 2011 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 7 October 2011 (Exhibit CE-97)
Original plan	Original pre-pack reorganization plan of BD Agro, dated 25 November 2014 (Exhibit CE-321)
Pledge	Pledge that was constituted in favor of the Privatization Agency over the shares of BD Agro, as per the Share Pledge Agreement concluded on 4 October 2005, between Mr. Djura Obradovic and Privatization Agency, as Appendix 1 of the Privatization Agreement concluded between the same parties and on the same day (Exhibit CE-17)
Privatization	Privatization of BD Agro in 2005

Privatization Agreement	Agreement on Sale of Socially Owned Capital through the Method of Public Auction, concluded between Privatization Agency and Mr. Djura Obradovic on 4 October 2005 (Exhibit CE-17)
Purchase Price	Price of the socially-owned capital that was the subject of the Privatization Agreement in the amount of RSD 470,000,000.00 (EUR 5,548,996.46)
Recommendation	Opinion of the Ombudsman dated 19 June 2015 (Exhibit CE-42)
Regulation on Sale	Regulation on the Sale of Capital and Property at a Public Auction (" <i>Official Gazette of the Republic of Serbia</i> ", No. 52/2005) (Exhibit RE-218)
Refinancing Loan	Agreement on Long-Term Loan no. D-07/12-NA-00, concluded between Nova Agrobanka ad Beograd and BD Agro on 22 June 2012 (Exhibit CE-441)
Request for Assignment	Request for issuing of prior approval for assignment of the Privatization Agreement to Coropi, submitted by Mr. Obradovic on 1 August 2013 (Exhibit CE-273)
Second plan	Pre-pack reorganization plan of BD Agro, dated 11 January 2016 (Exhibit CE-369)
SIEPA	Serbian Investment Promotion Agency of the Republic of Serbia
Supervision Proceedings	Ministry of Economy's control of the Privatization Agency's work in relation to BD Agro, commenced on 23 December 2013 and completed on 7 April 2015
Third plan	Pre-pack reorganization plan of BD Agro, dated 16 May 2016
Treaties	Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments of 27 April 2015 and Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments of 23 December 2005

INTRODUCTION

- i. The heart of the matter in the case at hand is a contractual dispute between the Privatization Agency of Serbia (the Agency) and Mr. Djuro Obradovic, a dual Serbian and Canadian national, and a well-known buyer of privatized companies in Serbia.
- ii. The agreement on sale of 70% of socially-owned capital in BD Agro (the Privatization Agreement), a company engaged primarily in milk-production and located in Dobanovci (Serbia), was concluded on 4 October 2005.¹ The buyer took upon himself to pay the purchase price of EUR 5,548,996.46 payable in six annual installments.
- iii. The dispute arose due to Mr. Obradovic's persistent refusal to honor his obligations under Article 5.3.4. of the Privatization Agreement – a provision that stipulated that Mr. Obradovic would not encumber assets of BD Agro with pledge, except for securing claims against the company and created during its regular business activities or for obtaining funds that would be used for the benefit of BD Agro.²
- iv. In December 2010 Mr. Obradovic directed BD Agro to obtain a loan from a Serbian bank, Agrobanka, in the amount of RSD 221 million. The loan was secured with the pledge over real estate of BD Agro. However, about a half of the money acquired through the loan was used for the benefit of the two other Mr. Obradovic's companies (Crveni Signal and Inex). When the Agency discovered the transaction, it promptly requested that the funds be returned to BD Agro and warned Mr. Obradovic that it would otherwise terminate the Privatization Agreement.³
- v. The Agency showed remarkable patience in its dealings with Mr. Obradovic. The Privatization Agreement was terminated only after the Agency waited *for almost five years* on Mr. Obradovic to remedy the breach of the contract – the breach whose existence Mr. Obradovic himself acknowledged more than once.

¹ Privatization Agreement, **CE-17**.

² Privatization Agreement, Article 5.3.4., **CE-17**.

³ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, **CE-31**.

Out of 30 notifications issued by the Agency to Mr. Obradovic for several different breaches of the Privatization Agreement, no less than 8 concerned the breach that eventually led to the Agreement's termination in October 2015. Each and every time the Agency gave Mr. Obradovic an extension of time for fulfillment of his obligation, it also warned him that it considered the breach of Article 5.3.4. as a valid reason for the termination. Mr. Obradovic never objected.

- vi. The money supposedly used by Inex and Crveni Signal was never returned and pledges on BD Agro's land were never removed even though Mr. Obradovic had almost five years to remedy this "insignificant" breach, as Claimants see it. During the course of this arbitration the real reason for Mr. Obradovic's unwillingness to act in accordance with the contract was discovered. While Claimants (erroneously) argued that BD Agro was allowed to extend loans to Mr. Obradovic's other companies bought in privatization, the truth of the matter is that money borrowed by BD Agro was never even used by Crveni Signal and Inex. The sum of approximately RSD 100 million (*i.e.* EUR 900,000) ended up on Mr. Obradovic's personal bank account while these two companies ended up ruined as a result Mr. Obradovic's management.⁴
- vii. This is by no means the only example of Mr. Obradovic's treatment of BD Agro's assets as his personal to detriment of the company and its other shareholders. Mr. Obradovic used 'repayment' of shareholder loans that have never actually hit BD Agro's accounts as the main way to drain money from the company and misrepresent his performance under the Privatization Agreement. And, Mr. Obradovic's gain was by no means insignificant. It measured in millions of euros. In single transaction, for example, Mr. Obradovic managed to obtain a significant part of BD Agro's land, as a repayment of the alleged EUR 400,000 shareholder loan, only to re-sell the land four months later for more than EUR 1,400,000.⁵
- viii. Respondent will provide the Tribunal with comprehensive analysis of financial transactions between Mr. Obradovic and BD Agro. The analysis demonstrates

⁴ See Section I.F.2.3.4.

⁵ See Section I.F.2.2.

that the entire operation with regards BD Agro was undoubtedly irrefutably tainted with corruption and fraud. This is why Mr. Obradovic's business venture was an object of interest of various Public Prosecutor's Offices and Serbian courts long *before* the arbitration was commenced. Respondent will demonstrate that the "investment" at stake cannot be afforded protection under the rules of international law.

- ix. Another peculiar aspect of the dispute at hand is a remarkable transformation of Mr. Rand, from potential Canadian investor in BD Agro in 2013, to the owner, driving force and principal manager of BD Agro business in 2018, when the arbitration commenced. In September 2015, just before the Privatization Agreement was terminated, Mr. Obradovic wrote to the Agency claiming that he was entitled to protection as a Canadian investor and threatening to commence arbitration under the Canada – Serbia BIT.⁶ In February 2018 the arbitration was indeed initiated - not by Mr. Obradovic, but by Mr. Rand and his companies. As a result, Respondent is forced into a dispute about the contract it did not conclude, with Claimants who did not buy and have never owned BD Agro.
- x. Claimants invest considerable effort in order to explain how they acquired ownership of BD Agro under the laws of British Columbia and Cyprus. However, the main problem with Claimants' beneficial ownership construct remains the fact that they are unable to prove the existence of ownership of shares in BD Agro, a Serbian joint stock company, under the only national law relevant for the inquiry – Serbian law.
- xi. Claimants are also well aware that the termination of a contract cannot of itself create responsibility for the State under international law. This is why they continuously attempt to implicate Respondent into contractual dispute between Mr. Obradovic and the Agency.
- xii. This is also the reason why Claimants desperately search for any proof that the Agency acted in bad faith, in abuse of some superior governmental prerogatives. As it will be demonstrated in the Rejoinder, Claimants are firmly determined not

⁶ Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, CE-48.

to let the facts stand in their way. Much of their case is fundamentally based on misinterpretation of factual matrix of the dispute, sometimes bordering with outright manipulation – such is the case, for instance, with the claim that the loan that led to the encumbrance of BD Agro’s assets (and to the termination of the Privatization Agreement) was repaid.⁷ This is a false statement shamelessly repeated over and over again by Claimants and their associate Mr. Obradovic.

- xiii. The Agency terminated the Privatization Agreement using its prerogative as a contractual party under the law governing the contract – the 2001 Law on Privatization. It did so without ill intent, after repeatedly urging Mr. Obradovic to remedy his contractual breach. All Claimants’ attempts to uncover conspiracy supposedly behind this act fall patently short and for a good reason – there was no such conspiracy. If anything, the Agency demonstrated good faith in trying to maintain the Privatization Agreement in life, despite the fact that it had every opportunity (and good reasons) to terminate the Privatization Agreement much earlier.
- xiv. Another instance of misrepresentation of facts relates to the BD Agro’s financial state at the time of purported breach, *i.e.* in October 2015. While Claimants would have the Tribunal believe that the company was thriving under Mr. Obradovic’s (Mr. Rand’s) management at the time the Privatization Agreement was terminated, this could not be further from the truth. The reality was that BD Agro was all but formally bankrupt already at the beginning of 2013 and that the bankruptcy was inevitable at the time the contractual relationship between the Agency and Mr. Obradovic came to its end. Naturally, Claimants do not accept this fact and instead argue that they should be paid more than EUR 80 million for the company paid some EUR 5,5 million and thoroughly destroyed under their management.

⁷ See Section I.B.3.2.3.

I. FACTS

A. BD AGRO WAS OWNED BY MR OBRADOVIC

1. The privatization process in Serbia is mainly regulated by the Law on Privatization. The first law under this name was enacted in 2001 and was in force until 2014 (“**2001 Law on Privatization**”),⁸ while a new law was enacted in 2014 and remains in force until today (“**2014 Law on Privatization**”).⁹ In addition to that, the privatization process is regulated by a number of bylaws.¹⁰
2. Pursuant to the 2001 Law on Privatization (under which BD Agro was privatized) one of four main principles of privatization is transparency.¹¹ If Claimants’ story is taken for granted and Mr. Rand was indeed the beneficial owner of BD Agro’s shares, then in case of BD Agro’s privatization (“**Privatization**”) Mr. Rand and Mr. Obradovic blatantly violated this very principle, as well as a number of other laws and bylaws.
3. According to Claimants, the story begins with Mr. Rand’s approach to the Serbian authorities in 2005 when he expressed his alleged interest in the purchase of BD Agro.¹² Interestingly, this approach was made towards Mr. Ljubisa Jovanovic, the then Assistant Minister, who, shortly after the privatization of BD Agro, became the CEO of BD Agro. For some reason, however, Mr. Rand allegedly decided not to participate at the auction process but to “hide” behind Mr. Obradovic, who then became the nominal owner of BD Agro, while Mr. Rand retained actual ownership over the company.¹³ This arrangement was however not communicated to the Serbian authorities, and certainly not to the Privatization Agency (“**Agency**”).

⁸ 2001 Law on Privatization, **CE-220**.

⁹ Law on Privatization, Official Gazette of the Republic of Serbia no. 83/2014 and 46/2015, **CE-223**.

¹⁰ See e.g. Articles 20đ, 33, 40, 43 and 76 of the 2001 Law on Privatization, **CE-220** (prescribing that bylaws regulate e.g. restructuring procedure, procedure and manner of the sale of capital and property through tenders and public auctions etc.); Articles 35, 57, 83 of the 2014 Law on Privatization, **CE-223** (prescribing that bylaws regulate e.g. conditions, procedure and manner of the sale of capital and property, procedure of control of fulfilment of contractual obligations etc.).

¹¹ Other three principles were creation of conditions for economic development and social stability; flexibility; and establishing of sale price in accordance with market conditions. Article 2 of the 2001 Law on Privatization, **CE-220**.

¹² E-mail from W. Rand to P. Bubalo dated 4 June 2005; E-mail from Lj. Jovanovic to W. Rand dated 6 June 2005, **CE-14**.

¹³ Memorial, para. 67.

4. When it comes to the motive for this "hide and seek" arrangement, Claimants remain silent. However, an insight into privatization rules reveals that the probable motive was circumventing the rules concerning payment of the purchase price in privatization. These rules allowed only a Serbian natural person (meaning Mr. Obradovic and not Mr. Rand or any of his companies) to pay the purchase price in installments.¹⁴ Consequently, it was Mr. Obradovic and not Mr. Rand who concluded the Privatization Agreement with the Agency. Mr. Obradovic was also the one who was registered as the owner of BD Agro's shares. Claimants state that this is irrelevant, but it is not.
5. In this section Respondent will show that **(1)** Mr. Rand could appear as the buyer of BD Agro's shares; **(2)** Mr. Rand deceived the Agency during the Privatization; **(3)** Mr. Obradovic was registered as the owner of shares; **(4)** before the Privatization, Mr. Rand's involvement in purchase of the shares was communicated only to future CEO of BD Agro; **(5)** after the Privatization, Mr. Rand's alleged beneficial ownership was not communicated to the Agency nor to any Serbian official; **(6)** Mr. Obradovic acted and was treated as the owner of BD Agro; and **(7)** Mr. Rand's motive was a sinister abuse of rules concerning the payment of the purchase price.

1. Mr. Rand could appear as the buyer

6. Privatization is conducted through either sale of capital or transfer of capital free of charge.¹⁵ BD Agro (as well as other companies owned by Mr. Obradovic) was privatized using the first model.
7. Sale of capital of the subject of privatization could be performed through a public tender or a public auction. In case of a public auction (applied in BD Agro's case), the sale was regulated by the Regulation on the Sale of Capital and Property at a Public Auction ("**Regulation on Sale**").¹⁶

¹⁴ Article 31 of the Regulation on the Sale of Capital and Property at a Public Auction (45/2001), **RE-217**; Article 39 of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

¹⁵ Article 9 of the 2001 Law on Privatization, **CE-220**.

¹⁶ Article 40 of the 2001 Law on Privatization, **CE-220**; Regulation on the Sale of Capital and Property at a Public Auction (45/2001), **RE-217**; Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**. The Regulation on Sale was first enacted in 2001, while a new version was enacted in 2005. The latter version governed the auction of BD Agro.

8. In a public auction, the buyer of capital or property could be a domestic or a foreign legal entity or an individual.¹⁷ A buyer was able to authorize another person to act on its behalf at the public auction. In that case, the representative would have to submit to the Agency a certified power of attorney before the auction.¹⁸
9. Domestic or foreign legal entities or individuals could also jointly buy a socially owned enterprise, in which case they had a duty to authorize one member to represent them before the Agency.¹⁹ Such authorization, as well as the agreement regulating the joint venture, had to be court-certified and submitted to the Agency.²⁰ It was so important that the Agency was aware of the relations between the persons involved in privatization, that it was considered that a joint venture agreement could not be even amended or terminated without consent of the Agency.²¹ The members of the joint venture were jointly and severally liable for the performance of the privatization agreement.²²
10. Therefore, an individual could appear at an auction in three different capacities:
 - 1) as a buyer acting in his own name and on his own behalf;
 - 2) as the representative of the buyer, acting only on behalf of that other individual or legal entity; and
 - 3) as a member of a joint venture authorized to represent the joint venture acting as the buyer.
11. Mr. Obradovic appeared at the auction of BD Agro as the buyer acting in his own name and on his own behalf.²³ There was no mention of Mr. Rand, although he could have appeared as the buyer, alone, together with or represented by Mr. Obradovic.

¹⁷ Article 12(1) of the 2001 Law on Privatization, **CE-220**; Article 18 on the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

¹⁸ Articles 21 and 24 of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

¹⁹ Article 12(2) of the 2001 Law on Privatization, **CE-220**; Article 19(1) on the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

²⁰ Article 19 on the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**. Judgment of the Higher Commercial Court, Pz. 3159/05 dated 6 May 2005, **RE-294**.

²¹ Decision of the Supreme Court of Serbia, Prev. 32/07 dated 5 July 2007, **RE-283**.

²² Decision of the Supreme Court of Serbia, Prev. 32/07 dated 5 July 2007, **RE-283**.

²³ Application for the participation at the auction for BD Agro, 19 September 2005, **RE-211**; Approval of the application for the participation at the auction, 26 September 2005, **RE-212**; Minutes of the public auction nos. 4 and 5, 29 September 2005, **RE-213**.

2. If Claimants' assertions are true, Mr. Rand deceived the Agency during the Privatization

12. If Claimants' assertions with regards the arrangement between Mr. Rand and Mr. Obradovic are taken on their face as true, Claimants obtained their investment through misrepresentation and deceitful conduct.
13. Privatization process in Serbia was conducted by the Agency. The Agency was the one who (*inter alia*) determined whether a particular legal or natural person fulfilled the criteria to appear as the buyer and also the entity that concluded the privatization agreements in case it found that the necessary criteria were fulfilled.²⁴ This required that the Agency was aware of who the true buyer of the capital was. Otherwise, Agency's inquiry into a "nominal" bidder's ability to appear as the buyer would be meaningless as, although formally the buyer, his role would be in fact the role of the (true) buyer's representative.
14. This is what happened in this case if one accepts the scenario offered by Claimants – the Agency was unaware that *actually* Mr. Rand was the buyer of BD Agro, so instead of inspecting whether he fulfilled the criteria to appear as the buyer, it was inspecting whether Mr. Rand's representative, Mr. Obradovic, fulfilled those criteria.
15. The Agency had no reason to suspect that Mr. Obradovic was the true buyer. Unlike Mr. Rand, Mr. Obradovic was a well-known businessman who privatized many companies in Serbia. Until 2007, Mr. Obradovic already bought as many as seven socially-owned companies in Serbia²⁵ (including BD Agro), which made him a well-known figure in the privatization process at the time.
16. As he regularly did in other privatizations, Mr. Obradovic personally participated at the auction for BD Agro. Mr. Rand was never mentioned in this process at all. All applications, approvals, statements and other documents submitted or issued in relation to the auction referred exclusively to Mr. Obradovic. In particular, it was Mr.

²⁴ Articles 8, 13, 23 and 24 of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

²⁵ From Claimants' Reply, we now learned that Mr. Rand was allegedly the true buyer of at least five of these other privatized companies as well (Crveni Signal, Inex Nova Varos, Obnova, Beotrans and PIK Pester). See Second Witness Statement of Mr. William Rand, para. 6; Second Witness Statement of Mr. Đura Obradovic, para. 6. Another company not mentioned by Mr. Rand was Uvac Gazela. See Privatization Agreement (Uvac Gazela), 18 March 2003, **RE-222**.

Obradovic who: (i) purchased the auction documentation, (ii) registered as participant in the auction, and (iii) paid the deposit.²⁶

17. The auction documentation contained the application for participation in the auction.²⁷ In the application the buyer had to provide a number of information, including information on his citizenship and a statement confirming that the buyer was not: (i) a domestic legal entity doing business by using the majority of socially owned capital; (ii) an individual, a legal entity and the founder of a legal entity with due and outstanding obligations towards the subject of privatization; (iii) an individual, a legal entity and the founder of a legal entity with whom an agreement on sale of capital or property, had been terminated due to non-performance of contractual duties;²⁸ (iv) a member of the auction commission or a person closely affiliated with a member of the auction commission;²⁹ and (v) a member of the family of the person who had lost the capacity of the buyer.³⁰ The Agency was obliged to check whether these statements were correct and whether restrictions concerning who can appear as the buyer existed in the case at hand.³¹
18. In other words, the relevant regulation mandates that the buyer's identity had to be transparently communicated to the Agency as it was the one who had to check whether the buyer fulfilled the necessary conditions (and as it was the one who signed the privatization agreement). Otherwise, the above-mentioned regulation was without purpose as the Agency would actually check whether the *representative of the buyer* fulfilled the condition to be the buyer, while the buyer would avoid this scrutiny.
19. If one follows Claimants' narrative, all the above points to the fact that in BD Agro's case the relevant regulations were circumvented and the Agency was obviously deceived as the entire documentation and information that was presented to it at the time pointed only to Mr. Obradovic as the buyer, although he is now alleged to have

²⁶ Application for the participation at the auction for BD Agro, 19 September 2005, **RE-211**; Approval of the application for the participation at the auction, 26 September 2005, **RE-212**; Minutes of the public auction nos. 4 and 5, 29 September 2005, **RE-213**. Article 18(2) of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

²⁷ Article 18(2) of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

²⁸ Article 12 of the 2001 Law on Privatization, **CE-220**.

²⁹ Article 20 of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

³⁰ Article 21 of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

³¹ Articles 8, 13, 23 and 24 of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

been only the representative of the buyer.³² This would have two serious consequences. First, the Agency was unable to check whether Mr. Rand fulfilled the conditions to appear as the buyer. Second, the Agency was left with Mr. Obradovic's empty pockets³³ and with no right to claim any performance from Mr. Rand as he was not the one who signed the Privatization Agreement.

3. Mr. Obradovic was registered as the owner of BD Agro shares

20. Ownership over Serbian companies was and still is mainly regulated by the Law on Companies. At the time of the acquisition of BD Agro, the 2004 Law on Companies was in force,³⁴ and it remained in force until 2011, when a new law was enacted³⁵ (which remains in force until today).
21. According to Law on Companies, the share capital of joint stock companies (as BD Agro was) is expressed in stocks. The registered owner of the stocks is considered to be their owner towards the company and all third parties.³⁶ After the Privatization Agreement was concluded, Mr. Obradovic was registered as the owner of the shares.³⁷
22. According to the Law on Companies, each ordinary share (as shares owned by Mr. Obradovic were) gives to its holder the following rights:
 - (i) the right to access to legal and other documents and information pertaining to and in possession of the company;
 - (ii) the right to participate in the shareholders' assembly;
 - (iii) the right to vote at the shareholders' assembly based on the principle that one share gives the right to one vote;

³² Memorial, para. 8 (“Mr. Rand decided to participate in the auction through Mr. Obradović [...]”); Reply, para. 34 (“Mr. Obradović would attend the auction of the Privatized Shares and submit the bid in the auction on Mr. Rand's behalf”) Second Witness Statement of Mr. Wiliam Rand, 4 October 2019, para. 14 (“*Having secured the financing, I agreed with Mr. Obradovic that he would attend the auction and submit a bid on my behalf*”).

³³ Second Witness Statement of Mr. Đura Obradovic, 3 October 2019, para. 7.

³⁴ 2004 Law on Companies, **RE-320**.

³⁵ 2011 Law on Companies, **RE-321**.

³⁶ Article 207 of the 2004 Law on Companies, **RE-96**.

³⁷ Letter from BD Agro to the Privatization Agency, 27 December 2005, **RE-470**; Excerpt from the Central Securities Registry on BD Agro's shareholders, 16 October 2015, **RE-471**.

- (iv) the right to receive dividends after any dividends payable pursuant to preferential rights of preferred shares have been paid in full;
 - (v) the right to receive a distribution on liquidation of the company after the claims of creditors and holders of any preferred shares have been satisfied;
 - (vi) preemptive rights to acquire newly-issued shares and other securities of the company; and
 - (vii) the right to receive distributions on shares in accordance with law.³⁸
23. According to the Law on Companies, out of the listed shareholder rights, only the right to receive dividends and the right to receive a distribution after liquidation of the company (points (iv) and (v) above), could be contractually transferred by a shareholder to a third party.³⁹ Yet, Claimants contend that by MDH and Sembi agreements Mr. Obradovic in fact immediately transferred all of his shareholder rights to Mr. Rand.⁴⁰ Consequently, Mr. Rand was thus allegedly able to completely control BD Agro and perform all shareholder rights, while Mr. Obradovic was entirely stripped of any ownership.⁴¹ The cited regulation however demonstrates that if one wished to *e.g.* exercise legal control over certain shares, he would have to become their registered owner, which Mr. Rand never was. In other words, by conclusion of the MDH and Sembi agreements the Serbian legislation was once again circumvented.

4. Before the Privatization Mr. Rand's involvement in purchase of the shares was communicated only to future CEO of BD Agro

24. While keeping the Agency in the dark about its interest to privatize BD Agro, Mr. Rand communicated this during Privatization, to the then Assistant Minister of Economy in charge of privatization of BD Agro – Mr. Ljubisa Jovanovic. It was him who in June 2005 received Mr. Rand's email which intended to inform Minister

³⁸ Article 208(1) of the 2004 Law on Companies, **RE-320**.

³⁹ Article 208(3) of the 2004 Law on Companies, **RE-320**.

⁴⁰ Reply, paras. 34, 40 ("*The effect of these rights was that MDH would acquire beneficial ownership of the Privatized Shares and any shares in BD Agro subsequently acquired by Mr. Obradović as soon as those shares were acquired by Mr. Obradović*"), 110-111; Second Witness Statement of Mr. Wiliam Rand, 4 October 2019, paras. 14, 54-55.

⁴¹ Second Witness Statement of Mr. Wiliam Rand, 4 October 2019, paras. 14 ("*If successful, Mr. Obradovic was to nominally acquire the Privatized Shares while I would become the beneficial owner. Mr. Obradovic was never supposed to have any beneficial interest in BD Agro. His role was simply to assist in dealing with the Serbian officials and, should I manage to purchase BD Agro, assist me with its oversight.*"), 54-55.

Bubalo of Mr. Rand's interest to buy BD Agro (no evidence suggest that Minister Bubalo ever received this email).⁴² Eventually, the news of Mr. Obradovic's success in the auction for privatization of BD Agro were notified to Mr. Rand by Mr. Jovanovic.⁴³ While personally informing Mr. Rand of this success, Mr. Jovanovic added "*I suggest to use your forthcoming visit to discuss all relevant issues regarding my position as well as other farm programs details*".⁴⁴ This implies that a "position" was already being discussed with Mr. Jovanovic. Indeed, immediately after the auction, Mr. Jovanovic became the CEO of BD Agro⁴⁵ – thus attaining the "position" from his email.

25. In other words, during the Privatization, the Assistant Minister overseeing that very privatization,⁴⁶ discussed his engagement as CEO of BD Agro with Messrs. Obradovic and Rand. Needless to say, due to the promise of a "position", Mr. Jovanovic clearly had a personal interest in Mr. Obradovic (*i.e.* Mr. Rand) succeeding in the auction. This also provides an explanation as to why Mr. Jovanovic apparently sent significant business information on BD Agro and the value of its land individually to Messrs. Obradovic and Rand during the privatization process, placing other participants of the auction in an unfair position in that way.⁴⁷ Respondent became aware of all this correspondence only during the present arbitration. There is no evidence indicating that the Agency or any Serbian official were aware of any of the above communications and of *a deal* between these three gentlemen.
26. In particular, there is also no evidence that Minister Bubalo was aware of that deal. The "evidence" of his alleged awareness of the arrangement between Mr. Obradovic and Mr. Rand are two emails sent in 2004 and 2005:

⁴² Mr. Jovanovic responded to Mr. Rand, without copying Mr. Bubalo: „*Just to let you know that Minister Bubalo has another email address to which you should be contacting : c.vuckovic@mpriv.sr.gov.yu*“. See E-mail from Mr. William Rand to Mr. Predrag Bubalo; Email from Mr. Ljubisa Jovanovic to Mr. William Rand, **CE-14**. Claimants submitted no proof that the email was ever subsequently sent to the correct email address of Mr. Bubalo or that Mr. Rand has ever received a feedback from Mr. Bubalo in this regard.

⁴³ E-mail from Lj. Jovanovic to W. Rand dated 29 September 2005, **CE-16**.

⁴⁴ E-mail from Lj. Jovanovic to W. Rand dated 29 September 2005, **CE-16**.

⁴⁵ First Witness Statement of W. Rand, 5 February 2018, paras. 24-25.

⁴⁶ Second Witness Statement of Mr. William Rand, 3 October 2019, para. 9 (“*Mr. Jovanovic was the main person at the Ministry of Economy responsible for BD Agro's privatization*”).

⁴⁷ E-mail from Lj. Jovanovic to W. Rand dated 16 May 2005, **CE-13** (stating, *inter alia*, that „*This position has caused the current price of the land , that nowadays reached EURO 50.000/hectare . To that price , very big Italian company recently bought one piece !*“).

- i. Mr. Rand's email to Minister Bubalo from November 2004⁴⁸ related exclusively to the interest for the potential acquisition of another unrelated company named Centroprom. This email, dating back one year before the auction for BD Agro, contained absolutely no mention of BD Agro or Mr. Obradovic. Thus, Claimants' reliance on the said document is utterly inapposite;
 - ii. as already noted, the email from June 2005⁴⁹ referring to Mr. Rand's interest in participating at the auction for BD Agro, although intended to be sent to Minister Bubalo, never reached him as it was sent to the wrong email address.⁵⁰ In addition, the email contained no mention of Mr. Obradovic let alone that Mr. Rand planned to hide behind him during Privatization. In fact, Mr. Rand wrote "*I would be interested in participating in the auction sale of the company [...]*", which means that even if received by Minister Bubalo, email would not revealed to him that Mr. Obradovic would privatize BD Agro on behalf of Mr. Rand, but that Mr. Rand was interested to appear as the buyer himself.⁵¹
27. In addition, Mr. Rand submitted one handwritten and undated page, for which he claims to be an excerpt from his diary.⁵² Needless to say, this unreliable piece of paper without context and date, whose authenticity cannot be verified (especially not without its original remaining parts – which Claimants should provide), does not have any greater weight than Mr. Rand's untrustworthy testimony. In any event, the content of the submitted page again tells nothing about the beneficial ownership arrangement. It is only written that Mr. Rand (and someone else - unidentified) had to have a very early meeting with Mr. Bubalo (not mentioning a date) because the Minister had other appointments that day, "*so it was [Mr. Rand's] only chance to meet him*".⁵³ Mr. Rand

⁴⁸ Letter from W. Rand to P. Bubalo dated 1 November 2004, **CE-581**.

⁴⁹ E-mail from Mr. William Rand to Mr. Predrag Bubalo dated 4 June 2005; E-mail from Mr. Ljubiša Jovanović to Mr. William Rand dated 6 June 2005, **CE-14**.

⁵⁰ Mr. Jovanovic responded to Mr. Rand, without copying Mr. Bubalo: „Just to let you know that Minister Bubalo has another email address to which you should be contacting : c.vuckovic@mpriv.sr.gov.yu“. See E-mail from Mr. William Rand to Mr. Predrag Bubalo; Email from Mr. Ljubisa Jovanovic to Mr. William Rand, **CE-14**. Claimants submitted no proof that the email was ever subsequently sent to the correct email address of Mr. Bubalo or that Mr. Rand has ever received a feedback from Mr. Bubalo in this regard.

⁵¹ Mr. Obradovic was not even copied in the email to Mr. Bubalo.

⁵² Excerpt from Mr. Rand's diary, **CE-582**.

⁵³ Excerpt from Mr. Rand's diary, **CE-582**.

then wrote that Mr. Bubalo prevented a postponement of the auction for BD Agro, which is the only evidence about the event,⁵⁴ but it again does not mention exactly who asked the Minister to do that (meaning that it could have been done by Mr. Obradovic).⁵⁵

28. Mr. Bubalo has not been performing any official function at any level of Serbian Government since 2008. Respondent has gone through considerable efforts to obtain Mr. Bubalo's testimony in the present arbitration but to no avail. Respondent also emphasizes that it is striking that Claimants did not provide testimony of Mr. Bubalo in order to support their allegations, especially having in mind that Mr. Bubalo was reachable to Claimants as he was reported to be a close acquaintance of Mr. Obradovic.⁵⁶ Respondent respectfully submits that it is nothing short of cynical to argue, as Claimants now do, that "*Serbia chose to make Mr. Bubalo literally invisible to the Tribunal.*"⁵⁷
29. In addition, Mr. Rand states that in May 2005 he also had a series of meetings with state officials other than Mr. Bubalo (*i.e.* Mr. Dinkic and Mr. Golubovic), but does not specify the date of the meetings, who exactly attended them and what was discussed.⁵⁸ It is also striking that those alleged meetings were not preceded or followed by any written correspondence and that the only evidence that Claimants can offer is the witness statement of Mr. Rand himself. However, since he is interested in the outcome of this proceedings his statement is unreliable.⁵⁹

⁵⁴ Notably, in the Privatization files there is no document showing the postponement of the auction for BD Agro was ever requested.

⁵⁵ The alleged diary page only states that "We [again not specifying who exactly] *had told the minister (Bubala) and the Agency that we were buying the debt*" - which debt was the reason for the proposed postponement. However, it does not say upon whose initiative did Mr. Bubalo allegedly phoned the Agency and said that the auction should not be postponed. See Excerpt from Mr. Rand's diary, **CE-582**.

⁵⁶ Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia, 29 April 2010, p. 5, **RE-116** ("*Mr. PREDRAG BUBALO is a very frequent "Guest" in BD AGRO, in Dobanovci, he comes almost every month, and he obviously already knows the buyer Djuro Obradovic, from when they stayed together in Canada*"); Letter from Center for education and representation of shareholders and employees to the Privatization Agency, 11 February 2010, p. 2, **RE-118** ("*it is confirmed that the former Minister Bubalo still has "unauthorized" influence on the Agency, who is also frequent "guest" in BD AGRO*"); Letter from Center for education and representation of shareholders and employees to the Agency, 8 July 2009, p. 4, **RE-228** ("*Ex Minister Predrag Bubalo often comes to BD AGRO (almost always after Agency's inspections)*").

⁵⁷ Claimants' Reply, para. 620.

⁵⁸ Second Witness Statement of Mr. William Rand, 3 October 2019, para. 8; Reply, paras. 501-502.

⁵⁹ See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 14, paras. 69, 70 at 43, **RLA-9**.

30. Therefore, the only person who apparently communicated with Mr. Rand prior to the Privatization was Mr. Jovanovic, an Assistant Minister negotiating simultaneously his CEO position at BD Agro, who resigned from his function immediately after the public auction. However, even Mr. Jovanovic, in his statement given to the public prosecutor before the initiation of the present arbitration (which proceedings are further elaborated in Section F. 4.1.2 below), explicitly stated that Mr. Obradovic “*was the owner [of BD Agro] who was permanent and who dealt with key issues, some other acquisitions and relationships with banks, all that should be done by a majority owner*”.⁶⁰ Needless to say, Mr. Jovanovic made no mention of Mr. Rand at any point during the making of the statement.

5. After the Privatization Mr. Rand’s alleged beneficial ownership was not communicated to the Agency nor to any Serbian official

31. What is most important is that Claimants failed to provide a single document showing that Mr. Obradovic, as the signatory of the Privatization Agreement, and as the one who was registered as the owner of BD Agro shares (and thus the only legal owner of the shares), ever notified the Agency or any state official that Mr. Rand was the actual owner, and not him. Without such explicit statement it would be preposterous to expect that any authority or state official would and could deem and treat Mr. Rand as the owner of BD Agro.

5.1. Communication with state officials

32. In their Reply, Claimants’ go to great lengths in order to try to prove that Mr. Rand’s alleged beneficial ownership of BD Agro was being openly communicated to the Serbian authorities. In this regard, they mostly focus their attention to the period from 2013-2015, even though the relevant moment when their arrangement should have been disclosed was before September 2005 *i.e.* before the public auction and the conclusion of the Privatization Agreement. Nevertheless, for the sake of completeness, Respondent further explains why the allegations and exhibits submitted in this respect are utterly irrelevant, misrepresented or simply untrue.⁶¹

⁶⁰ Indictment no. KTI 65/16, 5 April 2017, p. 12, **RE-399**.

⁶¹ As a general remark, Claimants’ reliance on the witness testimonies of Mr. Rand and other persons interested in the outcome of the dispute are completely unreliable, as Respondent already explained. *See* also Counter-Memorial, paras. 252-255.

33. *First*, Mr. Rand claims that he remained in contact with Mr. Bubalo even after the auction for BD Agro. As proof of this statement Claimants submitted an email that Mr. Rand received from an employee of BD Agro.⁶² The said email however proves that Mr. Rand was not in contact with Mr. Bubalo at least until 16 July 2008, as it was only then when he got Mr. Bubalo's phone number.⁶³ However, just over a week *before* that day, Mr. Bubalo ceased to be a minister, *i.e.* state official,⁶⁴ which means that content of their potential conversations was fully irrelevant at that point.
34. *Second*, Claimants' attempt to show that the alleged arrangement between Mr. Rand and Mr. Obradovic was formally notified to Serbia in 2010, through a casual, informal conversation with an Assistant Minister of Foreign Affairs, Mr. Damjan Krnjetic Miskovic, is farfetched, to say the least.⁶⁵ Upon a closer inspection of the correspondence that followed the meeting,⁶⁶ it becomes clear that Mr. Rand did not state at any moment that Mr. Obradovic is only a nominal owner of BD Agro on behalf of Mr. Rand, or anything similar to that effect. To the contrary, Mr. Rand only presented himself as a part of BD Agro,⁶⁷ which was true at the time, as he was a member of the board of directors of the company.⁶⁸
35. *Third*, Claimants state that in December 2013, Mr. Milan Kostic of the Serbian Progressive Party was expressly informed of Mr. Rand's beneficial ownership of BD Agro and that he passed that information on to Minister Radulovic, who involved Messrs. Milenkovic and Dzafic from Serbian Investment Promotion Agency ("**SIEPA**").⁶⁹ Mr. Milan Kostic was a politician, completely unrelated to the Privatization, and most importantly, he was not a Serbian official.⁷⁰ Therefore, Mr. Kostic's communication with Mr. Rand and his representatives is of no relevance. When it comes to Minister Radulovic, on 18 December 2013, he received an email

⁶² Second Witness Statement of Mr. William Rand, 3 October 2019, para. 77.

⁶³ Email from A. Janičić to W. Rand dated 16 July 2008, **CE-704**.

⁶⁴ Predrag Bubalo, Wikipedia, **RE-296**.

⁶⁵ Reply, para. 139.

⁶⁶ Email from L. Jovanovic to D. Miskovic, 21 May 2010, **CE-706**.

⁶⁷ The letter was sent in Mr. Rand's personal capacity (not as a representative of Rand Investments), and his connection to BD Agro is only seen from the usage of the terms such as: „our dairy operation in Dobanovci“, „our business“, „our raw milk“ etc. See Email from L. Jovanovic to D. Miskovic, 21 May 2010, **CE-706**.

⁶⁸ Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, **CE-72**.

⁶⁹ Reply, para. 504.

⁷⁰ Reply, para. 240 ("*chair of the economic council of the Serbian Progressive Party*"); Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013 **CE-769** ("*On behalf of the Council for Economy SNS (Serbian Progressive Party) NBgd*").

from Mr. Kostic where it was stated that Mr. Rand was a *majority owner of BD Agro*, and not that he was the beneficial owner while Mr. Obradovic was the nominal owner.⁷¹ That information had no bearing on the present case. Neither is the Minister's job to double-check who are the buyers of one of the thousands of socially owned entities being privatized in Serbia since 2001, *i.e.* whether in case of BD Agro it was Mr. Rand or Mr. Obradovic, nor did Minister Radulovic deal with said email at all, but simply forwarded it to his assistant and referred it to SIEPA.⁷²

36. On 19 December 2013, Messrs. Markicevic and Broshko apparently met with Mr. Dzafic, deputy director of SIEPA. From the email that Mr. Dzafic, sent after the meeting to the director of SIEPA, Mr. Vladimir Petrovic, it transpires that the beneficial ownership arrangement was notified only at that meeting but not to the state officials and not by Mr. Obradovic, as they were not present at the meeting.⁷³ It is also important to note that SIEPA was not (and has never been) an organ of Serbia, but one of many public agencies dedicated to promotion of business conditions, promotion and attraction of foreign investments.⁷⁴ Thus, Claimants' attempt to equate an employee of SIEPA (Mr. Dzafic) with Serbian Government is clearly inapposite. In addition, and more importantly, the email reveals that Mr. Rand was aware of the fact that his arrangement with Mr. Obradovic was simply impossible under Serbian law:

“Company BD AGRO Dobanovci was privatized in 2005 [...] Purchaser of the company was individual – Mr. Djura Obradovic, who has purchased the company on behalf and for the account of the investment fund RAND Investment Ltd. Since our law does not recognize ownership in this form, Mr. Djura Obradovic was registered as the owner of the company.”⁷⁵

37. *Fourth*, Claimants also rely on an email sent in April 2014 by Mr. Markicevic to Mr. Ristic, an “*expert advisor to the Deposit Insurance Agency in charge of Nova Agrobanka*”⁷⁶ in which it was stated that a “[r]epresentative of the owner from

⁷¹ Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, **CE-769**

⁷² Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, **CE-769**.

⁷³ Email communication between G. Džafić and I. Markićević, 19 December 2013, **CE-311**.

⁷⁴ Article 3 of the Decision on the establishment of the Agency for Foreign Investments and Promotion of Export (“Official Gazette of the Republic of Serbia, no. 107/2009 and 15/2010”), **RE-424**.

⁷⁵ Email communication between G. Džafić and I. Markićević, 19 December 2013, **CE-311**.

⁷⁶ Reply, para. 505.

Canada is arriving in Belgrade".⁷⁷ As evident, Mr. Ristovic was not a state official, but an "expert advisor" to the Deposit Insurance Agency. Further, the email did not mention Mr. Rand by name but just a Canadian citizen - Mr. Obradovic is one, as well.⁷⁸

38. *Fifth*, Claimants also state that in 2015, Mr. Kojic, the Chief of Staff of the then Prime Minister, was informed of Mr. Rand's beneficial ownership.⁷⁹ This is however misrepresentation of the witness statement given by Mr. Rand as he did not allege that Mr. Kojic was informed of his beneficial ownership of Mr. Obradovic's shares but that it was explained to Mr. Kojic "*that I [Mr. Rand] had been active as an investor in Serbia for many years and that my activities were related to various companies, most notably BD Agro*".⁸⁰ And indeed Mr. Rand was related to BD Agro as he was an indirect shareholder through MDH.
39. *Sixth*, the officials from the Agency and the Ministry of Economy always treated Messrs. Rand and Broshko as representatives of the company seeking to assume the role of Mr. Obradovic in the Privatization Agreement.⁸¹ In fact, Claimants themselves introduced Mr. Rand as a Canadian investor who was ready to provide financial support to BD Agro subject to the transfer of ownership from Mr. Obradovic to Coropi.⁸²
40. *Seventh*, the allegation that on 15 December 2014, Mr. Obradovic was asked to leave the meeting at the Ministry of Economy regarding BD Agro, as he was not invited,⁸³ is of no relevance because it proves nothing. As Mr. Stevanovic, state secretary at the Ministry of Economy, confirms in his witness statement, Mr. Obradovic was asked to leave because the meeting was not organized upon his request, but rather at the request of Coropi's representatives, and because it was clear that the representatives of Coropi, who requested the meeting, were not agreeing to Mr. Obradovic's presence.⁸⁴ It is absurd to claim that due to this event, the Ministry of Economy was somehow not

⁷⁷ Email from I. Markićević to M. Ristović (Deposit Insurance Agency), 22 April 2014, **CE-289**.

⁷⁸ See Section I. A. 5.3 below.

⁷⁹ Reply, para. 505.

⁸⁰ Second Witness Statement of Mr. William Rand dated 3 October 2019, para. 100.

⁸¹ Counter-Memorial, paras. 257-259.

⁸² Counter-Memorial, paras. 260-261.

⁸³ Broshko First WS, para. 28; Broshko Second WS, para. 39; Markicevic Second WS, para. 93; Broshko Third WS, para. 11; Markicevic Third WS, para. 55.

⁸⁴ Witness Statement of Mr. Dragan Stevanovic, 23 January 2020, para. 8.

perceiving Mr. Obradovic as the owner of BD Agro.⁸⁵ In fact, Mr. Stevanovic leaves no doubt that he and his staff never treated, nor could have treated, Mr. Rand as BD Agro's majority owner.⁸⁶

41. What is important to note is that the above mentioned meetings and correspondence took place long after the signing of the Privatization Agreement. Therefore, even if Claimants had revealed the "true" ownership structure, this could not remedy the misrepresentations made during the purchase of BD Agro. In addition, the persons to whom the information about beneficial ownership was allegedly communicated were not the proper addressees - the proper addressee was only the Agency who was Mr. Obradovic's contracting party.

5.2. Communications with the Agency

42. As from 2005, the Agency had numerous meetings with Mr. Obradovic, and subsequently also with Mr. Markicevic and Mr. Broshko. They exchanged numerous of letters with the Agency. Yet, none of the letters mention Mr. Rand as the beneficial owner. Claimants do not even try to argue that the Agency was informed of Mr. Rand's alleged beneficial ownership before 2013.⁸⁷ Instead, they contend that the Agency's representatives,⁸⁸ who were dealing with BD Agro in the period 2013 – 2015, were specifically informed of Mr. Rand's beneficial ownership at the meetings that took place at the time.⁸⁹ As Respondent already explained, this is incorrect. The meetings that were held in the period of 2013-2015⁹⁰ with the Agency and the Ministry of Economy, concerned potential transfer of the Privatization Agreement to Coropi and there was no mention of Mr. Rand's beneficial ownership.⁹¹

⁸⁵ Reply, para. 501; Broshko First WS, para. 28; Broshko Second WS, para. 39; Markicevic Second WS, para. 93; Broshko Third WS, para. 11; Markicevic Third WS, para. 55..

⁸⁶ Witness Statement of Mr. Dragan Stevanovic, 23 January 2020, paras. 7-8.

⁸⁷ In paras. 501-505 of the Reply Claimants list all "state officials" to whom alleged beneficial ownership was notified and the personnel of the Agency is mentioned only in the period 2013-2015.

⁸⁸ Ms. Marijana Radovanović, Ms. Julijana Vučković, Ms. Tanja Mitrović, Ms. Mira Kostić, Ms. Katarina Misailović.

⁸⁹ Reply, para. 503.

⁹⁰ Reply, paras. 501-505.

⁹¹ Counter-Memorial, paras. 256-275.

43. Contrary to Claimants allegations,⁹² beneficial ownership was not notified even at the meeting held on 30 January 2014 when the Agency was told that Mr. Rand *provided financing* to Mr. Obradovic.:

*“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.”*⁹³

44. Even this “financing arrangement” was evidently not previously known by the Agency, as the Agency explicitly noted in its subsequent letter to Mr. Markicevic, saying:

*“At the meeting, you introduced Erinn Broshko, director of “Rand Investments” ltd. Vancouver, Canada, company owned by William Rand, and you stated that his means were used to finance the entire process of privatization of “BD Agro” Dobanovci.”*⁹⁴

45. What can be concluded is that, contrary to what Claimants⁹⁵ and Mr. Broshko state,⁹⁶ the Agency was not informed that Mr. Rand was the beneficial owner of BD Agro but that he was a supposed financier of Privatization, which could have been any bank as well. In addition to that, and even more importantly, Mr. Obradovic, the buyer of BD Agro, was not present at the said meeting and never confirmed that someone else, and not himself, financed the Privatization let alone that Mr. Rand was the beneficial owner instead of him.

⁹² Reply, para. 503.

⁹³ Minutes from meeting held at the Privatization Agency on 30 January 2014, 30 January 2014, **RE-28**.

⁹⁴ Letter from the Agency to BD Agro, 21 August 2014, **CE-317**.

⁹⁵ Reply, para. 503.

⁹⁶ Third Witness Statement of Mr. Erinn Broshko, 3 October 2019, para. 26.

46. To the contrary, at the meeting with the Agency held on 4 February 2014,⁹⁷ Mr. Obradovic was clear that while he had a partner during the privatizations in which he participated, he was the *only* owner of BD Agro shares and wanted to exchange these shares for the shares in another company, PIK Pester:

“The buyer, Djura Obradovic, stated that during the purchase of several entities of privatization, including “BD Agro” Dobanovci, he has had a partner with whom he came into conflict of opinion on the management of agricultural goods, a year and a half ago. For the above reasons, the decision was made to divide business and ‘for the partner to get all the companies in Belgrade, therefore “BD Agro” was part of that division. The idea is that the partner replaces the shares held in the PIK Pester, Sjenica, with the shares of Djura Obradovic in “BD Agro”, Dobanovci..””⁹⁸

47. Had it been true that Mr. Rand alone financed the Privatization and that he was the beneficial owner of BD Agro, then there would be no mention in 2014 that he would “get all the companies in Belgrade [i.e.] “BD Agro”, and that in exchange he must compensate Mr. Obradovic by the shares in another company. In other words, at the meeting held on 4 February 2014 Mr. Obradovic confirmed to the Agency that he considered himself to be the only owner of BD Agro’s privatized shares and it clearly transpires that he was not a proxy to Mr. Rand.
48. Yet, Claimants persist in their tenacious assertion that, from June 2013, the Agency and the Ministry of Finance considered Messrs. Rand, Broshko and Markićević as the only competent representatives for addressing the matters concerning BD Agro. They base this assertion on Mr. Broshko’s and Mr. Markicevic’s statement that after 11

⁹⁷ Mr. Obradovic now claims that he does not recall this meeting nor any of the people present there. See Second Witness Statement of Mr. Djura Obradovic, 4 October 2019, para. 90. However, Mr. Obradovic obviously has astonishingly bad memory, as the Agency’s officials present there (in particular Ms. Jevtic and Ms. Misailovic) were consistently present at all other meetings regarding BD Agro. See Minutes from meeting held at the Ministry of Economy on 17 December 2014, RE-22; Minutes from meeting held at the Privatization Agency on 27 April 2015, RE-23; Minutes from meeting held at the Privatization Agency on 30 January 2014, RE-28; Minutes from meeting held at the Privatization Agency on 4 February 2014, RE-36; Minutes from meeting held at the Ministry of Economy on 3 November 2014, RE-37; Minutes from meeting held at the Ministry of Economy on 15 December 2014, RE-38; Minutes from meeting held at the Ministry of Economy on 16 January 2015, RE-39; Minutes from meeting held at the Privatization Agency on 20 April 2015, RE-41; Invitation to Mr. Obradovic to attend the meeting of 30 October 2012, RE-80.

⁹⁸ Minutes from meeting held at the Privatization Agency on 4 February 2014, 4 February 2014, RE-36.

June 2013, Mr. Obradovic was not present at any of the meetings (attended by them) with the Agency and the Ministry of Economy.⁹⁹ These statements are obviously erroneous and misleading. *First*, as explained, it was Mr. Obradovic (not Mr. Rand or Messrs. Broshko and Markicevic) who was present at the meeting with the Agency on 4 February 2014, when the fulfillment of the Privatization Agreement was discussed and when he confirmed that he was the only owner of the shares.¹⁰⁰ *Second*, Mr. Rand, who claims to be the actual owner, never attended any meetings with the Agency or the Ministry, neither before, nor after June 2013. *Third*, Mr. Obradovic's presence was not necessary at each meeting because Mr. Markicevic, in the capacity of the CEO of BD Agro (and not in the capacity of Mr. Rand's representative), was present. *Finally*, the presence of Mr. Broshko, representative of Coropi, was not surprising as the potential transfer of the Privatization Agreement to Coropi was discussed at the meetings in question.

5.3. Canadian flag, Canadian Embassy, Mr. Rand's business partners

49. Mr. Obradovic is indisputably a Canadian citizen as well as Serbian one.¹⁰¹ Therefore, it is unclear why Claimants consider that Serbian officials (Mr. Bubalo, Mr. Kostunica and Mr. Ilic)¹⁰² should have known that the Canadian flag displayed at the entrance of BD Agro "*represented Mr. Rand*",¹⁰³ and not Mr. Obradovic. Mr. Obradovic openly presented himself as a "Canadian businessman" at all times,¹⁰⁴ and it was therefore not surprising to see a Canadian flag as one of the flags displayed at BD Agro's premises.
50. Likewise, Claimants' emphasis on the communication that Mr. Rand had with the Canadian Embassy in Serbia equally misses the point. Most importantly, the communication was performed without the involvement of Serbian authorities.¹⁰⁵ In

⁹⁹ Reply, paras. 248-249. Markicevic Third WS, para. 57; Broshko Third WS, para. 12.

¹⁰⁰ Minutes from meeting held at the Privatization Agency on 4 February 2014, 4 February 2014, **RE-36**.

¹⁰¹ Witness Statement of Mr. Đura Obradovic dated 20 September 2017, para. 1.

¹⁰² Reply, paras. 1-4, 94-95.

¹⁰³ Reply, para. 86.

¹⁰⁴ "Đura Obradovic from Vancouver, owner of "Pester-Sjenica" invested 15 mil EUR, announces another 32 mil EUR for the most modern dairies, export to the EU", eKapija, 13 March 2006, **RE-214**; "Small shareholders accuse the owner of BD "Agro" Đura Obradovic for robbery and abuses", Kurir, 24 May 2009, **RE-109**; "Wolves are eating me", Novosti, 29 June 2010, **RE-215**.

¹⁰⁵ Reply, paras. 138-142, 506; *See* Visit of the Honourable Peter Milliken, M.P., Speaker of the House of Commons, and a Parliamentary Delegation, United Kingdom and Serbia, Parliament of Canada, 25 September 2019 (accessed), **CE-438**; Email from K. Lutz to R. Rand, 16 July 2010, **CE-439**; Emails from

addition, Mr. Obradovic is a Canadian national, and the interest of the Canadian diplomatic staff in BD Agro is therefore expected regardless of any involvement of Mr. Rand. In any event, Canada is not the host State, and even if it believed that Mr. Rand was the actual owner of BD Agro, this changes absolutely nothing with respect to what was presented to Serbia at the time.

51. Finally, what was communicated to business partners and consultants of BD Agro or Mr. Rand¹⁰⁶ is completely immaterial to the case at hand as they are not representatives of the host State. Respondent therefore considers it unnecessary to comment on these assertions.

6. Mr. Obradovic acted and was treated as the owner of BD Agro

52. As noted above, Mr. Obradovic was registered as the owner of BD Agro shares, and the Agency (or any state official) was never notified that Mr. Rand has any rights over the shares. On top of that, as the evidence show, from the beginning of the Privatization, only Mr. Obradovic acted as the buyer, in his own name and on his own behalf. And only he was treated as the buyer as well.

6.1. Mr. Obradovic's behavior

53. Mr. Rand testified that “*Mr. Obradovic had no beneficial interest in BD Agro and his role was simply to assist in dealing with the Serbian officials.*” Mr. Obradovic added that he in fact “*had no money*” of his own that he could invest.¹⁰⁷ And yet, although he was solely a *penniless assistant*, both Mr. Rand and Mr. Obradovic had no issue with Mr. Obradovic becoming the registered owner of shares and the party to the Privatization Agreement, being the holder of all rights and obligations relating to the sale of BD Agro.
54. As the record shows, it was only Mr. Obradovic who was visible all the time, in particular he was the one who:

J. Morrison and D. Ceramilac, 20 July 2010, **CE-440**; Email communication between W. Rand and J. Morrison, 9 June 2010, **CE-705**.

¹⁰⁶ Reply, paras. 132-137, 506.

¹⁰⁷ Second Witness Statement of Mr. Đura Obradovic, 3 October 2019, para. 7.

- (i) personally submitted an application for the participation at the auction for the shares in BD Agro;¹⁰⁸
- (ii) provided a legally binding statement to the Agency that he personally fulfilled all conditions for being a bidder in the auction for BD Agro;¹⁰⁹
- (iii) personally paid a participation deposit;¹¹⁰
- (iv) personally was granted approval by the Agency to participate in the auction;¹¹¹
- (v) personally participated and submitted bids at the auction;¹¹²
- (vi) personally entered into the Privatization Agreement with the Agency;¹¹³
- (vii) personally gave all representations and warranties;¹¹⁴
- (viii) personally was inscribed in Central Register of Securities as the owner of BD Agro shares;¹¹⁵
- (ix) personally requested extensions¹¹⁶ from and communicated with the Agency regarding fulfillment of the obligations from the Privatization Agreement.¹¹⁷

55. For instance, in April 2012, Mr. Obradovic sent a letter to the Ministry of Economy in which he was explicit that he was an important investor in the privatized companies and that he was the owner of BD Agro and other companies he bought:

“Despite several verbal interventions, as well as a written one of February 14, 2012, there have been no actions on this request, nor have I been provided with the response as the Buyer of the capital who brought over 20 million euros in Serbia for several privatizations. Based on all above stated, I think that my obligations towards the Agency have been fully settled, and that

¹⁰⁸ Application for the participation at the auction for BD Agro, 19 September 2005, **RE-211**;

¹⁰⁹ Application for the participation at the auction for BD Agro, 19 September 2005, **RE-211**;

¹¹⁰ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, 15 October 2015, **RE-33**.

¹¹¹ Approval of the application for the participation at the auction, 26 September 2005, **RE-212**;

¹¹² Minutes of the public auction nos. 4 and 5, 29 September 2005, **RE-213**.

¹¹³ Privatization Agreement, **CE-17**.

¹¹⁴ Article 5 of the Privatization Agreement, **CE-17**.

¹¹⁵ Letter from BD Agro to the Privatization Agency, 27 December 2005, **RE-470**; Excerpt from the Central Securities Registry on BD Agro’s shareholders, 16 October 2015, **RE-471**.

¹¹⁶ See e.g. Letter from Mr. Obradovic to the Agency, 13 October 2008, **RE-231**; Letter from Mr. Obradovic to the Agency, 17 November 2008, **RE-232**; Letter from Mr. Obradovic to the Privatization Agency, 28 November 2008, **RE-434**.

¹¹⁷ See e.g. Letter from Mr. Obradovic and BD Agro to the Agency of 23 July 2012, **RE-21**; Letter from Mr. Obradovic to the Agency of 29 December 2011, **RE-27**; Letter from Mr. Obradovic to the Agency of 30 April 2015, **RE-42**; Letter from Mr. Obradovic to the Agency attaching the statement from BD Agro’s director of 9 November 2011, **RE-60**.

*the conditions have been met for removal of pledge on shares, and after the investment of more than 50.000 euros, in three auditor's reports the Agency has gained access to legality of business activities of both BD AGRO and other companies owned by me.*¹¹⁸

56. Mr. Rand on the other hand remained invisible, which, if he was really what he claims today he was, goes contrary to one of the basic principles of the Law on Privatization – transparency.¹¹⁹

6.2. Agency's behavior

57. On its part, the Agency had no doubts who was the owner of BD Agro and with whom it should be communicating. This was always Mr. Obradovic. Each and every letter, request, warning notice and extension of deadline concerning the fulfillment of the obligations from the Privatization Agreement was sent exclusively to Mr. Obradovic (or BD Agro's CEO, Mr. Markicevic) – never to Mr. Rand.¹²⁰ All meetings regarding fulfillment of obligations from the Privatization Agreement were organized with Mr. Obradovic as the owner (or BD Agro's CEO, Mr. Markicevic) – never Mr. Rand.¹²¹ When reporting on suspicious activities in BD Agro to the police, only one owner was mentioned – Mr. Obradovic, never Mr. Rand.¹²²

¹¹⁸ Letter from Mr. Obradović to the Ministry of Economy, 2 April 2012, **CE-077**.

¹¹⁹ Article 2(2) of the Law on Privatization, **CE-220**.

¹²⁰ Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-31**; Notice of the Privatization Agency on Additional Time Period 22 December 2011, **CE-32**; Notice on Termination of the Privatization Agreement 28 September 2015, **CE-50**; Notice of the Privatization Agency on Additional Time Period 31 July 2012, **CE-78**; Notice of the Privatization Agency on Additional Time Period 8 November 2012, **CE-79**; Notice of the Privatization Agency on Additional Time Period 22 June 2011, **CE-96**; Notice of the Privatization Agency on Additional Time Period 6 October 2011, **CE-97**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 24 February 2009, **RE-99**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 31 March 2009, **RE-100**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 13 April 2009, **RE-101**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 1 June 2009, **RE-102**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 30 July 2009, **RE-103**.

¹²¹ See e.g. Invitation to Mr. Obradovic to attend the meeting of 30 October 2012, **RE-80**; Minutes from meeting held at the Agency on 4 February 2014, **RE-36**.

¹²² Letter from the Agency to the Criminalistic Police Authority, Sector for Combating Commercial Crime, 4 March 2009; **RE-276** Letter from the Agency to the Criminalistic Police Authority, Sector for Combating Commercial Crime, 19 June 2009, **RE-277**; Letter from the Agency to the Criminalistic Police Authority, Sector for Combating Commercial Crime, 30 June 2011, **RE-279**; Letter from the Agency to the Higher Public Prosecutor's Office and the Criminalistic Police Authority, 29 April 2013, **RE-280**; Letter from the Agency to the Higher Public Prosecutor's Office and the Criminalistic Police Authority, 12 May 2014, **RE-281**; Letter from the Agency to the Higher Public Prosecutor's Office and the Criminalistic Police Authority,

58. The Agency's conduct was fully consistent with respect to all other companies claimed to be beneficial owned by Mr. Rand (*i.e.* Inex, Crveni Signal, PIK Pester, Beotrans and Obnova). In each and every instance, the Agency was communicating solely with Mr. Obradovic as the owner – never Mr. Rand.¹²³
59. On the other hand, as Respondent already explained in more detail in its Counter-Memorial,¹²⁴ Messrs. Rand and Broshko were only treated as the party attempting to have the Privatization Agreement transferred (assigned) to itself - never as the already existing owner of shares.
60. Officials involved in the matter had no doubts about this as well. As Ms. Vuckovic testifies:

“During the entire period of the Agreement validity, Mr. Obradovic presented himself as the only owner of privatized capital in BD Agro and the Agency treated him as such. [...] the Agency never considered the possibility that the buyer of the capital, that is, the owner of shares of BD Agro, was not Mr. Obradovic. As far as I knew, something like that was simply never told to the Agency, nor was it legally possible for the Agency to treat any third person as contractual partner from the Agreement on Privatization of BD Agro.”¹²⁵

61. Likewise, her colleague from the Agency, Ms. Radovic Jankovic, also confirms that:

“I did not know that anyone else, apart from Djura Obradovic, was the owner of privatized shares. As far as I remember, the first time I heard about Mr. Rand was during the meetings held at the Ministry of Economy in 2014 and 2015, which related to the assignment of the Agreement to Coropi. At that time, Mr. Rand's representatives told us that Mr. Rand was interested in assigning

30 May 2014, **RE-282**; Letter from the Agency to the Higher Public Prosecutor's Office, 30 September 2015, **RE-284**.

¹²³ See *e.g.* Letter from the Agency to Mr. Obradovic, 18 March 2011, **RE-473**; Letter from the Privatization Agency to Mr. Obradovic dated 30 August 2007, **RE-407**; Letter from the Privatization Agency to Mr. Obradovic, 27 December 2010, **RE-389**; Report from 9th control of Inex, 5 March 2010, **RE-403**.

¹²⁴ Counter-Memorial, paras. 257-274.

¹²⁵ Witness Statement of Ms. Julijana Vuckovic, 22 January 2020, paras. 7-8.

*the Agreement to his company Coropi. I do not remember that we were notified that Mr. Obradovic was not the owner of the shares, but that the owner was Mr. Rand instead. I believe that that I would have remembered that information since it would be contrary to the fact that the Agreement was concluded with Mr. Obradovic, and not with Mr. Rand.”*¹²⁶

6.3. Employees and minority shareholders

62. Although Claimants are making a great effort trying to demonstrate that Mr. Rand’s alleged beneficial ownership was widely known in BD Agro itself, the facts speak otherwise. The labor unions and minority shareholders in BD Agro frequently addressed the Agency with various claims and suspicions of foul play by the owner - Mr. Obradovic - and the management of BD Agro. Had Mr. Rand’s purported ownership been a commonplace in BD Agro, he would have certainly been mentioned in these complaints. But he never was. The employees and shareholders always perceived Mr. Obradovic as the owner.¹²⁷

6.4. Serbian media

63. Claimants’ further contend that “*Mr. Rand’s ownership of BD Agro was also known to the Serbian media*”, referring to a newspaper article reporting “*that the farm was being built using “Canadian capital”*”.¹²⁸ Again, the mention of “Canadian capital” does not mean much, because it was a natural consequence of the fact that Mr. Obradovic was a declared Canadian national and businessman. In fact, the same newspaper which mentioned the “*Canadian capital*” in BD Agro reported in its other articles from the same period that “*economist Đura Obradovic from Vancouver*

¹²⁶ Witness Statement of Ms. Branka Radovic Jankovic, 23 January 2020, para. 8.

¹²⁷ Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 26 January 2009, **RE-114**; Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 16 March 2009, **RE-115**; Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia, 29 April 2010, **RE-116**; Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**; Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 20 December 2010, **RE-125**; Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 21 March 2012, **RE-147**.

¹²⁸ Reply, para. 85.

bought [...] the agricultural enterprise 'Buducnost' in Dobanovci"¹²⁹ and that "the majority owner of the company 'BD Agro' [...] is the Canadian businessman Đura Obradovic, who owns 75,9% of shares in this company".¹³⁰ Therefore, it is completely evident that the "connection" with Canada was none other than of Mr. Obradovic.

64. In fact, Mr. Obradovic was widely known and perceived in the public and the media as the majority owner of BD Agro throughout the relevant period. There are numerous instances proving that Mr. Obradovic represented himself as BD Agro's majority owner (and of all other companies now claimed to be beneficially owned by Mr. Rand).¹³¹ On the other hand, Mr. Rand points to only one interview which he gave to a Serbian newspaper one year after the auction was held, and in which he in general terms stated that he invested in Serbia "*together with his partners, naturalized Canadians – a Swiss, a Swede and Serb Djura Obradovic*".¹³² The main focus of the article was obviously the investment in the area of Raska i.e. in Inex and PIK Pester,¹³³ while BD Agro was mentioned only in passing. Furthermore, Mr. Rand did not state at any point that Mr. Obradovic was only a nominal owner of BD Agro, that Mr. Obradovic held the shares only for the benefit of Mr. Rand, or anything similar to that effect.¹³⁴ Likewise, there is not a single newspaper article in which Mr. Obradovic himself claimed to be only a nominal or minority owner or that the true owner of BD Agro was actually Mr. Rand. On the contrary, there is an abundance of interviews

¹²⁹ "Đura Obradovic from Vancouver, owner of 'Pester-Sjenica' invested 15 mil EUR, announces another 32 mil EUR for the most modern dairies, export to the EU", eKapija, 13 March 2006, **RE-214**.

¹³⁰ "'BD Agro' got to 1% of Agrobanka's shares", eKapija, 27 July 2010, **RE-216**.

¹³¹ Minority Shareholders accuse the owner of BD "Agro" Djura Obradovic for theft and misdeeds" (Mali akcionari optužuju vlasnika BD "Agro" Đuru Obradovica za pljacku i zloupotrebe), Kurir, 24 May 2009; emphasis added, **RE-109**; "The Minister said that he does not feed tycoons" (Ministar je rekao da ne hrani tajkune), Politika, 3 March 2010; **RE-110**; "Đura Obradovic from Vancouver, owner of 'Pester-Sjenica' invested 15 mil EUR, announces another 32 mil EUR for the most modern dairies, export to the EU" (Đura Obradovic iz Vankuvera, vlasnik „Pester-Sjenica“ uložio 15 mil EUR, najavljuje još 32 mil EUR za najmodernije mlekare, izvoz u EU), eKapija, 13 March 2006, **RE-214**; "Wolves are eating me", Novosti, 29 June 2010, **RE-215**; "'BD Agro' got to 1% of Agrobanka's shares", eKapija, 27 July 2010, **RE-216**.

¹³² R. Petrović, Dollar for the best food in Europe, Nova Politika, 27 October 2006, **CE-655** ("*Their initial investments in Serbia were not very successful. Three years ago, they were experiencing all the traps of the current market, but they did not give up. [...] They purchased [...] they expect*").

¹³³ R. Petrović, Dollar for the best food in Europe, Nova Politika, 27 October 2006, **CE-655** ("*William Bill Rand: When I saw the area of Raska... [...] Rand Edgar Investment Corporation, one of the biggest global investors in the production of healthy food in the area of Raska in Serbia [...] I have many businesses in other parts of Europe, in Geneva and Italy, I went to school in London, I am connected to Europe... But when I saw the nature in Raska... I knew that was a chance for us to discover to other people from Europe and the world the unused treasures available in the area of Raska [...] Regardless of current economic parameters, investments in the area of Raska and Serbia present such type of investment, which does not bring you high amounts of money, but make you completely satisfied*").

¹³⁴ The reference of Mr. Rand being the "largest shareholder in the joint venture" also related to the investments in Serbia as a whole, and not specifically to BD Agro.

speaking otherwise.¹³⁵ Thus, even the public image of BD Agro's ownership structure corresponded to its legal (or in Claimants' words, "nominal") ownership structure.

6.5. Claimants' behavior

65. Finally, it must be noted that Claimants intended to persist in their tenacious misrepresentation of the true owner of the shares in BD Agro, even when it came to initiating an investment treaty arbitration. As the Respondent already noted,¹³⁶ it was Mr. Obradovic who in September 2015 threatened to submit a claim against Serbia in accordance with the Canada-Serbia BIT.¹³⁷ However, Claimants now stipulate that this fact is irrelevant as the letter was allegedly drafted by Messrs. Markicevic, Broshko and Dokleštic and was approved by Mr. Rand.¹³⁸ Yet, at the same time, Mr. Broshko reveals that:

*"When we wrote this paragraph, we were under the impression that Mr. Obradovic, as the nominal owner of BD Agro shares and a double-national of Canada and Serbia would have the standing to bring a claim under the Canada-Serbia BIT. Later we realized that because of the definition of a "national" under the Canada-Serbia BIT, this would not be possible."*¹³⁹

66. This staggering admission evidently confirms that Mr. Obradovic was considered as the investor. Only after Claimants realized that Mr. Obradovic does not have the standing to sue under the Canada-Serbia BIT, an elaborate theory of the beneficial ownership arrangement was conceived in an attempt to artificially create an investment treaty claim where none exists.

¹³⁵ Minority Shareholders accuse the owner of BD "Agro" Djura Obradovic for theft and misdeeds" (Mali akcionari optuzuju vlasnika BD "Agro" Đuru Obradovica za pljacku i zloupotrebe), Kurir, 24 May 2009; emphasis added, **RE-109**; "The Minister said that he does not feed tycoons" (Ministar je rekao da ne hrani tajkune), Politika, 3 March 2010; **RE-110**; "Đura Obradovic from Vancouver, owner of "Pester-Sjenica" invested 15 mil EUR, announces another 32 mil EUR for the most modern dairies, export to the EU" (Đura Obradovic iz Vankuvera, vlasnik „Pester-Sjenica“ uložio 15 mil EUR, najavljuje još 32 mil EUR za najmodernije mlekare, izvoz u EU), eKapija, 13 March 2006, **RE-214**; "Wolves are eating me", Novosti, 29 June 2010, **RE-215**; "'BD Agro' got to 1% of Agrobanka's shares", eKapija, 27 July 2010, **RE-216**.

¹³⁶ Counter-Memorial, para. 290.

¹³⁷ Letter from Mr. Obradovic to the Agency dated 8 September 2015, p. 6, **CE-48**.

¹³⁸ Reply, para. 615.

¹³⁹ Third Witness Statement of Mr. Erinn Broshko dated 3 October 2019, para. 16.

7. Mr. Rand's motive was sinister abuse of rules concerning the payment of the purchase price

67. Despite the submission of three extensive written pleadings by Claimants and two witness statements of Mr. Rand, and of Mr. Obradovic, the reason why would Claimants opt for the peculiar “beneficial ownership structure” still remains undisclosed. However, Claimants’ silence has a good reason - the arrangement can only be explained by a bad faith motive to abuse Serbian legislation.
68. According to the Regulation on Sale, only if the declared buyer at the auction was a domestic individual (*i.e.* a natural person who is a Serbian citizen) acting alone, he could pay the sale price in up to six annual installments.¹⁴⁰ A foreign natural person and a domestic or foreign legal entity, always had to pay the price at once, as well as a joint venture of domestic and/or foreign individuals and/or legal entities.¹⁴¹ This rule was in place from 2001 until 2008, and was abolished afterwards.¹⁴²
69. Importance of this rule for the case at hand is more than evident because the payment of the Purchase Price in installments would not be possible had Mr. Rand participated in the auction. Only Mr. Obradovic, acting as the sole buyer who was a Serbian national (apart from holding Canadian nationality as well), would qualify for the payment in installments. Mr. Rand and/or any of his companies would have to pay the Purchase Price at once, immediately after the auction. Bearing in mind that the purchase price for BD Agro was over EUR 5.5 million, while the investment obligation under the Privatization Agreement was over EUR 2 million, this benefit was obviously substantial, if not crucial.
70. Indeed, the record shows that payment in installments was apparently an extremely important issue for Mr. Obradovic (or Mr. Rand).
71. *First*, as Respondent further explains below,¹⁴³ the payment in installments was misused by extracting the funds of BD Agro to effectuate the payments in question.

¹⁴⁰ Article 39(1) of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

¹⁴¹ Article 39(2) of the Regulation on the Sale of Capital and Property at a Public Auction (52/2005), **RE-218**.

¹⁴² Regulation on the Sale of Capital and Property at a Public Auction (45/2001), Article 31, **RE-217**; Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Article 39, **RE-218**.

¹⁴³ See Section I. F. 3.1.

In this way, the purchase price was effectively paid by BD Agro itself, and not by Mr. Obradovic. This would not be possible if the price had to be paid at once.

72. *Second*, even with the possibility to use BD Agro's money for effecting payments of the purchase price for the company, most of the installments were paid belatedly, after repeated warnings *i.e.* extensions given by the Agency. Only the first (out of six) installment for BD Agro was paid on time.¹⁴⁴ In that regard, the Agency issued as many as 10 warnings *i.e.* extensions of deadlines to Mr. Obradovic.¹⁴⁵ Therefore, the payment of the purchase price obviously presented an issue for Mr. Obradovic even when divided in installments and with the possibility to use BD Agro's money - it follows that the payment of the whole price at once would have been impossible.¹⁴⁶
73. *Third*, Mr. Obradovic (or Mr. Rand) also misused the possibility of paying the purchase price in installments when buying the shares in Crveni Signal, Inex, PIK Pester, Beotrans and Uvac Gazela.¹⁴⁷ At the time of each of these privatizations, the possibility of payment in installments was granted solely to domestic individuals (acting as sole buyers) under the Regulation on Sale.¹⁴⁸
74. With all of the above in mind, it is clear that Mr. Rand's main motive for acquiring ownership in BD Agro through Mr. Obradovic, could only be to deceitfully acquire

¹⁴⁴ The Agency issued warnings in relation to the second, the fourth, the fifth and the sixths installment of the purchase price, while the third installment was paid belatedly, but without the issuance of a previous warning. *See* Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, 15 October 2015, **RE-33**; Letter from the Agency to Mr. Obradovic, 1 October 2007, **RE-469**.

¹⁴⁵ Letter from the Agency to Mr. Obradovic, 2 November 2006, **RE-200**; Letter from the Agency to Mr. Obradovic, 9 October 2008, **RE-201**; Letter from the Agency to Mr. Obradovic, 3 November 2008, **RE-202**; Letter from the Agency to Mr. Obradovic, 9 December 2008, **RE-203**; Letter from the Agency to Mr. Obradovic, 11 December 2009, **RE-204**; Letter from the Agency to Mr. Obradovic, 29 January 2010, **RE-205**; Letter from the Agency to Mr. Obradovic, 15 October 2010, **RE-206**; Letter from the Agency to Mr. Obradovic, 3 December 2010, **RE-207**; Letter from the Agency to Mr. Obradovic, 25 January 2011, **RE-208**; Letter from the Agency to Mr. Obradovic, 3 March 2011, **RE-209**.

¹⁴⁶ In fact, by making partial and belated payments, Mr. Obradovic effectively paid the purchase price in 11, instead of 6 installments. *See* Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

¹⁴⁷ Assignment agreement between V. Vukelic and D. Obradovic, 2 March 2007, Article 1, **CE-565**; Privatization Agreement (Crveni Signal), 21 February 2003, Article 4, **RE-219**; Privatization Agreement (Inex), 26 November 2004, Article 1.3, **RE-220**; Privatization Agreement (PIK Pester), 3 March 2006, Article 1.3, **RE-210**; Privatization Agreement (Beotrans), 14 March 2007, Article 1.3, **RE-221**; Privatization Agreement (Uvac Gazela), 18 March 2003, Article 4, **RE-222**. Although the Regulation on Sale changed in 2005, the provision in question remained the same throughout the time of the conclusion of all of these privatization agreements (2001-2008). *See* Regulation on the Sale of Capital and Property at a Public Auction (45/2001), Article 31, **RE-217**; Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Article 39, **RE-218**.

¹⁴⁸ Regulation on the Sale of Capital and Property at a Public Auction (45/2001), Article 31, **RE-217**; Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Article 39, **RE-218**.

the possibility of paying the purchase price in six installments under an elaborate scheme where the payments were mainly made by the company itself.

8. Conclusion

75. It is undeniable that Mr. Rand could have appeared as the buyer. But, in Claimants' narrative, he chose not to. Instead, Mr. Obradovic signed all the papers in his own name and on his behalf. By signing the Privatization Agreement, he personally assumed all rights and obligations regarding BD Agro. After signing the Privatization Agreement, Mr. Obradovic continued to act as the owner of BD Agro's shares. He never negated that he was the owner.
76. Simply speaking, if it looks like a duck, swims like a duck, and quacks like a duck, then it probably *is* a duck. Likewise, if Mr. Obradovic participated at the auction as the buyer, acted as the owner of the shares and never said that he is not the owner, then he probably *was* the owner.
77. If, however, Mr. Rand's story of the beneficial arrangement was true, and the duck was not a duck, then there were two possible motives for such conduct: (i) gaining the possibility to pay the purchase price in six installments; and (ii) evasion of all (civil and criminal) liability. This would be a blatant violation of good faith and such arrangement cannot have any investment treaty protection.

B. TERMINATION OF THE PRIVATIZATION AGREEMENT

78. The central issue raised by Claimants in the present proceedings revolves around a purely contractual topic – the termination of the Privatization Agreement. Although this seems as a common subject of dispute, the first impression is misleading – the cause of the dispute is completely atypical. This is a case of a notoriously negligent investor who was given literally a hundred of second chances to fulfill his obligations from privatization agreements and who is now unsatisfied as one of his contracts was terminated after he was unable to cure the same breach for almost five years. In other words, Respondent is being sued because the Agency was giving too many chances to Claimants *i.e.* their alleged *alter ego* Mr. Obradovic.

79. The Agency is also criticized because it terminated the Privatization Agreement due to an allegedly minor breach of the contract i.e. breach of an obligation that is insignificant. Yet, Claimants fail to explain why, during almost five years of additional deadlines, Mr. Obradovic did not fulfil that obligation - if the obligation was *insignificant*, than its fulfillment should not have been difficult for Mr. Obradovic.
80. In this section, Respondent explains: **(1)** Mr. Obradovic's history of negligent contractual performance; **(2)** the obvious breach of Article 5.3.4. of the Privatization Agreement; **(3)** the contracting parties' conduct regarding the breach of Article 5.3.4.; **(4)** the Ministry of Economy's position; and **(5)** the legal ground for termination of the Privatization Agreement.

1. Mr. Obradovic's history of negligent contract performance

81. When reading Claimants' submissions, one could get an impression that Mr. Obradovic was a diligent investor who fulfilled all his obligations in due course but was nevertheless harmed by the State through an unlawful and unjustified termination of the Privatization Agreement. Yet, the truth is quite the opposite.
82. Mr. Obradovic was an extremely problematic buyer who was given a number of "second chances" and extensions for the fulfillment of his obligations related to various privatized companies, including BD Agro. The Privatization Agreement was terminated only after he was not able to cure its one breach for almost five years. Those are the inescapable facts.

1.1. Breaches of other privatization agreements

83. Mr. Obradovic (*i.e.* Mr. Rand) prides himself in acquiring several companies other than BD Agro in the privatization process (PIK Pester, Inex, Crveni Signal, Beotrans). However, what Claimants do not mention is that in these privatizations Mr. Obradovic also made a number of breaches of privatization agreements, including the breach of article 5.3.4. (which corresponded to the same provision in the Privatization Agreement).
84. As in the case of BD Agro, in these other privatizations Mr. Obradovic was also granted numerous additional time extensions in order to fulfill his obligations and remedy the breaches in question. Specifically, Mr. Obradovic was issued with:

- i. 25 notices/extensions for PIK Pester;¹⁴⁹
 - ii. 19 notices/extensions for Beotrans;¹⁵⁰
 - iii. 13 notices/extensions for Inex;¹⁵¹
 - iv. 6 notices/extensions for Crveni Signal.¹⁵²
85. In other words, more than 60 notices and extensions were given to Mr. Obradovic in privatizations other than BD Agro (all claimed to be beneficially owned by Mr. Rand¹⁵³). In each case, Mr. Obradovic eventually managed to remedy the breach, albeit with more or less delays. The only breach where he was ultimately unsuccessful despite additional extensions of time, was the 221 Million Pledge in the case of BD Agro.
86. This clearly demonstrates that Mr. Obradović was an experienced investor, in particular when it comes to the privatization in Serbia, and that he was very well aware of the true extent of his obligations towards the Agency under the Privatization Agreement.

1.2. Breaches of the Privatization Agreement

87. In the case of BD Agro, the Agency issued 30 notices to Mr. Obradovic with extension of time for fulfillment of the obligations.
88. Mr. Obradovic was in breach of his obligations almost immediately after the conclusion of the Privatization Agreement. According to Article 3.3 of the Privatization Agreement, Mr. Obradovic was under the obligation to submit to the Agency an unconditional bank guarantee for the fulfillment of mandatory investment obligations, within 30 days from the date of signing of the Privatization Agreement.¹⁵⁴

¹⁴⁹ Report from the 17th control of PIK Pester, 1 April 2011, p. 2, **RE-379**.

¹⁵⁰ Report from the 9th control of Beotrans (with supplementations), 21 April 2011, **RE-404**.

¹⁵¹ Report from 9th control of Inex, 5 March 2010, **RE-403**.

¹⁵² Letter from the Privatization Agency to Mr. Obradovic dated 30 August 2007, **RE-407**; Letter from the Privatization Agency to Mr. Obradovic dated 30 May 2008, **RE-408**.

¹⁵³ Second Witness Statement of Mr. William Rand, 3 October 2019, para. 6.

¹⁵⁴ Privatization Agreement with Annexes, 4 October 2005, **CE-17**, Article 3.3.

However, when he did not submit the guarantee within the said deadline, the Agency sent Mr. Obradovic four warning notices, granting him extensions of the deadline.¹⁵⁵

89. Finally, more than six months after the first notice was served, Mr. Obradovic provided the guarantee.¹⁵⁶
90. Mr. Obradovic struggled with the payment of the Purchase Price as well. In 2006, the second installment was paid only after a warning notice was sent to him.¹⁵⁷ Two years later, in 2008, he paid the fourth installment after three notices,¹⁵⁸ while in 2009, he paid the fifth installment after three notices.¹⁵⁹ In 2010, the Privatization Agency demonstrated more understanding than ever before, when it gave Mr. Obradovic as many as four extensions of the deadline for payment of the sixth installment of the Purchase Price.¹⁶⁰
91. Mr. Obradovic however showed most persistence and lack of care by indebting BD Agro and pledging its assets for the benefit of third parties, contrary to Article 5.3.4. of the Privatization Agreement. In one of its controls, the Privatization Agency discovered that, in 2008, BD Agro pledged some of its real estate in order to secure a EUR 400,000 loan given by *Erste Bank* to another company - Vihor.¹⁶¹ In the same period, it made another discovery of additional pledges established on BD Agro's real estate as the security for repayment of a loan taken by Inex.¹⁶² In February 2009, Mr. Obradovic was warned and given an additional deadline to cure the said breaches.¹⁶³

¹⁵⁵ Letter from the Privatization Agency to Mr. Obradovic, 8 November 2005, **RE-380**; Letter from the Privatization Agency to Mr. Obradovic, 2 March 2006, **RE-381**; Letter from the Privatization Agency to Mr. Obradovic, 12 April 2006, **RE-382**; Letter from the Privatization Agency to Mr. Obradovic, 1 June 2006, **RE-383**.

¹⁵⁶ Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 7, **CE-98**.

¹⁵⁷ Letter from the Privatization Agency to Mr. Obradovic, 2 November 2006, **RE-200**.

¹⁵⁸ Letter from the Privatization Agency to Mr. Obradovic, 9 October 2008, **RE-201**; Letter from the Privatization Agency to Mr. Obradovic, 3 November 2008, **RE-202**; Letter from the Privatization Agency to Mr. Obradovic, 9 December 2008, **RE-203**.

¹⁵⁹ Letter from the Privatization Agency to Mr. Obradovic, 16 October 2009, **RE-384**; Letter from the Privatization Agency to Mr. Obradovic, 11 December 2009, **RE-204**; Letter from the Privatization Agency to Mr. Obradovic, 29 January 2010, **RE-205**.

¹⁶⁰ Letter from the Privatization Agency to Mr. Obradovic, 15 October 2010, **RE-206**; Letter from the Privatization Agency to Mr. Obradovic, 3 December 2010, **RE-207**; Letter from the Privatization Agency to Mr. Obradovic, 25 January 2011, **RE-208**; Letter from the Privatization Agency to Mr. Obradovic, 3 March 2011, **RE-209**; Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, 15 October 2015, **RE-33**.

¹⁶¹ Letter from the Privatization Agency to Mr. Obradovic, 24 February 2009, **RE-385**.

¹⁶² Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 31 March 2009, **RE-100**.

¹⁶³ Letter from the Privatization Agency to Mr. Obradovic, 24 February 2009, **RE-385**.

As he failed to comply with the notice, more warnings and extensions came. Finally, after seven additional notices *i.e.* extensions, Mr. Obradovic complied and erased the pledges in question, as explained in more detail below.¹⁶⁴ It should be noted that each time that the Agency gave an extension because of these breaches of Article 5.3.4, it explicitly warned that the Privatization Agreement would be terminated in case of non-compliance.¹⁶⁵

92. In summary, apart from the breach that lead to the termination of the Privatization Agreement, Mr. Obradovic committed a number of other breaches that could be a reason for the Agency to declare the said agreement terminated throughout its duration. However, the Agency demonstrated extreme patience and understanding, and gave Mr. Obradovic as many as twenty-one “second chances”.
93. Even after all this, the Agency did not lose patience with Mr. Obradovic. On the contrary, as explained further below, the Agency gave another four years of extensions to Mr. Obradovic (raising the total number of warning notices to 30), before it terminated the Privatization Agreement, because even after all this time Mr. Obradovic did not remedy the breach. Claimants now contend¹⁶⁶ that the termination was conducted too late *i.e.* that the Agency had to terminate the Agreement when it discovered the breach. In other words, the Agency is accused of giving too many chances to Mr. Obradovic. This is absurd.
94. Apparently, Claimants are on the position that it would be fairer that in case of 221 Million Loan the Agency acted differently than in the case of the previous breaches when Mr. Obradovic was also given a number of additional deadlines to remedy the breach (which he did each time, except with 221 Million Loan breach).

2. There was obvious breach of Article 5.3.4.

95. This dispute revolves around an uncontested factual state. It is undisputed that, on 22 December 2010, BD Agro, as debtor, entered into a Loan Agreement with Agrobanka

¹⁶⁴ Section I. B. 3.3.3.

¹⁶⁵ Letter from the Privatization Agency to Mr. Obradovic, 31 March 2009, **RE-386**; Letter from the Privatization Agency to Mr. Obradovic, 13 April 2009, **RE-387**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 30 July 2009, **RE-103**; Letter from the Privatization Agency to Mr. Obradovic, 24 February 2009, **RE-385**.

¹⁶⁶ Reply, paras. 393 *et seq.*

for the amount of RSD 221,000,000 (app EUR 2 million)¹⁶⁷ (“**221 Million Loan**”). It is also uncontested that around 50% of the 221 Million Loan was used for the benefit of two of Mr. Obradovic’s affiliated companies, and that these amounts were never returned to BD Agro. Finally, it is uncontested that this agreement served as a basis to establish a pledge over BD Agro’s real estate on 14 January 2011, as security for repayment of the amount of RSD 221,000,000 (and other obligations from the agreement).¹⁶⁸

96. However, what is contested in the present arbitration is whether this constituted a contract breach. Claimants contend that Article 5.3.4. of the Privatization Agreement was not breached by the 221 Million Loan, *i.e.* by the manner in which that loan was used. As will be elaborated hereunder, this is incorrect.

2.1. Meaning and purpose of Article 5.3.4.

97. Article 5 of the Privatization Agreement deals with the representations, warranties and obligations of the buyer. Among other things, in Article 5.3.4, Mr. Obradovic obliged himself that, without the previous written approval by the Agency, BD Agro:

*“[...] will not encumber with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards the subject stemming from regular business activities of the subject, or except for the purpose of acquiring of the funds to be used by the subject.”*¹⁶⁹

98. Therefore, the cited provision established that a pledge on the fixed assets was prohibited, and that it was only allowed as an exception for two limited purposes: (i) securing claims towards BD Agro stemming from regular business activities; or (ii)

¹⁶⁷ At the time the 221 Million Agreement was concluded, on 22 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 106.44 (221,000,000 ÷ 106.44 = 2,076,287.11). National Bank of Serbia RSD Exchange Rate on 22 December 2010, **RE-44**.

¹⁶⁸ Pledge was constituted over cadastral parcels no. 4670, 4673-4684, 4686-4687, 5516-518, 5527-5528, 5544, 5546-5549, 5550/1, 5553, 5574-5584, 5587-5589, 5023/1, 5023/5, 5023/7, 5521 and 5522, all located in cadastral municipality Dobanovci and owned by BD Agro. Decision of the First Basic Court in Belgrade no. Dn-14124/10 of 14 January 2011, **RE-9**; Excerpt from the Land Register no. 4031, cadastral municipality Dobanovci of 13 March 2019, **RE-45**.

¹⁶⁹ Article 5.3.4. of the Privatization Agreement, **RE-12**.

acquiring funds to be used for the benefit of BD Agro. The stipulated rule was thus quite straightforward and was explained in detail in Counter-Memorial.¹⁷⁰

99. Nevertheless, Claimants (and their expert Mr. Milosevic) are persistent with introducing an interpretation of Article 5.3.4. which is completely divorced from reality. According to them, the “regular business activity” of BD Agro encompasses loaning the funds;¹⁷¹ the funds are used by BD Agro even when they are spent for benefit of third persons;¹⁷² and the purpose of Article 5.3.4. is only to secure fulfillment of other contractual obligations,¹⁷³ meaning that the Privatization Agreement could not be terminated only for the breach of that provision. This is all wrong.

2.1.1. BD Agro’s “regular business activity” was not loaning funds

100. BD Agro’s “regular business activity” was agriculture. In fact, the translation of BD Agro’s full name at the time of the Privatization reads as “Agricultural-food industry” Budućnost Dobanovci.¹⁷⁴ The public call for the auction for BD Agro also stated that its business activity was “*Growing grain and crops and planting*”.¹⁷⁵ Furthermore, the public call also described that the “*most important products / services*” of BD Agro were: “*1-wheat, (seed, mercantile) 2-sunflower, mercantile, 3-barley (seed and mercantile), 4-sugar beet, 5-table eggs, 6-beef cattle, 7-lambs and pigs, 8-unprocessed milk.*”¹⁷⁶ The management of BD Agro after the auction also described the business activity of BD Agro as “*milk production*” or “*primary agricultural production*”.¹⁷⁷
101. Since BD Agro was an agricultural company, and not a bank or a credit institution, paying out debts of third parties and giving out interest-free loans definitely does not fall under its “regular business activity”. Yet, Claimants beg to differ.

¹⁷⁰ Counter-Memorial, paras. 88-96.

¹⁷¹ Reply, para. 165.

¹⁷² Second Expert Report of Mr. Milos Milosevic, 3 October 2019, paras. 46; Reply, para. 170.

¹⁷³ Second Expert Report of Mr. Milos Milosevic, 3 October 2019, paras. 66.

¹⁷⁴ Public Call for BD Agro’s Auction, 26 August 2005, **RE-397** (in Serbian: “Poljoprivredno-prehrambena industrija”).

¹⁷⁵ Public Call for BD Agro’s Auction, 26 August 2005, **RE-397**.

¹⁷⁶ Public Call for BD Agro’s Auction, 26 August 2005, **RE-397**.

¹⁷⁷ BD Agro’s Business Plan for the years 2006-2011, pp. 4-5, 8, 14, **CE-20**.

102. Claimants argue that the use of the 221 Million Loan did not present a breach of Article 5.3.4. because the transactions between BD Agro, Crveni signal and Inex “*represented regular business activity which is common in groups of companies that share the same ultimate owner.*”¹⁷⁸ According to this unreasonable position, any and all companies in the world, regardless of what industry they are in and what is their main work activity (be it wood processing, aluminum production, education, healthcare, banking, tourism or literally anything else), share a common “*regular business activity*” of giving out loans, assuming and/or paying out third parties’ debts - as long as they share the same ultimate owner with the third parties in question. Needless to say, such interpretation has no sense and completely ignores the ordinary meaning of the term “regular business activity”.

2.1.2. Using of funds by BD Agro means using the funds for its benefit

103. According to Claimants, since Article 5.3.4. states that BD Agro can pledge its assets “*for the purpose of acquiring of the funds to be used*” by BD Agro, Mr. Obradovic did not commit a breach as the funds from the 221 Million Loan were “used by” BD Agro “*to repay the debt it had assumed from Crveni Signal [...] and BD Agro used another part of these funds to provide a loan to Inex*”.¹⁷⁹ Remarkable word play, to say the least. Again, the interpretation offered by Claimants only leads to absurd results, as Article 5.3.4. would be rendered meaningless. The Buyer would be allowed to easily evade the said rule by simply taking an unlimited number of loans, pledging all of its property, and forwarding all such funds to third parties, claiming that the funds are being “used” by BD Agro. This obviously cannot be the correct interpretation of Article 5.3.4.

104. In addition, Claimants’ interpretation also rests on an inaccurate translation of the words “*čiji će korisnik biti subjekt*”. In Prof. Radovic’s opinion, these words „*could only mean that the pledges could have secured BD Agro’s acquisition of funds for the benefit of BD Agro*”, and not *to be used by* BD Agro.¹⁸⁰ Thus, the accurate translation of Article 5.3.4. also confirms that any funds secured by a pledge over BD Agro’s property had to be used for the benefit of BD Agro and nobody else.

¹⁷⁸ Reply, para. 165.

¹⁷⁹ Reply, paras. 168-170.

¹⁸⁰ Second Expert Report of Prof. Radovic, 24 January 2020, para. 24.

105. With respect to Inex, Claimants allege¹⁸¹ that BD Agro only “returned a favor” since Inex acquired certain debts of BD Agro back in 2005 and decided not to pursue an alleged interest of EUR 1.7 million. First of all, there is no evidence in support of this argument – the existence of the interest is not proven let alone that it was not paid. In addition, this “favor” was nowhere to be mentioned in the interest-free loan agreement.¹⁸² Finally, and more importantly, Article 5.3.4. does not recognize any exception when it comes to use of the funds for the benefit of third parties – this is simply prohibited if they are acquired through pledging the fixed assets of BD Agro.¹⁸³ Mr. Obradovic knew this full well, and even confirmed the same understanding with the Agency when it previously made the same breach and agreed to remedy it.¹⁸⁴
106. Hence, bearing in mind the use of the 221 Million Loan, which was secured by the 221 Million Pledge, there was obviously a breach of Article 5.3.4. of the Privatization Agreement because the loaned funds were not used by BD Agro. Mr. Obradovic was well aware that in that way he breached the Privatization Agreement. As in the cases of his previous breaches of Article 5.3.4. in BD Agro¹⁸⁵ and PIK Pester,¹⁸⁶ Mr. Obradovic was aware that his actions were contrary to the Privatization Agreement, so he again admitted his breach and promised to remedy it.¹⁸⁷
107. Respondent’s interpretation is supported by case law of Serbian courts. Commercial Court decided in 2011 in the *Betonjerka* case, that this kind of behavior constituted a clear case of bad faith that breached Article 5.3.4.¹⁸⁸ In the *Betonjerka* case the subject of privatization was a company for production of concrete pillars, power substations and accompanying elements for construction and maintenance of electric power facilities.¹⁸⁹ However, it borrowed the funds obtained through loans (which were

¹⁸¹ Reply, para. 157.

¹⁸² Agreement on Interest-Free Loan of 29 December 2010, **RE-10**.

¹⁸³ In fact, the “favor” could only explain the motive behind Mr. Obradovic’s conduct with respect to the 221 Million Loan, which was, however, utterly irrelevant. Therefore, the “favor” was legally inexistent for the purpose of interpreting the pertinent contractual provisions. Furthermore, as Mr. Rand explained, this “favor” was apparently done in order to enable him to buy BD Agro *i.e.* to improve his chances of success in the bidding process (See Second Witness Statement of Mr. William Rand, 3 October 2019, para. 22). Therefore, Mr. Rand states that the debt was acquired in order to be sure that bankruptcy would not be initiated before the auction, and because it improved Mr. Rand’s chances of success at the auction itself. Hence, Inex was not “doing a favor” to BD Agro, but to Messrs. Obradovic and Rand.

¹⁸⁴ See Section I. B. 3.3.3

¹⁸⁵ See Section I. B. 3.3.3

¹⁸⁶ See Section I. B. 3.3.2.

¹⁸⁷ See Section I. B. 3.2.1 and I. B. 3.2.2.

¹⁸⁸ Judgment of the Commercial Court in Belgrade, No. 4.P 1744/10, dated 3 June 2011, pp. 11-12, **RE-370**.

¹⁸⁹ Judgment of the Commercial Court in Belgrade, No. 4.P 1744/10, dated 3 June 2011, p. 1, **RE-370**

secured by the pledges) to affiliated entities of the buyer. The court concluded that the buyer acted in bad faith as the pledges were not established to secure claims stemming from the regular business activity of the subject, seeing that credit placements were not part of its business.¹⁹⁰ The court also concluded that the funds in question were not “used by” the subject as they were just forwarded *i.e.* loaned to other entities.¹⁹¹ This decision was confirmed in the appellate proceedings by the second instance court.¹⁹²

108. Finally, in their Reply, Claimants repeat their argument that the Privatization Agreement was not breached by the pledge, since the pledge was not established by Mr. Obradovic, as the buyer, but by BD Agro.¹⁹³ As Respondent has already explained the absurdity of this assertion in the Counter-Memorial the Tribunal is kindly directed to that discussion.¹⁹⁴

2.1.3. Purpose of Article 5.3.4.

109. When it comes to purpose of Article 5.3.4. it was well defined in the decision of the Commercial Court of Appeal in the *Betonjerka* case:

*“The goal of the provision of Article 5.3.4. is to protect the property of the subject of privatization and to safeguard the material base of the business of the subject of privatization, without which the buyer, due to their nature and the nature of the contract, cannot fulfill other contractual obligations, cannot secure continuity of business operations of the enterprise and fulfillment of the agreed obligations.”*¹⁹⁵

110. The court clearly emphasized that the purpose of Article 5.3.4. is “[i] to protect the property of the subject of privatization”; and [ii] to safeguard the material base of the

¹⁹⁰ Judgment of the Commercial Court in Belgrade, No. 4.P 1744/10, dated 3 June 2011, p. 12, **RE-370**. (“[...] the plaintiff has not [...] proven that he acted in good faith during the conclusion of the said legal arrangements *i.e.* it does not arise that these arrangements served the purpose of securing claims towards the subject which stemmed from the regular business activity of the subject as its business are not credit placements *i.e.* it does not arise that they have been concluded for the purpose of acquiring funds to be used by the subject (in accordance with Article 5.3.4. of the Agreement)”).

¹⁹¹ Ibid.

¹⁹² Judgment of the Commercial Appellate Court No. Pž 8687/2011, 18 December 2012, **CE-722**.

¹⁹³ Reply, para. 167.

¹⁹⁴ Counter-Memorial, para. 96.

¹⁹⁵ Judgment of the Commercial Appellate Court No. Pž 8687/2011, 18 December 2012, p. 5, **CE-722**.

business of the subject of privatization.”¹⁹⁶ The court just went on to add that the values which are protected by Article 5.3.4, are also necessary, due to their nature and the nature of the contract, to fulfill other contractual obligations, such as securing continuity of business operations of the enterprise. This reasoning obviously stems from the basic principles of the Law on Privatization, which include, *inter alia*, the creation of conditions for economic development and social stability.¹⁹⁷ These principles are the very reason why Article 5.3.4. was introduced. Pledges are basically a synonym for liquidity issues and instability. Without such provision, the buyer would be free to pledge all assets of the subject of privatization for the benefit of any third persons (which Claimants state Article 5.3.4. allows) meaning that regardless of the fulfillment of all other obligations, principles of economic development and social stability would still not be achieved. Therefore, as also confirmed by Prof. Radovic,¹⁹⁸ it is incorrect to state that after fulfillment of other obligations Article 5.3.4. lost its purpose after the payment of the purchase price.

111. With this in mind it is more than clear how erroneous is Claimants’ (and their expert’s) conclusion that “*upon the payment of the full purchase price and the fulfilment of all other obligations under the Privatization Agreement, Article 5.3.4. lost its purpose because there was no longer any outstanding contractual performance to be secured.*”¹⁹⁹
112. Claimants’ interpretation of the cited decision is illogical for another reason as well. Payment of the purchase price is obligation that should have been executed by the Buyer and without the effect on BD Agro’s property. Hence, Article 5.3.4. (which protected the property of BD Agro) could not serve as a security for payment of the purchase price.
113. On the other hand, Claimants argue that Respondent’s interpretation of Article 5.3.4. is “*nonsensical*” since, according to the Privatization Agreement, BD Agro was free to *sell* its land plots for EUR 2 million in December 2010 (assuming the 10% and 30% limits would not have been reached) and loan or even donate the proceeds from the

¹⁹⁶ Judgment of the Commercial Appellate Court No. Pž 8687/2011, 18 December 2012, p. 5, **CE-722**.

¹⁹⁷ Article 2 of the 2001 Law on Privatization, **CE-220**.

¹⁹⁸ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 27.

¹⁹⁹ Reply, para. 402.

sale to other entities.²⁰⁰ Therefore, according to Claimants, the “more disruptive option” (sale and donation or loan) is clearly allowed by the Privatization Agreement—while under Serbia’s interpretation, the “less disruptive option” (pledge and loan) would have been prohibited.

114. However, the truth is that Claimants’ interpretation would actually be the most disruptive for BD Agro, as BD Agro would be free to pledge all of its land in exchange for loans, and then donate or loan all of the funds thus acquired to third parties. Having been used to a one way extraction of funds and assets from BD Agro, Claimants’ seem to struggle with seeing the major difference between Articles 5.3.3. and 5.3.4. In case of the former, BD Agro disposes of its assets, but the corresponding purchase price for such assets returns back to the company. In case of the latter, funds only exit BD Agro and its pledged assets are only put at a risk of being compulsorily sold with no benefit for the company.

115. The idea behind Articles 5.3.3. and 5.3.4. is to disable uncontrolled disposal of BD Agro’s property. Article 5.3.3. allowed the Buyer to freely dispose with limited scope of the assets, meaning that, as suggested by Claimants, BD Agro could have sold its land and donate the proceeds from the sale, as long as the 10% and 30% limitations are not reached. This limitation in disposal of the property is exactly the reason why the restriction from Article 5.3.4. was needed. Otherwise Article 5.3.3. would be meaningless, as the 10% and 30% limitations could be easily evaded. In fact, this is exactly what Claimants intend to do with their interpretation of Article 5.3.4. - to render it meaningless.

2.2. Use of 221 Million Loan breached Article 5.3.4.

116. Contrary to Claimants’ irrational assertions,²⁰¹ Mr. Obradovic’s breach of Article 5.3.4. of the Privatization Agreement was quite straightforward as out of the 221 Million Loan, which was secured by the 221 Million Pledge, almost 50% i.e. EUR

²⁰⁰ Reply, paras. 171-172.

²⁰¹ Reply, paras. 387-392.

959,719.60, was used for benefit of Mr. Obradovic *i.e.* Inex and Crveni Signal, companies owned by Mr. Obradovic²⁰² *i.e.* Mr. Rand²⁰³.

117. The 221 Million Agreement - On 22 December 2010, Agrobanka as creditor and BD Agro as debtor concluded the 221 Million Agreement for the amount of RSD 221,000,000 (app EUR 2 million),²⁰⁴ to be used for “*the consolidation of the company and related entities*”.²⁰⁵
118. The 221 Million Pledge - Based on the 221 Million Agreement, BD Agro submitted to the court the request for registration of pledge accompanied by the statement of pledge.²⁰⁶ On 14 January 2011, the court registered the 221 Million Pledge as security for repayment of the amount of RSD 221,000,000 (and other obligations from the agreement) over BD Agro’s real estate. This pledge remains until today.²⁰⁷
119. By establishing the 221 Million Pledge, Mr. Obradovic obviously “*encumbered with pledge the fixed assets*” of BD Agro, in the meaning of Article 5.3.4. of the Privatization Agreement. He also evidently “*disposed of its property*” in the meaning of Article 41a(1) of the Law on Privatization.
120. The next question that needs to be answered is: has Mr. Obradovic established the 221 Million Pledge for the purpose of securing claims towards BD Agro stemmed from its regular business activities or for the purpose of acquiring of the funds for the benefit of BD Agro (in accordance with Article 5.3.4)? The answer is a resounding “no”.
121. BD Agro guaranteed the repayment for Crveni Signal – Prior the 221 Million Loan Agreement was concluded, on 2 June 2010, Crveni Signal concluded the Short Term Loan Agreement with Agrobanka in the amount of RSD 65.000.000 (app EUR

²⁰² Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, p. 2, **RE-72**.

²⁰³ Second Witness Statement of Mr. William Rand, 3 October 2019, para. 6.

²⁰⁴ At the time the 221 Million Agreement was concluded, on 22 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 106.44 (221,000,000 ÷ 106.44 = 2,076,287.11). National Bank of Serbia RSD Exchange Rate on 22 December 2010, **RE-44**.

²⁰⁵ Short Term Loan Agreement no. K-571/10-00 of 22 December 2010, Article 1, **RE-6**.

²⁰⁶ Request for registration of pledge in accordance with the Short Term Loan Agreement no. K-571/10-00, **RE-7**. Statement of pledge no. Ov-37246/2010 of 28 December 2010, **RE-8**.

²⁰⁷ Pledge was constituted over cadastral parcels no. 4670, 4673-4684, 4686-4687, 5516-518, 5527-5528, 5544, 5546-5549, 5550/1, 5553, 5574-5584, 5587-5589, 5023/1, 5023/5, 5023/7, 5521 and 5522, all located in cadastral municipality Dobanovci and owned by BD Agro. Decision of the First Basic Court in Belgrade no. Dn-14124/10 of 14 January 2011, **RE-9**; Excerpt from the Land Register no. 4031, cadastral municipality Dobanovci of 13 March 2019, **RE-45**.

600,000).²⁰⁸ Simultaneously, BD Agro guaranteed the repayment of that loan to Agrobanka.²⁰⁹ On the same day that Crveni Signal received the funds from Agrobanka, it immediately transferred them to the personal bank account of Mr. Obradovic.²¹⁰ The said loan remained unsettled. That is where BD Agro came in.

122. Agreement on Assumption of Crveni Signal's Debt - On 28 December 2010, only a few days after the conclusion of the 221 Million Loan Agreement, Crveni Signal, Agrobanka and BD Agro concluded the Agreement on Assumption of Debt under which BD Agro assumed the entire debt of Crveni Signal towards Agrobanka from the Short Term Loan Agreement of Crveni Signal, in the amount of RSD 65,000,000 (app EUR 600,000)²¹¹ plus interest, whereas Crveni Signal was released from the said debt.²¹² The funds were provided from the 221 Million Loan.
123. Agreement on Interest-Free Loan to Inex - At the same time, on 29 December 2010, BD Agro and Inex (another company owned by Mr. Obradovic²¹³ *i.e.* Mr. Rand²¹⁴) concluded an Agreement on Interest-Free Loan to Inex by which BD Agro undertook to provide to Inex a cash loan in the amount of RSD 32,000,000 (app EUR 300,000).²¹⁵ Same as with Crveni Signal's debt, these funds also ended up on Mr. Obradovic's private bank account.²¹⁶ The pertinent funds were also provided from the 221 Million Loan.
124. It is important to note that Claimants do not dispute these facts in any way. They only disagree with legal qualification of whether or not these circumstances constituted a

²⁰⁸ Agreement on Assumption of Debt of 28 December 2010, Articles 1 and 4, **RE-11**. At the time the Agreement on Assumption of Debt of Crveni Signal was concluded, on 28 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 106.08 (65,000,000 ÷ 106.08 = 612,745.09). National Bank of Serbia RSD Exchange Rate on 28 December 2010, **RE-81**.

²⁰⁹ Guarantee agreement between BD Agro and Agrobanka, 2 June 2010, **RE-005**.

²¹⁰ Crveni Signal Bank Statement, 2 June 2010, **RE-372**.

²¹¹ At the time the Agreement on Assumption of Debt of Crveni Signal was concluded, on 28 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 106.08 (65,000,000 ÷ 106.08 = 612,745.09). National Bank of Serbia RSD Exchange Rate on 28 December 2010, **RE-81**.

²¹² Agreement on Assumption of Debt of 28 December 2010, Articles 1 and 4, **RE-11**.

²¹³ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, p. 2, **RE-72**.

²¹⁴ Second Witness Statement of Mr. William Rand, 3 October 2019, para. 6.

²¹⁵ Agreement on Interest-Free Loan of 29 December 2010, Articles 1 and 4, **RE-10**. At the time the Agreement on Interest-Free Loan to Inex was concluded, on 29 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 105.88 (32,000,000 ÷ 105.88 = 302,228.94). National Bank of Serbia RSD Exchange Rate on 29 December 2010, **RE-82**.

²¹⁶ Bank Statement of Mr. Obradovic's, 14 February 2011, **RE-437**;

breach. Therefore, it is undisputed that (contrary to the clear wording of Article 5.3.4.) BD Agro encumbered with pledge its fixed assets in order to, *inter alia*:

- a) payout Crveni Signal's debt towards Agrobanka in the total amount of RSD 70,944,422.27 (EUR 670,045.54),²¹⁷ and
- b) give out an interest free loan to Inex in the total amount of RSD 30,670,690 (EUR 289,674.06).²¹⁸

125. The Agency discovered the said transactions in January 2011. In February 2011 it notified the breach of Article 5.3.4. and requested an according remedy from Mr. Obradovic. During the following four years, the Agency granted another eight additional terms for remedying this same breach. Yet, all auditor's reports Mr. Obradovic delivered to the Agency throughout period 2011-2015 consistently showed that the debts of Crveni Signal and Inex remained unpaid and that the 221 Million Pledge remained registered.

126. What is shocking is that Mr. Obradovic and Claimants lie through their teeth (any other phrase would be inappropriate) that the 221 Million pledge was erased *i.e.* that it is only formality to erase it. They lied not once but three times. And they lied not only to the Agency but also to the Tribunal. This fact speaks for itself.

127. First time Mr. Obradovic lied in his letter to the Agency of 10 September 2015, when he explicitly stated that:

“[I] attached the evidence that BD Agro is in possession of all the documents needed for deletion of pledges registered on its immovable property as security instruments for the loans BD Agro received from Nova Agrobanka [], which were partially used to finance loans approved to related parties — Inex — Nova Varos [] and Crveni Signal []. Since BD Agro repaid these loan obligations in timely manner, on September 4, 2015, Nova

²¹⁷ Audit report by Auditor doo of 29 April 2011, **RE-13**. On 29 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 105.88 ($70,944,422.27 \div 105.88 = 670,045.54$). National Bank of Serbia RSD Exchange Rate on 29 December 2010, **RE-82**.

²¹⁸ Audit report by Auditor doo of 29 April 2011, **RE-13**. On 29 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 105.88 ($30,670,690 \div 105.88 = 289,674.06$). National Bank of Serbia RSD Exchange Rate on 29 December 2010, **RE-82**.

*Agrobanka provided appropriate statement for deletion of these pledges [...] This way, complete fulfillment of obligations referred to in Article 5.3.4. of the Agreement was ensured, since all of the conditions were met for the deletion of all disputed aforementioned pledges (all necessary documents were obtained), and BD Agro is waiting for an appropriate decision from the [...] Real Estate Cadastre Office on deletion of the pledges”.*²¹⁹

128. The second time Claimants lied in their Memorial. This time they attempted to deceive the Tribunal in the same way Mr. Obradovic tried to deceive the Agency and provided the same documentation that referred to removal of another pledge, not the 221 Million Pledge. They even dare argue how shocking it was of the Agency not to accept these papers as evidence that the pledge, due to which the Privatization Agreement was terminated, was deleted.²²⁰ However, after being confronted in Respondent’s Counter-Memorial with the fact that the said documentation related to a completely different pledge (while the 221 Million Pledge remains registered),²²¹ in their Reply Claimants have said nothing more in this regard, thereby ostensibly putting an end to this embarrassing attempt of deception.
129. However, Claimants did not refrain from lying for the third time, by advancing another misleading argument which states that the 221 Million Loan was repaid by a new loan from Nova Agrobanka in 2012 (“**Refinancing Loan**”), and that Nova Agrobanka “*could not exercise any pledge rights after the repayment of the secured loan in 2012*”.²²² Claimants further stated that the “*continuing formal existence of the pledge [...] did not violate Article 5.3.4. of the Privatization Agreement*”.²²³ Here, after all, Claimants admit that the pledge continues to exist, albeit "formally". However, their explanation is all wrong, just like the conclusion of the auditor Prva Revizija (on

²¹⁹ Letter from Mr. Djura Obradović to Privatization Agency , 8 September 2015, p. 3, **CE-48**.

²²⁰ Memorial, paras. 213 (“Attached to the letter were documents showing BD Agro’s request to the Land Register for removal of the pledge on BD Agro’s land securing Crveni Signal’s debt, which had been granted on 7 September 2018. The letter also reminded the Privatization Agency that BD Agro’s auditors had confirmed that the conditions for removal of the remaining pledges had been met because the secured loans had been repaid”), 409 (“In fact, Mr. Obradović remedied the purported breach of Article 5.3.4. when all the requirements for the removal of the allegedly non-compliant pledge were met and the pledge was ultimately deleted from the Land Register on 7 September 2015”).

²²¹ Counter-Memorial, para. 75.

²²² Reply, para. 425.

²²³ Reply, para. 426.

which Claimants rely) that “*Mortgages on the basis of security for obligations of third person have not been deleted, but those obligations have been settled and the conditions have been met for deletion of mortgage on this basis*”.²²⁴

130. First, by the Refinancing Loan, BD Agro indebted itself by another loan with the same bank in order to repay the 221 Million Loan. The 221 Million Loan Agreement was not terminated nor did the 221 Million Pledge become unenforceable or erased. Article 14 of the Refinancing Loan clearly stated:

“The Beneficiary agrees that in case of non-payment of obligations within deadlines and under conditions prescribed in this Agreement Nova Agrobanka is entitled to declare as due all investments from all agreements concluded with the Beneficiary before execution of this Agreement, in particular: [...]

Short-Term Loan Agreement no. K-571/10-00, dated 22 December 2010; [i.e. 221 Million Loan]

[...]

In accordance with the previous paragraph, the Beneficiary authorizes Nova Agrobanka to declare as due all claims in accordance with this agreement and the agreements listed above, and to take all necessary measures for collecting payments through activation of security instruments.”²²⁵

131. Therefore, the refinancing of the 221 Million Loan obviously did not provide for a deletion of the 221 Million Pledge, on the contrary, it clearly stated that this pledge can be enforced *under the Refinancing Loan*. In addition to the permanent existence of the 221 Million Pledge as from 2010, the funds used for the benefit of Inex and Crveni Signal (or rather for the benefit of Mr. Obradović himself), obtained from Agrobanka and secured by that pledge, remained unreturned. Therefore, breach of

²²⁴ Report on Factual Findings from Prva Revizija, 12 January 2015 (emphasis added), CE-327, p. 5.

²²⁵ Loan agreement between BD Agro and Nova Agrobanka, 22 June 2012 (emphasis added), CE-441.

Article 5.3.4. existed and in fact it would still exist (absent the termination of the Privatization Agreement).

132. *Second*, the Refinancing Loan established new pledges on the fixed assets of BD Agro.²²⁶ Therefore, even if Mr. Obradovic had managed to delete the 221 Million Pledge, the fixed assets of BD Agro would still be pledged for funds that were used by Inex and Crveni Signal. More precisely, BD Agro spent a part of the Refinancing Loan (secured by new pledges) in order to “pay out” the 221 Million Loan which was partially used by Inex and Crveni Signal. Yet, the 221 Million Loan was still on standby, and the 221 Million Pledge remained registered and could have been activated at any moment.

3. Contracting parties’ conduct regarding the breach of Article 5.3.4.

133. As Respondent has already explained in detail the exact content and chronology of the Agency’s and Buyer’s communication regarding breach of Article 5.3.4. in its CounterMemorial,²²⁷ it will not repeat itself herein. Instead, for ease of reference, Respondent prepared the chart showing chronology of communication between the Agency and the Buyer (see Appendix 1). This chronology clearly shows that (i) the Agency was constantly on the position that the Article 5.3.4. was breached and that the breach had to be remedied, or the agreement would be terminated according to Article 41a of the Law on Privatization, (ii) that Mr. Obradovic also had no doubt that he breached the Article 5.3.4. and that he kept promising that the breach would be remedied but that at one point he changed his story.
134. Hereunder Respondent will point to only several, most indicative instances of communication, and will afterwards address the contracting parties’ conduct in other cases when Article 5.3.4. was breached.

²²⁶ Loan agreement between BD Agro and Nova Agrobanka 22 June 2012, Article 8, **CE-441**.

²²⁷ Counter-Memorial, paras. 30-84.

3.1. Agency's conduct regarding the Breach of Article 5.3.4.

3.1.1. Agency's notices

135. In January 2011, the Agency discovered numerous breaches of the Privatization Agreement, including in particular the breach of Article 5.3.4. based on the 221 Million Pledge. Immediately upon discovering it, in February 2011, the Privatization Agency notified Mr. Obradovic, stating in this regard that:

“[...] by the review of excerpts from real estate registers submitted by the Subject of privatization on January 27, 2011, it was noted that on the fixed assets of the Subject of privatization, inter alia, pledge rights were registered to secure the obligations of third parties, pledge rights to secure the funds (loans) whose beneficiaries are third parties (partially or fully), pledge rights to secure the loans from 2010 which were not shown in Final balance as of December 31, 2010 [...]”²²⁸

136. Furthermore, the Agency decided that:

“[...] in accordance with Article 41a of the Law on Privatization, the Buyer is given additionally granted term of 60 days from the day of the receipt of this Decision for fulfillment of obligations referred to in items 5.3.3 and 5.3.4 of the Agreement and submission of a report (previously approved by the Agency in writing) [...] containing the findings on actions of the Buyer undertaken in the additionally granted term, stating whether the Buyer has fulfilled the obligations referred to in items [...] 5.3.4 of the Agreement [...]”²²⁹

137. More specifically, the buyer was obliged to submit an audit report, which would demonstrate, *inter alia*:

²²⁸ Notice of the Privatization Agency on Additional Time Period, 24 February 2011 (emphasis added), CE-31.

²²⁹ Notice of the Privatization Agency on Additional Time Period, 24 February 2011 (emphasis added), CE-31.

“ - whether all the encumbrances have been deleted and all other security instruments for the obligations of third parties have been returned and all encumbrances which have been registered on no grounds were deleted (debt returned, new pledges and pledge of chattels registered, the old ones not deleted);

- whether all the loans given to third parties by the Subject of privatization from loan amounts secured by encumbrances on the property of the Subject have been returned.”²³⁰

138. The consequence of not complying with the notice within the additionally granted term was communicated equally clearly, stating:

“In the event of failure to comply with the above stated contractual obligations within the additionally granted term as per this Notice, the Privatization Agency will undertake the measures under Article 41a of the Law on Privatization”²³¹

139. Throughout the period of 2011-2015, this Agency’s stance with respect to the breach of Article 5.3.4, its remedy and the ensuing consequences in case the breach was not remedied remained the same.²³²

140. Notably, Claimants do not even argue that the Agency ever changed its position regarding Mr. Obradovic's breach of Article 5.3.4. by using the 221 Million Loan. Instead they state that the Agency’s requests were arbitrary as there was no need to request both the deletion of the pledge and return of the funds used by Crveni Signal and Inex.²³³ The truth is that the Agency only listed documentation which it regularly required as a proof of the remedy of the breach of Article 5.3.4. As transcripts from the sessions of the Commission for Control demonstrate, providing proof for either one of the requested actions would have been a sufficient remedy for the Agency.²³⁴

²³⁰ Notice of the Privatization Agency on Additional Time Period, 24 February 2011 (emphasis added), **CE-31**.

²³¹ Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-31**.

²³² See Appendix 1.

²³³ Reply, para. 424.

²³⁴ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 7, **CE-768** (“[...] what they are asking from them is either to delete the pledge or to act. Now, deleting pledge could probably be a problem because of the settlement of other creditors’ claims by creditor classes, but they could resolve this issue through repayment of funds by these third parties. Or, and we have requested

In any case, Mr. Obradovic never delivered any of the requested evidence - thereby rendering Claimants' argument in this regard moot.

3.1.2. Meetings with the Buyer

141. Besides the notices, the Agency also organized a number of meetings with Mr. Obradovic. At all these meetings, the Agency's stance remained the same, which is also evident from the chronology of the communications with the Buyer presented in the Appendix 1.
142. For instance, on 23 November and 16 December 2011, the Agency reiterated its previous requests and concluded that the Buyer needs to deliver an appropriate audit report containing, *inter alia*, explicit statements as to the fulfillment of his obligations in accordance with Article 5.3.4. and including excerpts from the real estate cadaster.²³⁵ In March 2012, the Agency again only repeated its previous requests,²³⁶ while in November 2012, the representatives from the Ministry of Economy explicitly supported the Agency's request at a meeting where they were present.²³⁷
143. At the meeting held on 4 February 2014, the Agency's representatives very clearly repeated their previous requests²³⁸ and stated that:

“the payment of the purchase price is only one of the contractual obligations and that the execution of other contractual obligations is independent of the obligation to pay the purchase price. [The Agency's representative] also stated that the Agency in its work

this, since this is a fault, so to say, of the buyer, we are treating this as the buyer's fault, if the aforementioned cannot be achieved, to repay this from his own funds as an extraordinary revenue (vanredni prihod)” (emphasis added)).

²³⁵ Proposal of the Center for Control for the session of the Commission for Control of 21 December 2011, p. 2, **RE-71.1**.

²³⁶ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, p. 7, **RE-72.1**.

²³⁷ Proposal of the Center for Control for the session of the Commission for undertaking measures of 7 November 2012, **RE-75** (“representatives of the Ministry confirmed that the Buyer has the obligation to submit to the Agency the auditor's report with auditor's statement on acting of the Buyer within the additional deadline, as well as to submit explanation of reasons for not being able to meet the obligations under the Agreement as a whole”)

²³⁸ Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36** (“By the representative of the Center for Control of Performance of Agreements the Buyer was informed that the violation of contractual obligations was established before the Buyer paid the full purchase price, and that before the payment of the price the measures were taken towards the Buyer, i.e., there was a remedial period given to him to submit proof that the violations have been cured and that the Buyer has still not acted accordingly.”)

*applies the Law on Privatization and controls the concrete sale contract, that all obligations are important and that what is signed must be completed to the end. This is a standard form contract of sale by public auction and the treatment during the control is the same, for any offense, irrespective of the gravity of the offense.*²³⁹

144. Conveniently, Mr. Obradovic now claims to have no recollection of this meeting ever taking place.²⁴⁰ In fact, he states that he does not recall ever meeting any of the representatives of the Agency present there either (*i.e.* Dr. Albina Kecman Susnjar, Ms. Angelina Jevtic and Ms. Katarina Misailovic). However, Mr. Obradovic obviously has astonishingly bad memory (when necessary), as the Agency's officials present there frequently appeared at the meetings regarding BD Agro both before and after February 2014.²⁴¹ In particular, Ms. Misailovic was apparently present at all of the earlier meetings held with Mr. Obradovic,²⁴² and was even the one sending the invitations for these meetings to him.²⁴³
145. The meetings that followed (held on 15 and 17 December 2014, 16 January, 20 and 27 April 2015) did not change the Agency's stance in any way. The insistence that there was a breach of Article 5.3.4. and the request for remedy were reiterated over and over again.²⁴⁴

²³⁹ Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

²⁴⁰ Second Witness Statement of Mr. Djura Obradovic, 4 October 2019, para. 90.

²⁴¹ See Proposal of the Center for Control for the session of the Commission for Control of 21 December 2011, **RE-71.1**, Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72.1**, Proposal of the Center for Control for the session of the Commission for undertaking measures of 7 November 2012, **RE-75.1**; Minutes from meeting held at the Ministry of Economy on 17 December 2014, **RE-22**, Minutes from meeting held at the Privatization Agency on 27 April 2015, **RE-23**; Minutes from meeting held at the Privatization Agency on 30 January 2014 **RE-28**; Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**; Minutes from meeting held at the Ministry of Economy on 3 November 2014, **RE-37**; Minutes from meeting held at the Ministry of Economy on 15 December 2014, **RE-38**; Minutes from meeting held at the Ministry of Economy on 16 January 2015, **RE-39**; Minutes from meeting held at the Privatization Agency on 20 April 2015, **RE-41**; Invitation to Mr. Obradovic to attend the meeting of 30 October 2012, **RE-80**.

²⁴² See Proposal of the Center for Control for the session of the Commission for Control of 21 December 2011, **RE-71.1**; Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72.1**; Proposal of the Center for Control for the session of the Commission for undertaking measures of 7 November 2012, **RE-75.1** (all of these reports were prepared by, *inter alia*, Ms. Katarina Misailovic).

²⁴³ Invitation to Mr. Obradovic to attend the meeting of 30 October 2012, **RE-80**.

²⁴⁴ Minutes from meeting held at the Ministry of Economy on 17 December 2014, **RE-22**, Minutes from meeting held at the Privatization Agency on 27 April 2015, **RE-23**, Minutes from meeting held at the Ministry of Economy on 15 December 2014, **RE-38**, Minutes from meeting held at the Ministry of Economy on 16 January 2015, **RE-39**, Minutes from meeting held at the Privatization Agency on 20 April 2015, **RE-41**.

3.1.3. Sessions of the Commission for Control

146. Claimants place a significant emphasis upon the transcripts from two sessions of the Commission for Control that took place on 23 April and 19 June 2015²⁴⁵ and state that the “*audio recordings of the meetings of the Commission for Control show the shocking true motivations for the Serbian government’s actions*”.²⁴⁶ The recordings however demonstrate that there was absolutely no bad faith on the part of the Agency. On the contrary, the conversation between the members of the Commission for Control is exactly how a good faith discussion and exchange of opinions looks like before making a decision. Had there been any malicious intent of the Agency, the members of the Commission would certainly not reexamine their positions nor express any *pro* and *contra* stances, as the decision would have already been made in advance.
147. To prove differently, Claimants however blatantly misrepresent the transcripts from the meetings of the Commission for Control held on 23 April and 19 June 2015.
148. *First*, Claimants contend that the members of the Commission for Control were “*well aware that the Privatization Agreement did not allow Serbia to terminate the agreement based on the alleged violation of Article 5.3.4*”.²⁴⁷ In this regard, they cite Ms. Vuckovic stating:

*“First of these provisions, 5.3.3, was prescribed as basis for termination of the agreement, and the other one [5.3.4], which refers to pledges, in accordance with the agreement, was not prescribed as basis for termination of the agreement [...]”*²⁴⁸

149. This is a textbook example of misleading and selective reading of a text. Namely, what Claimants intentionally omit to include is the continuation of the same sentence, which says:

²⁴⁵ Audio recording from meeting of the Commission for Control, 23 April 2015 **CE-767**; Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015 **CE-768**; Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015 **CE-770**; Audio recording from meeting of the Commission for Control, 19 June 2015 **CE-771**.

²⁴⁶ Reply, Section II.P

²⁴⁷ Reply, para. 298.

²⁴⁸ Reply, para. 298 (citing **CE-767**, and **CE-768**, p. 2).

*“[...] although article 41a of the Law on Privatization, which is applicable on these agreements, prescribes that an agreement may be terminated in case of explicitly listed violations of contractual obligations and, in the last item of the article, it prescribes it may be terminated in other cases as prescribed in the agreement.”*²⁴⁹

150. It is thus completely evident that the Agency always properly interpreted Article 5.3.4. of the Privatization Agreement as a legal ground for termination, in accordance with Article 41a of the Law on Privatization.

151. *Second*, Claimants advance another misleading argument by saying that the Agency “purposefully required remedies to the alleged breaches of Article 5.3.4. that it knew the buyer was not able to perform”.²⁵⁰ In that regard, Claimants cite one of the members of the Commission for Control who stated at the meeting held on 23 April 2015 that after the expiration of the additionally granted term of 90 days, the Agency will “probably have to terminate” the agreement “since Juliana already said^[251] that there is no chance they will fulfil all of these contractual obligations. That is, they have already stated publically that they... cannot fulfil some of these obligations”.²⁵² Such a claim is absurd from more than one standpoint.

152. To start with, Ms. Vuckovic was wrongly paraphrased by her colleague. What Ms. Vuckovic actually said just minutes before that quote, was that she received information from the representatives of BD Agro that for a “*part of obligations [the Buyer] would require a bit more time*.”²⁵³ Therefore, Ms. Vuckovic did not consider that the pertinent remedies were impossible to perform, but said that they would have to be delayed additionally (and they were, as the Buyer was given additional deadline

²⁴⁹ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 2 (emphasis added), **CE-768**.

²⁵⁰ Reply, Section II.P.4.

²⁵¹ Mrs. Julijana immediately added: “*This is according to the statement of the director of the mere subject.*”

²⁵² Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 9, **CE-768**.

²⁵³ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 7 (emphasis added), **CE-768** (“*What we received as information, and really in meetings, orally, from representatives of the subject of privatization (telephone vibrates in the background), is that they will, generally, have problems with repayment of certain funds from two or three legal persons; that part of their obligations could be fulfilled, so to say, immediately and for another part of obligations they would require a bit more time.*”)

to remedy the breach²⁵⁴) because Mr. Markicevic said so.²⁵⁵ The transcripts also show that, nevertheless, Ms. Vuckovic presented several quite plausible alternatives for Mr. Obradovic to cure the said breaches, saying:

“according to that PPRP, they are prepared to invest in the subject an investment of, I think, 4.5 or 5.5 million euros. So I think that they should not have any problems regarding repayment of these funds. Because, what they are asking from them is either to delete the pledge or to act. Now, deleting pledge could probably be a problem because of the settlement of other creditors’ claims by creditor classes, but they could resolve this issue through repayment of funds by these third parties. Or, and we have requested this, since this is a fault, so to say, of the buyer, we are treating this as the buyer’s fault, if the aforementioned cannot be achieved, to repay this from its own funds as an extraordinary revenue (vanredni prihod), which means that this should be clearly stated.”²⁵⁶

153. In addition, even the other member of the Commission, that is cited by Claimants, said that the Agreement would “*probably*” have to be terminated, meaning that it clearly did not deem it “impossible” for the buyer to perform the obligations in question. More importantly, the said discussion took place only in 2015 while the remedies for the breaches of Article 5.3.4. had been requested already in 2011 and Mr. Obradovic had never said that he was unable to remedy the breach. To the contrary, in many occasions he promised to cure the breach.²⁵⁷

154. *Third*, Claimants’ quote Mrs. Vuckovic discussing the breach of Article 5.3.3. on the Commission’s session of 19 June 2015, and state that the Agency requested Mr. Obradovic to prove his compliance with this article even though the Privatization

²⁵⁴ The Agency granted Mr. Obradovic 90 days to remedy the breach by its letter of 27 April 2015. See Letter from the Privatization Agency to D. Obradović, 27 April 2015, **CE-348**.

²⁵⁵ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 9, **CE-768** (“*This is according to the statement of the director of the mere subject itself.*”).

²⁵⁶ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 7 (emphasis added), **CE-768**.

²⁵⁷ See Sections I. B. 3.2.1I. B. 3.2.1 and I. B. 3.2.2. See also Appendix 1.

Agency knew that that provision had not been violated.²⁵⁸ What however transpires from the transcript is that Mrs. Vuckovic had an understanding for Claimants' position but needed a confirmation from competent auditors before taking a final stance.²⁵⁹ This is why the Buyer was constantly required to provide the audit report confirming the compliance with Article 5.3.3.

155. Evidently, the only thing that this transcript shows is that members of the Commission were openly discussing the breaches and exchanging their opinions in that regard. When members of the Commission considered that certain behavior does not represent a breach, they clearly said so – just as when they considered that certain conduct was a breach. And indeed, the Privatization Agreement was not terminated due to the breach of Article 5.3.3, but for the “*far more critical [...] issue of pledges and disposals to the benefit of third parties.*”²⁶⁰ In such circumstances, there was obviously no malicious intent, as the Agency limited itself solely to what it ultimately considered to be a breach.

3.2. Buyer's conduct regarding the breach of Article 5.3.4.

156. In the period 2011-2015 Mr. Obradovic delivered total of six audit reports²⁶¹ which all confirmed that: (i) funds received by BD Agro from the 221 Million Loan were used for the benefit of third parties, i.e. Crveni Signal and Inex; (ii) Inex did not repay the funds to BD Agro; (iii) Crveni Signal did not repay the funds to BD Agro; and that (iv) the 221 Million Pledge was still registered. The Buyer's letters and the meetings reveal that he was aware of the breach and its consequences.

²⁵⁸ Reply, paras. 295-297.

²⁵⁹ Mrs. Vuckovic's main concern with the breach of Article 5.3.3 was the fact that the audit report “[...] stated that the buyer did not violate its contractual obligation and has not exceeded the percentage of 10%, and did not give its opinion on the total percentage of 30%. So we are asking and reminding that this segment should also be supplemented in the new auditor's report [...]” See Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 2, **CE-770**.

²⁶⁰ Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 6, **CE-770**.

²⁶¹ Audit report by Auditor doo of 29 April 2011, **RE-13**; Audit report by Auditor doo of 19 July 2011, **RE-14**; Audit report by Auditor doo of 2 February 2012, **RE-17**; Audit report by Auditor doo of 22 November 2011, **RE-18**; Audit report by Auditor doo of 13 December 2012, **RE-19**; Report on Factual Findings from Prva Revizija, 12 January 2015 **CE-327**.

3.2.1. Letters

157. When it comes to letters sent to the Agency by Mr. Obradovic concerning the breach of Article 5.3.4, Mr. Obradovic explicitly recognized that this article was breached due to the use of the 221 Million Loan:
158. On 9 November 2011, Mr. Obradovic sent a letter to the Agency and noted: *“In respect of repayment of loans given to third parties out of loaned funds we deliver to you a statement of responsible persons with attachments (attachment: Statement)”*.²⁶² The said Statement of BD Agro read as follows: *“As some assets of debtors are offered for sale (Crveni signal, Ineks), our claim will be realized out of funds generated from it.”*²⁶³ There was not a single word denying that Article 5.3.4. was breached. Instead, the repayment of the funds given to Inex and Crveni Signal was promised.
159. On 2 April 2012, Mr. Obradovic wrote to the Ministry of Economy to complain about the Agency’s stance, but even then he did not argue that the 221 Million Pledge did not breach Article 5.3.4, but simply said that the breach was irrelevant as no significant damage occurred for BD Agro:

*“Return of the loans BD AGRO gave to third parties from the loan assets has been partially implemented. The loans which have not been returned are the loans given to the company Crveni signal (70 million dinars) and Inex, N. Varos (18 million dinars). We think that these loans did not directly cause the damage to the company [...]”*²⁶⁴

160. In July 2012, Mr. Obradovic wrote to the Agency:

“Regarding your [Notice] of 21 June 2012, received by BG AGRO on 22 June 2012, concerning the additionally granted period for the Buyer to act in accordance with the Decision of the Agency dated 27 December 2011, we herewith inform you of the

²⁶² Letter from Mr. Obradovic to the Privatization Agency attaching the statement from BD Agro’s director of 9 November 2011, **RE-60**.

²⁶³ Letter from Mr. Obradovic to the Privatization Agency attaching the statement from BD Agro’s director of 9 November 2011, **RE-60**.

²⁶⁴ Letter from Mr. Djura Obradović to the Ministry of Economy, 2 April 2012, **CE-77**.

realization of part of contractual obligations which have not been carried out in the previous reports [...]

*Regarding your other requests, there were no changes in the meantime, so we [Mr. Obradovic and BD Agro] submit the Request for an additional period during which the contractual obligations may be realized pursuant to your [Privatization Agency's] Decision [...]*²⁶⁵

161. As Respondent already indicated in its Counter-Memorial, Mr. Obradovic's July 2012 letter was another clear admission that there were obligations that were not yet fulfilled.²⁶⁶ In fact, Mr. Obradovic requested additional period to fulfill the remaining obligations (although Claimants now complain that he was given too many additional periods). However, in his second witness statement, Mr. Obradovic claims to have a different understanding of this letter. Struggling to come up with a reasonable response, Mr. Obradovic could say nothing more than that he "*simply wanted to continue discussions, hoping that the Privatization Agency would eventually recognize that there had been no breach.*"²⁶⁷ This 'explanation' does not hold water. Instead of promising the remedy of the breach, if he really wanted "to continue discussions" to convince the Agency that there was no breach, he could at least say that there was no breach in the first place. But Mr. Obradovic did not do so because he knew it would be just an empty story that even contradicts his own behavior in previous cases involving the breach of the same provision. In addition, if Mr. Obradovic was really on the position that he did not breach Article 5.3.4, then it was only imprudent of him to promise compliance with Agency's request that he never intended to obey, just in order to "continue discussions".

162. On the other hand, once Mr. Obradovic disagreed with other Agency's requests (for fulfillment of investment obligations), he openly said so, stating that such requests were illegitimate and that he would not comply.²⁶⁸ However, he never communicated anything of the sort with regard to the 221 Million Loan breach.

²⁶⁵ Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012 (emphasis added), **RE-21**.

²⁶⁶ Counter-Memorial, para. 49.

²⁶⁷ Second Witness Statement of Mr. Djura Obradovic, 3 October 2019, para. 87.

²⁶⁸ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72**.

163. On 16 December 2014, Mr. Markicevic also sent a letter to the Agency, submitting, *inter alia*, a supplemented audit report regarding the fulfillment of obligations from the Privatization Agreement and certain documentation regarding the status of Crveni Signal's and Inex's debts towards BD Agro.²⁶⁹ The letter contained absolutely no objection or any hint of disagreement with the Agency's position regarding the breach of Article 5.3.4.
164. On 23 March 2015, Mr. Markicevic sent a rather confusing letter requesting from the Agency issuance of "*a Certificate on Fulfillment of the Obligations Referred to in the [Privatization Agreement]*".²⁷⁰ The letter contained no further explanations. It did not state to which obligations exactly was Ms. Markicevic referring to, nor what was the legal ground for requesting the certificate. Furthermore, it certainly did not contain any objection or disagreement with the Agency's position that certain obligations were not fulfilled. In fact, on 30 April 2015, Mr. Obradovic (re)submitted to the Agency audit reports which again confirmed that the pertinent breaches of Article 5.3.4. were not remedied.²⁷¹ Again, the letter contained absolutely no indication of any kind of disagreement with the Agency's stance in this regard.
165. On 2 July 2015, Mr. Markicevic sent a letter on behalf of BD Agro, confirming that Mr. Obradovic submitted to the Agency audit reports which stated that the Buyer fulfilled all contractual obligations, "except in relation to lending to third parties, namely Inex Nova Varos ad Nova Varos and Crveni signal a.d. Beograd".²⁷² This was a clear recognition of the existence of the breach and any further comment of that statement, including interpretation of any witness, Claimants or Respondent, is superfluous.
166. The letter also noted that the Prva Revizija audit report also stated how "*Pledges given as security for third-party liabilities have not been deleted, however, these obligations have been settled and conditions have been met to delete the pledge on this basis.*"²⁷³ This was obviously not a disagreement with the Agency's position, but only an unconvincing attempt in persuading the Agency that the breach was essentially

²⁶⁹ Letter from BD Agro to the Privatization Agency, 16 December 2014, **CE-323**.

²⁷⁰ Request for issuance of confirmation on fulfillment of obligations from the Privatization Agreement of 23 March 2015, **RE-51**.

²⁷¹ Letter from Mr. Obradovic to the Privatization Agency of 30 April 2015, **RE-42**.

²⁷² Letter from BD Agro to Privatization Agency, 2 July 2015 (emphasis added), **CE-46**.

²⁷³ Letter from BD Agro to Privatization Agency, 2 July 2015, **CE-46**.

remedied or about to be remedied at least. In any event, even the cited conclusion of the auditor was untrue, as explained above (See Section I. B. 2.2).

3.2.2. Meetings

167. Mr. Obradovic acknowledged breach of Article 5.3.4. not only in his letter, but at the meetings as well:
168. For instance, on 23 November and 16 December 2011, the Agency reiterated its previous requests and it was concluded that the Buyer needs to deliver an appropriate audit report containing, *inter alia*, explicit statements as to the fulfilment of Article 5.3.4. and including excerpts from the real estate cadaster.²⁷⁴
169. In March 2012, two meetings were held between Mr. Obradovic and the Agency. There, Mr. Obradovic stated, *inter alia*, that he would invest additional efforts to have Crveni Signal's debt repaid and that Inex would likewise return the loan when conditions were met.²⁷⁵ On the other hand, he stated that the Agency's request for fulfillment of investment obligations were not legitimate and that he would not fulfil them.²⁷⁶ Mr. Obradovic apparently has no recollection of these meetings, other than the fact that he allegedly did not accept that there had been a breach of the Privatization Agreement. Likewise, at the meeting in November of that same year, Mr. Obradovic apparently did not raise any objections either.²⁷⁷
170. At the meeting held on 4 February 2014, Mr. Obradovic stated that he "*does not understand why the Agency does not issue the said certificate [of execution of contractual obligations] since he paid the price.*"²⁷⁸ He again expressed no disagreement with the Agency's position on the breach of Article 5.3.4. but only hoped that he could somehow prematurely achieve removal of the pledge established over the privatized shares, based solely on the fact that he paid the purchase price.

²⁷⁴ Proposal of the Center for Control for the session of the Commission for Control of 21 December 2011, **RE-71.1**, p. 2.

²⁷⁵ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72.1**.

²⁷⁶ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72.1**.

²⁷⁷ Proposal of the Center for Control for the session of the Commission for undertaking measures of 7 November 2012, **RE-75.1**.

²⁷⁸ Minutes from meeting held at the Privatization Agency on 4 February 2014 (emphasis added), **RE-36**.

171. In December 2014, the Agency and the Ministry of Economy held another two meetings with Mr. Markicevic. On 15 December 2014, Mr. Markicevic apparently *“committed to prepare for the next meeting [„] the materials on the state of the mortgages registered on the property of the Entity undergoing privatization as a collateral warranty for the liability of third parties.”*²⁷⁹

172. On 17 December 2014, Mr. Markicevic:

*“stated that the condition regarding the already stated audit finding had not been changed, and that, in their opinion, the biggest problems in execution of obligations of the Buyer from the respective Agreement [...] were claims which the Entity had towards the company Crveni Signal Beograd and Inex Nova Varos [...]”*²⁸⁰

173. At the meetings held on 15 January²⁸¹ and 20 April 2015,²⁸² there were apparently no objections by Mr. Markicevic either, while at the meeting held on 27 April 2015, Mr. Markicevic:

*“summarized the line of acting after receiving the decision of the Agency, including: supplying audit report which confirms execution of obligations within additionally approved deadline, which should be submitted by the Buyer, Djura Obradovic [...]”*²⁸³

174. Thus, instead of raising an objection, Mr. Markicevic again confirmed that there was a breach that should be remedied. However, the promised remedy never took place.

3.2.3. U-turn

175. After all of the letters exchanged and meetings held, on 10 September 2015, Mr. Obradovic suddenly threatened with arbitration. This was also the first time that Mr.

²⁷⁹ Minutes from meeting held at the Ministry of Economy on 15 December 2014, **RE-38**.

²⁸⁰ Minutes from meeting held at the Ministry of Economy on 17 December 2014, **RE-22**.

²⁸¹ Minutes from meeting held at the Ministry of Economy on 16 January 2015, **RE-39**.

²⁸² Minutes from meeting held at the Privatization Agency on 20 April 2015, **RE-41**.

²⁸³ Minutes from meeting held at the Privatization Agency on 27 April 2015, **RE-23**.

Obradovic expressed disagreement with the Agency's interpretation of Article 5.3.4, albeit again confirming that he had indeed committed a breach:

“[...] In relation to [the breach of Article 5.3.4.], please find attached the evidence that BD Agro is in possession of all the documents needed for deletion of pledges registered on its immovable property as security instruments for the loans [...]

This way, complete fulfillment of obligations referred to in Article 5.3.4. of the Agreement was ensured, since all of the conditions were met for the deletion of all disputed aforementioned pledges (all necessary documents were obtained), and BD Agro is waiting for an appropriate decision from the Republic Geodetic Authority-Real Estate Cadastre Office on deletion of the pledges.

In addition, I must also point out that your Reply contains an incorrect interpretation of Article 5.3.4. of the Agreement since it claims that the article prevents giving loans or guarantees to related parties. As you know, this article does not express any such restriction, but it only refers to restriction on registration of pledges on the fixed assets of BD Agro.”²⁸⁴

176. Therefore, Mr. Obradovic again admitted that Article 5.3.4. was breached by the 221 Million Pledge, and submitted documentation that allegedly proved that the said pledge would be deleted from the cadaster. Upon inspection of the submitted documentation, it was clear that it related to other pledges, and not to the 221 Million Pledge.²⁸⁵ This was the last straw, after which the Agency finally terminated the Privatization Agreement, seeing that additional deadlines would definitely be pointless.

²⁸⁴ Letter from Mr. Djura Obradović to Privatization Agency, 8 September 2015 (emphasis added), **CE-48**.

²⁸⁵ Decision of the First Basic Court in Belgrade no. Dn-7084/10 of 7 June 2010, **RE-3**. Short Term Loan Agreement no. 181/10-00 of 2 June 2010, **RE-4**. Guarantee Agreement no. J-182/10-00 of 2 June 2010, **RE-5**. Confirmation by Nova Agrobanka on fulfillment of obligations from the Short Term Loan Agreement K-181/10-00 of 4 September 2015, p. 1, **RE-53**. BD Agro's request for deletion of pledge registered in excerpt from the Land Register no. 2258, cadastral municipality Ugrinovci of 7 September 2015, p. 1, **RE-54**. Decision of the Land Register of 7 September, p. 1, **CE-87**. Letter from BD Agro to the Privatization Agency of 10 September 2015, **CE-357**.

177. In summary, from the moment that the 221 Million Pledge was discovered by the Agency, up until the termination of the Privatization Agreement, Mr. Obradovic never denied (and in fact admitted) that the 221 Million Pledge breached Article 5.3.4. It should be noted in this regard that if Mr. Obradovic indeed thought that the Agency's requests for remedy of Article 5.3.4. were unsubstantiated and that there was no breach at all, he could have easily sued the Agency before a court at any time, claiming that it was the one breaching the Privatization Agreement through such conduct. However, he never did so during the four years that he was unable to cure the breach. Mr. Obradovic never did so because he knew that the Agency was right.

3.3. Parties' conduct in other cases

178. The use of the 221 Million Loan was not the first time that such a breach of Article 5.3.4. was noticed by the Agency during the privatization of companies. Notably, the Agency always acted consistently with respect to a breach of Article 5.3.4. It always requested the remedy of that breach, and it always considered it to be a termination reason.²⁸⁶ Mr. Obradovic, on the other hand, acted inconsistently only in the case of the 221 Million Pledge. This can be seen from: (i) privatizations not involving Mr. Obradovic; (ii) Mr. Obradovic's breaches of Article 5.3.4. in cases other than BD Agro; and (ii) previous breach of Article 5.3.4. in BD Agro privatization.

3.3.1. Privatizations not involving Mr. Obradovic

179. Mr. Obradovic's case was not a unique situation. The Agency had encountered buyers other than Mr. Obradovic who also committed breaches of Article 5.3.4. In each case, the Agency's conduct was the same. Besides the previously cited *Betonjerka case*,²⁸⁷ there were also other examples comparable with the present situation.

180. In 2008, in the *Krusik case*, the Agency discovered that the property of the subject was pledged for the benefit of a third party *i.e.* it has been determined that three loan agreements were concluded by the subject and that the security for all three loans were pledges *i.e.* mortgages established on the subject's real estate. Furthermore, the Agency discovered that at the period after the conclusion of these agreements, there

²⁸⁶ See Counter-Memorial, paras. 124-125; Notice on termination of privatization agreement for subject of privatization Betonjerka of 30 December 2008, **RE-97**.

²⁸⁷ Counter-Memorial, paras. 124-125; Notice on termination of privatization agreement for subject of privatization Betonjerka of 30 December 2008, **RE-97**.

was a significant outflow of funds from the subject in the form of loans to other legal entities. Consequently, the Agency concluded that a part of these outflowed funds was acquired through the pertinent loans which were secured by the fixed assets of the subject, thereby finding a breach of Article 5.3.4. of the privatization agreement. The Agency thus granted the buyer an additional period to remedy the breach and to deliver according evidence on: repayment of the funds given to other legal entities (and an according reduction of credit debts); erasing the mortgages, and proper usage of the remaining amount of loaned funds (which were secured by mortgages). It was also noted that in case the buyer fails to act as requested the Agency will undertake the measures as per Article 41a of the Law on Privatization.²⁸⁸

181. Likewise, in 2009 in the *Rasadnici case*, the Agency discovered that the subject pledged the property of the subject in favor of a bank, for the purpose of securing a loan used by the buyer. Hence, the Agency granted an additional term to the buyer to remedy the breach of Article 5.3.4. *i.e.* to deliver proof that the mortgage in question has been erased or to deliver the proof that the said loan has been spent purposefully for the needs of the subject. The Agency noted that in case of noncompliance the privatization agreement will be terminated as per Article 41a of the Law on Privatization.²⁸⁹
182. In 2010 in the *IHTM case*, the Agency discovered that the subject entered into certain guarantee and loan agreements, pledging the assets of the subject for the benefit of third parties, thereby breaching Article 5.3.4. of the privatization agreement. The Agency granted an additional term to the buyer, requesting remedy of the breach and delivery of documentation proving that Article 5.3.4. has been fulfilled (including statements from the cadaster). In this case as well, the Agency stressed that in case the buyer fails to act as requested the privatization agreement will be terminated as per Article 41a of the Law on Privatization.²⁹⁰

²⁸⁸ Notice from the Privatization Agency to Mr. Pera Jovanovic Krusik-plastika and NPCO, 31 December 2009, **RE-364**.

²⁸⁹ Notice from the Privatization Agency to Jugotehnika, 9 September 2009, **RE-363**.

²⁹⁰ Notice from the Privatization Agency to Mr. Milenko Zimonjic, 15 December 2010, **RE-368**.

3.3.2. Privatizations involving Mr. Obradovic, other than BD Agro

183. In approximately the same period that Mr. Obradovic breached Article 5.3.4. of the Privatization Agreement, he made the same breach with respect to the privatization of PIK Pester.
184. Specifically, on 23 December 2010 (just prior to the establishment of the 221 Million Pledge), the Agency wrote to Mr. Obradovic as the Buyer of PIK Pester, explicitly invoking Article 5.3.4, and stating that it discovered that a mortgage has been established in favor of Agrobanka on certain land owned by PIK Pester, as security for the bank's claims towards an affiliated company of the buyer – Inex.²⁹¹
185. Having determined the breach, the Agency also requested an according remedy within an additional term of 30 days *i.e.* it requested evidence that the pledge has been erased.²⁹² The consequence of not complying with the additionally granted term was communicated equally clearly in the letter from December 2010:

*“In case the Buyer does not perform the state obligation within the additionally granted term from the previous paragraph, we inform you that the Agency will take measures in accordance with Article 41a of the Law on Privatization [...]”*²⁹³

186. Thus, at the time that Mr. Obradovic was spending the 221 Million Loan for the benefit of Inex and Crveni Signal, he was explicitly informed in another privatization that pledging the assets for obtaining the funds to be used by third persons represents a breach of Article 5.3.4. and a justifiable reason for termination of the contract in that case. He was requested to remedy the breach, and warned that the Agency would terminate the privatization agreement in case he does not comply.

²⁹¹ Letter from the Agency to Mr. Obradovic, 27 December 2010, **RE-389** (“During the control performed on 23 November 2010, it has been determined that on the basis of the Decision of the Management Board no. B-I/60-10 of 21 July 2010, a mortgage has been established in favor of “Agrobanka” ad Beograd on the forest and agricultural land owned by the Subject of privatization [...] as security for the Bank's claims in the amount of RSD 110.000.000, on the basis of the Short-Term Loan Agreement No. K-309110-00 of 21 July 2010, concluded with a third party, company “Inex” ad Nova Varos.”).

²⁹² Letter from the Agency to Mr. Obradovic, 27 December 2010, **RE-389**.

²⁹³ Letter from the Agency to Mr. Obradovic, 27 December 2010 (emphasis added), **RE-389**.

187. Mr. Obradovic successfully remedied the breach with no objection.²⁹⁴ Interestingly, this occurred less than two weeks after the first notice regarding the 221 Million Pledge was issued to Mr. Obradovic.
188. Similarly, in the case of Beotrans, the Agency also requested documentation issued by the cadaster as proof that Mr. Obradovic did not breach Article 5.3.4.²⁹⁵ After Mr. Obradovic ignored two notices granting him with additional terms for the delivery of the pertinent documentation, the Agency itself checked this information directly with the cadaster and determined that Article 5.3.4. was not breached.²⁹⁶ Again the Agency was clear that breach of Article 5.3.4. would not be tolerated.

3.3.3. Mr. Obradovic's previous breach of Article 5.3.4. in BD Agro

189. The first time that the Agency ascertained that BD Agro's property was pledged for the benefit of third parties occurred at the beginning of 2009. The property in question was pledged for the benefit of a company named Vihor (which was later accused of fraudulently extracting funds from BD Agro together with Mr. Jovanovic²⁹⁷). Consequently, on 24 February 2009, the Agency sent a letter to Mr. Obradovic, informing him of the discovered breach of Article 5.3.4. and granting him an additional term of 30 days to submit evidence on the deletion of the pledge from the cadaster.²⁹⁸ The Agency also made sure to note that in case Mr. Obradovic would not remedy the breach within the extended term, the privatization agreement shall be deemed terminated.²⁹⁹

²⁹⁴ Letter from Mr. Obradovic to the Privatization Agency, 4 March 2011, **RE-390**.

²⁹⁵ Letter from the Agency to Mr. Obradovic, 28 January 2011, **RE-409**; Letter from the Agency to Mr. Obradovic, 18 March 2011, **RE-473**.

²⁹⁶ Report from the 9th control of Beotrans (with supplementations), 21 April 2011, **RE-404**.

²⁹⁷ See Section I. F. 4.1.3.

²⁹⁸ Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 24 February 2009, **RE-99** ("*Bearing in mind that the fixed assets of the Subject are provided as a real security for the fulfilment of the obligation of a third party, that is, that the Subject is not using the obtained loan funds, you are invited, within an additional 30-day deadline from the day of receipt, to submit evidence on the abolishment of the Mortgage statement, the withdrawal of the application for registration of the mortgage on immovable property of the mortgage debtor BD "Agro" Dobanovci, and in the event that the said mortgage is registered in the registry of the Land Registry Court, you shall provide evidence of the deletion of the mortgage from it.")*).

²⁹⁹ Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 24 February 2009, **RE-99** ("*In the event that you should not act in compliance with this Notice, the [Privatization Agreement] shall be deemed terminated due to failure to comply in accordance with Article 41a. of the Law on Privatization*")).

190. Soon afterwards, one more notice was sent, after another discovery of numerous pledges being established on BD Agro's real estate *i.e.* fixed assets. The pledges were established, *inter alia*, as security for repayment of a loan taken by Inex.³⁰⁰ Again, the Agency acted consistently and requested remedy of the breach of Article 5.3.4, under the threat of termination.³⁰¹ Another deadline was thus given to Mr. Obradovic.
191. As Mr. Obradovic was not remedying the breaches of Article 5.3.4, the Agency continued to issue warning notices and grant him additional extensions.³⁰² Mr. Obradovic then stalled the Agency, delivering, *inter alia*, a statement from Erste Bank confirming that it would erase the pertinent pledge after the Vihor loan was secured by other property.³⁰³ He also claimed that Inex was in the process of obtaining funds necessary for erasing the pledge in question.³⁰⁴
192. Despite the fact that the breach was not remedied after four additional deadlines, the Agency continued to grant extensions to Mr. Obradovic, insisting upon the proper remedy of the breach.³⁰⁵ In fact, during the control of 30 September 2009, the Agency discovered another breach, as BD Agro entered into a leasing agreement for equipment which was used by PIK Pester.³⁰⁶ However, instead of terminating the Privatization Agreement after he repeatedly failed to remedy of two breaches and the discovery of another one, the Agency gave yet another chance to Mr. Obradovic, asking him to remedy all breaches within the additionally granted term.³⁰⁷
193. On 18 January 2010, BD Agro delivered to the Agency the documentation from the cadaster that showed the pledges in question have been erased.³⁰⁸ Thus, these breaches of Article 5.3.4. were successfully remedied with no objection from the buyer.

³⁰⁰ Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 31 March 2009, **RE-100**.

³⁰¹ Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 31 March 2009, **RE-100**.

³⁰² Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 13 April 2009, **RE-101**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 1 June 2009, **RE-102**.

³⁰³ Letter from BD Agro to the Privatization Agency, 8 July 2009, **RE-405**.

³⁰⁴ Letter from BD Agro to the Privatization Agency, 8 July 2009, **RE-405**.

³⁰⁵ Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 30 July 2009, **RE-103**.

³⁰⁶ Notice from the Privatization Agency to Mr. Obradovic, 16 October 2009, **RE-384**.

³⁰⁷ Notice from the Privatization Agency to Mr. Obradovic, 16 October 2009, **RE-384**.

³⁰⁸ Email from BD Agro to the Privatization Agency, 18 January 2010, **RE-406**.

4. Ministry of Economy position

194. Bearing in mind that the Agency's position regarding the pertinent breaches was quite straightforward, Claimants argue that the Ministry of Economy in 2012 was at the position that termination would be illegal.³⁰⁹ However, Claimants are refuted by the fact that in 2012 the Ministry of Economy did not say anything about its legal position, while in 2015, after Supervision Proceedings were conducted, it clearly stated that it shared the position taken by the Agency – that the breach of Article 5.3.4. existed and that it had to be remedied.
195. As Respondent already explained, the Ministry of Economy's letter of 30 May 2012 focused on the "economic justification" of the termination, and it did not touch open legal issues.³¹⁰ This is also how it was understood at the time. As explained at the session of the Commission for Control on 23 April 2015:

*"[...] the competent ministry [...] delivered its opinion that it would not be expedient to terminate the agreement on sale of capital, not saying anything regarding the agreement itself. Therefore, the Agency even after that, that is, the Commission, provided, I think, two additional terms and since we did not receive the opinion of the ministry, it was agreed that further proposals regarding BD Agro Dobanovci will not be put before the Commission and that controls will not be carried out until we get an official opinion from the ministry. The second opinion from the ministry was not delivered, and on December 23, 2013 the supervision procedure over the work of the Privatization Agency was opened."*³¹¹

196. The fact that the Agency did not adopt the "economic" approach in its conduct towards Mr. Obradovic once again shows that the Ministry of Economy was not "ordering" the Agency what to do.

³⁰⁹ Reply, paras. 188-195.

³¹⁰ Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012, **CE-33**.

³¹¹ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 3 (emphasis added), **CE-768**.

197. When it comes to the Supervision Proceedings, these were initiated on 23 December 2013, upon request of BD Agro's employees.³¹² While the Supervision Proceedings were ongoing, the Agency could not take any measures with respect to BD Agro.³¹³ The Supervision Proceedings ended in April 2015, with the Ministry of Economy reaching the same conclusion as the Agency, and recommending that an additional deadline of 90 days be granted to Mr. Obradovic in order to deliver evidence that the breach of Article 5.3.4. had been remedied.³¹⁴
198. Finally, Claimants' complaint on the length of the Supervision Proceedings³¹⁵ is confusing and misplaced, as this only prolonged the period in which Mr. Obradovic could remedy the pertinent breach, if he wanted to. In other words, there was no harm done to Mr. Obradovic – just the opposite.

5. Legal ground for termination

199. After establishing the breach of Article 5.3.4, giving to Mr. Obradovic additional deadline for performance of the obligation, and Mr. Obradovic's failure to remedy the breach, the Agency had to react accordingly. As Claimants' expert, Mr. Milosevic, correctly noted in his second expert report:

*"[...] under Article 41a(1) of the Law on Privatization, termination occurred ex lege if the buyer failed to remedy the violation of the privatization agreement within an additional deadline granted by the Privatization Agency."*³¹⁶

200. In this section Respondent will explain that: (i) the Agency had a clear legal ground for termination based on Article 41a(1) of the Law on Privatization; (ii) the Agency could terminate the Privatization Agreement due to a breach of Article 5.3.4. only; (iii) Article 5.3.4. could serve as a termination reason even after the payment of the purchase price; (iv) the breach substantially impacted the Privatization Agreement; (v) termination was a proportionate and, in fact, the only adequate measure in the

³¹² Decision of the Ministry of Economy, 23 December 2013, **CE-206**.

³¹³ Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

³¹⁴ Report of Ministry of Economy on the Control over the Privatization Agency 7 April 2015, **CE-98**, p. 13

³¹⁵ Reply, para. 247.

³¹⁶ Second Expert Report of Mr. Milos Milosevic, 3 October 2019, para. 114.

circumstances; and (vi) the Agency's decision was made independently, without being affected by any outside "pressure".

5.1. Article 41a(1) of the 2001 Law on Privatization

201. The legal ground for terminating the Privatization Agreement was prescribed in Article 41a(1) of the Law on Privatization, *i.e.*:

*"The agreement on sale of the capital or property shall be deemed terminated due to non-fulfillment, if the buyer, even within an additionally granted term for fulfillment [...] disposes of the property of the subject of privatization contrary to provisions of the agreement"*³¹⁷

202. As Respondent already explained, according to the Serbian Law on Companies, case law of the highest Serbian court, Privatization Agency's practice in other cases and the expert opinion of Prof. Radovic, "*disposal of property*" would undoubtedly encompass the establishment of a pledge over BD Agro's fixed assets (including, of course, real estate).³¹⁸ Consequently, a breach of Article 5.3.4. of the Privatization Agreement falls under the Article 41a of the Law on Privatization, meaning that it presents a statutory termination reason. As already explained, application of the *ex lege* termination reasons is not excluded by the fact that the agreement did not expressly stipulate them.³¹⁹
203. On the other hand, Claimants and their expert have a different understanding of the pertinent provision and rely solely on their own words to support it, as they have not submitted a single court decision contradicting Respondent's interpretation. Namely, they agree that Article 41a(1) of the Law on Privatization has a mandatory nature.³²⁰ In other words, they agree that the parties cannot agree otherwise in privatization

³¹⁷ Article 41a(1) of the 2001 Law on Privatization (emphasis added), **CE-220**.

³¹⁸ Counter-Memorial, paras. 120 *et seq.*

³¹⁹ Decision of the Constitutional court of Serbia of 6 October 2016, pp. 8 and 9, **RE-95**.

³²⁰ Second Expert Report of Mr. Miloš Milošević, 3 October 2019, para. 92 ("*This does not by any means violate the mandatory nature of Article 41a(1) of the 2001 Law on Privatization*", emphasis added). See also Reply, para. 48 ("*The content of the Privatization Agreement was non-negotiable and most of its provisions were prescribed by mandatory provisions of Serbian law.*"); First Expert Report of Mr. Miloš Milošević, 16 January 2019, para. 59(c) ("*the Privatization Agency's conduct in the entire privatization process, including during and after fulfillment of the privatization agreement, was prescribed by the mandatory provisions of the Law on Privatization*").

agreements. However, Mr. Milošević is of the opinion that since Article 7.1 of the Privatization Agreement did not expressly state that Article 5.3.4. is a reason for termination “*the parties intended not to allow for termination of the Privatization Agreement in case of violation of Article 5.3.4. of the Privatization Agreement*”.³²¹

204. First of all, Mr. Milosevic’s stance defies fundamental legal principles since Article 41a(1) of the Law on Privatization was indisputably a mandatory provision. As such, it is completely irrelevant whether the parties agreed to list Article 5.3.4. as a termination reason in Article 7.1. of the Privatization Agreement or not. If a breach of Article 5.3.4. represented a ground for termination under Article 41a(1) of the Law on Privatization (which it obviously did), then the discussion whether the Privatization Agreement lists it as a termination reason is redundant. Prof. Radovic confirms this as well:

“Disposition of the property of the subject of privatization contrary to provisions of the agreement was *explicitly enlisted in Article 41a(1)(3) of the 2001 Law on Privatization as one of the possible grounds for contract termination. The said mandatory statutory provision would even have priority over any conflicting contractual provisions (in the present case, however, there was no such conflicting contractual provision). Therefore, parties to a privatization agreement were only free to determine which dispositions of assets of the privatization subject are prohibited to the buyer (para. 33 of my First Expert Report). On the other hand, they were not at liberty to determine which of those prohibited dispositions represented a valid ground for termination. This is because each disposition contrary to provisions of the agreement represented a mandatory ground for termination of privatization agreements under the law.*”³²²

205. Claimants’ feeble attempt at saying that the parties intended to deviate from this provision by not explicitly mentioning Article 5.3.4. in Article 7.1 of the Privatization Agreement is absurd. First, it is clear that the parties cannot contract away a mandatory

³²¹ Second Expert Report of Mr. Miloš Milošević, 3 October 2019, para. 91.

³²² Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 2.

provision of law. Second, Claimants' interpretation renders Article 5.3.4. effectively meaningless, as it would enable the buyer to breach the said provision with no consequences. Namely, the only sanction available to the Agency for Buyer's breaches of Article 5 of the Privatization Agreement, was the Agreement's termination. Under Claimants' reading of the Privatization Agreement, Mr. Obradovic could effectively pledge 100% of BD Agro's assets, transfer the funds to other companies (or himself) and the Agency could never terminate the contract for this reason. Such interpretation is manifestly absurd.

206. In addition, there is no proof whatsoever that the parties even intended to derogate from a mandatory provision of 41a(1) of the Law on Privatization. Namely, Article 7.1 of the Privatization Agreement lists several instances in which the "*Agreement shall be considered terminated ex lege*" but it does not state that the agreement shall be terminated only in these cases, i.e. it does not state that the list of termination reasons is exhaustive.
207. The court practice undoubtedly confirms that Respondent's position is correct. Most notable example of an analogous case is *Betonjerka*, another case where the privatization agreement was terminated solely on the basis of Article 5.3.4. In that case, Article 5.3.4. was also not explicitly prescribed as the termination reason in the agreement. The case ended up before a court due to the alleged unlawfulness of the termination and was decided in favor of the Agency.³²³ The second-instance court confirmed this decision. However, Claimants dismiss this case as inapposite since the privatization agreement was not terminated *after* the payment of the purchase price. This is however irrelevant for the discussion whether the court practice was on the stand that the privatization agreement may be terminated in accordance with Article 41a(1) of the Law on Privatization, despite of the fact that the breach of Article 5.3.4. was not listed in the agreement as a reason for termination. In any event, in the cases of *Rasadnici* and *Geodetski Biro*, the privatization agreements were both terminated after the full payment of the purchase price and were terminated due to breaches that

³²³ Judgment of the Commercial Appellate Court No. Pž 8687/2011, 18 December 2012, **CE-722**.

were not listed as termination reasons in the pertinent agreements (including for breaches of Article 5.3.4.).³²⁴

208. Mr. Milosevic then states that the case law provided by Respondent is “largely irrelevant” because it related to privatization agreements concluded before 8 June 2005, i.e. before 2005 statutory changes of the Law on Privatization.³²⁵ This is inapposite.
209. Before the pertinent amendments, the law did not provide a list of reasons for termination but only stated that “[i]f the contractual price is paid in several installments and the buyer does not pay installment within the agreed time, the contract shall be terminated and the capital that is the subject of the sale shall be transferred to the Share Fund.”³²⁶ After the 2005 amendments, the said article simply became more detailed and provided a list of breaches leading to *ex lege* termination of the privatization agreements.
210. However, as explained by professor Radovic, this change did not make the existing case law irrelevant. On the contrary:

*“Firstly, the case law Mr. Milošević refers to is not from the period before 2005, but afterwards. Secondly, none of these court decisions were based on Article 41a of the Law on Privatization. Court’s stance that all obligations contained in a privatization agreement are equally important is derived from Article 2(1)(1) of the Law on Privatization which prescribes that the goal of privatization is the development of the economy and social stability. Finally, the case law in question also reflected general rules of contract law, which do not differentiate between essential and non-essential contract obligations.”*³²⁷

³²⁴ Termination of Geodetski biro privatization agreement of 27 March 2013, **RE-31**; Notice on Termination from the Privatization Agency to Jugotehnika, 20 November 2009, **RE-562**.

³²⁵ Second Expert Report of Mr. Miloš Milošević, 3 October 2019, para. 29.

³²⁶ Article 41a of the 2001 Law on Privatization as amended in 2003, **RE-137**.

³²⁷ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 22.

5.2. Termination due to breach of Article 5.3.4. only

211. Although Respondent provided a number of analogies showing that the Agency terminated privatization agreements based on breaches of Article 5.3.4. even when this was not explicitly listed as a termination reason, Claimants consider them irrelevant since Article 5.3.4. was not the *only* breach that caused termination.³²⁸ This contention is absurd, to say the least. If Article 5.3.4. was explicitly listed as a termination ground in a notice on termination, then there is no doubt that the Agency considered it as an independent basis for terminating a privatization agreement, with or without other breaches found.
212. But Respondent also mentioned one case where a breach of Article 5.3.4. was the *only reason* for the termination of the pertinent privatization agreement - the previously cited case of *Betonjerka*. As already noted, this case even underwent court scrutiny which confirmed the lawfulness of the Agency's conduct.

5.3. Termination after the payment of the purchase price

213. In their Reply Claimants note that “[e]ven though the Privatization Agency accepted the last installment of the purchase price and the Privatization Agreement was consummated, the Privatization Agency continued to claim the purported violations of Articles 5.3.3 and 5.3.4 and insisted on remedial actions”.³²⁹
214. Mr. Obradovic paid the Purchase Price on 8 April 2011 while the interest accrued because of the delay in payments was performed on 30 December 2011.³³⁰ As the Privatization Agreement was still in force at the time, the payment was simply executed as a Buyer's obligation, meaning that there was nothing to be “accepted” by the Agency. Furthermore, the Agency clearly communicated its position regarding the non-fulfillment of certain obligations to Mr. Obradovic significantly before the pertinent payment. Specifically, until December 2011, Mr. Obradovic was already granted four extensions for remedying the breach of Article 5.3.4. and had two meetings with the Agency in that respect. In other words, Mr. Obradovic was more than aware that the Agency considered Article 5.3.4. to be breached and that it

³²⁸ Reply, para. 406.

³²⁹ Reply, para. 188.

³³⁰ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

considered that breach to represent the reason for termination of the Privatization Agreement.

215. In any event, Respondent provided examples of three other cases: *Zastava PES*, *Trayal Korporacija* and *Geodetski biro*,³³¹ all of which were terminated *after* the full payment of the purchase price (Respondent now adds to this list the case of *Rasadnici*³³²). Furthermore, *Zastava PES*, *Trayal Korporacija* and *Rasadnici* were all terminated due to a breach of Article 5.3.4. (notably, *Rasadnici* and *Geodetski biro* were also cases where the breach in question was not explicitly stipulated as a termination ground in the privatization agreement).
216. As already explained, the case law of the Serbian Supreme Court of Cassation also confirms that termination of a privatization agreement is fully possible even after the payment of the purchase price.³³³ On the other hand, Claimants failed to submit a single court decision which would support their interpretation of the pertinent provisions.
217. As for the Radovic & Ratkovic legal opinion rendered in 2013,³³⁴ its analysis was obviously conducted superfluously and arrived at completely wrong conclusions. This can be seen from the fact that the case law of the Serbian Supreme Court of Cassation and the Constitutional Court directly contradicts the legal findings of the Radovic & Ratkovic opinion.³³⁵ Thus, the Agency's disagreement with it was completely

³³¹ Counter-Memorial, para. 109; Termination of Zastava PES privatization agreement of 9 April 2013, **RE-59**; Termination of Geodetski biro privatization agreement of 27 March 2013, **RE-31**; Termination of Trayal korporacija privatization agreement of 6 December 2013, **RE-24**.

³³² Notice on Termination from the Privatization Agency to Jugotehnika, 20 November 2009, **RE-562**.

³³³ Counter-Memorial, paras. 100-105.

³³⁴ Reply, paras. 202-208; Legal Opinion on the Privatization Agency's Recommendation for Termination of the Agreement on Sale of Socially Owned Capital of the Subject of Privatization, "PPK Buducnost" from Dobanovci (now "BD AGRO a.d."), through Public Auction, 11 June 2013, **CE-34**.

³³⁵ Legal Opinion on the Privatization Agency's Recommendation for Termination of the Agreement on Sale of Socially Owned Capital of the Subject of Privatization, "PPK Buducnost" from Dobanovci (now "BD AGRO a.d."), through Public Auction, 11 June 2013, p. 3, **CE-34** ("According to the agreement itself, the Agency does not have the right to terminate the agreement due to violation of obligation referred to in Article 5.3.4, because this is not stipulated as a reason for termination.") cf. Judgment of the Supreme Court of Cassation no. Prev. 132/13 of 29 May 2014, p. 4, **RE-356** ("Failure to comply with any of the undertaken obligations, even if not foreseen by the [privatization] contract as a termination reason, can be the reason for termination of the contract in accordance with the law itself."); Decision of the Constitutional court of Serbia of 6 October 2016, pp. 8-9, **RE-95** ("the fact that the privatization agreement did not expressly stipulate that the agreement may be terminated in the case of the [buyer's] failure to perform the investment obligation in the subject of privatization within the agreed term, but other specific cases of termination of this contract on privatization were stipulated [...] does not preclude the application of the provisions of Article 125 of the Law on Obligations, which establish the rules of termination of the contract due to failure to fulfill the obligation within the agreed time."); See also Judgment of the Supreme Court of Serbia, Prev.

legitimate and justified. Furthermore, the opinion was not “concealed” from anyone, which is proven by the mere fact that Claimants easily obtained it. In this regard, Mr. Markicevic, known for his false testimonies,³³⁶ has blatantly misled the Tribunal when stating that Ms. Vuckovic allegedly told him that the Agency had received a legal opinion on the violations of the Privatization Agreement, but the officials were told to “put the legal opinion into a drawer” and forget about it.³³⁷ However, Ms. Vuckovic testifies that:

*”This is absolutely incorrect, I never said anything like that to Mr. Markicevic. Not only that the subject opinion was not placed in a drawer, but it was referred to members of the Commission who also considered that legal opinion. The decision not to act in accordance with that legal opinion was made by the Commission, since that opinion was contrary to the stance of the Agency which was taken not only in privatization of BD Agro, but in other privatizations as well, and no convincing reasons due to which it should act in different manner with regard to BD Agro were put forward”*³³⁸

218. In any event, Claimants now expressly accept that privatization agreements may be terminated after the full payment of the purchase price (due to a breach of an essential obligation), thereby putting an end to this discussion.³³⁹ What Claimants still advance, however, is that Article 5.3.4. was not an “essential” obligation.³⁴⁰

410/2005 from 1 March 2006, **RE-166** (“a contract on the sale of the socially-owned capital can be legally terminated due to non-fulfillment of only one of the contracted commitments.”).

³³⁶ See Section I. F. 4.1.6.

³³⁷ Reply, para. 207.

³³⁸ Witness Statement of Ms. Julijana Vuckovic, para. 21.

³³⁹ Reply, para. 410 (“To be clear: the Claimants are not arguing that a privatization agreement cannot be terminated after the payment of the purchase price for violation of the buyer’s other essential obligations relating, for example, to compliance with the agreed social program for the employees of the privatized company. They argue—and show—that the Privatization Agreement could not be terminated for the alleged violation of Article 5.3.4. alone after payment of the full purchase price and the fulfilment of all (other) contractual obligations”).

³⁴⁰ Specifically, Claimants agree that the Privatization Agreement could have been deleted after full payment of the purchase price, but only disagree that this could not have been done due to a breach of Article 5.3.4. **alone** – as it was not an essential obligation of the contract. This statement directly contradicts Claimants’ other assertion on how: “There was no common understanding between the Privatization Agency and Mr. Obradović and the Claimants that the Privatization Agreement could be terminated after the payment of the purchase price.” (Reply, para. 396).

5.4. Breach was substantial

219. Claimants further contend that “*an agreement can be terminated only for violation of an essential obligation and only if such violation is not only minor.*”³⁴¹ In that respect, they add that Article 5.3.4. did not regulate an essential obligation, as “[i]t has an accessory character because it only secures the buyer’s performance of his other obligations.”³⁴²
220. Respondent already explained and pointed to the practice of the Serbian Supreme Court of Cassation confirming that “*all contractual obligations are legally equally relevant for the achievement of the purpose of privatization*”.³⁴³ Hence, there is no division to “essential” and “non-essential” obligations when it comes to privatization agreements. In fact, as Prof. Radovic confirms, Serbian general contract law also does not differentiate between essential and non-essential obligations, and allows for termination of a contract due to a breach of any obligation.³⁴⁴
221. Furthermore, if Article 5.3.4. had the purpose “*to protect the property of the subject of privatization and to safeguard the material base of the business of the subject of privatization*” (which it clearly had),³⁴⁵ it is absurd to say that this was not an essential obligation.
222. Claimants consider that the breach of Article 5.3.4. was only minor as the pertinent funds secured by the 221 Million Pledge “*represented an insignificant part of the value of BD Agro’s assets.*”³⁴⁶ However, Claimants seem to forget that the Purchase Price for BD Agro amounted to EUR 5,548,996.46 EUR,³⁴⁷ while the funds that were used for the benefit of Crveni Signal and Inex amounted to EUR 959,719.60 (RSD 101.615.112,57).³⁴⁸ Therefore, the value connected with the violation was approximately 17% of the total Purchase Price, and 140% of the value of its one

³⁴¹ Reply, para. 417.

³⁴² Reply, para. 418.

³⁴³ Counter-Memorial, paras. 100-105; Judgment of the Supreme Court of Cassation of 14 November 2013, p. 5, **RE-62**.

³⁴⁴ Second Expert Report of Prof. Mirjana Radovic, 24 January 2019, para. 20.

³⁴⁵ Judgment of the Commercial Appellate Court No. Pž 8687/2011, 18 December 2012, **CE-722**.

³⁴⁶ Reply, para. 419.

³⁴⁷ Article 1.2 of the Privatization Agreement, **CE-17**.

³⁴⁸ Counter-Memorial, paras. 22-23.

installment.³⁴⁹ Bearing in mind that the failure to pay just one of the installments of the Purchase Price is indisputably a reason for termination, the pertinent funds were obviously far from minor. Indeed, Claimants' assertion that the violation was minor is wholly unconvincing considering that its value exceeded the value of an installment of the Purchase Price, while Mr. Obradovic struggled with payment of five out of six installments of the Purchase Price.³⁵⁰

223. Furthermore, Claimants' contention that “[i]t simply did not make any sense for the Privatization Agency to request that BD Agro obtain deletion of the pledge and repayment of the funds from Crveni Signal and Inex—only to be perfectly free to give them the money back and reinstate the pledges on the following day”³⁵¹ is nonsensical in itself. This stance relativizes all contractual obligations as breach of almost all of them could be repeated immediately after it was remedied. Thus, according to Claimants' unreasonable position, there would be no sense in requesting Mr. Obradovic to remedy any of the breaches as it would be in position to repeat each of them “on the following day” after payment of the purchase price.

5.5. Termination was a proportionate measure

224. Claimants further insist that termination of the Privatization Agreement was a disproportional measure by way of comparison with the breach of Article 5.3.4.³⁵² However, their argument is misplaced from the onset. As Prof. Radovic explains:

“this was not a question of proportionality, but a question of whether the breach of the Privatization Agreement was insignificant or not [...] This is because contract termination was a commercial act of the Privatization Agency, which was regulated by the Law on Obligations. Further, it can be said that the rule preventing contract termination due to an insignificant

³⁴⁹ The value of one installment was EUR 684,909.09. See Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, 15 October 2015, **RE-33**.

³⁵⁰ See Section I. B. 1.2.

³⁵¹ Reply, para. 422.

³⁵² Reply, paras. 417-420.

*breach is in a general sense a reflection of the principle of proportionality.”*³⁵³

225. In fact, Claimants contend that “*the disproportionality of the termination is obvious. The pledge caused no damage and did no harm to anyone.*”³⁵⁴ Yet, this is far from the truth.
226. First of all, even after partial repayments, the total debt of Crveni Signal and Inex towards BD Agro still remains at RSD 70.386.222,01 (EUR 664.603,53).³⁵⁵ This amount clearly represents the damage that has been caused to BD Agro by the breach of Article 5.3.4.
227. In addition, considering that the installments of the Purchase Price amounted to EUR 684.909,09, the amount of funds provided to affiliated companies (EUR 959.719,60) for which Mr. Obradovic pledged the land, was therefore much higher than an installment of the Purchase Price. Therefore, if termination due to non-payment of just one of the installments of the Purchase Price is a proportionate measure (which is undisputed), then there is no reason why termination due to a pledge resulting in the same (or even higher) loss to BD Agro would be disproportionate. This analogy gains particular weight when viewed in light of the present case.
228. Furthermore, based on the banking documentation analyzed in more detail hereunder (Section I. F. 2.3.4), it can be quite easily traced that the entire amount of over RSD 100 million spent for the benefit of Crveni Signal and Inex, actually ended up on the accounts of Mr. Obradovic.³⁵⁶
229. *First*, based on the bank statement of Crveni Signal, it is evident that the entire amount of RSD 65 million was paid directly to the bank account of Mr. Obradovic on the same day that Crveni Signal acquired them.³⁵⁷ *Second*, a month and a half after BD Agro gave the RSD 30 million loan to Inex, the latter company paid approximately RSD 30 million to Mr. Obradovic on the day that he partially paid two installments of

³⁵³ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 29.

³⁵⁴ Reply, para. 430.

³⁵⁵ Analytical card of debts owed by Inex on 25 March 2019, **RE-1** (RSD 26.539.008,45); Analytical card of debts owed by Crveni Signal on 25 March 2019, **RE-190** (43.847.213,56)

³⁵⁶ Even the additional amount of RSD 84 million paid to Inex for allegedly provided “goods and services” largely ended up with Mr. Obradovic.

³⁵⁷ Bank Statement of Crveni Signal, 2 June 2010, **RE-372**.

the purchase price for PIK Pester and BD Agro.³⁵⁸ Inex was also making substantial payments to Mr. Obradovic in between receiving the loan and paying for the installment, thereby leaving no doubt that the “benefit” of Inex was in fact personal benefit of Mr. Obradovic.³⁵⁹ Bearing this in mind, the loss that BD Agro suffered due to the payments for Crveni Signal and Inex was directly contributed to Mr. Obradovic, and was more than enough to cover an installment of the Purchase Price (specifically, the sixth installment, together with the accruing interest). Consequently, it can be easily concluded that Article 5.3.4. in this instance most directly served the purpose “to protect the property of the subject of privatization and to safeguard the material base of the business of the subject of privatization”, and that the breach was even misused to pay the Purchase Price.

230. Finally, it should be noted that Mr. Milosevic is of the opinion that the Agency failed to adequately “consider whether termination of the Privatization Agreement was a necessary and proportionate measure under the circumstances”.³⁶⁰ However, what Mr. Milosevic ignores is that the Privatization Agreement and the applicable law left no other measure at the Agency’s disposal except for termination. In other words, the Agency did not have an option to choose between two or more measures. The only thing it could have done was to grant extensions to Mr. Obradovic until he remedied the breach. The only question was how much patience will the Agency have. After four years of Mr. Obradovic’s failures to remedy the breach, there should be no doubt that not only was termination a proportionate measure with respect to the 221 Million Pledge, but it was *the only* available measure at the Agency’s disposal.

5.6. No outside “pressure”

231. Claimants’ also made sure to reiterate over and over again how the Agency’s conduct was allegedly motivated by outside pressure applied by the unions and minority shareholders (the alleged Ombudsman’s pressure is separately analyzed in Section I. C. 2). The central “support” for this allegation are the transcripts from the sessions of the Commission for Control, where Ms. Vuckovic stated at one point that

³⁵⁸ Mr. Obradovic’s Bank Statement from Vojvodjanska Banka for 14 February 2011, **RE-437**; Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, 15 October 2015, **RE-33**.

³⁵⁹ See Sections I. F. 2.3.4 and I. F. 3.1.4.

³⁶⁰ Second Expert Report of Mr. Milos Milosevic, 3 October 2019, para. 110.

*“We have mentioned daily communications we are receiving from the employees and trade unions, wherein they are requesting urgent measure to be taken and stating that they generally have big problems concerning business operations, in particular maintaining production and keeping the cattle alive, which is the core business activity of the subject of privatization”*³⁶¹

232. Claimants misleadingly attempt to present this as a conspiracy by “self-styled” and “obscure” associations of employees and shareholders. However, the truth is that minority shareholders and labor unions have been repeatedly requesting termination of the Privatization Agreement for a number of years prior to the actual termination, and even prior to the 221 Million Pledge.³⁶² These letters were in fact very helpful in discovering various instances of mismanagement of BD Agro and breaches of the Privatization Agreement. However, they could never create pressure or impact the Agency’s decision to terminate the Privatization Agreement in any way. This can be best seen from the fact that the Agency granted over 30 extensions to Mr. Obradovic while it was continuously receiving numerous letters from the unions and minority shareholders requesting termination. Evidently, had the Agency felt any undue pressure, it would have terminated the agreement much sooner. Mr. Obradovic provided it with many opportunities throughout the term of the Privatization Agreement to do so, but it nevertheless gave him second chances over and over again.
233. Transcripts of the sessions of the Commission for Control also confirm that the labor unions’ letters had absolutely no impact upon the Agency,³⁶³ contrary to Claimants’

³⁶¹ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 4-5, **CE-768**.

³⁶² Requests of unions of BD Agro’s employees of 24 May 2013, **RE-104**. Letter from Center for education and representation of shareholders and employees to the Government of the Republic of Serbia of 20 December 2010, **RE-125**; Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 26 January 2009, **RE-114**; Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 16 March 2009, **RE-115**; Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.; Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 21 March 2012, **RE-147**.

³⁶³ For instance, on 23 April 2015, after the discussion was well under way and after the Agency’s positions were already clearly expressed, Ms. Vuckovic only “mentioned daily communications [...] from the employees and trade unions”, and later went on to say how “[b]earing in mind that we no longer monitor this, our proposal would be to forward these communications to the competent labor inspectorate [...]”. This later quote was expectedly omitted by Claimant. The transcripts confirm that there is absolutely no indication that anyone at the Agency was under any “outside” pressure to terminate the agreement.

absurdly dramatized interpretation of these discussions.³⁶⁴ In this regard, Ms. Vuckovic further testifies that:

*“the Agency never rendered any decision, including the decision on termination of Agreement, because of complaints of unions. If the complaints of unions could influence decision of the Agency on whether it will terminate the Agreement, then the Agreement would be terminated much earlier [...]”*³⁶⁵

234. Her colleague from the Agency, Ms. Branka Radovic Jankovic, likewise confirms that:

*“we never understood the letters of the labor unions as pressure or influence to our decision. Labor unions could not have influenced the decision on whether or not the Agreement was breached and what would the next steps be. We sent the labor union’s letters pointing out to Mr. Obradovic’s numerous illegal actions, to the competent institutions for undertaking actions.”*³⁶⁶

235. Claimants have even named a mastermind behind the conspiracy – Mr. Zoran Ristic, director of an “*alleged*”³⁶⁷ Center for Education, Research and Privatization at a “*purported*”³⁶⁸ United Industry Unions “Independence”.³⁶⁹ Claimants indicate that Mr. Ristic approached the Agency with respect to BD Agro back in 2013, and that the Agency took him very seriously.³⁷⁰ In that regard, Claimants put great emphasis on the fact that Mr. Ristic was named as the new General Manager of BD Agro after the termination of the Privatization.³⁷¹ In fact, they state that they “*are left to wonder if*

Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 4-5, **CE-768**; Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, **CE-770**.

³⁶⁴ Reply, paras. 309-313.

³⁶⁵ Witness Statement of Ms. Julijana Vuckovic, 22 January 2020, para. 26.

³⁶⁶ Witness Statement of Ms. Branka Radovic Jankovic, 23 January 2020, para. 16.

³⁶⁷ Claimants provide absolutely no explanation as to why they consider that the Center was an “alleged” association.

³⁶⁸ Claimants provide absolutely no explanation as to why they consider that the Union was a “purported” association.

³⁶⁹ Reply, para. 329.

³⁷⁰ Reply, para. 330.

³⁷¹ Reply, paras. 458-460; Decision of the Serbian Business Register Agency, 15 December 2015, **RE-414**.

*the appointment was intended to reward Mr. Ristić for his role in the expropriation of the Claimants' investment.”*³⁷²

236. However, the truth of the matter appears significantly different when these facts put in the proper context. *First*, Mr. Ristic³⁷³ was at the head of a section of only one of the several labor associations which was protecting the rights of employees, not just in BD Agro but also in other companies. The letters and requests of the labor unions towards the Agency did not start and did not end with Mr. Ristic. Therefore, he was obviously not the "reason" for the “pressure” by the employees and minority shareholders. *Second*, being at the head of a devastated company at the verge of bankruptcy proceedings was not an appealing task, and could not possibly be Mr. Ristic’s motive for the purported conspiracy. Mr. Ristic proved as much when he resigned the position of BD Agro’s General Manager in less than a month after he was appointed.³⁷⁴ There would simply be no logic in orchestrating a conspiracy for terminating the Privatization Agreement for more than two years, all in order to gain a position that was abandoned in less than a month.
237. Complaints from labor unions and minority shareholders were nothing uncommon for Mr. Obradovic. The same kind of letters were sent to the Agency in another similar privatization involving a large number of employees and minority shareholders - PIK Pester.³⁷⁵ However, the Agency did not terminate the agreement in that instance, as the breaches were ultimately remedied after a number of extensions.³⁷⁶
238. Unfortunately, that was not the case with the 221 Million Loan breach which was not remedied even after almost five years of additionally granted terms for performance. Consequently, *“under Article 41a(1) of the Law on Privatization, termination occurred ex lege [since] the buyer failed to remedy the violation of the privatization agreement within an additional deadline granted by the Privatization Agency.”*³⁷⁷

³⁷² Reply, para. 459.

³⁷³ CV of Mr. Zoran Ristic, **RE-410**.

³⁷⁴ Resignation of Mr. Zoran Ristic, 11 January 2016, **RE-306**.

³⁷⁵ Letter from the Minority Shareholders Association and the Labor Union Solidarnost, 8 April 2010, **RE-472**.

³⁷⁶ Letter from the Privatization Agency to the Ombudsman, 22 June 2011, **RE-358**.

³⁷⁷ Second Expert Report of Mr. Milos Milosevic, 3 October 2019, para. 114.

C. OMBUDSMAN'S INVOLVEMENT HAD NO UNDUE INFLUENCE OVER THE AGENCY

239. Claimants' case substantially hinges on a conspiracy theory saying that someone, having political motives, exercised undue influence over the Agency in order to procure unlawful termination of the Privatization Agreement and expropriation of Mr. Obradovic's shares in BD Agro. However, the main protagonists of this conspiracy seem quite atypical as Claimants' main suspects are labor unions and an ombudsman in charge of protecting human rights.
240. Although the Ombudsman's involvement in the case started much after the pertinent breach of the Privatization Agreement was already discovered and seven notices under the warning of termination were already issued to Mr. Obradovic, Claimants see no obstacle in accusing Ombudsman of effectively causing the termination of the Privatization Agreement. However, this preposterous theory fails for several reasons, all of which have already been explained in the Counter-Memorial.³⁷⁸ Nevertheless, as Claimants' insist upon reiterating the same allegations in their Reply, Respondent will once again briefly explain that Ombudsman's: **(1)** involvement was lawful; **(2)** recommendation had not been taken into account when deciding on whether or not to terminate the Privatization; and **(3)** interventions also existed in other privatization cases.

1. Ombudsman's investigation was lawful

241. As Respondent previously explained,³⁷⁹ Ombudsman conducted his investigation in accordance with the law, which resulted in the issuance of a completely lawful recommendation to the Agency. Yet, in their Reply, Claimants' repeat their preposterous allegations from their previous submission, claiming the opposite.³⁸⁰

³⁷⁸ Counter-Memorial, Section II.B.

³⁷⁹ Counter-Memorial, Section II.B.1.

³⁸⁰ Reply, Section II.R.

1.1. Ombudsman acted upon employees' petition concerning the violation of human rights

242. As Claimants' themselves confirm, the Ombudsman's involvement was prompted by BD Agro's employees' petition submitted in November 2013.³⁸¹ Yet, without any explanation whatsoever, Claimants label the employees in question as "alleged employees".³⁸² However, not only were these actual employees, but they were in fact two presidents of two labor unions and the president of the striking committee at BD Agro *i.e.* persons obviously representing the vast majority of BD Agro's employees.³⁸³
243. Claimants further state that the Ombudsman did not have the jurisdiction to investigate the conduct of the Ministry of Economy and the Agency with respect to BD Agro as this was apparently "*completely unrelated to the protection of citizens' rights*".³⁸⁴ To the contrary, as the Ombudsman normally does, he investigated the complaints in order to determine whether there was a violation of human rights. In particular, the employees were complaining that their human rights were violated by (i) Ministry of Labor's failure to properly conduct inspection of BD Agro regarding labor law violations; and (ii) the Agency's failure to finally decide on the status of the Privatization Agreement. Namely, since BD Agro was brought to a disastrous financial condition by Mr. Obradovic and his associates through their various fraudulent activities and breaches of the Privatization Agreement, its employees were in a state of uncertainty regarding their labor rights. Employees knew that Mr. Obradovic was a notoriously negligent Buyer who indisputably failed to fulfill his obligations from the Privatization Agreement, and were thus asking why the Agency had not yet terminated the Privatization Agreement, in accordance with the Law on Privatization.

³⁸¹ Opinion of the Ombudsman, 19 June 2015, **CE-42**.

³⁸² Reply, para. 332. With no explanation whatsoever, Claimants' frequently label these, and all other unions or organizations who complained at the management of BD Agro, as "alleged" and "obscure". *See e.g.* Reply, paras. 146, 328-329, 331.

³⁸³ Letter from Union "Independence" and an Independent Union BD Agro to the Prime Minister and Minister of Interior, 24 May 2013, **CE-783**. See also Letter from Union "Independence" and an Independent Union BD Agro to the Privatization Agency, 24 May 2013, **RE-104**.

³⁸⁴ Reply, para. 347.

244. Regarding the first aspect of the complaints *i.e.* those regarding labor law, the Ombudsman determined that there were no violations of human rights committed by the competent authorities.³⁸⁵
245. When it comes to the other aspect of the complaints, the Ombudsman started investigating whether the Agency acted in accordance with the Law on Privatization *i.e.* whether employees' rights were violated by the Agency's possible failure to properly conduct its controls.
246. Having all of this in mind, the Ombudsman had all the right to investigate the situation. As Prof. Radovic confirms:

*“the Ombudsman was expressly authorized to control the legality and proper work of authorities [...], including holders of public authority (such as the Privatization Agency). Since the Privatization Agency was entrusted to control the privatization process and to follow up on contract performance, in my view the Ombudsman had the authority to look into the case of BD Agro.”*³⁸⁶

1.2. Ombudsman did not ignore the Agency's and the Ministry of Economy's position

247. Claimants' wrongly advance that the Ombudsman ignored the Agency's and the Ministry of Economy's letters (from 11 November 2014 and 11 May 2015, respectively) explaining their positions to him, and that: “[w]ithout any justification as to why he disagreed with the explanations of the Ministry of Economy and the Privatization Agency, the Ombudsman stated that the Privatization Agency should have terminated the Privatization Agreement [...]”.³⁸⁷

³⁸⁵ Letter from the Ombudsman to the Ministry of Labor, 8 October 2014, **CE-774**; Letter from the Ombudsman to the Independent Union BD Agro AD Dobanovci, 8 October 2014, **CE-775**; Letter from the Labor Inspectorate to the Ministry of Labor, 7 July 2014, **CE-776**.

³⁸⁶ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 44 (emphasis added).

³⁸⁷ Reply, Section II.R.2. and 3, *referring to* Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-43**; and Letter from the Ministry of Economy to the Ombudsman dated 11 May 2015, **CE-44**.

248. This is an astonishing example of how far are Claimants ready to go with misrepresentation of the written evidence. A simple comparison of Claimants' interpretation in paras 336 and 337 of the Reply and what was written in the letters referred to therein³⁸⁸ is a good example. Contrary to Claimants' (evidently) erroneous assertions, the Agency and the Ministry were not explaining to the Ombudsman why the Privatization Agreement should not have been terminated, but were explaining the reasons why the status of the Privatization Agreement was not yet decided. In that regard, in the letter from 14 November 2014 the Agency said that "*there are several reasons why the Agency did not yet render a decision on termination*" and then it elaborated those reasons.³⁸⁹ The Agency concluded that "*the Buyer has not completely fulfilled his contractual obligations*".³⁹⁰ Likewise, in its letter from 11 May 2015, the Ministry of Economy informed the Ombudsman that, after the Supervision Proceedings were conducted, it instructed the Agency, to grant Mr. Obradovic an additional term for delivery of evidence on remedial actions, and instructed it to undertake measures within its authority in case the Buyer does not comply.³⁹¹ It could not be any clearer that the Ministry of Economy also considered that there was an uncured breach which constituted a termination reason.

1.3. Claimants, Mr. Obradović and BD Agro did not have to be informed of the Ombudsman's investigation

249. Claimants' assertion that Claimants, Mr. Obradović and BD Agro were not informed of the Ombudsman's investigation, and that they were not able to defend themselves before the Ombudsman's final verdict was made public,³⁹² is much ado about nothing.

250. Ombudsman's investigation concerns solely the conduct of the state authorities and organizations entrusted with certain public authorities. He is not a decision-making body which administers any kind of contentious legal proceedings and decides upon legal issues disputed amongst private parties. He only investigates whether individual *i.e.* citizen rights were breached in the conduct of the pertinent subjects. There is simply no legal basis upon which third parties, such as Mr. Obradovic, would be

³⁸⁸ Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-43**, and Letter from the Ministry of Economy to the Ombudsman, 11 May 2015, **CE-44**.

³⁸⁹ Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-43**.

³⁹⁰ Letter from the Privatization Agency to the Ombudsman, 14 November 2014, **CE-43**.

³⁹¹ Letter from the Ministry of Economy to the Ombudsman, 11 May 2015, **CE-44**.

³⁹² Reply, Section II.R.2.

notified of the investigation or participate in it.³⁹³ There was particularly no reason to do so in the present case, as the Ombudsman did not decide upon any rights of Claimants,³⁹⁴ Mr. Obradovic nor BD Agro, as Respondent explains below.

1.4. The Recommendation was issued within the limits of Ombudsman's authority

251. Claimants' once again allege that the in his recommendation of 19 June 2015 (**"Recommendation"**), "*Ombudsman concluded that the Privatization Agreement should have been terminated*".³⁹⁵ This is yet another example of Claimants obvious misrepresentation of the written evidence. As Respondent already pointed out,³⁹⁶ the Ombudsman did not express his own position on the breach and the lawfulness of the termination at any point, but simply determined that the Agency's and the Ministry's delays in resolving the status of the Privatization Agreement breached employees' rights. This was very clear from the Recommendation itself, which determined that:

"[...] the Privatization Agency [...] and the Ministry of Economy made omissions in their work to the detriment of the employees of company [BD Agro] by doing the following, regardless of the fact that it had been determined [by the Agency] on January 17, 2011 that the buyer of the subject of privatization failed to fulfill his contractual obligations:

- In further procedure, the Privatization Agency failed to make a decision whether [...] legally prescribed requirements were met for the Agreement on sale of socially owned capital to be deemed terminated;

- The Ministry of Economy failed to give instructions to the Privatization Agency on further actions [...]

- Regardless of the fact that [...] when the Ministry of Economy initiated procedures for supervision [...] it still had not taken a

³⁹³ Counter-Memorial, para. 142.

³⁹⁴ Notably, it is also completely unclear why the Ombudsman would even consider ever contacting Claimants at any point, since they had absolutely no connection with BD Agro and its employees.

³⁹⁵ Reply, Section II.R.2.

³⁹⁶ Counter-Memorial, paras. 140-143.

stand whether the [Privatization Agreement] should be deemed terminated [...].”³⁹⁷

252. Consequently, further actions that were recommended likewise contained no position of the Ombudsman on whether a breach indeed occurred or whether the termination would be lawful, but it simply stated that the Agency:

“[...] shall take all necessary measures to determine, within the shortest period of time, whether all conditions stipulated by the Law on Privatization of 2001 for termination of the [Privatization Agreement] have been fulfilled, in order to finally clarify legal status of the subject of privatization [...] and its employees who, for a long period of time, have lacked any certainty regarding manner of exercising of their labor rights.”³⁹⁸

253. By obvious misinterpretation of certain quotes,³⁹⁹ Claimants try to create the impression that the Ombudsman took his own position on the existence of the breach and lawfulness of the termination of the Privatization Agreement. On the contrary, each misinterpreted quote used by Claimants reveals that the Ombudsman was mentioning findings made by the Agency and the Ministry themselves in this regard. This can be easily noticed by simply reading these quotes, where it was stated that:

“During the control performed on January 17, 2011, at the seat of the subject of privatization [...] the Privatization Agency determined that there was a violation of the Agreement [...]”⁴⁰⁰

or

“The Ministry of Economy and the Privatization Agency violated their obligations [...] since they failed to determine whether the required conditions were met for termination of the Agreement on sale of socially owned capital through the method of public auction for the subject of privatization [...] at the time when it was

³⁹⁷ Opinion of the Ombudsman, 19 June 2015, p. 1, **CE-42**.

³⁹⁸ Opinion of the Ombudsman, 19 June 2015, p. 2, **CE-42**.

³⁹⁹ Reply, Section II.R.2.

⁴⁰⁰ Opinion of the Ombudsman, 19 June 2015, p. 6 (emphasis added), **CE-42**.

*determined that there were violations of provisions of the agreement.”*⁴⁰¹

or

*“The Ombudsman has determined that despite the fact that several years ago, it was ascertained that the buyer did not fulfil its contractual obligations in the privatization procedure, the Privatization Agency and the Ministry of Economy have not terminated the Agreement, but rather have prolonged rendering of the final decision and thus breached the rights of employees of this company”*⁴⁰²

254. As it is evident from the above, there was nothing in Ombudsman’s conduct that overstepped the boundaries of his authority. Ombudsman issued a recommendation that did not deal with *how* the Agency should decide in the present case, but only that *it should decide something* as soon as possible.

2. Recommendation had not been taken into account when deciding on whether or not to terminate the Privatization Agreement

255. Inexplicably, Claimants once more completely ignore the circumstances and the timeline of the Ombudsman’s investigation, repeating that the “Agency reacted to the Ombudsman’s findings by demanding new audit reports on compliance with the Privatization Agreement”,⁴⁰³ and that the Agency “followed the unlawful instruction of the Serbian Ombudsman in the termination of the Privatization Agreement”.⁴⁰⁴

256. Ombudsman’s investigation started at the moment when the Supervision Proceedings were ongoing. Long before the Supervision Proceedings, the Agency took a clear stance in saying that conditions for termination were already met and that the breach of the Privatization Agreement must be remedied or termination would be inevitable.⁴⁰⁵ The Supervision Proceedings ended on 7 April 2015,⁴⁰⁶ over two months

⁴⁰¹ Opinion of the Ombudsman, 19 June 2015, p. 6 (emphasis added), **CE-42**.

⁴⁰² Ombudsman’s On-Line Statement, 23 June 2015 (emphasis added), **CE-45**.

⁴⁰³ Reply, Section II.S.

⁴⁰⁴ Reply, para. 1001.

⁴⁰⁵ See Section I. B. 3.1.

⁴⁰⁶ Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, **RE-98**.

before the Ombudsman issued his recommendations, and the Ministry just repeated what the Agency already concluded – that the breach of the Privatization Agreement must be cured. At the sessions held on 23 April and 19 June 2015, the Agency’s Commission for Control confirmed that it is still on that same position. There was no mention of the Ombudsman whatsoever.⁴⁰⁷ Four days after the former session, on 27 April 2015,⁴⁰⁸ and four days after the latter session, on 23 June 2015,⁴⁰⁹ the Agency sent letters to Mr. Obradovic in accordance with conclusions from its discussions.

257. It was only after the latter session of the Commission when, on 23 June 2015, the Ombudsman published his Recommendation saying that the Agency should decide on the status of the Privatization Agreement.⁴¹⁰ In the previously described circumstances existing at the time, it is literally impossible to say that the Recommendation could have had any impact on what was obviously already imminent at that point.
258. Communication between the Ombudsman and the Agency following the Recommendation, likewise contains no indication of any impact of the Recommendation on the Agency’s decision-making process.
259. On 17 August 2015, the Agency simply informed the Ombudsman of the timeline and current status of the case, and stated that it will inform him “*of the measures undertaken towards the Buyer [...] as soon as the decision of the competent Commission has been rendered*”.⁴¹¹ As no decision had been made by the Agency for almost a month after this letter (neither to terminate nor not to terminate), Ombudsman replied on 18 September 2015, reiterating how his recommendations were given “*in order to finally clarify the legal status of the subject of privatization*”, and to do so “*in the shortest possible period of time*”.⁴¹² The Ombudsman’s letter again contained no instruction to terminate the agreement,⁴¹³ just to take actions to finally resolve the situation.⁴¹⁴ For the sake of clarity, besides terminating the Privatization Agreement,

⁴⁰⁷ See e.g. Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, **CE-768**; Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, **CE-771**.

⁴⁰⁸ Letter from the Privatization Agency to Djura Obradovic, 27 April 2015, **CE-348**.

⁴⁰⁹ Letter from the Privatization Agency to Djura Obradovic and BD Agro, 23 June 2015, **CE-351**.

⁴¹⁰ Opinion of the Ombudsman, 19 June 2015, **CE-42**.

⁴¹¹ Letter from the Privatization Agency to the Ombudsman, 21 August 2015, **CE-725**.

⁴¹² Letter from the Ombudsman to the Privatization Agency, 18 September 2015, **CE-88**.

⁴¹³ Contrary to Claimants’ irrational interpretation. See Reply, Section II.U.

⁴¹⁴ Letter from the Ombudsman to the Privatization Agency, 18 September 2015, **CE-88** (“*it is necessary that [the Agency] submit to us a new notice on actions based on the recommendations and undertaken measures*”).

the Agency could have finally resolved the situation by issuing a confirmation that the Buyer fulfilled all of his contractual obligations⁴¹⁵ (provided, of course, that he did in fact fulfil them – which never occurred).

260. After the decision on termination was made, the Agency simply informed the Ombudsman of this development.⁴¹⁶ Consequently, the Ombudsman merely acknowledged the content of the Agency’s decision, and noted that the Agency acted in accordance with his Recommendation,⁴¹⁷ since a decision was finally made. In other words, it was not the termination as such that “satisfied” the Ombudsman,⁴¹⁸ but the fact that status of the Privatization Agreement was finally resolved, *i.e.* that a decision was taken.

3. Ombudsman’s interventions in other cases

261. It should also be noted that BD Agro was not the only privatization of Mr. Obradovic where the Ombudsman intervened. In May 2011, prompted by the employees’ complaints, the Ombudsman conducted an investigation regarding the Agency’s conduct in case of privatization of PIK Pester. Just as in the case of BD Agro, the employees were complaining that Mr. Obradovic breached the Privatization Agreement, and that the Agency failed to adequately react to these breaches *i.e.* that it failed to conduct proper control of the fulfilment of the buyer’s obligations.⁴¹⁹ The Ombudsman thus requested that the Agency provides him with a number of explanations.⁴²⁰ Yet, unlike in the case of BD Agro, with respect to PIK Pester the Agency stated that it did find breaches during the control of the privatization agreement, but that it determined in its last control that all breaches were remedied and that all obligations of the buyer were fulfilled.⁴²¹ Having reviewed the Agency’s explanations and the relevant documentation, the Ombudsman decided to terminate

in which you will inform us whether the issue of validity of disputable Agreement [...] was solved or not [...]”).

⁴¹⁵ See e.g. Article 41(3) of the 2001 Law on Privatization, **CE-220** (“After the buyer of capital or property has fulfilled his obligations from the agreement on sale of the capital or property, which has to be proven by the confirmation of the Agency, [...]”); Article 2(1) of the Rulebook on criteria for decision-making of 30 April 2015, **RE-92** (“The Commission renders decisions on fulfilment of obligations of the buyer [...] from agreements concluded in the process of privatization, [...] decisions on termination [...]”)

⁴¹⁶ Letter from the Privatization Agency to Ombudsman, 14 October 2015, **CE-726**.

⁴¹⁷ Letter from the Ombudsman to the Privatization Agency, 21 October 2015, **CE-727**.

⁴¹⁸ Reply, Section II.V.2.

⁴¹⁹ Letter from the Ombudsman to the Privatization Agency, 23 May 2011, **RE-357**.

⁴²⁰ Letter from the Ombudsman to the Privatization Agency, 23 May 2011, **RE-357**.

⁴²¹ Letter from the Privatization Agency to the Ombudsman, 22 June 2011, **RE-358**.

his inquiry.⁴²² This once again proves that it was not the Ombudsman's intention to achieve that the Agency terminate the Privatization Agreement but to, simply, finally decide whether or not it should be terminated.

D. PLEDGE OVER THE SHARES IN BD AGRO WAS LAWFULLY KEPT AND ACTIVATED

262. An inseparable part of the Privatization Agreement was the Share Pledge Agreement,⁴²³ which prescribed that:

“The Pledgor undertakes to pledge with the Agency the Confirmation of the shares of [BD Agro] which was purchased at the auction held on September 29, 2005. [...]

Confirmation of the shares [...] is pledged with the Agency by the Pledgor for the period of 5 years as of the day of conclusion of the sale and purchase agreement, that is, until final payment of sale and purchase price.”⁴²⁴

263. As explained in Counter Memorial,⁴²⁵ this agreement established a pledge over the shares in BD Agro (“**Pledge**”) in order to secure that the shares could be transferred back to the Share Fund in case the Privatization Agreement was terminated due to the buyer's fault.⁴²⁶ The transfer of the shares to the Share Fund was the mandatory consequence of the termination and had to be effectuated regardless of termination reason.⁴²⁷ However, Claimants' and their expert Mr. Milosevic persistently misrepresent the legal ground and the reasons for which the Pledge was established

⁴²² Letter from the Ombudsman to the Privatization Agency, 28 February 2012, **RE-359**.

⁴²³ Articles 3.1.2. and 11.1 of the Privatization Agreement, **CE-17** (“*The Buyer and the Agency conclude the share pledge agreement (confirmation of the shares) based on which the Buyer submits the confirmation of the shares to the Agency, which is kept by the Agency until payment of sale and purchase price. [...] The following appendices shall constitute integral part of this agreement: [...] Share Pledge Agreement – Appendix I*” (emphasis added))

⁴²⁴ Articles 1 and 2 of the Share Pledge Agreement, **CE-17**.

⁴²⁵ See Counter Memorial, Section II C.

⁴²⁶ Article 41a(2) of the Law on Privatization, **RE-136** (“*In the event of termination of the agreement referred to in paragraph 1 of this Article [...] the capital that was the subject of sale shall be transferred to the Share Fund.*”).

⁴²⁷ Article 41a(2) of the Law on Privatization, **RE-136**.

and argue that the Pledge could not be retained after the payment of the Purchase Price.⁴²⁸

264. Bearing this in mind, Respondent once again explains: **(1)** the purpose of the Pledge in the privatization; **(2)** that the Agency had completely justified reasons for retaining the Pledge; **(3)** that the Agency had a strong legal ground to retain the Pledge after payment of the Purchase Price; and **(4)** that in any event, retaining the Pledge caused no harm to Mr. Obradovic or Claimants.

1. Purpose of the Pledge

265. Claimants and their expert Mr. Milosevic's argue that after payment of the Purchase Price the Pledge should have been released,⁴²⁹ because "*under Serbian law, a pledge can only secure monetary claims*".⁴³⁰ This is incorrect.
266. First of all, there is no Serbian law provision that states that the *pledge can only secure monetary claims*. Mr. Milosevic's only source for this argument is a book which states that "*the pledge implies the settlement of that claim from the realization of the acquired value of the pledged item*".⁴³¹ Based on this Mr. Milosevic concludes that the pledge can secure only monetary claims. However, Mr. Milosevic ignores the fact that the book adds that "*if a manual pledge is aimed to secure the execution of non-monetary receivable, it must first be transformed in a certain way, it must be expressed in money, and then that monetary claim can be secured with pledge*".⁴³² Therefore, the cited scholars confirm that non-monetary receivables can also be secured by pledges, as long as they can be expressed in money.
267. In any event, the said discussion is inapplicable to the case at hand. As Prof. Radovic explains,⁴³³ the purpose of the pledge over the shares of a privatized company was not the same as the purpose of pledges in general (which is to secure collection of receivables). In case of privatization:

⁴²⁸ Reply, paras. 180-187; Second Expert Report of Mr. Milos Milosevic, 3 October 2019, paras. 158-171.

⁴²⁹ Second Expert Report of Mr. Milos Milosevic, 3 October 2019, para. 171. Reply, para. 182.

⁴³⁰ Second Expert Report of Mr. Milos Milosevic, 3 October 2019, para. 170.

⁴³¹ D. Hiber, M. Zivkovic, Obezbeđenje i učvršćenje potraživanja [in English: Securing and Fortifying Claims], (2015, Belgrade Law Faculty, Belgrade), p. 140, **CE-719**.

⁴³² D. Hiber, M. Zivkovic, Obezbeđenje i učvršćenje potraživanja [in English: Securing and Fortifying Claims], (2015, Belgrade Law Faculty, Belgrade), pp. 140-141, **CE-719**.

⁴³³ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, Section 4.

*“the pledge secured the Privatization Agency’s (future and conditional) right to claim shares back from the buyer in case his potential breach of contract eventually led to termination of the privatization agreement.”*⁴³⁴

268. In particular, Article 41a(2) of the Law on Privatization prescribed that after termination of a privatization agreement privatized shares are being returned to the Share Fund.⁴³⁵ This obligation was the reason for constitution of the pledge over the shares and not the payment of the purchase price. This is confirmed by the fact that there was no possibility of selling the shares by activation of a pledge in order for the purchase price to be collected, which is the general purpose of pledge as means of security. Rather, the Law on Privatization prescribed that in case of nonpayment of the purchase price (as well as in case of other breaches) the privatization agreement will be *ex lege* terminated while the shares will be returned to the Share Fund.⁴³⁶ Consequently, the purpose of the pledges over privatized shares could not be to secure the *payment* of the purchase price as Claimants contend.
269. The fact that the above understanding of the purpose of the pledges in privatization is correct one is further confirmed by the Law on Privatization enacted in 2014. Article 37(8) of that law prescribed that the pledge over the privatized shares is erased only after *“the buyer performs his last contractual obligation”*.⁴³⁷ The lawmaker explained that these amendments were made *“based on good experiences from the previous period”*,⁴³⁸ thereby indicating that this was an already applied rule.
270. Furthermore, Prof. Radovic’s analysis also confirms that, due to the principle of publicity, *“it was justified to keep the pledge in place, in order to inform all third parties that shares in question could be transferred to the Share Fund if the agreement was terminated.”*⁴³⁹

⁴³⁴ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 47.

⁴³⁵ Article 41a(2) of the 2001 Law on Privatization

⁴³⁶ Article 41a of the 2001 Law on Privatization, **RE-136**.

⁴³⁷ Article 37(8) of the 2014 Law on Privatization, **CE-223**.

⁴³⁸ Draft 2014 Law on Privatization, p. 38, available at: www.parlament.gov.rs (28.12.2019), **RE-482**.

⁴³⁹ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 48.

2. Agency's reasons for retaining the Pledge were justified

271. Claimants assert that the Agency “*kept the pledge in place, with the sole purpose of preventing Mr. Obradović from transferring the Privatized Shares—and making sure that the Privatization Agency would be able to expropriate them.*”⁴⁴⁰ They rely in this regard to the transcripts from the sessions of the Commission for Control held on 23 April and 19 June 2015, which Claimants have preposterously dramatized and misrepresented with respect to multiple topics, including this one.⁴⁴¹

272. The truth of the matter is that the Agency did not keep the Pledge in order to be able to expropriate the shares but in order to secure the fulfillment of the obligations from the Privatization Agreement. Ms. Vuckovic confirmed this at the session of 23 April 2015:

*“[...] if the Agency was to render a decision on deletion of pledge against shares to the buyer registered to his benefit, it would be free to dispose of them, which would be certain bearing in mind the buyer's request for assignment of the agreement. If this disposal of shares is permitted, and the buyer is, I repeat, entitled to this in accordance with the agreement, generally the Agency would no longer be in a contractual relation with someone and you would no longer be able to take measures against the contracting party, when the legal ground had generally ceased with it, and the buyer would be free to dispose of its shares.”*⁴⁴²

273. In Claimants' view,⁴⁴³ this quote demonstrates that the Agency considered that the Pledge over the shares should have been released after payment of the Purchase Price. However, what Claimants omit to note is that the Agency was actually concerned with the fact that Mr. Obradovic, as a notoriously negligent buyer in clear breach of the Privatization Agreement, would use the first opportunity to dispose of the shares and

⁴⁴⁰ Reply, para. 187.

⁴⁴¹ Reply, Section II.P.

⁴⁴² Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4 (emphasize added), **CE-768**.

⁴⁴³ Reply paras. 291-292.

effectively hinder the Agency's efforts to obtain remedy of the breach of the Privatization Agreement.

274. Furthermore, at the same session of the Commission, it was noted that keeping the Pledge would be in line with its very purpose. In that regard, immediately after the above quote, Ms. Vuckovic stated:

“Also, the new Law, let us remind, in article 37 paragraphs 8 and 9, prescribes that on the day of certification of the agreement on sale of capital, the Agency acquires a statutory pledge right against the capital which was the subject of the sale, and it is obligated, within 15 days after fulfilment of the last contractual obligation of the buyer, to notify the competent registry for the purposes of deletion of the statutory pledge against the capital. This provision of the law was, in fact, an attempt to, so to say, prevent and avoid that what we had as a clear omission in our agreements [...] where we allowed disposal of capital during the validity of the agreement, we generally allowed shares to be alienated and we were still monitoring the agreement which was a substantial problem.”⁴⁴⁴

275. Interestingly, in their Reply, Claimants omit to mention this explanation in which the Agency was evidently considering that the purpose of the Pledge was to secure the fulfilment of all obligations of the Buyer, not just the payment of the Purchase Price. Other quotes from the session of 23 April 2015, that Claimants referred to, only further confirm this:

“Sasa Novakovic: And the agreement on purchase of capital, it stated that the buyer can dispose of the shares, right? Freely?

Female voice 2: That it can once it had paid the purchase price. Which it did. But if we were to decide like this, at least in my opinion, I would not be inclined to, although I have a problem with the provision of the agreement such as it is, if we were now to

⁴⁴⁴ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4 (emphasis added), **CE-768**.

release this pledge he would be free to dispose of the shares freely, but then it is a problem, so I would rather advocate that we postpone deletion of pledge until [fulfillment],^[445] that is until expiry of this deadline until which it had not fulfilled its contractual obligations we have ordered it to fulfil, that is, that is not us, but the minister ordered it. And we will confirm such decision (laugh).”⁴⁴⁶

276. The above quote clearly demonstrates that the intention was not shares to be expropriated, but the Pledge to be retained until “*fulfillment*” of the remaining obligation or (only in case the remaining obligations are not fulfilled) until “*expiry of this [additional] deadline*”.

277. Claimants further state that the Commission for Control undoubtedly understood that the Buyer would not be able to comply with the requested remedies within 90 days and that this would give the Agency the opportunity to terminate the agreement before the Buyer procures court protection.⁴⁴⁷ Allegedly, this can be seen from another selective quote from the same session of the Commission:

“Female voice 2: [...] Now, I just don’t know, they can enter into certain dispute and we are in violation of contractual...”

Saša Novaković: True.

Julijana Vučković: Well, certainly.

Female voice 4: Ninety days will pass quickly and the dispute will not even get scheduled in 90 days. So we will resolve this before, I mean... dear God knows”⁴⁴⁸

⁴⁴⁵ Claimants translated this word (“izvršenje”) as “execution”, although the more accurate term in this context would be “fulfillment”, as Claimants have correctly translated it in the continuation of the same sentence.

⁴⁴⁶ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 10 (emphasis added), **CE-768**.

⁴⁴⁷ Reply, para. 305.

⁴⁴⁸ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 10, **CE-768**.

278. Again, Claimants intentionally omit to include the continuation of the quoted conversation, where it was stated:

“Female voice 2: It all depends whether we will be able to resolve this issue if we maybe change the rulebook and loosen the conditions a little bit for the buyer which...

Female voice 3: On the other hand, [the Buyer] should fulfil, it did not fulfil obligations from the agreement, these obligations for which we are granting the additional deadline of 90 days?

Julijana Vuckovic: That is correct. That is correct. Others, it had fulfilled.

*Female voice 2: Okay, we have 90 days, afterwards we will see what we will do.^[449] Within 90 days and proposal of these measures there is nothing new to... that's [instructed]^[450] to us in supervision... and we can never...*⁴⁵¹

279. Clearly, there were no bad faith intentions towards Mr. Obradovic. To the contrary, members of the Commission have discussed how they could use the 90 days period to change the Agency's rulebooks and “loosen the conditions a little bit” for the benefit of the Buyer. In fact, the Agency obviously hoped that the Buyer will be able to remedy the breach and even discussed possibility of granting him yet another additional deadline in case he again fails to remedy the breach. In that regard, at the session of 19 June 2015, one of the members of the Commission stated:

“Do we need, after expiry of these 90 days, to render a final decision on what to do with the company; if [the Buyer] fulfilled its contractual obligations all is well, but if it did not fulfil the contractual obligations then we know what the sanction is. Or do we have the right to provide it with another additional term. This

⁴⁴⁹ Claimants have incorrectly included a reference to a „laugh“ at this moment. However, after reviewing the audio transcripts, no laugh can be heard.

⁴⁵⁰ Claimants translate this word as „order“ („naložiti“) although it would be more accurately translated as „instruct“.

⁴⁵¹ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 10 (emphasis added), **CE-768**.

*is imposed on me as a strictly legal question, I am not asking from you to give me an answer now, but this is something we need to deal with.”*⁴⁵²

280. Obviously, this whole discussion would serve no purpose if the Agency’s intention was to simply “expropriate” Mr. Obradovic’s shares in BD Agro.
281. Bearing all of the above in mind, there should be no doubt that the transcripts of the sessions of the Commission for Control do not contain even a glimpse of bad faith. On the contrary, they evidence that members engaged in a good faith discussions of the Agency’s contractual options (just as any other contractual party would do) and that they were conscientiously and diligently doing their jobs and even trying to help Mr. Obradovic.
282. On a related note, Claimants’ allegation on how the Agency’s “*officials purposefully switched off the recording for the last part of their discussion about BD Agro*”,⁴⁵³ is utterly speculative. Ms. Vuckovic, who attended the said session held on 23 April 2015, does not remember the recording being switched off at any point, but is completely confident that even if there was any interruption of the recording, this did not occur because a hidden agenda was to be discussed.⁴⁵⁴ Given the apparent openness of the discussions at these sessions, Claimants’ sensationalist interpretation of this event indeed seems highly unlikely.

2.1. The Buyer was familiar with the reasons for retaining the Pledge

283. Even when Mr. Obradovic inquired on why the certificate necessary for deletion of the Pledge was not issued after he paid the Purchase Price, the Agency provided him with the same explanation that was later put forward at Commission’s sessions *i.e.:*

“that the payment of the purchase price is only one of the contractual obligations and that the execution of other contractual obligations is independent of the obligation to pay the purchase price. She also stated that the Agency in its work applies the Law

⁴⁵² Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 5 (emphasis added), CE-770.

⁴⁵³ Reply, Section II.P.7.

⁴⁵⁴ Witness Statement of Ms. Julijana Vuckovic, 24 January 2020, para. 25.

on Privatization and controls the concrete sale contract, that all obligations are important and that what is signed must be completed to the end. This is a standard form contract of sale by public auction and the treatment during the control is the same, for any offense, irrespective of the gravity of the offense.”⁴⁵⁵

284. The stance conveyed by the Agency was obviously understood and accepted by Mr. Obradovic, as BD Agro subsequently proposed, in one of its letters regarding the transfer of shares to Coropi, that:

“Pledge on shares of BD Agro [...] would still be in favor of the Republic of Serbia until the moment of fulfillment of remaining obligations from the [Privatization Agreement]”⁴⁵⁶

285. Therefore, this letter was obviously an admission that BD Agro *i.e.* Mr. Obradovic, knew full well that the Pledge was not to be removed until he remedied the breaches in question.

2.2. Retention of pledges in other privatizations

286. The Agency’s stance that the Pledge cannot be removed because there were some outstanding obligations of the Buyer, was followed in other privatization cases as well.

287. For instance, in the case of privatization of *VS Ada*, the buyer paid the full purchase price in 2013, and requested deletion of the pledge immediately thereafter.⁴⁵⁷ However, the Agency only accepted to issue him with the certificate of payment of the purchase price.⁴⁵⁸ The approval of deletion of the pledge was not given because at the time there were certain obligations that were yet to be fulfilled (continuity of business operations had to be maintained for seven years, which expired in 2015, *i.e.* after the payment of the purchase price). Therefore, only after it was determined that

⁴⁵⁵ Minutes from meeting held at the Privatization Agency on 4 February 2014 (emphasis added), **RE-36**.

⁴⁵⁶ Letter from BD Agro to the Privatization Agency, 26 February 2015 (emphasis added), **CE-334**.

⁴⁵⁷ Letter from Mr. Rusak Jozef to the Privatization Agency, 31 May 2013, **RE-334**.

⁴⁵⁸ Confirmation on payment of the purchase price for *VS Ada*, 17 June 2013, **RE-335**. Letter from Mr. Rusak Jozef to the Privatization Agency, 22 August 2013, **RE-336**.

the buyer fulfilled all his obligations within the terms prescribed by the Privatization Agreement,⁴⁵⁹ the buyer's repeated request on deletion of the pledge⁴⁶⁰ was granted.

288. Similarly, in the case of privatization of *Vocno Lozni Rasadnik*, the buyer paid the last installment of the purchase price on 8 January 2014. A few days later, the buyer requested the confirmation that the purchase price was paid,⁴⁶¹ which was issued on 29 January 2014.⁴⁶² However, a couple of months prior to the purchase price being paid, the Agency sent a notice to the buyer regarding alienation and pledging of the fixed assets of the subject, as it was not able to determine with certainty whether the buyer breached the relevant provisions of the privatization agreement.⁴⁶³ In the following months the buyer delivered documentation, including two audit reports, confirming that there were no breaches of the pertinent provisions. The Agency analyzed the documentation and determined that the buyer fulfilled all his obligations from the privatization agreement.⁴⁶⁴ After that, on 12 June 2014, the buyer requested deletion of the pledge over the privatized shares, having in mind that he “*settled his obligations and paid the purchase price*”.⁴⁶⁵

289. Having in mind these examples, it is evident that it was clear to all concerned that the Agency had a practice of retaining pledges until fulfilment of all obligations from the pertinent privatization agreement (which the buyers accepted). It follows that the Agency obviously did not have an intention to “expropriate” the shares in case of BD Agro, but followed its practice to secure that the privatization agreement was complied with, and was ready to release the pledge when this occurred, as in other cases. Unfortunately, the Buyer never complied with his obligations in the case of BD Agro.

3. Legal ground for retaining the Pledge

290. As Respondent previously explained,⁴⁶⁶ the Agency had a clear legal ground to keep the pledge over the shares in BD Agro even after the payment of the Purchase Price

⁴⁵⁹ Report from the 17th control of contractual obligations for VS Ada, 24 April 2015, **RE-337**.

⁴⁶⁰ Letter from Mr. Rusak Jozef to the Privatization Agency, 16 June 2015, **RE-338**.

⁴⁶¹ Report from the 16th control of the contractual obligations for Vocno Lozni Rasadnik, 29 May 2014, **RE-339**.

⁴⁶² Confirmation on payment of the purchase price for Vocno Lozni Rasadnik, 29 January 2014, **RE-340**.

⁴⁶³ Report from the 16th control of contractual obligations for Vocno Lozni Rasadnik, 29 May 2014, **RE-339**.

⁴⁶⁴ Report from the 16th control of contractual obligations for Vocno Lozni Rasadnik, 29 May 2014, **RE-339**.

⁴⁶⁵ Letter from Kolubara Gradjevinar to the Privatization Agency, 12 June 2014 (emphasis added), **RE-341**.

⁴⁶⁶ Counter-Memorial, paras. 146-152.

because the Buyer did not fulfil his other obligations. The legal ground for such conduct is based on Article 122 of the Law on Obligations, that states:

*“(1) In bilateral contracts, no party shall be bound to fulfill its obligation unless the other party fulfills, or is simultaneously ready to fulfill, its obligation [...]”*⁴⁶⁷

291. Therefore, the Agency was not bound to release the Pledge until the Buyer fulfilled his obligations from the Privatization Agreement. Specifically, the Agency was not bound to release the Pledge until Mr. Obradovic fulfilled *i.e.* was ready to simultaneously fulfil his obligations from Article 5.3.4.
292. Claimants state that *“application of Article 122 of the Law on Obligation would violate Serbian law because the pledge would effectively secure also the Privatization Agency’s non-monetary claims from the Privatization Agreement”*.⁴⁶⁸ However, as explained above in Section I. B. 2.1.3, securing non-monetary claims would be completely permissible as the purpose of the pledge in privatizations is to secure all claims from the privatization agreement.
293. Claimants and their expert further contend that Article 122 was not applicable in the case at hand, because (i) obligation from Article 5.3.4. and obligation to release the Pledge were not reciprocal obligations; and (ii) the pledge was established *i.e.* agreed upon solely for securing payment of the Purchase Price.⁴⁶⁹ As Respondent explains below, these arguments are completely unfounded as well.

3.1. Reciprocity

294. Claimants contend that Article 122 only applies to reciprocal obligations, while *“Article 5.3.4 of the Privatization Agreement was not reciprocal to the Privatization Agency’s obligation [...] to release the pledge”*.⁴⁷⁰ First of all, Article 122 does not stipulate that it applies only to reciprocal obligations.

⁴⁶⁷ Law on Obligations, Article 122 (1), **RE-32**.

⁴⁶⁸ Reply, para. 184.

⁴⁶⁹ Reply, paras. 291-294; Second Expert Report of Mr. Milos Milosevic, 3 October 2019, paras. 167-171.

⁴⁷⁰ Reply, para. 183.

295. Nevertheless, as already explained, releasing the Pledge was reciprocal to fulfillment of all obligations from the Privatization Agreement.⁴⁷¹ Hence, refusal to release the Pledge was absolutely reciprocal to the Buyer's failure to fulfil his obligations and remedy the breach from Article 5.3.4.

3.2. Accessority

296. Claimants recycle the same reciprocity argument under the principle of accessority as well. Namely, they contend that the said principle was violated by the application of Article 122 because in that way, the pledge would secure all of Mr. Obradović's obligations instead of only the obligations that it was agreed to secure.⁴⁷² However, as Prof. Radovic explains:

“[Claimants’] arguments in this respect are entirely based on the assumption that payment of the purchase price was the only claim secured by the Pledge. However, [...] this was not the case. The Pledge secured a future and conditional claim arising out of contract termination in case the buyer breached any of the obligations listed in Article 41a of the 2001 Law on Privatization. For this reason, the principle of accessority was not violated since the claim against the buyer was indeed secured by the Pledge”⁴⁷³

297. Bearing in mind the above, the Agency had more than compelling legal grounds (and a duty) to retain the Pledge after the payment of the Purchase Price, as Mr. Obradovic's obvious breaches of the Privatization Agreement were discovered and were not remedied before that point in time.

4. In any event, the Pledge caused no harm to Claimants

298. Another question that needs to be answered is - what harm did retaining of the Pledge actually cause to Mr. Obradovic *i.e.* Claimants? The answer is none.

299. Regardless of the Pledge, Mr. Obradovic was completely free to manage BD Agro as he deemed fit. The only thing that Mr. Obradovic could not do prior to remedying the

⁴⁷¹ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 52.

⁴⁷² Reply, para. 185.

⁴⁷³ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 51 (emphasis added).

breaches was to transfer the pledged shares. Thus, BD Agro's business was unhindered by the Pledge. Hence, the Pledge had absolutely no negative effects to the Claimants' purported "investment".

300. According to the Claimants' narrative, their purported investment in BD Agro was structured as the venture in which Mr. Obradovic was the nominal owner of BD Agro, while the company was beneficially owned by Mr. Rand. Claimants have not so far offered any persuasive explanation as to why the transfer of merely "nominal" title in shares from Mr. Obradovic to Coropi was essential for their business operation. The answer is clear – it was not. If that would be the case, Claimants would not structure the operation in a way which allegedly they did. The fact that Mr. Obradovic retained his nominal ownership after 2013 did not in any way prevent Claimants from operating BD Agro's business in the same manner in which this business was, according to Claimants, operated ever since October 2005.

E. REQUEST FOR ASSIGNMENT OF THE PRIVATIZATION AGREEMENT TO COROPI

301. Claimants' continue to complain about another situation for which they have nobody else to blame but themselves – the unsuccessful attempt to transfer the shares to Coropi. It is an undisputed fact that Mr. Obradovic was the only buyer of BD Agro under the Privatization Agreement and was the only one registered as the majority owner of the shares of BD Agro in the period of 2005-2015. What is contended by Claimants, however, is that Mr. Obradovic held this status only "nominally", and that all along the real "beneficial" owner of BD Agro was Mr. Rand *i.e.* Claimants. Under their interpretation, the "beneficial" owners exercised full control over the company and had all the benefits of legal ownership, while Mr. Obradovic essentially had nothing.⁴⁷⁴
302. Nevertheless, under Claimants' story, the "beneficial" owner wanted to change this arrangement in 2013. He wanted to have Mr. Obradovic's "nothing" as well.⁴⁷⁵

⁴⁷⁴ Reply, Sections II.A-II.F.

⁴⁷⁵ Peculiarly, with the request for assignment, Claimants apparently did recognize the significance of being the contractual party under the Privatization Agreement and having registered ownership, but seemed to have developed a different understanding when defending their position in this arbitration – where they essentially see no difference in the effects of "beneficial" and legal ownership.

Apparently, the reason for this move was that the company needed additional capital, which “*Mr. Rand was more than willing to inject [...] but planned to do so only after having Mr. Obradović transfer the nominal ownership of BD Agro*”.⁴⁷⁶ So, Mr. Rand did not mind allegedly investing millions of dollars without being the registered owner for years, but suddenly refused to invest a single cent without acquiring registered ownership first. This story is simply illogical.⁴⁷⁷

303. Be it as it may, having in mind that Claimants have continued to advance their tenacious story in accusing the Agency of maliciously not approving their request for assignment, Respondent once again explains below that the request: (1) was prepared negligently; (2) was submitted as incomplete; (3) could not have been considered during the Supervision Proceedings; (4) was never updated *i.e.* completed after the Supervision Proceedings; and (5) did not fulfill the requirements for being approved at any single point in time.

1. Negligent preparation of the request for the assignment

304. In June 2013, the Agency was approached for the first time with a request to transfer the Privatization Agreement from Mr. Obradovic to a company affiliated with Mr. Rand. Specifically, on 11 June 2013, Mr. Markicevic inquired with the Agency regarding this possibility and received a list of documents that a buyer was required to submit together with a request for assignment under the Agency’s bylaws.⁴⁷⁸ However, Claimants assert that the assistant who allegedly gave Mr. Markicevic the list (Ms. Jelena Jelic), also explained to him that the list “*had been created for Serbian assignees and, if some of the required documents were impossible to obtain for foreign entities, an adequate foreign equivalent document or an affidavit would do*”.⁴⁷⁹ As it is the case with many of Claimants’ crucial allegations, their only support for this claim is Mr. Markicevic’s plain assertions.⁴⁸⁰

⁴⁷⁶ Memorial, para. 143.

⁴⁷⁷ A more plausible scenario would be that *e.g.* Mr. Rand wanted to acquire BD Agro from Mr. Obradovic as compensation for some outstanding obligations that Mr. Obradovic owed to him.

⁴⁷⁸ Reply, para. 212.

⁴⁷⁹ Reply, para. 212.

⁴⁸⁰ The only indication that Ms. Jelic allegedly gave the list to Mr. Markicevic was her handwritten name and phone number on the same paper. However, this handwriting miraculously disappeared from the original when Claimants mistakenly submitted the same document with their Reply - thereby leaving serious doubt as to the authenticity of this exhibit and the testimony of Mr. Markicevic. *See* List of documents requested

305. In any event, Mr. Rand, an experienced businessman in charge of a multimillion dollar empire, apparently relied heavily on an oral and unofficial explanation of the assignment procedure, given to Mr. Markicevic by an assistant working at the Agency. And, for the next two years, Messrs. Obradovic and Rand persistently relied on that alleged explanation with no effort at providing what was actually written on that piece of paper *i.e.* what was envisaged by the applicable regulation. The truth is that Mr. Obradovic and Claimants acted carelessly in their attempt to assign the Privatization Agreement to Coropi and that they are the only ones to blame for the assignment not being approved.

2. Submission of an incomplete request for assignment

306. First, the request for assignment was submitted by Mr. Obradovic on 1 August 2013, with no supporting documentation whatsoever.⁴⁸¹ Having in mind that Mr. Obradovic admittedly had previous experience in assigning privatization agreements,⁴⁸² and that Mr. Markicevic was even provided with a list of required documents two months before, Mr. Obradovic was fully aware that he submitted an incomplete request. This already demonstrated how “diligent” the attempt to assign the Privatization Agreement was.

307. Throughout the following two months, the request was supplemented as many as four times, concluding with 26 September 2013.⁴⁸³ However, even after the request was repeatedly supplemented, the documentation was still not complete, given that Coropi did not manage to deliver everything that was required by the applicable regulation.

308. Specifically, out of the documents required at the time of the request, Claimants’ request did not contain: (i) an appropriate bank guarantee; (ii) certificate issued by a competent authority, not older than six months, that the controlling member or shareholder has not been convicted for any criminal offences referred to in Article 12

by the Privatization Agency, 11 June 2013, **CE-272**; *cf.* List of documents requested by the Privatization Agency, 11 June 2013, **CE-564**.

⁴⁸¹ Letter from D. Obradović to the Privatization Agency, 1 August 2013, **CE-273**.

⁴⁸² Reply, para. 222.

⁴⁸³ Letter from Coropi to the Privatization Agency, 26 August 2013, **RE-55**; Letter from DPB Lawyers a.o.d. to the Privatization Agency, 2 September 2013, **RE-56**; Statement of the controlling shareholder of Coropi, 19 August 2013, **RE-57**; Letter from Coropi to the Privatization Agency, 26 September 2013, **CE-275**; Agreement on Assignment of the Privatization Agreement between D. Obradović and Coropi, 21 September 2013, **CE-274**.

of the Law on Privatization; and (iii) certificate issued by a competent authority, not older than six months, that against the natural person that is the controlling member or shareholder no proceedings have been conducted for any criminal offences referred to in Article 12 of the Law on Privatization.⁴⁸⁴

3. Supervision Proceedings enabled consideration of the request for assignment

309. On 23 December 2013, the Supervision Proceedings were initiated,⁴⁸⁵ after which the Agency informed Messrs. Obradovic, Markicevic and Broshko that during these proceedings the Agency could not take any measures or render any decisions with regard to BD Agro.⁴⁸⁶ Nevertheless, the Agency also informed them that the documentation submitted with the request was incomplete.⁴⁸⁷ The Agency's stance in that regard was repeatedly and consistently confirmed and communicated to Mr. Obradovic, BD Agro and Coropi throughout the duration of the Supervision Proceedings.⁴⁸⁸ The Supervision Proceedings ended on 7 April 2015.⁴⁸⁹

310. Therefore, between 23 December 2013 and 7 April 2015, the request for assignment had to be put on hold, and Mr. Obradovic and Coropi knew this full well.⁴⁹⁰

4. Failure to update and complete the request for assignment

311. After the Supervision Proceedings ended, the Agency again acquired the possibility to decide upon the request. However, the Agency had no doubt that the previously submitted request was incomplete even before the Supervision Proceedings were initiated, as it was clearly noted at the session of the Commission for Control of 23 April 2015:

“[...] in August 2013, the buyer submitted a request for assignment of the agreement to one Canadian company [...] the Centre for Control reviewed the documentation submitted by the

⁴⁸⁴ Procedure for Conducting of Activities of the Center for Control of 29 November 2011, Article 8.2., **RE-107**; See also Counter-Memorial, paras. 167-170.

⁴⁸⁵ Decision of the Ministry of Economy, 23 December 2013, **CE-206**.

⁴⁸⁶ Minutes of the meeting held at the Privatization Agency on 30 January 2014, **RE-28**; Minutes of the meeting held at the Privatization Agency on 4 February 2014, **RE-36**. See also Counter-Memorial, paras. 155-160.

⁴⁸⁷ Counter-Memorial, paras. 156.

⁴⁸⁸ Counter-Memorial, paras. 155-160.

⁴⁸⁹ Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, **CE-98**.

⁴⁹⁰ Counter-Memorial, paras. 155-160.

*assignee, and we determined at that point that the assignee did not submit the entire documentation, which was pointed out on several occasions in meetings held at the mere headquarters of the Agency”*⁴⁹¹

312. Yet, Mr. Obradovic and Coropi did absolutely nothing to change this state of affairs.

4.1. Certificates on criminal record and criminal proceedings

313. Claimants do not contest the fact that the certificates regarding criminal convictions and proceedings were never submitted.⁴⁹² Instead, Claimants argue that, Mr. Jennings, as the “nominal” controlling shareholder of Coropi, mentioned in his statement submitted to the Agency that he was never convicted and that there were no criminal proceedings open against him.⁴⁹³ But this was not what the regulation required. The regulation required the certificate to be issued by a *competent authority*,⁴⁹⁴ such as a court or the justice department in the home state of the shareholder.

314. Yet, Claimants consider that this requirement was unnecessary. They state that in “practice”, foreign citizens were basically relieved of this obligation “*if it was impossible to obtain the required document in their home jurisdiction*”.⁴⁹⁵ However, they have provided absolutely no support for the existence of any such practice, except for their usual “source of all knowledge”, Mr. Markicevic.⁴⁹⁶

315. Nevertheless, Claimants have not even stated nor tried to prove why it was “impossible” for Mr. Jennings to obtain the requested certificates in his home jurisdiction, be it Cyprus⁴⁹⁷ or Ireland.⁴⁹⁸ Furthermore, even if it was impossible for Mr. Jennings to obtain it (*quod non*), Mr. Rand, as the claimed “beneficial” controlling shareholder behind the Ahola Trust, was free to obtain it for himself in Canada.

⁴⁹¹ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 3 (emphasis added), **CE-768**.

⁴⁹² Reply, para. 227.

⁴⁹³ Reply, paras. 226-227.

⁴⁹⁴ Procedure for Conducting of Activities of the Center for Control of 29 November 2011, Article 8.2., **RE-107**.

⁴⁹⁵ Reply, para. 227.

⁴⁹⁶ Third Witness Statement of Mr. Igor Markicevic, 3 October 2019, para. 94.

⁴⁹⁷ Home state of Coropi. See Corporate register of Coropi, 5 September 2019, **CE-83**.

⁴⁹⁸ Home state of Mr. Jennings. See Witness Statement of Mr. Robert Jennings, 3 October 2019, para. 1.

316. Moreover, Claimants completely ignore the fact that the requested certificates must not have been older than six months.⁴⁹⁹ Therefore, even if a statement of the controlling shareholder could have replaced a certificate issued by a competent state authority (*quod non*), then, *mutatis mutandis*, Mr. Obradovic had to submit these statements updated after the Supervision Proceedings ended. However, he had never done so.

4.2. Bank guarantee

317. While the previous version of the Rulebook indicated that there were several forms of guarantees, Article 34 of the Rulebook on Undertaking of Measures from 7 April 2014, changed the said provision and provided that a bank guarantee in the value of 30% of the purchase price had to be submitted together with the request.⁵⁰⁰ When the Supervision Proceedings ended, on 7 April 2015,⁵⁰¹ this provision was still in force. During the validity of this rulebook, the bank guarantee was never submitted. In any event, as the Agency announced to Mr. Markicevic, a new Rulebook abandoned the requirement of a bank guarantee as of 30 April 2015.⁵⁰²

4.3. Opinion of the authority for the prevention of money laundering

318. At the same time, the new Rulebook of 30 April 2015 also introduced the requirement of the delivery of an “[o]pinion of the competent organization for the prevention of money laundering in accordance with Article 13 of the Law on Privatization and non-existence of obstacles on the receiver’s part for the assignment of the Agreement on sale, i.e. for acquiring the capacity of the buyer.”⁵⁰³ This opinion was never submitted.

319. Claimants do not contest the fact that they never delivered this document.⁵⁰⁴ What they do contend is that this requirement was irrelevant as it was introduced in April 2015 - meaning that it could not have been the reason for not approving the assignment in September 2013.⁵⁰⁵ However, Respondent never asserted that this was the reason

⁴⁹⁹ Procedure for Conducting of Activities of the Center for Control of 29 November 2011, Article 8.2., **RE-107**.

⁵⁰⁰ Article 34 of the Rulebook on undertaking of measures of 7 April 2014, **RE-93**.

⁵⁰¹ Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, **CE-98**.

⁵⁰² Article 25 of the Rulebook on undertaking of measures of 30 April 2015, **RE-92**.

⁵⁰³ Article 25 of the Rulebook on undertaking of measures of 30 April 2015, **RE-92**.

⁵⁰⁴ Reply, paras. 228-230.

⁵⁰⁵ Reply, para. 229.

for not approving the request back in 2013. The opinion of the organization for money laundering should have been submitted after 30 April 2015, since the request for assignment was still active at the time. However, this never happened.

320. It is also preposterous to claim that the opinion was not submitted since it was not on the list of documents that Mr. Markicevic obtained in June 2013.⁵⁰⁶ The list of required documents that he received back then was not invariable and eternal, and Messrs. Obradovic, Markicevic and Broshko were clearly informed that they have to update the assignment request in accordance with the applicable regulation.⁵⁰⁷ They also had benefit of professional legal advice.⁵⁰⁸ However, they chose to do nothing, as they have not even bothered to simply read the requirements from the applicable rulebooks. Regardless of their meetings with the Agency, all they had to do is go to the website of the Agency and download the rulebook applicable at the time. The archived webpage of the Agency demonstrates that the uploaded rulebooks were up-to-date and were very easily accessible to anyone at all relevant times.⁵⁰⁹ Therefore, Claimants have no excuse for not being aware of what documentation had to be submitted at what period.

5. Conditions for assignment were not fulfilled at any moment

321. In summary, since its submission on 1 August 2013, up until the termination of the Privatization Agreement on 1 October 2015, the request for assignment was not complete at any point. In fact, the status of the missing documentation was as follows:

Period	Missing documents under the rulebook applicable at the time
1 Aug 2013 -	<ul style="list-style-type: none"> (i) Certificate of competent authority on no criminal convictions (ii) Certificate of competent authority on no criminal proceedings

⁵⁰⁶ Reply, para. 230.

⁵⁰⁷ Counter-Memorial, paras. 156-157, 161-165.

⁵⁰⁸ Reply, para. 264 (noting that Mr. Rand's lawyer in these discussions was Mr. Doklestic); E mail from Mr. Jakovljevic to the Privatization Agency of 16 April 2013, **RE-108** (demonstrating that, months before the request for assignment, Mr. Rand was already advised in this regard by another attorney, Mr. Jakovljevic).

⁵⁰⁹ See Archived Website of the Privatization Agency as of 3 July 2014, **RE-479**; Archived Website of the Privatization Agency as of 8 April 2015, **RE-480**; Archived Website of the Privatization Agency as of 8 May 2015, **RE-481**.

7 Apr 2014 ⁵¹⁰	(iii) Bank guarantee (as one of the forms of a guarantee)
7 Apr 2014 – 30 Apr 2015 ⁵¹¹	(i) Certificate of competent authority on no criminal convictions (ii) Certificate of competent authority on no criminal proceedings (iii) Bank guarantee amounting to 30% of the Purchase Price
30 Apr 2015 - 1 Oct 2015 ⁵¹²	(i) Certificate of competent authority on no criminal convictions (ii) Certificate of competent authority on no criminal proceedings (iii) Opinion of the Authority on prevention of money laundering

322. Claimants’ negligent approach in requesting assignment was probably best described at the session of the Commission for Control of 23 April 2015, where it was stated how:

“[...] representatives of this Canadian investor [...] expressed their interest in assignment of the agreement, of course with plenty of misunderstanding about our positive regulations and obligations they have, asking that we decide immediately on the request for assignment of the agreement, not understanding that the documentation they submitted, firstly, was obsolete and could not be accepted as such [...]”⁵¹³

323. Indeed, as they did in many other aspects of their case, Claimants acted carelessly and ignored the regulations of the host state, thereby being the only cause of their failure.

F. DEVASTATING MANAGEMENT AND ABUSE OF BD AGRO

324. Although Claimants desperately try to showcase BD Agro as an increasingly successful business enterprise in the period that followed conclusion of the

⁵¹⁰ Procedure for Conducting of Activities of the Center for Control of 29 November 2011, Article 8.2, **RE-107**.

⁵¹¹ Rulebook on undertaking of measures of 7 April 2014, Article 34, **RE-93**.

⁵¹² Rulebook on undertaking of measures of 30 April 2015, Article 25, **RE-93**

⁵¹³ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 5 (emphasis added), **CE-768**.

Privatization Agreement,⁵¹⁴ they cannot escape the undeniable facts which demonstrate that their story is pure fiction. Instead of flourishing after privatization, BD Agro withered. The reason for this is simple: BD Agro was disastrously mismanaged, as Respondent already elaborated in its Counter-Memorial.⁵¹⁵

325. Claimants' defense in this regard comes down to accusing the labor unions and minority shareholders' organizations as being "obscure" and advancing obviously meritless claims.⁵¹⁶ Furthermore, Mr. Obradovic briefly dismisses all accusations claiming that financial auditors did not notice the claims raised by employees and the media.⁵¹⁷ And yet, it was precisely the financial auditors who were not able to confirm that Mr. Obradovic fulfilled his obligations from the Privatization Agreement.⁵¹⁸ Moreover, financial fraud would not be a fraud if it was obvious when analyzing the documentation prepared by the fraudster himself. Claimants' cannot escape the undeniable evidence which proves not only that BD Agro was mismanaged, but that this was largely done in order to deceive the Agency and falsely show that the Buyer fulfilled its contractual obligations - paid the purchase price and made necessary investments. In reality, however, it was BD Agro who paid the price for its own shares and financed investment in its business. The outcome of these machinations is yet to be seen in many criminal proceedings initiated against Mr. Obradovic and his partners. All this will be elaborated in detail in this Section, in particular it will be demonstrated: (1) that BD Agro financed its own Privatization; (2) that BD Agro was heavily mismanaged; (3) that performance of the Privatization Agreement was misrepresented; (4) that a number of criminal proceedings were accordingly initiated.

1. BD Agro financed its own Privatization

326. The underlying reason behind the mismanagement of BD Agro is that Mr. Obradovic was using a privatization model that ensured that, at the end of the day, his exposure *i.e.* financial investment was essentially zero. Since he had the option of paying the

⁵¹⁴ Reply, Section II.C.

⁵¹⁵ Counter-Memorial, Section II.E.

⁵¹⁶ Reply, para. 146 („Serbia's allegations are predominantly based on several letters sent by an obscure group, self-styled as the "Center for Education and Representation of Shareholders and Workers", to the Agency and the Council of Ministers. The allegations set out in these letters are clearly without any merit."), 328 („the Ombudsman was responding, same as the Agency, to requests for termination of the Privatization Agreement allegedly coming from obscure labor unions.").

⁵¹⁷ Second Witness Statement of Mr. Djura Obradovic, 3 October 2019, para. 57.

⁵¹⁸ See Section I. B. 3.2

Purchase Price in installments, he misused this option and abused the property of BD Agro in order to finance the Privatization and considerably increase his personal wealth, as explained in more detail below (*See* Sections I. F. 2.1 and I. F. 3.2).

327. In his second witness statement Mr. Obradovic states that “[...] *all of the funds used for the acquisition of the Privatized Shares and for further investment in BD Agro, were secured by Mr. Rand. They were provided to me through loans from the Lundin family [...]*”. He also claims that: “[t]he total amount of funds I received from the Lundin family and its associated entities amounted to approximately EUR 13.8 million.”⁵¹⁹ However, Claimants are only able to produce evidence of foreign payments being made to Mr. Obradovic’s personal bank accounts, but cannot provide any trace of where that money ultimately ended up. Having in mind that in the same period when these payments were made there were also several privatizations where Mr. Obradovic appeared as the buyer (and where Mr. Rand claims to be the beneficial owner), it is virtually impossible to conclude how these funds were used. He could have use them for his personal benefit or for the benefit of any affiliated company other than BD Agro. Therefore, Claimants have not adduced contemporaneous evidence that the Lundins’, the Claimants’ and/or Mr. Obradovic’s money was in fact used to finance the Privatization of BD Agro.

328. In his Second Witness Statement, Mr. Obradovic claims that: “*Sembi also provided to me the funds for the payment of the remaining installments of the purchase price under the Privatization Agreement. I received these funds indirectly, from BD Agro, as a repayment of the loans that I had provided from the Lundins’ money to BD Agro and that I transferred to Sembi under the Sembi Agreement as assets held by me related to the business of BD Agro.*”⁵²⁰ However, as it is explained in more detail below, remaining installments of the Purchase Price were actually paid by BD Agro. Again, there is no trace that these funds originated from the Lundins’ *i.e.* Sembi’s money.

2. Mismanagement of BD Agro

329. It seems that under the leadership of Mr. Obradovic and his accomplices, BD Agro essentially had no chance of success. Over-indebting the company, extracting its

⁵¹⁹ Second Witness Statement of Mr. Obradovic, 3 October 2019, paras 19 and 20.

⁵²⁰ Second Witness Statement of Mr. Djura Obradovic, 3 October 2019, para. 48.

assets for personal gain, and making unreasonable expenditures, was a one-way street leading to the only possible outcome – bankruptcy. To be clear, this is not a case of minor irregularities in making and performing an investment. This is a case completely tainted by unlawfulness, misrepresentation, fraud and corruption in all of its phases. As Respondent elaborates below, Mr. Obradovic: (i) deceitfully financed himself and his affiliated companies at the expense of BD Agro; (ii) performed various machinations with BD Agro’s land; (iii) over-indebted BD Agro through various loans taken from banks; and (iv) performed other unjustified spending of BD Agro’s assets for personal gain.

2.1. Payments to Mr. Obradovic and his affiliated companies

330. Respondent will first explain Mr. Obradovic’s two most frequently used ways of extracting money from BD Agro’s accounts *i.e.* money siphoning by: (i) repayment of the alleged shareholder loans to Mr. Obradovic and (ii) giving out loans and making other payments to Mr. Obradovic’s affiliated companies.

2.1.1. Repaying the alleged shareholders loans

331. In his Second Witness Statement Mr. Obradovic claims that he had a significant receivable against BD Agro that stemmed from his loans to BD Agro.⁵²¹ Indeed, when going through BD Agro’s financial reports one can notice that significant loans were recorded as going in and out of BD Agro.⁵²² Based on BD Agro’s financial documentation, the ultimate balance between Mr. Obradovic and BD Agro should be zero.
332. The truth is, however, that Mr. Obradovic’s elaborate scheme of asset extraction was mainly grounded on his alleged shareholder loans. Specifically, Mr. Obradovic indebted BD Agro directly towards himself through allegedly providing a remarkably high number of loans to both BD Agro and BD Agro Mlekara.⁵²³ As Respondent already explained in more detail in its Counter-Memorial,⁵²⁴ Mr. Obradovic thus created an intricate but dubious web of loans between BD Agro, BD Agro Mlekara

⁵²¹ Second Witness Statement of Mr. Djura Obradovic, 3 October 2019, para 40.

⁵²² See *e.g.* Notes to Financial Statements of BD Agro for year 2007, 3 July 2017 (accessed), **CE-418**; Notes to Financial Statements of BD Agro for year 2008, 3 July 2017 (accessed), **CE-419**.

⁵²³ Counter-Memorial, para. 183.

⁵²⁴ Counter-Memorial, para. 183.

and himself. Expectedly, although being in a devastating financial condition, BD Agro returned each loan that Mr. Obradovic seemingly gave to it.⁵²⁵ In fact, BD Agro *returned* more than it received from Mr. Obradovic. However, this cannot be seen solely from BD Agro's financial documentation, which is likely the reason why various auditors did not pick up on this financial fraud.⁵²⁶ Only when analyzing BD Agro's bank accounts one can determine what actually occurred *i.e.* it can determine that there is a significant misbalance between the financial books and reality. Having in mind the relatively long period under review, as well as an enormous number of active accounts, many of which were in banks that were later extinguished, this was an extremely burdensome task.

333. As established in the second expert report of Mr. Cowan, in the years that followed Privatization (*i.e.* period from 2005-2015), Mr. Obradovic paid to BD Agro's accounts (including its subsidiaries) a total of RSD 496,871,720 (EUR 4,828,651.59⁵²⁷). Out of this amount:

- (i) RSD 359,859,365 was referenced as "shareholder loan";
- (ii) RSD 21.114.000 was referenced as "investment";
- (iii) RSD 58,348,524 was referenced as payment for "goods and services";
- (iv) RSD 57,414,463 was referenced as "transfers"; and
- (v) RSD 135,369 was referenced as "other transactions".⁵²⁸

334. On the other hand, BD Agro (including its subsidiaries) paid to Mr. Obradovic's personal bank accounts a total of RSD 608,232,801 (EUR 6,824,020.02⁵²⁹). Out of this amount:

⁵²⁵ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 1.

⁵²⁶ See Second Expert Report of Mr. Djura Obradovic, 3 October 2019, para. 57.

⁵²⁷ Calculated as the sum of all annual net cash flows (Question 1 of Mr. Cowan's analysis) which were previously divided by the according annual middle exchange rate of the National Bank of Serbia. See Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

⁵²⁸ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 1.

⁵²⁹ Calculated as the sum of all annual net cash flows (Question 1 of Mr. Cowan's analysis) which were previously divided by the according annual middle exchange rate of the National Bank of Serbia. See Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

- (i) RSD 406,857,417 was referenced as “return of shareholder loan”,⁵³⁰
- (ii) RSD 100,000 was referenced as payment for “goods and services”;
- (iii) RSD 199,075,356 was referenced as “transfers”; and
- (iv) RSD 2,200,028 was referenced as “other transactions”.⁵³¹

335. Therefore, in total, BD Agro repaid to Mr. Obradovic RSD 111,361,081 more than it ever received from him (608,232,801 - 496,871,720).

336. However, for the purpose of calculating how much money did Mr. Obradovic siphon from BD Agro without a ground, this balance needs to exclude two categories of payments made by Mr. Obradovic to BD Agro: (i) “investments”, as these payments were Mr. Obradovic’s obligation under the Privatization Agreement; and (ii) “goods and services”, as these payments were made in exchange for some specific goods (*e.g.* land) or services received by Mr. Obradovic from BD Agro. Thus, when comparing only those payments which could be considered as loans, there is a difference of RSD 190,723,605 (approx. EUR 1,995,368.43⁵³²), as shown in the following table:

Data from BD Agro bank accounts in relation to Mr. Obradovic			
Year	Payments from BD Agro	Payments to BD Agro	Net cashflow
2005	-	8,000,000	8,000,000
2006	(4,700,000)	279,956,265	275,256,265
2007	(120,891,332)	19,717,463	(101,173,870)
2008	(206,994,147)	31,803,000	(175,191,147)
2009	(66,316,506)	9,716,369	(56,600,137)
2010	(139,387,111)	32,009,100	(107,378,011)
2011	(39,938,684)	33,647,000	(6,291,684)

⁵³⁰ Documentary evidence shows that BD Agro even gave loans to Mr. Obradovic. For instance, on 27 December 2010, BD Agro concluded an interest-free loan agreement with Mr. Obradovic, thereby “lending” him RSD 2.300.000. Apparently, the loan remained unreturned. *See* Report of the Privatization Agency on Control of BD Agro, p. 10, **CE-30**.

⁵³¹ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 1.

⁵³² Calculated as the sum of all annual net cash flows (Question 1 of Mr. Cowan’s analysis) which were previously divided by the according annual middle exchange rate of the National Bank of Serbia. *See* Average exchange rates of the dinar against the world’s leading currencies, National Bank of Serbia, **RE-365**.

2012	(28,624,021)	2,480,000	(26,144,021)
2013	(1,281,000)	80,000	(1,201,000)
TOTAL:	(608,132,801)	417,409,196	(190,723,605)

337. In addition, the analysis of bank accounts transactions do not reveal other means in which BD Agro ‘made payments’ to Mr. Obradovic. For example, such was the case with a EUR 400.000 land assignment in 2007 from BD Agro to Mr. Obradovic. As it will be explained further below, Mr. Obradovic transferred certain land of BD Agro to himself as means of settling an alleged shareholder loan in the amount of EUR 400.000. Having the above, the amount of money which BD Agro gave to Mr. Obradovic as “repayment” of a shareholder loan increases to at least EUR 7,224,020.02, raising the total amount of siphoned money to astonishing:

EUR 2,395,368.43

338. Furthermore, it should be noted that all payments from BD Agro to Mr. Obradovic which came from bank loans, meant that BD Agro suffered additional costs beyond such payments, as it had to pay high interest rates to banks. Therefore, the above difference between Mr. Obradovic's "loans" to BD Agro and the latter's repayments of nearly RSD 353 million was Mr. Obradovic's profit, while the damage to BD Agro was significantly higher than that amount, when considering: (i) high interest rates paid on the loaned funds; (ii) numerous pledges that were established over BD Agro's property in order to acquire the loaned funds, and (iii) sale of BD Agro's property at an undervalue.

339. Aware that it is impossible to prove that he actually loaned to BD Agro the amount that BD Agro returned to him, Mr. Obradovic now states that he „*did not keep record of BD Agro's repayments [...] and their subsequent use for the payment of the last installments due to the Agency*“ and that he was not able to retrieve the information regarding his accounts from Vojvodanska and Unicredit banks (which were used “*to receive payments from BD Agro and make payments to the Privatization Agency*”).⁵³³ Allegedly, “*both banks informed [Mr. Obradovic] that due to the lapse of time and*

⁵³³ Second Witness Statement of Mr. Đura Obradovic, 3 October 2019, paras. 49-50.

*changes to their software, they could not retrieve the requested information.”*⁵³⁴ We now know that this is not true. First of all, it is unlikely that a person would not keep record of multimillion transactions with the company that is still in the sphere of his interests. Second, Mr. Obradovic provided no proof that he ever attempted to obtain the bank statements, or that any bank responded negatively to him. Third, and most important is that Respondent provides transactions from all active bank accounts of BD Agro (as well as its subsidiaries BD Agro Mlekara and Veterinarska sluzba) for the period 2005-2015,⁵³⁵ in which all payments between BD Agro and Mr. Obradovic are easily detectable.

2.1.2. Payments to Mr. Obradovic’s related companies

340. As previously elucidated, besides effecting payments to his own accounts, Mr. Obradovic also used BD Agro’s funds to finance his other companies (now claimed to be beneficially owned by Mr. Rand), such as Crveni Signal, Inex, PIK Pester, Beotrans and Obnova. Unjustified payments were also made towards Mr. Rand’s Serbian company – MDH doo (“**MDH Serbia**”).
341. The First Expert Report of Mr. Sandy Cowan provides a useful overview of these loans.⁵³⁶ The best indicator of the fact that these payments were unjustified is that the affiliated companies of Messrs. Obradovic and Rand still remain largely in debt towards BD Agro. More precisely, the balance sheet of these debts (as of March 2019) demonstrates that the total outstanding debt of six different affiliated companies stands at RSD 89.517.139,42⁵³⁷ (approx. EUR 760.000).

⁵³⁴ Second Witness Statement of Mr. Đura Obradovic, 3 October 2019, para. 50

⁵³⁵ Lists of transactions conducted through bank accounts owned by BD Agro, **RE-515**; Lists of transactions conducted through bank accounts owned by BD Agro Mlekara, **RE-516**; Lists of transactions conducted through bank accounts owned by Veterinarska sluzba BD Agro, **RE-517**.

⁵³⁶ First Expert Report of Mr. Sandy Cowan, 19 April 2019, Appendix 7.

⁵³⁷ Analytical card of debts owed by Inex on 25 March 2019, **RE-1** (RSD 26.539.008,45); Analytical card of debts owed by Crveni Signal on 25 March 2019, **RE-190** (43.847.213,56); Analytical card of debts owed by PIK Pester on 1 January 2019, **RE-373** (9.116.181,37); Analytical card of debts owed by MDH doo on 1 January 2019, **RE-376** (8.804.698,31); Analytical card of debts owed by Mica Mlekarica on 1 January 2019, **RE-375** (RSD 856.589,60); Analytical card of debts owed by Obnova on 1 January 2019, **RE-374** (RSD 353.448,13).

2.2. Machinations with BD Agro's land

342. BD Agro was the owner of substantial amount of land which Mr. Obradovic saw as a significant source of his funding.
343. For instance, in 2008, BD Agro sold substantial land to Hypo Park Dobanovci. The value of the transaction was RSD 1,220,010,327.33 (EUR 15,187,480.73⁵³⁸). According to the specification of spending of these funds, BD Agro paid to Mr. Obradovic the amount of RSD 59.309.385 (EUR 738,321.73⁵³⁹ *i.e.* more than the value of one installment of the Purchase Price) acquired from this sale, referencing it as repayment of shareholder loans.⁵⁴⁰ In other words, BD Agro was selling some of its most valuable property in order to make payments towards Mr. Obradovic.
344. Likewise, after the sale of its land to the company Eko Elektofrigo, BD Agro used a significant part of the price thus acquired to make payments towards Mr. Obradovic, again referenced as repayment shareholder loan, which he in turn immediately used to pay the fourth installment of the Purchase Price.⁵⁴¹
345. Even more striking are cases with obvious conflict of interest, in which BD Agro's land was sold to Mr. Obradovic below the market price or likewise used as means of settling of an alleged debt towards him.
346. In 2007, Mr. Obradovic, as the majority shareholder and president of the Management Board of BD Agro, directed BD Agro to give to him personally more than 4 ha (= 42.172 m²) of land in Dobanovci as means of settling of an (alleged) debt of EUR 400,000 (cca. 9.5 EUR/m²).⁵⁴² The agreement on the assignment of land was concluded on 14 February 2007. Only four months later, on 21 June 2007, Mr. Obradovic concluded an agreement on sale of that same land to a company named

⁵³⁸ At the time the Hypo Park Agreement was concluded, on 11 June 2008, the RSD middle exchange rate of the National Bank of Serbia for EUR was 80.33 (1.220.010.327,33 ÷ 80.33 = 15,187,480.73). *See* NBS middle exchange rates from 2008 to 2013, **RE-192**.

⁵³⁹ At the time the Hypo Park Agreement was concluded, on 11 June 2008, the RSD middle exchange rate of the National Bank of Serbia for EUR was 80.33 (1.220.010.327,33 ÷ 80.33 = 15,187,480.73). *See* NBS middle exchange rates from 2008 to 2013, **RE-192**.

⁵⁴⁰ Specification of spending of the funds acquired from the contract no. 1210 dated 11 June 2008, **RE-371** (submitted as attachment to the Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 26 January 2009, **RE-114**).

⁵⁴¹ *See* Section I. F. 3.1.2

⁵⁴² Decision on approval of transfer of land of 13 February 2007, **RE-146**.

Calpo Project, for the purchase price of EUR 1,417,000,⁵⁴³ which was over one million euros more than the price for which he acquired it from BD Agro. Only three months after this sale, Calpo sold the same land to its current owner, a company named Hit International, for the astonishing price of EUR 3,331,667.⁵⁴⁴ Therefore, in the period of just seven months, the price of the land that Mr. Obradovic took from BD Agro seemed to have mysteriously skyrocketed *i.e.* increased in value over eight times. Needless to say, BD Agro was substantially and intentionally damaged by Mr. Obradovic, who directly benefited from this arrangement for at least EUR 1,017,000.⁵⁴⁵ Having in mind the price that the land achieved when resold to Hit International in that same year, it is evident that, through the described “compensation”, Mr. Obradovic caused damage to BD Agro amounting to EUR 2,931,667.

347. However, the highpoint of the story actually lies in the fact that BD Agro ultimately repaid in cash to Mr. Obradovic’s personal bank accounts the full EUR 400,000 for which the land was assigned to him.⁵⁴⁶ Therefore, Mr. Obradovic in fact acquired the land with no compensation, and directly earned at least EUR 1,417,000 on it in just a few months, all at the expense of BD Agro.
348. Although it might seem unbelievable, this was not the largest known land machination conceived by Mr. Obradovic. On 12 April 2010, as his appetites grew, Mr. Obradovic concluded an agreement with BD Agro on sale of around 20 hectares of BD Agro’s land in Dobanovci for the purchase price of EUR 3,038,880.⁵⁴⁷ First, the price for which the land was sold is, according to Claimants’ expert, an unrealistically low price for such land. Specifically, Claimants’ expert values this land to 30 EUR/m²,⁵⁴⁸ meaning that its price would lie somewhere in the neighborhood of EUR 6,000,000 *i.e.* double of the agreed price. While Respondent objects to this valuation as inflated

⁵⁴³ Indictment of the Higher Public Prosecutor’s Office no. KTO 93/18 dated 14 February 2018, pp. 2-3, 21-22, **RE-426**.

⁵⁴⁴ Indictment of the Higher Public Prosecutor’s Office no. KTO 93/18 dated 14 February 2018, p. 22, **RE-426**; Agreement on purchase of land between Djuro Obradovic and Calpro project doo, 21 June 2007, **RE-488**.

⁵⁴⁵ Assuming that he did not have any interest in the highly suspicious resale of the land to Hit International (which is hard to believe).

⁵⁴⁶ See Section I. F. 2.1.1.

⁵⁴⁷ Report of the Privatization Agency on Control of BD Agro of 25 February 2011, pp. 21-22, **CE-30**.

⁵⁴⁸ Expert Report of Mr. Krzysztof Grzesik, 3 October 2019, paras. 6.11, 6.14, 6.19.

(which is confirmed by Ms. Ilic⁵⁴⁹) and considers that it should not be accepted by the Tribunal, it must be indicated that, if accepted, it heavily incriminates Mr. Obradovic's attempt at repeatedly abusing his position. Second, Mr. Obradovic actually never paid a cent of the price to BD Agro. A part of the price (EUR 66.411,97) was *paid* by setting off previous debt allegedly owed by BD Agro to Mr. Obradovic. In addition, RSD 28,114,000 (EUR 282,435.23) was paid from the money that Mr. Obradovic obtained from another of his privatized (and then devastated) companies, Inex.⁵⁵⁰ The remaining amount that Mr. Obradovic owed for the land was EUR 2,689,803.60. Given that the payment of that amount (which represented almost 90% of the purchase price)⁵⁵¹ was never effectuated, Mr. Obradovic had to terminate the agreement on sale of the land. Notably, termination came only after the intervention of the Agency.⁵⁵² While this land machination was successfully prevented, this does not exonerate Mr. Obradovic from his bad faith attempt of repeatedly abusing the property of BD Agro.

349. Mr. Obradovic also misused BD Agro's land for the benefit of his close associates. The most notable example is the case of Ms. Zlatija Nedeljkovic, the director's secretary,⁵⁵³ and the later president of the Shareholders' Assembly,⁵⁵⁴ to whom BD Agro, under the instructions of Mr. Obradovic, simply gave 12.445 m² of land in Dobanovci with no compensation whatsoever. Although the land was allegedly transferred for resolving her "residential issues", Ms. Nedeljkovic immediately divided the land into smaller plots and started selling it to third parties for 12 EUR/m² in average.⁵⁵⁵ Evidently, BD Agro was again damaged by the fraudulent actions of Mr. Obradovic.

⁵⁴⁹ Expert Report of Ms. Danijela Ilic, 24 January 2020, Section 4.c.

⁵⁵⁰ Notably, a part of the price paid to BD Agro, ended up in the account of Mr. Rands related company, MDH Serbia. See Letter from Agency to BD Agro, 20 July 2015, p. 4, **CE-47** (*„out of 349,076.40 EUR received from sale of industrial land, the Subject gave loans to third parties, that is, that "out of the said funds, the Subject gave a loan to "Marine Drive d.o.o." Belgrade in the amount of 745,000.00 RDS as per Contract of October 16, 2009, as well as a loan to "BD Agro Mlekara d.o.o." Dobanovci in the amount of 3,300,000.00 dinars as per Contract of December 23, 2009. These loans have not been returned by the date of this Report".* [emphasis added]); Audit report by Auditor doo of 2 February 2012, p. 30, **RE-223**

⁵⁵¹ Report of the Agency on Control of BD Agro of 25 February 2011, pp. 21-22, **CE-30**.

⁵⁵² Report of the Agency on Control of BD Agro of 25 February 2011, p. 22, **CE-30**; Materials for the Session of the Commission, 28 September 2015, p. 28, **RE-89**.

⁵⁵³ "Minority Shareholders accuse the owner of BD 'Agro' for theft and misdeeds", Kurir, 24 May 2009, **RE-109**; Indictment of the Higher Public Prosecutor's Office no. KTO 93/18 dated 14 February 2018, p. 7, **RE-426**;

⁵⁵⁴ Decision of the Shareholders Assembly of BD Agro dated 17 June 2008, **RE-425**.

⁵⁵⁵ Indictment of the Higher Public Prosecutor's Office no. KTO 93/18 dated 14 February 2018, p. 2, **RE-426**.

350. Another machination was also a fraudulent land exchange with the Ministry of Agriculture, which is elaborated in more detail in Sections I. F. 3.3 and I. F. 4.1.2.
351. Expectedly, the described activities also became the subject of multiple criminal proceedings initiated against Mr. Obradovic, as also explained further below (see Section I. F. 4.1).

2.3. Indebting for the benefit of Mr. Obradovic and his related companies

352. The most notable fact that led to the devastation of BD Agro was the severe indebting of the already indebted BD Agro, mainly for the benefit of Mr. Obradovic or his other companies.
353. During the time of Mr. Obradovic's management, BD Agro concluded a number of loan agreements of substantial value with various banks,⁵⁵⁶ ultimately increasing the debt of the company in excess of EUR 20 million.⁵⁵⁷ Documentary evidence shows that the funds from these loans were used by or in the interest of third parties, and not BD Agro. The company likewise guaranteed for a number of debts of third persons *i.e.* companies, without justification.⁵⁵⁸

⁵⁵⁶ See Report of the Agency on Control of BD Agro of 25 February 2011, **CE-30**, Materials for the Session of the Commission, 28 September 2015, **CE-89**; and Decision of the Privatization Agency on the Transfer of BD Agro's Capital, **CE-105** (evidencing the following loans: Loan Agreement between BDA and NLB Interfinanz ag Zurich, 9 July 2007; Long Term Loan Agreement between BDA and Banca Intesa, 29 December 2008; Loan Agreement no. 10331000-5100277615 between BDA and Erste Bank, 14 April 2009; Short Term Loan Agreement no. K-232/10 between BDA and Agrobanka, 16 June 2010; Short Term Lease Agreement no. K-233/10 between BDA and Agrobanka, 16 June 2010; Agreement on Assignment of Debt from Vihor doo Beograd, no. 10832300-5100565089, between Vihor, BD Agro and Erste Bank, 28 June 2010; Long Term Lease Agreement no. D-330/10-00 between BDA and Agrobanka, 10 August 2010; Short Term Lease Agreement no. K-423/10-00 between BDA and Agrobanka, 6 October 2010; Short Term Lease Agreement no. 2658/10 between BDA, Privredna banka Beograd and Mr. Đura Obradovic, 14 October 2010; Short Term Lease Agreement no. K-482/10-00 between BDA and Agrobanka, 6 December 2010; Loan Agreement no. K-571/10-00 between BDA and Agrobanka, 22 December 2010; Long Term Lease Agreement between Nova Agrobanka and BDA no. D-07/12-NA-00, 22 June 2012).

⁵⁵⁷ Counter-Memorial, paras. 181-182;

⁵⁵⁸ Proposal of the Center for Control for the session of the Commission for Control of 10 July 2013, p. 23, **RE-49** ("it may be concluded that the Subject issued bills of exchange related to diverse Surety Contracts, but the Control Centre does not have the information for all the agreements and which obligations they provide"). See also Guarantee agreement between BD Agro and Agrobanka, 2 June 2010, **RE-5**; Agreement on Assumption of Debt of 28 December 2010, Articles 1 and 4, **RE-11**.

2.3.1. The EUR 8.2 Million Loan from NLB

354. On 7 July 2007, BD Agro loaned EUR 8.200.000 from NLB Interfinanz.⁵⁵⁹ According to the specification of the spending,⁵⁶⁰ the said loan was used for, *inter alia*, payments of:

- third instalment of the Purchase Price in the amount of EUR 684,909.09; and
- repayment of alleged shareholder loan to Mr. Obradovic in the amount of EUR 507,449.49.

355. Therefore, almost 15% of the NLB loan, *i.e.* EUR 1,192,358.58, was used directly for the benefit of Mr. Obradovic.⁵⁶¹ The analysis of BD Agro's bank accounts conducted by Mr. Cowan likewise confirms this percentage. Specifically, Mr. Cowan determined that, out of the loaned funds (RSD 650,570,168), BD Agro used RSD 91,495,242 (EUR 1,154,715.16⁵⁶²) for repayments of alleged shareholder loans to Mr. Obradovic.⁵⁶³

2.3.2. The EUR 9.9 Million Loan from Intesa

356. Bank documentation also reveals that Mr. Obradovic misused the EUR 9.900.000 long-term loan taken by BD Agro from Banca Intesa in 2008. Specifically, Mr. Obradovic received from this loan a total amount of RSD 49,299,000,⁵⁶⁴ and directly used RSD 47,400,000 to effectuate the payment of the fourth installment of the Purchase Price.⁵⁶⁵ In addition, these EUR 9.9 million were secured by first class mortgages on the vast majority of BD Agro's land plots and buildings (*i.e.* 85 out of 92 plots and 16 out of 18 buildings).⁵⁶⁶ Needless to say, having in mind the value of the loan and the value of BD Agro's land pledged,⁵⁶⁷ it was evidently irrational to restrict so many assets of BD Agro with this arrangement (as the secured assets

⁵⁵⁹ Report of the Agency on Control of BD Agro of 25 February 2011, p. 15, **CE-30**.

⁵⁶⁰ Specification of expenditures from NLB Bank, **RE-117**.

⁵⁶¹ The percentage is calculated as follows: (i) $684.909,09 + 507.449,49 = \text{EUR } 1,192,358.58$, and (ii) $8.200.000 / 1.192.358,58 = 0.145$ *i.e.* 14,5%.

⁵⁶² This amount was calculated by using the exchange rate applicable as at 31 December 2007. The likely reason for the minor discrepancy between the specification of spending and actual bank transactions is the application of a different exchange rate (depending on when an installment of the loan was paid).

⁵⁶³ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 3.

⁵⁶⁴ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 3.

⁵⁶⁵ See Section I. F. 3.1.2.

⁵⁶⁶ See Section I. G. 2.1.1.

⁵⁶⁷ Expert Report of Ms. Danijela Ilic, 24 January 2020, Section 9.

significantly exceeded the value of the loan). It should also be noted that it was exactly this kind of irresponsible lending that ultimately served as an ignition spark to the bankruptcy of BD Agro, as it was Banka Intesa who subsequently initiated this process, based on the claims it had under the EUR 9.9 Million Loan.⁵⁶⁸

2.3.3. The EUR 1.25 Million Loan from Erste

357. Mr. Cowan's analysis further reveals that a loan taken by BD Agro from Erste Bank in 2009, amounting to EUR 1,250,000, was likewise largely spent for the benefit of Mr. Obradovic and his affiliated companies. Specifically, out of the loaned funds (RSD 117,168,375), BD Agro paid RSD 30,748,324 to Mr. Obradovic as repayment of an alleged shareholder loan, and another RSD 32,807,145 as payment for allegedly provided goods and services of affiliated companies.⁵⁶⁹ In other words, BD Agro spent 54% of the Erste Loan (approx. EUR 675,000) in order to make payments towards Mr. Obradovic and his affiliated companies.

2.3.4. The RSD 221 Million Loan from Agrobanka

358. As Respondent already explained,⁵⁷⁰ around 50% of 221 Million Loan (for which Mr. Obradovic pledged the land of BD Agro) was used exclusively for settling debts of and giving out loans to two other companies owned by Mr. Obradovic – Crveni Signal and Inex. More specifically, BD Agro used the loan to pay out Crveni Signal's debt towards Agrobanka of around RSD 71 million and to give an interest-free loan to Inex in the amount of around RSD 30 million.⁵⁷¹ Obvious as it can be, there was absolutely no benefit for BD Agro in such actions.⁵⁷² On the contrary, while BD Agro had to pay the interest of 1.2% on the loaned amount on a monthly basis⁵⁷³ (*i.e.* RSD 2.652.000 per month or RSD 31,824,000 per year), it spent the loaned funds for the benefit of Crveni Signal and Inex without collecting any interest from them. In addition, BD

⁵⁶⁸ See Section I. G. 2.1.1.

⁵⁶⁹ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 3.

⁵⁷⁰ Counter-Memorial, para. 21-23.

⁵⁷¹ BD Agro Bank Statement from Agrobanka, 29 December 2010, **RE-427**.

⁵⁷² Mr. Obradovic's allegations of how Crveni Signal later "helped out" BD Agro in guaranteeing a loan for it, and how BD Agro actually returned an earlier favor to Inex, are completely inapposite (Second Witness Statement of Mr. Djura Obradovic, 3 October 2019, paras. 69-70). All of these companies were owned by Mr. Obradovic and were only serving his interests at all times. See also Section I. B. 2.2.

⁵⁷³ Short Term Loan Agreement no. K-571/10-00 of 22 December 2010, Article 4, **RE-6**.

Agro used another RSD 84,130,160 from the said loan to pay to Inex for allegedly⁵⁷⁴ provided “goods and services”.⁵⁷⁵ Therefore, out of the 221 Million Loan, BD Agro in fact paid a total of RSD 185,745,273 to his affiliated companies, which constitutes 84% of the total loan.⁵⁷⁶

359. What is even more interesting is that the Crveni Signal’s funds from Agrobanka eventually ended up on Mr. Obradovic’s account:

- (i) on 2 June 2010, Crveni Signal concluded the Short Term Loan Agreement with Agrobanka in the amount of RSD 65.000.000 (app EUR 600,000);⁵⁷⁷ simultaneously, BD Agro guaranteed the repayment of that loan to Agrobanka;⁵⁷⁸
- (ii) on 2 June 2010 Crveni Signal received RSD 65.000.000 from Agrobanka;
- (iii) immediately after it received the payment Crveni Signal transferred RSD 65.000.000 to the personal bank account of Mr. Obradovic;⁵⁷⁹
- (iv) on 22 December 2010, BD Agro concluded 221 million Loan Agreement with Agrobanka;
- (v) on 28 December 2010, Crveni Signal, Agrobanka and BD Agro concluded the Agreement on Assumption of Debt under which BD Agro assumed the entire debt of Crveni Signal towards Agrobanka from the Short Term Loan Agreement of Crveni Signal, in the amount of RSD 65,000,000 (app EUR 600,000)⁵⁸⁰ plus interest, whereas Crveni Signal was released from the said debt;⁵⁸¹

⁵⁷⁴ Based on available documentation, it remains unknown what “goods and services” were provided by Inex, if any.

⁵⁷⁵ BD Agro Bank Statement from Agrobanka, 29 December 2010, **RE-427**.

⁵⁷⁶ For the sake of clarification, Respondent notes that this percentage is calculated by taking into account how the entire 221 Million Loan was spent. In the Counter-Memorial (paras. 8, 23, 95), Respondent focused only on the two spendings which were identified as a breach of Article 5.3.4. *i.e.* the RSD 71 million of Crveni Signal’s debt and the RSD 30 million loan to Inex. However, after the analysis of BD Agro’s bank accounts, a more comprehensive calculation was made.

⁵⁷⁷ Agreement on Assumption of Debt of 28 December 2010, Articles 1 and 4, **RE-11**. At the time the Agreement on Assumption of Debt of Crveni Signal was concluded, on 28 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 106.08 (65,000,000 ÷ 106.08 = 612,745.09). National Bank of Serbia RSD Exchange Rate on 28 December 2010, **RE-81**.

⁵⁷⁸ Guarantee agreement between BD Agro and Agrobanka, 2 June 2010, **RE-005**.

⁵⁷⁹ Crveni Signal Bank Statement from Agrobanka, 2 June 2010, **RE-372**.

⁵⁸⁰ At the time the Agreement on Assumption of Debt of Crveni Signal was concluded, on 28 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 106.08 (65,000,000 ÷ 106.08 = 612,745.09). National Bank of Serbia RSD Exchange Rate on 28 December 2010, **RE-81**.

⁵⁸¹ Agreement on Assumption of Debt of 28 December 2010, Articles 1 and 4, **RE-11**.

- (vi) on 29 December 2010, Agrobanka paid RSD 221.000.000 to the account of BD Agro, referencing it as payment under the 221 Million Loan Agreement;⁵⁸²
- (vii) on 29 December 2010, BD Agro paid RSD 70.944.422,27 as means of settling the loan previously given by Agrobanka to Crveni Signal (money from this loan had been transferred to Mr. Obradovic's personal account).

360. The funds loaned to Inex had a very similar fate, since the entire RSD 30 million loan (and most of the "payment for goods and services") ended up on the personal accounts of Mr. Obradovic:

- (i) on 29 December 2010, Agrobanka paid RSD 221,000,000 to the account of BD Agro, referencing it as payment under the 221 Million Loan Agreement;⁵⁸³
- (ii) on 29 December 2010, BD Agro paid RSD 30,670,690 to the account of Inex, referencing it as an interest free loan;⁵⁸⁴
- (iii) on 29 December 2010, BD Agro paid RSD 84,130,160 to the account of Inex, referencing it as payment for allegedly provided goods and services;⁵⁸⁵
- (iv) in the period of 18 January 2011 - 8 April 2011, Inex paid a total of at least RSD 103,400,000 to the personal bank account of Mr. Obradovic.⁵⁸⁶

361. In summary, BD Agro took the 221 Million Loan, pledged its land for that loan, and Mr. Obradovic extracted 84% of that loan to his affiliated companies, out of which at least half of the loan (i.e. RSD 95,400,000) was transferred to his personal bank accounts using Inex and Crveni Signal as vehicles. As one would expect, most of these funds were never repaid to BD Agro. Inex still owes it RSD 26,539,008.45, while Crveni Signal owes it RSD 43,847,213.56.⁵⁸⁷

⁵⁸² BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.

⁵⁸³ BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.

⁵⁸⁴ BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.

⁵⁸⁵ BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.

⁵⁸⁶ Payments to Mr. Obradovic's bank account no. 245-0100101831196-74 in Nova Agrobanka, for the period of 18-25 January 2011, **RE-551**; Payments to Mr. Obradovic's bank account no. 245-0100101831196-74 in Nova Agrobanka, for 8 April 2011, **RE-552**; Mr. Obradovic's Bank Statement from Vojvodjanska Banka for 14 February 2011, **RE-437**.

⁵⁸⁷ Analytical card of debts owed by Inex on 25 March 2019, **RE-1** (RSD 26.539.008,45); Analytical card of debts owed by Crveni Signal on 25 March 2019, **RE-190** (RSD 43.847.213,56).

2.3.5. The RSD 100 Million Loan from Agrobanka

362. Other than the RSD 221 Million Loan, Agrobanka frequently loaned funds to BD Agro throughout the period of 2008-2012. Expectedly, BD Agro frequently used these loans to effectuate payments towards Mr. Obradovic and his affiliated companies.
363. One such loan was the RSD 100 Million Loan taken by BD Agro in 2010. As Mr. Cowan's analysis confirms, BD Agro used this loan to pay RSD 12,765,000 to Mr. Obradovic, as repayment of an alleged shareholder loan, and another RSD 36,748,690 to pay to Mr. Obradovic's affiliated companies for allegedly provided goods and services, and for "payment after billing".⁵⁸⁸ In total, BD Agro thus used around 50% of this Agrobanka Loan to effectuate payments towards Mr. Obradovic and his affiliated companies.

2.3.6. The RSD 50 Million Loan from Agrobanka

364. Mr. Cowan also analyzed a payment under an unidentified Agrobanka loan taken in March 2010, where a RSD 50.000.000 loan payment received from Agrobanka was simply transferred as repayment of an alleged shareholder loan to Mr. Obradovic.⁵⁸⁹ Thus, 100% of this loan was used for the benefit of Mr. Obradovic. Interestingly, Mr. Obradovic immediately paid the fifth installment of the Purchase Price by using the same funds.⁵⁹⁰

2.3.7. The RSD 17.5 Million Loan from Agrobanka

365. Finally, another Agrobanka loan taken in December 2010, in close proximity of the 221 Million Loan, was used predominantly for the interests of Mr. Obradovic. Specifically, BD Agro loaned RSD 17,500,000 from Agrobanka, and used RSD 15,300,000 to make payments towards Mr. Obradovic under the well-known guise of repayment of a purported shareholder loan.⁵⁹¹ Thus, BD Agro used 87% of this loan to make payments towards Mr. Obradovic.

⁵⁸⁸ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 3.

⁵⁸⁹ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 3.

⁵⁹⁰ See Section I. F. 3.1.3.

⁵⁹¹ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 3.

2.4. Other unjustified spending of BD Agro's assets for personal gain

366. Mr. Obradovic and his associates were also known for their other lavish and unjustified spending of BD Agro's assets.
367. In 2008, BD Agro purchased a brand new helicopter for approximately 250.000 EUR⁵⁹² - thereby becoming one of rare private owners of this type of aircraft in Serbia.⁵⁹³ However, the helicopter was obviously unnecessary for the functioning of an agricultural company, and there is in fact no evidence that it was ever used for the benefit of BD Agro. Thus, one can only assume that the aircraft was used solely for the personal enjoyment of Mr. Obradovic and/or his close associates or family members. Interestingly, when inquired by journalists at the time regarding the helicopter purchase, Mr. Obradovic stated that the helicopter was "*bought with his own money*",⁵⁹⁴ although we now know that this was absolutely not true.⁵⁹⁵ The same helicopter was sold four years later for less than half the price that it was paid.⁵⁹⁶
368. Even when travelling by land, Mr. Obradovic did not spare BD Agro's assets in order to accommodate his (and his associates') luxurious lifestyle. That is how in 2008, after deciding that a 3-year old Mercedes SUV was already outdated, BD Agro's assets were used to buy a brand new BMW SUV priced at EUR 80.000.⁵⁹⁷ Apparently, another expensive vehicle was bought / leased for EUR 65.394 in the same time period as well.⁵⁹⁸
369. Having in mind that purchases of helicopter and expensive cars occurred in the midst of the global economic crisis (which Mr. Obradovic used as an excuse for his delays in paying out the Purchase Price at the time⁵⁹⁹), and that BD Agro's business was

⁵⁹² Specification of spending of the funds received from the sale of Hypo Park Dobanovci – Contract 1210 dated 11 June 2008, **RE-371**.

⁵⁹³ Only 11 other private persons/entities were a helicopter owner in Serbia in 2010, most of which were companies from the aviation industry. *See* Register of aircraft (Serbia), 4 October 2010, **RE-225**; "Helicopter: a luxury from 50.000 to several million EUR", Blic, 5 May 2010, **RE-226**.

⁵⁹⁴ "Minority Shareholders accuse the owner of BD 'Agro' for theft and misdeeds", Kurir, 24 May 2009, **RE-109**.

⁵⁹⁵ Specification of spending of the funds received from the sale of Hypo Park Dobanovci – Contract 1210 dated 11 June 2008, **RE-371**

⁵⁹⁶ Invoices no. 12/0100290-1, 12/0100290-2, 12/0100290-3, 4 October 2012, **RE-377**.

⁵⁹⁷ Decision of BD Agro's Managing Board no. 2169, 15 September 2008, **RE-227**.

⁵⁹⁸ Overview of loans and the intended expenditures of the loaned funds, 14 October 2008, **RE-378**.

⁵⁹⁹ *See* Section I. F. 3.1.2.

operating at a loss throughout the period after Privatization,⁶⁰⁰ such expenditures were obviously irrational and unjustified.

370. In 2008, BD Agro entered into a leasing arrangement for acquiring equipment for sheep milking in the amount of CHF 81,388.49.⁶⁰¹ While this generally appears as a justified expense for an agricultural company, the main problem was that BD Agro did not use this equipment as it did not own a single sheep.⁶⁰² Instead, the equipment was actually used by Mr. Obradovic's other privatized company – PIK Pester.⁶⁰³ Once more, BD Agro had absolutely no financial interest in buying this equipment and the arrangement was used solely for the benefit of Mr. Obradovic.

371. Yet, one of the most severe cases of unjustified spending and fraudulent mismanagement relates to the alleged investments into BD Agro's buildings. Namely, Claimants' allege that, under the management of Mr. Rand, very significant funds were used "*to completely overhaul BD Agro's buildings, stables and barns and to put in place a new system of connections between stables and pastures*".⁶⁰⁴ However, what Claimants intentionally withhold from the Tribunal is that these significant funds substantially exceeded the value of the works actually conducted on the farm. As explained in more detail below (Section I. F. 4.1.3), Mr. Markicevic, on behalf of BD Agro, filed a criminal complaint against the former CEO of BD Agro, Mr. Jovanovic, in 2014, accusing him (together with seven other accomplices) of abusing his managerial position and committing a fraud in relation to these construction works, thereby damaging BD Agro in the amount of as much as EUR 2.775.549,58 (the difference between the actual value of the works and the amount paid).⁶⁰⁵

⁶⁰⁰ First Expert Report of Mr. Sandy Cowan, 19 April 2019, Section 4.

⁶⁰¹ Letter from Center for education and representation of shareholders and employees to the Agency, 8 July 2009, p. 2, **RE-228**; Leasing Agreement between no. 1619 dated 11 August 2008, **RE-378**.

⁶⁰² Letter from Center for education and representation of shareholders and employees to the Agency, 8 July 2009, p. 2, **RE-228**.

⁶⁰³ Notice from the Privatization Agency to Mr. Obradovic, 16 October 2009, **RE-384**.

⁶⁰⁴ Reply, para. 88. Messrs. Rand and Obradovic even repeatedly praise this "overhaul" as their significant accomplishment. *See* Witness Statement of Mr. William Rand, 5 February 2018, para. 26; Second Witness Statement of Mr. William Rand, 3 October 2019, para. 29

⁶⁰⁵ Criminal Complaint against Mr. Jovanovic and others, 8 December 2014, p. 5, **RE-258**.

372. There were also other examples of BD Agro's fixed assets being sold for less than their actual value or even without compensation,⁶⁰⁶ as well as reports of Mr. Obradovic using BD Agro's funds for a number of other unreasonable expenditures.⁶⁰⁷

3. Misrepresentation of the performance of the Privatization Agreement

373. Not only was the irresponsible handling of BD Agro's assets devastating for its financial condition, but it was also seriously misleading the Agency in terms of Mr. Obradovic's performance of the Privatization Agreement. More specifically, Mr. Obradovic used the property of BD Agro to create an appearance that he genuinely: paid the price for BD Agro, and performed his investment obligations, in accordance with the Privatization Agreement.⁶⁰⁸ In addition to that, he also disregarded the contractual obligation concerning the restitution of land.⁶⁰⁹

3.1. Payments of the Purchase Price

374. The purchase price for BD Agro shares amounted to RSD 470,000,000 *i.e.* EUR 5,548,996.46. It was payable in six installments. As Mr. Obradovic had to pay the deposit before the auction in the amount of RSD 179,941,000, this was calculated as the first installment. Therefore, the remaining Purchase Price was to be paid in another five equal installments amounting to EUR 684.909,09, payable in RSD according to the exchange rate valid at the time of each payment (which was nearly RSD 60 million at the time of the auction). Although the Purchase Price for the shares was ultimately paid in full, the origin of the funds used for the payments is a different matter.

⁶⁰⁶ Counter-Memorial, paras. 180, 186; Proposal of the Center for Control for the session of the Commission for Control of 10 July 2013, pp. 26, **RE-49** ("according to the data from the supplied audit reports, it was determined that certain fixed assets were alienated/sold without compensation and below the bookkeeping value, such as for example: Zlatija Nedeljkovic – employed in the Subject to whom land was given of the area 1ha24a45m2 without compensation in 2006; donation of basic herd worth 113,233 dinars – Audit report from April 2011. In addition, a part of fixed assets was sold to below its bookkeeping value, such as for example: mill in Dec with bookkeeping value of 97,882,811 dinars and sold for 99,000 EUR, Yugo Scala car of bookkeeping value of 259,574.43 dinars sold for 2,000 dinars to Slavica Obradovic").

⁶⁰⁷ Requests of unions of BD Agro's employees of 24 May 2013, **RE-104**. Letter from Center for education and representation of shareholders and employees to the Government of the Republic of Serbia of 20 December 2010, **RE-125**. Letter from Center for education and representation of shareholders and employees to the Agency of 21 March 2012, **RE-147**. Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Agency of 11 February 2010, **RE-118**.

⁶⁰⁸ Mr. Obradovic apparently did the same in relation to his other privatized companies. See *e.g.* Criminal Complaint against Mr. Đura Obradovic, 24 November 2015, **RE-229**.

⁶⁰⁹ Article 6.1 of the Privatization Agreement, **CE-17**.

375. Most commonly, a payment would be made to Mr. Obradovic from the account of BD Agro, being referenced as a “return of the shareholder’s loan”. On that same day (or the day after), a corresponding payment in the identical or almost identical amount would be transferred to the account of the Agency. Having in mind the disastrous financial condition of BD Agro, the funds for these *transactions* were obtained from the sale of BD Agro’s land or various loans that only further indebted BD Agro.

3.1.1. Third installment

376. Third installment of the Purchase Price in the amount of RSD 53,305,241.64 (EUR 684,909,09⁶¹⁰) was paid from the EUR 8.2 Million Loan from NLB⁶¹¹:

- (i) on 9 October 2007, NLB Bank paid RSD 54,425,000 (EUR 700.000)⁶¹² to BD Agro, referencing it as payment under the EUR 8.2 million loan agreement;⁶¹³
- (ii) on 10 October 2007, BD Agro paid RSD 42,215,693,55 (EUR 541,909.09) from that same account to the personal bank account of Mr. Obradovic, referencing it as repayment of a shareholder loan;⁶¹⁴
- (iii) on 10 October 2007, NLB Bank paid another RSD 15,486,000 (EUR 200,000)⁶¹⁵ to BD Agro, referencing it as payment under a loan agreement;⁶¹⁶
- (iv) on 11 October 2007, BD Agro paid RSD 14,259,548.09 (EUR 183,218.27) from that same account to the personal bank account of Mr. Obradovic, referencing it as another repayment of a shareholder loan;⁶¹⁷ and finally
- (v) on 11 October 2007, Mr. Obradovic paid RSD 53,305,241.64 from that same personal bank account to the account of the Agency, referencing it as payment of the third installment of the purchase price for BD Agro.⁶¹⁸

⁶¹⁰ Each instalment of the purchase price amounted to EUR 684.909 but the amount that was paid to the Agency was in dinars and depended on the exchange rate applicable at the date of payment.

⁶¹¹ Specification of expenditures from NLB Bank, **RE-117**; BD Agro’s Investment Project for the Period of 2008-2012, 20 March 2008, p. 3, **RE-392**.

⁶¹² Payment Instruction under the NLB Loan Agreement, 11 October 2007, **RE-430**.

⁶¹³ BD Agro Bank Statement from Banka Intesa for the period of 9-11 October 2007, **RE-431**; Instruction for payment of the loan dated 9 October 2007, **RE-230**.

⁶¹⁴ BD Agro Bank Statement from Banka Intesa for the period of 9-11 October 2007, **RE-431**.

⁶¹⁵ Payment Instruction under the NLB Loan Agreement, 9 October 2007, **RE-230**.

⁶¹⁶ BD Agro Bank Statement from Banka Intesa for the period of 9-11 October 2007, **RE-432**.

⁶¹⁷ BD Agro Bank Statement from Banka Intesa for the period of 9-11 October 2007, **RE-431**.

⁶¹⁸ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

3.1.2. Fourth installment

377. On 13 October 2008, Mr. Obradovic wrote to the Agency confirming that he has not paid the fourth installment on time and asking for an extension. In his letter, he stated:

*“Having in mind that I am expecting an inflow of funds until 5 November 2008 based on investing, I am referring to you with a plea for an extension of the deadline for payment of the fourth installment of the purchase price until the said date.”*⁶¹⁹

378. On 17 November 2008, Mr. Obradovic explained his request in even more detail, saying:

*“Having in mind the world economic crisis which has started to be felt in our country, the expected money inflow has not yet come to my account, and it is certain that this is the reason for the belatedness of the said inflow. I personally expect that the inflow will occur in the additional deadline which you have left to me for the fulfillment of the due installment, but because of all the current events on the world monetary market, it is possible that there will be unplanned delays, so I am referring to you for these reasons with a plea to consider the possibility of approving an additional deadline of 20 days, for the payment of the fourth installment of the purchase price.”*⁶²⁰

379. And indeed, only a few days later, on 25 November 2008, the expected inflow did come into Mr. Obradovic’s account - but from BD Agro, who had to sell some of its land to another company in order to obtain these funds.⁶²¹ After he received the money, Mr. Obradovic paid the first part of the fourth installment of the Purchase Price:

⁶¹⁹ Letter from Mr. Obradovic to the Agency, 13 October 2008 (emphasis added), **RE-231**.

⁶²⁰ Letter from Mr. Obradovic to the Agency, 17 November 2008 (emphasis added), **RE-232**.

⁶²¹ See Section I. F. 2.2.

- (i) on 24 November 2008, a company named Eko Elektrofrigo paid a total of RSD 40,552,927.95 to the account of BD Agro, referencing as payment for the purchase of real estate;⁶²²
- (ii) on 25 November 2008, Agrobanka paid RSD 25,311,604.73 to the account of BD Agro, referencing it as a loan (*i.e.* “overnight minus coverage”);⁶²³
- (iii) on 25 November 2008, BD Agro paid RSD 17,720,000 to the personal bank account of Mr. Obradovic, referencing it as repayment of a shareholder loan;⁶²⁴
- (iv) on 25 November 2008, Mr. Obradovic paid RSD 17,701,780 from that same personal bank account to the account of the Agency, referencing it as partial payment of the fourth installment of the purchase price for BD Agro.⁶²⁵

380. However, as this was only a partial payment of the fourth installment, Mr. Obradovic had to stall the Agency further. On 28 November 2008, Mr. Obradovic again wrote to the Agency, saying:

*“Having in mind that the current unfavorable financial situation is dictating a slow tempo of business and financing, I am referring to you with a plea to accept the fulfillment of the remaining debt in the amount of EUR 484.909 towards the Agency until 31 December 2008.”*⁶²⁶

381. And exactly on 31 December 2008, Mr. Obradovic’s “unfavorable financial situation” suddenly got better, but at the expense of BD Agro. Namely, on that day, BD Agro received the EUR 9.9 Million Loan from Banka Intesa, and simply forwarded the necessary funds for Mr. Obradovic’s payment of the installment.⁶²⁷ Mr. Obradovic then paid the second part of the fourth installment of the Purchase Price⁶²⁸:

⁶²² Out of these funds, RSD 28.306.676,34 was used to settle a loan towards Agrobanka while approx. 12 million was used for tomorrow’s payment to Mr. Obradovic. See BD Agro Bank Statement from Nova Agrobanka for the period of 24-25 November 2008, **RE-433**.

⁶²³ Out of these funds, RSD 19,974,240.00 was used to purchase foreign currency, while approx.. RSD 7.7 million was used for the payment to Mr. Obradovic. See BD Agro Bank Statement from Nova Agrobanka for the period of 24-25 November 2008, **RE-433**.

⁶²⁴ BD Agro Bank Statement from Nova Agrobanka for the period of 24-25 November 2008, **RE-433**.

⁶²⁵ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁶²⁶ Letter from Mr. Obradovic to the Privatization Agency, 28 November 2008 (emphasis added), **RE-434**.

⁶²⁷ See Section I. F. 2.3.2.

⁶²⁸ BD Agro’s Investment Project for the Period of 2008-2012, 20 March 2008, p. 10, **RE-392**.

- (i) on 31 December 2008, Banka Intesa paid RSD 447,234,834.11 to BD Agro, referencing it as payment under a long-term loan agreement;⁶²⁹
- (ii) on 31 December 2008, BD Agro paid RSD 47,400,000 to the personal bank account of Mr. Obradovic, referencing it as repayment of a shareholder loan;⁶³⁰
- (iii) on 31 December 2008, Mr. Obradovic paid RSD 42,963,430.29 from that same personal bank account to the account of the Agency, referencing it as payment of the fourth installment of the purchase price for BD Agro.⁶³¹

3.1.3. Fifth installment

382. Fifth installment of the Purchase Price was paid from an unidentified Agrobanka loan:

- (i) on 3 March 2010, Agrobanka paid RSD 50,000,000 to BD Agro, referencing it as payment under a short-term loan agreement;⁶³²
- (ii) on 3 March 2010, BD Agro paid RSD 50,000,000 from that same account to the personal bank account of Mr. Obradovic, referencing it as repayment of a shareholder loan;⁶³³
- (iii) on 3 March 2010, Mr. Obradovic paid RSD 50,000,000 from that same personal bank account to the account of the Agency, referencing it as payment of the fifth installment of the purchase price for BD Agro.⁶³⁴

3.1.4. Sixth installment

383. Sixth installment was likewise paid by BD Agro's funds, but this time by an indirect path through Inex, one of Mr. Obradovic's affiliated companies:

- (i) on 29 December 2010, Agrobanka paid RSD 221,000,000 to the account of BD Agro, referencing it as payment under the 221 Million Loan Agreement;⁶³⁵
- (ii) on 29 December 2010, BD Agro paid RSD 30,670,690 to the account of Inex, referencing it as an interest-free loan;⁶³⁶

⁶²⁹ BD Agro Bank Statement from Banka Intesa for 31 December 2008, **RE-432**.

⁶³⁰ BD Agro Bank Statement from Banka Intesa for 31 December 2008, **RE-432**.

⁶³¹ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁶³² BD Agro Bank Statement from Nova Agrobanka for 3 March 2010, **RE-435**.

⁶³³ BD Agro Bank Statement from Nova Agrobanka dated 3 March 2010, **RE-435**.

⁶³⁴ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁶³⁵ BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.

⁶³⁶ BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.

- (iii) on 29 December 2010, BD Agro paid another RSD 84,130,160 to Inex, referencing them as payment for allegedly provided “goods and services”,⁶³⁷
- (iv) on 18 January 2011, Inex paid RSD 9,000,000 from its account to the personal bank account of Mr. Obradovic, referencing it as repayment of a shareholder loan;⁶³⁸
- (v) on 18 January 2011, Mr. Obradovic paid RSD 9,000,000 from that same personal bank account to the account of the Agency, referencing it as partial payment of the sixth installment of the purchase price for BD Agro;⁶³⁹
- (vi) on 14 February 2011, Inex paid RSD 30,400,000 to the personal bank account of Mr. Obradovic;⁶⁴⁰
- (vii) on 14 February 2011, Mr. Obradovic paid RSD 16,014,724 to the Agency, as partial payment of the sixth installment of the Purchase Price.⁶⁴¹
- (viii) on 8 April 2011, Inex paid RSD 50,000,000 from its account to the personal bank account of Mr. Obradovic, referencing it as repayment of a shareholder loan;⁶⁴²
- (ix) on 8 April 2011, Mr. Obradovic paid RSD 47,261,296.70 from that same personal bank account to the account of the Agency, referencing it as payment of the sixth installment of the purchase price for BD Agro.⁶⁴³

384. Mr. Obradovic even paid the interest rate for the sixth installment directly from the funds of BD Agro:

- (i) on 29 December 2011, BD Agro paid RSD 6,500,000 from its account to the personal bank account of Mr. Obradovic, referencing it as repayment of a shareholder loan;⁶⁴⁴ while

⁶³⁷ BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.

⁶³⁸ Payments to Mr. Obradovic’s bank account no. 245-0100101831196-74 in Nova Agrobanka, for the period of 18-25 January 2011, **RE-551**.

⁶³⁹ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁶⁴⁰ Mr. Obradovic’s Bank Statement from Vojvodjanska Banka for 14 February 2011, **RE-437**.

⁶⁴¹ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁶⁴² Payments to Mr. Obradovic’s bank account no. 245-0100101831196-74 in Nova Agrobanka, for 8 April 2011, **RE-552**.

⁶⁴³ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁶⁴⁴ BD Agro Bank Statement from Banka Intesa for 29 December 2011, **RE-438**.

- (ii) on 30 December 2011, Mr. Obradovic paid RSD 5,690,000 from that same personal bank account to the account of the Agency, and another RSD 309,949.45 from a different account, referencing both as payment of the interest for the belated sixth installment of the purchase price for BD Agro.⁶⁴⁵

3.1.5. BD Agro actually paid for its shares

385. As can be seen, and as absurd as it may sound, BD Agro effectively took loans and sold its property in order to pay the purchase price for itself (instead of Mr. Obradovic). Previous analysis shows that approximately 51% of the total Purchase Price, *i.e.* RSD 241,936,472.63 (approx. EUR 2.85 million⁶⁴⁶) was evidently paid from BD Agro's own funds. This percentage was even higher, as Mr. Obradovic was continuously extracting funds from BD Agro.
386. Also, having in mind that the first and the largest installment of the Purchase Price had to be paid before Mr. Obradovic took control of BD Agro, there was no possibility for him to misuse BD Agro's funds for that payment.⁶⁴⁷ Therefore, in the period when Mr. Obradovic had the opportunity to abuse BD Agro's property (*i.e.* when paying the remaining five installments), it turns out that a total of 83% of his payments of the Purchase Price in fact originated from BD Agro.
387. Taking all of this into account, it is abundantly clear that Mr. Obradovic or Mr. Rand, according to Claimants' narrative, acquired the shares in BD Agro by mismanaging the property of BD Agro itself. On the other hand, the Agency was effectively precluded from determining this kind of fraud as its tasks ended with simply verifying whether an installment was paid or not.⁶⁴⁸ The Agency could do nothing more than to forward the various letters from the minority shareholders and employees to the police, which led to several criminal proceedings being initiated (*see* Section I. F. 4.1 below).

⁶⁴⁵ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁶⁴⁶ Using the amount of Purchase Price as a reference point, as expressed in Article 1.2 of the Privatization Agreement, **CE-17**.

⁶⁴⁷ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁶⁴⁸ Section 1.5.1 of the Directive on determining the procedures for control of performance of the agreements for sale of social and state capital, Privatization Agency, 2006, **RE-440**.

3.2. Fulfillment of the investment obligation

388. According to Article 5.2.1 of the Privatization Agreement (as amended in 2006), Mr. Obradovic had to invest in BD Agro EUR 1,998,554.⁶⁴⁹ The investment had to be made from Mr. Obradovic's own funds and had to be done in the fixed assets used solely for performance of main business activity of BD Agro. However, Mr. Obradovic misrepresented fulfillment of the investment obligation as well.
389. In 2006, Mr. Obradovic procured two auditor's reports confirming that he had fulfilled his obligation of investing RSD 168,683,000 (approximately EUR 1,982,000) in BD Agro's fixed assets.⁶⁵⁰ The auditor's reports showed that Mr. Obradovic made a series of payments to the suppliers of BD Agro and to BD Agro itself. The latter payments were recorded as payments of investment obligations. Bank account transactions now reveal that during the entire period of 2005-2015, only RSD 21,114,000 were "invested" by Mr. Obradovic in BD Agro (and even that amount was repaid to him under repayment of alleged shareholder loans).⁶⁵¹ According to Mr. Cowan's analysis of the bank account transactions, there have been no "investments" paid by any of the other affiliated companies of Mr. Obradovic, nor any such payments from Mr. Rand and his affiliated companies.⁶⁵²
390. Based on those data, the auditor issued its confirmations, which led the Agency to consequently issue its own confirmation of the fulfilled investment obligation.⁶⁵³ However, after Mr. Obradovic acquired the necessary validations, his "investments" were suddenly viewed differently in BD Agro's accounting books. More specifically, the same payments were now obviously being recorded as shareholder loans which were to be returned to Mr. Obradovic.⁶⁵⁴ This has now only been confirmed by the analysis of Mr. Cowan, which points to a substantial difference between the accounting books of BD Agro and the actual bank transactions.⁶⁵⁵

⁶⁴⁹ Article 5.2.1. of the Privatization Agreement, **CE-17**; Article 2 of the Amendment I to the Privatization Agreement dated 9 January 2006, **CE-110**.

⁶⁵⁰ Audit Report from Konsultant - revizija, 10 March 2006, **CE-51**; Audit Report from Konsultant - revizija, 9 June 2006, **CE-52**.

⁶⁵¹ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 1.

⁶⁵² Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 2.

⁶⁵³ Confirmation of the Privatization Agency of the Completion of Investment, 10 October 2006, **CE-18**.

⁶⁵⁴ Counter-Memorial, para. 179.

⁶⁵⁵ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 1.

391. Furthermore, through a subsequent control by the Agency, it was discovered that a significant part of the allegedly acquired fixed assets (which were recorded as fulfilled investment obligations), was actually not in the possession of BD Agro. This was also confirmed by financial experts and auditors.⁶⁵⁶ Interestingly, Claimants seem to categorically deny Mr. Obradovic or BD Agro ever being confronted with these issues by the Agency.⁶⁵⁷ However, this is evidently not true as such issues were the cause of considerable discussions with the Agency regarding the fulfilment of the Privatization Agreement.⁶⁵⁸
392. Such was the case with *e.g.* two brand new SUV's which were purchased by Mr. Obradovic in 2005 and presented as part of the fulfillment of the investment obligation into BD Agro,⁶⁵⁹ although they were actually used (without compensation) by PIK Pester. It was only in 2011 that they were returned to BD Agro, upon the initiative of the Agency.⁶⁶⁰
393. Having all of that in mind, it is more than evident that Mr. Obradovic severely misrepresented the fulfillment of his investment obligations under the Privatization Agreement in multiple ways. If nothing else, documentary evidence shows that Mr. Obradovic paid RSD 608,232,801 to BD Agro, and directly received a total of RSD 496,871,720.⁶⁶¹ Thus, it was BD Agro who "invested" into Mr. Obradovic and not the other way around.
394. It should also be noted that Mr. Cowan's comprehensive analysis of BD Agro's bank accounts did not find a single example of a payment being made by Claimants *i.e.* Sembi Investments Ltd., Rand Investments Ltd., or Mr. Rand himself to BD Agro, except for the minor EUR 0,2 million loan in 2008.⁶⁶²

⁶⁵⁶ Proposal of the Center for Control for the session of the Commission for Control of 10 July 2013, pp. 25-28, **RE-49**.

⁶⁵⁷ Reply, para. 148 ("*It therefore comes as no surprise that neither the Privatization Agency nor the Ministry of Economy ever brought any of these issues to the attention of the Claimants' representatives, Mr. Obradović and BD Agro.*").

⁶⁵⁸ Proposal of the Center for Control for the session of the Commission for Control of 10 July 2013, pp. 27-28, **RE-49**

⁶⁵⁹ Overview of investments into the fixed assets for performing the regular business of the Subject of privatization, **RE-393** (attachment of the Auditor's report of 10 March 2006, **CE-51**).

⁶⁶⁰ Letter from BD Agro to the Agency, 9 November 2011, **RE-60**.

⁶⁶¹ Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 1.

⁶⁶² Second Expert Report of Mr. Sandy Cowan, 24 January 2020, Appendix 3, Question 2.

3.3. Restitution of land

395. One of the machinations was a land swap agreement between BDA and Ministry of Agriculture which Mr. Obradovic procured through collusion with two officials from the Ministry of Agriculture. Namely, one of the processes which Serbia underwent during its transition to market economy was the restitution of private real estate nationalized by the State authorities during the communist era. As BD Agro was previously a socially-owned company, a significant part of its land was nationalized land which was to be returned to its previous owners.⁶⁶³ Mr. Obradovic agreed to comply with any such restitution and this was also explicitly stipulated in Article 6 of the Privatization Agreement.⁶⁶⁴
396. However, as Respondent already explained,⁶⁶⁵ in the period between 2008-2010, Mr. Obradovic had BD Agro propose⁶⁶⁶ and then conclude an agreement with the Ministry of Agriculture, by which BD Agro exchanged 46 hectares of its land that was returned to its previous owners in the restitution process, for new unburdened plots granted by the Ministry of Agriculture, valued at RSD 622,852,000 (app EUR 7,800,000).⁶⁶⁷ This exchange was conducted although BD Agro was explicitly informed by the Land Cadaster in 2008 (at the latest) that those same land plots were to be returned to their previous owners in accordance with the Law on Restitution of Property.⁶⁶⁸ Two years later, on 4 January 2010, the contract was concluded between BD Agro and the Ministry of Agriculture, and the land was exchanged. As a result, instead of returning the land to its previous owners, Mr. Obradovic defrauded the State together with his accomplices, including state officials from the Ministry, and thus acquired for BD

⁶⁶³ Article 6.1 of the Privatization Agreement, **CE-17**.

⁶⁶⁴ Article 6.1 of the Privatization Agreement, **CE-17** (“*Before the day of the auction, the Buyer of the capital is aware of the fact that integral part of the subject’s property includes nationalized property and agrees that the nationalized property should be treated pursuant to the provisions of the Law on Property Restitution and Compensation [...] The Buyer shall return nationalized property in its natural state in cases stipulated by the law.*”).

⁶⁶⁵ Counter-Memorial, para. 188.

⁶⁶⁶ Letter from BD Agro to the Ministry of Agriculture, Forestry and Water Management, 13 April 2007, **RE-401**.

⁶⁶⁷ Agreement on exchange of land between the Ministry of Agriculture, Forestry and Water Management and BD Agro, 4 January 2010, **RE-396**; Indictment of the Prosecutor’s Office for Organized Crime, no. KTI 65/16 dated 15 December 2016, p. 8, **RE-399**; Letter from the Land Cadaster to BD Agro, 8 February 2008, **RE-395**.

⁶⁶⁸ Letter from the Land Cadaster to BD Agro, 8 February 2008, **RE-395**.

Agro unburdened and unrestricted State land worth almost EUR 8 million (that was subsequently encumbered for obtaining several significant bank loans).

397. The exchange had no legal basis and never acquired the necessary approvals, as Respondent already indicated in its Counter-Memorial.⁶⁶⁹ In their Reply, Claimants respond by simply saying that the information in question came from a newspaper article and that:

“The truth is that there was nothing illegal about the land swap with the Ministry of Agriculture. BD Agro approached the Ministry of Agriculture with a request for the swap and the Ministry agreed and approved the swap. Serbia cannot seriously claim that the Privatization Agreement was violated by a transaction that was expressly approved by the Ministry of Agriculture.”⁶⁷⁰

398. However, what Claimants ignore is that such an exchange of land should have actually been approved by the Government’s decision,⁶⁷¹ which was never obtained. The Ministry only gave a proposal (not the approval as Claimants contend), while the approval had to come from the Government. The reason for the lack of an approval lies in the fact that an exchange of state land was allowed only if this would lead to consolidation of smaller land plots into a larger whole.⁶⁷² The exchange proposed by BD Agro had exactly the opposite effect.⁶⁷³ This lack of legal ground is why the proposed exchange did not even pass the State Attorney’s scrutiny,⁶⁷⁴ let alone the Government’s. However, the management of BD Agro nevertheless decided to pursue this exchange together with two officials from the Ministry of Agriculture, currently accused for corruption in connection to said transaction.⁶⁷⁵

399. Not only that, by this exchange of land, Mr. Obradovic breached Serbian law and committed a criminal offence, but he also breached the Privatization Agreement,

⁶⁶⁹ Counter-Memorial, para. 188.

⁶⁷⁰ Reply, paras. 150-151.

⁶⁷¹ Law on Agricultural Land, Article 73(2), **RE-234**.

⁶⁷² Law on Agricultural Land, Article 73(1), **RE-234**.

⁶⁷³ Opinion of the Office of the State Attorney, 16 February 2010, **RE-394**.

⁶⁷⁴ Opinion of the Office of the State Attorney, 16 February 2010, **RE-394**.

⁶⁷⁵ I.e. Messrs. Nikola Jaksic and Tomislav Pavlovic.

which in Article 6.3.1 expressly prohibited the Buyer from taking any actions in order to prevent application of the restitution law.⁶⁷⁶ In other words, Mr. Obradovic did not fulfill his obligations regarding restitution, but chose to fraudulently avoid them at the expense of Respondent, by transferring the land in question to Serbia (and receiving “clean” land instead). This is why Serbia initiated litigation proceedings against BD Agro for the purpose annulling the pertinent agreement and returning ownership of its land.⁶⁷⁷

400. In the Reply, Claimants contend that the said breach of the Privatization Agreement was never alleged by any of the auditors, the Agency nor the Ministry of Economy.⁶⁷⁸ What Claimants purposefully ignore is that it is precisely the difficulty to notice an irregularity what makes fraudulent activities – fraudulent. The illegality of the exchange required a more thorough investigation aimed at the specific transaction. The investigation did occur, and ultimately led to the arrest and trial of Messrs. Obradovic and Jovanovic, together with other persons, as will be elaborated further below.⁶⁷⁹ This arrest occurred in December 2015, two months after the Privatization Agreement was terminated. This is why the breach of Article 6.3.1 was never claimed – it was discovered when the agreement had already been terminated.
401. Finally, it should be noted that the fraudulent acquisition of the land served an important purpose. Namely, Mr. Obradovic pledged the said land obtained from Serbia for several substantial bank loans from Agrobanka and Intesa⁶⁸⁰ (including in particular the 65 Million Loan of Crveni Signal) by which, as explained hereunder, he financed himself and his other companies and caused the bankruptcy of BD Agro.

4. Criminal proceedings

402. As one would expect, Mr. Obradovic’s various illicit activities ultimately led to criminal prosecution as well. In fact, several criminal proceedings are currently

⁶⁷⁶ Article 6.3.1 of the Privatization Agreement, **CE-17** (“*The Buyer undertakes that he shall not, until adoption of the law, undertake legal and factual actions in order to prevent application of special regulations which define the issues of restitution of property to previous owners*”).

⁶⁷⁷ List of BD Agro’s land which was not sold, dated 30 June 2018. **RE-451** (land plots for which it is noted that there is a court dispute with the Republic of Serbia, are the same land plots exchanged by Mr. Obradovic).

⁶⁷⁸ Reply, paras. 152-153.

⁶⁷⁹ See Section I. F. 4.1.2.

⁶⁸⁰ Indictment of the Prosecutor’s Office for Organized Crime, no. KTI 65/16 dated 15 December 2016, pp. 9-10, 49-50, **RE-399**.

ongoing in relation to Mr. Obradovic's mismanagement of BD Agro. Besides proceedings regarding Mr. Obradovic's actions, there are currently open investigations under a number of other criminal complaints filed against responsible persons of BD Agro, Crveni Signal, Inex and PIK Pester.⁶⁸¹ All these proceedings are intertwined and relate to, among other things, various parts of the elaborate scheme by which Mr. Obradovic illicitly extracted the funds from the companies which he privatized, including in particular BD Agro.

4.1. Criminal proceedings against Mr. Obradovic and his associates

403. Criminal proceedings against Mr. Obradovic and his close associates are anything but new. Initially, after an expert team of the Minority Shareholders' Association conducted a financial analysis of BD Agro's business in 2007, it proposed to the minority shareholders of BD Agro to submit a criminal complaint against Mr. Obradovic for illicit extraction of funds from the company.⁶⁸²
404. Likewise, the minority shareholders of BD Agro asked the Agency to submit a criminal complaint *i.e.* initiate criminal prosecution of Mr. Obradovic and the management of BD Agro on multiple occasions, much before the initiation of the present proceedings.⁶⁸³ The suspicions concerned the misrepresentation of the performance of the Privatization Agreement by Mr. Obradovic (misrepresented payment of the purchase price and investment obligations), as well as the continuous financial destruction of BD Agro through various illicit activities. Although the Agency did react to these claims accordingly, minority shareholders and employees of BD Agro also directly submitted criminal complaints in this regard against the management of BD Agro on several occasions.⁶⁸⁴
405. All these initiatives did lead to specific actions.

⁶⁸¹ Report of Police Department for the Suppression of Economic Crimes, 18 July 2019, **RE-195**.

⁶⁸² Financial Analysis of BD Agro's business in the period of 1 January – 31 December 2006, Expert Team of the Minority Shareholders' Association, 10 April 2007, p. 19, **RE-275**.

⁶⁸³ Letter of Center for education and Representation of the shareholders and employees to the Agency as of 21 May 2009, **RE-436**; Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 21 March 2012, **RE-147**.

⁶⁸⁴ *See e.g.* Criminal Complaint against Mr. Đura Obradovic and others, 20 September 2009, **RE-411**.

4.1.1. Fraudulent mismanagement and illicit extraction of funds

406. Regarding Mr. Obradovic's various instances of fraudulent behavior and asset extraction from BD Agro, several criminal proceedings were initiated and are still very much active.
407. *First*, minority shareholders of BD Agro submitted a direct criminal complaint against Mr. Obradovic and the management of BD Agro in June 2009, while the District Public Prosecutor's Office in Belgrade acted upon the complaint and initiated investigative activities already in July and August 2009.⁶⁸⁵ In September 2009, a more extensive criminal complaint was also filed by the minority shareholders against Mr. Obradovic and his associates, regarding various instances of criminal behavior, including malpractice, abuse of position, fraud, tax evasion and failure to report a criminal act.⁶⁸⁶ The complaints contained detailed suspicions of, *inter alia*, illicit extraction of funds through shareholder loans and misrepresentation of investment obligations. The prosecution authorities acted upon that criminal complaint as well and also initiated investigative activities back in 2009.⁶⁸⁷ Throughout the past years, the prosecution was largely slowed down by apparent difficulties in obtaining the relevant information, especially when BD Agro was still in the hands of Mr. Obradovic.⁶⁸⁸ However, the public prosecutor's office kept requesting information

⁶⁸⁵ Request for the collection of necessary information no. KTR 2466/09, District Public Prosecutor's Office, 17 July 2009, **RE-235**.

⁶⁸⁶ Criminal Complaint against Mr. Đura Obradovic and others, 20 September 2009, **RE-411**.

⁶⁸⁷ Request for Collection of Necessary Notifications no. KTI 2643/09, Fourth Basic Public Prosecutor's Office, 10 November 2009, **RE-236**.

⁶⁸⁸ The prosecutor's office sent numerous letters requesting additional information from the police authorities. *See e.g.* Request for Collection of Necessary Notifications no. KTI 2643/09, Fourth Basic Public Prosecutor's Office, 10 November 2009, **RE-236**; Decision of the First Basic Court in Belgrade no. Ki 11453/12, 26 November 2012, **RE-237**; Letter from the Second Basic Court in Belgrade to the First Basic Court in Belgrade no. Ki 141/13, 15 January 2013, **RE-238**; Letter from the First Basic Court in Belgrade to the Second Basic Court in Belgrade no. Ki 11453/12-S, 8 March 2013, **RE-239**; Order of the Second Basic Court in Belgrade no. Su 1-92/13, 1 November 2013, **RE-240**; Letter from the Third Basic Public Prosecutor's Office to the Third Basic Court in Belgrade, 13 March 2014, **RE-241**; Letter from the Third Basic Public Prosecutor's Office to the Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 20 March 2015, **RE-242**; Letter from the Third Basic Public Prosecutor's Office to the Prosecutor's Office for Organized Crime no. KT 1033/14, 14 July 2016, **RE-243**; Letter from the Third Basic Public Prosecutor's Office to the Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 8 December 2016, **RE-244**; Letter from the Third Basic Public Prosecutor's Office to the Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 30 March 2017, **RE-245**; Letter from the Third Basic Public Prosecutor's Office to the Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 22 September 2017, **RE-246**; Letter from the Third Basic Public Prosecutor's Office to the Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 7 February 2018, **RE-247**; Letter from the Third Basic Public Prosecutor's Office to the Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 4 September 2018, **RE-248**; Letter from the Third Basic Public Prosecutor's Office to the

from the competent police authorities (both before and after the initiation of the present proceedings) and is still in the process of ongoing investigative activities.

408. Likewise, the Agency accordingly notified the competent investigative authorities of the various suspicions raised by minority shareholders' complaints. On 4 March 2009, the Agency sent an official request to the Police Authority – Sector for Combating Commercial Crime, to investigate the management of BD Agro regarding the allegations of minority shareholders.⁶⁸⁹ The Agency even followed up on its request on 19 June 2009 in order to expedite the process.⁶⁹⁰ After inspecting the allegations of the Agency, the police authorities referred the case to the District Public Prosecutor's Office.⁶⁹¹

409. In this regard, the Agency regularly notified the competent authorities of the suspicions of criminal activity of Mr. Obradovic in BD Agro.⁶⁹² The Agency was also actively seeking updates on the status of the ongoing criminal proceedings.⁶⁹³ On the other hand, the police and prosecution authorities specialized in organized crime and corruption, conducted various investigative activities in this regard throughout the

Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 8 February 2019, **RE-249**; Letter from the Third Basic Public Prosecutor's Office to the Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 11 April 2019, **RE-250**; Letter from the Third Basic Public Prosecutor's Office to the Criminalistic Police Authority - Sector for Combating Commercial Crime no. KT 1033/14, 16 September 2019, **RE-251**.

⁶⁸⁹ Letter from the Agency to the Criminalistic Police Authority, Sector for Combating Commercial Crime, 4 March 2009.

⁶⁹⁰ Letter from the Agency to the Criminalistic Police Authority, Sector for Combating Commercial Crime, 19 June 2009, **RE-277**.

⁶⁹¹ Letter from the Criminalistic Police Authority, Sector for Combating Commercial Crime to the Agency, 10 July 2009, **RE-278**.

⁶⁹² Letter from the Agency to the Criminalistic Police Authority, Sector for Combating Commercial Crime, 30 June 2011, **RE-279**; Letter from the Agency to the Higher Public Prosecutor's Office and the Criminalistic Police Authority, 29 April 2013, **RE-280**; Letter from the Agency to the Higher Public Prosecutor's Office and the Criminalistic Police Authority, 12 May 2014, **RE-281**; Letter from the Agency to the Higher Public Prosecutor's Office and the Criminalistic Police Authority, 30 May 2014, **RE-282**; Letter from the Agency to the Higher Public Prosecutor's Office, 30 September 2015, **RE-284**.

⁶⁹³ Letter from the Agency to the Criminalistic Police Authority, Sector for Combating Commercial Crime, 19 June 2009, **RE-277**; Letter from the Agency to the Higher Public Prosecutor's Office, 24 February 2011, **RE-285**; Letter from the Agency to the Higher Public Prosecutor's Office, 7 October 2011, **RE-286**; Letter from the Agency to the Higher Public Prosecutor's Office and the Criminalistic Police Authority, 29 April 2013, **RE-280**.

relevant period.⁶⁹⁴ The Agency also regularly complied with the requests for information from these authorities.⁶⁹⁵

410. *Second*, on 24 November 2015, yet another criminal complaint was submitted against Mr. Obradovic for several similar criminal offences *i.e.* abuse of position, abuse of authority and fraud.⁶⁹⁶ More specifically, Mr. Obradovic was again accused of illicit extraction of funds and assets from BD Agro and its subsidiaries through misuse of his powers and various forms of misrepresentation. He was accused of financially destroying BD Agro, indebting it and selling out its assets for personal gain. Furthermore, Mr. Obradovic was accused for similar acts in relation to Inex, Crveni Signal, PIK Pester and Uvac Gazela.⁶⁹⁷ The Higher Public Prosecutor's Office acted accordingly and initiated the investigative collection of necessary information in December 2015.⁶⁹⁸

411. The pending criminal proceedings *i.e.* investigations regarding the charges raised in the above described complaints, are still very much active.⁶⁹⁹

4.1.2. Land machinations

412. It comes as no surprise that, besides in cases of financial fraud and money siphoning, Mr. Obradovic became a criminal suspect regarding some of the previously described machinations with BD Agro's land.

413. *First*, on 9 December 2015, a formal investigation was ordered against Mr. Obradovic for: (i) the improper transfer of significant amount of land without compensation to Mr. Obradovic's associate *i.e.* employee at BD Agro, Ms. Zlatija Nedeljkovic, and (ii)

⁶⁹⁴ Letter from the Criminalistic Police Authority - Sector for Combating Organized Crime to the Agency, 10 October 2014, **RE-287**; Request from the Criminalistic Police Authority - Sector for Combating Organized Crime to the Agency, 28 July 2015, **RE-288**; Email from Police Inspector Zoran Radevic to the Agency, 4 September 2015, **RE-289**; Letter from the Higher Public Prosecutor's Office to the Agency no. KTR 2466/09, 10 May 2013, **RE-290**.

⁶⁹⁵ Letter from the Agency to the Criminalistic Police Authority - Sector for Combating Organized Crime, 29 June 2009, **RE-291**; Letter from the Agency to the Criminalistic Police Authority - Sector for Combating Organized Crime, 18 April 2013, **RE-292**; Letter from the Agency to the Criminalistic Police Authority - Sector for Combating Organized Crime, 23 October 2014, **RE-293**; Letter from the Agency to the Criminalistic Police Authority, 14 August 2015, **RE-295**.

⁶⁹⁶ Request for Collection of Necessary Notifications no. KT 1109/15, Higher Public Prosecutor's Office, 14 December 2015, **RE-252**.

⁶⁹⁷ Criminal Complaint against Mr. Đura Obradovic, 24 November 2015, **RE-229**.

⁶⁹⁸ Request for Collection of Necessary Notifications no. KT 1109/15, Higher Public Prosecutor's Office, 14 December 2015, **RE-252**.

⁶⁹⁹ Report of Police Department for the Suppression of Economic Crimes, 18 July 2019, **RE-195**.

the improper acquisition of BD Agro's land by Mr. Obradovic himself,⁷⁰⁰ which caused significant financial harm to BD Agro in excess of at least EUR 1 million. Both of these acts were conducted in the period of 2006-2007, in the midst of the alleged investment activities in BD Agro. On 14 February 2018, after gathering sufficient evidence, the Higher Public Prosecutor's Office raised a 22-page indictment against Mr. Obradovic.⁷⁰¹ These criminal proceedings are still ongoing.

414. *Second*, another subject of criminal proceedings was the fraudulent exchange of land that occurred in the period of 2008-2010 (as elaborated above in Section I. F. 3.3). These actions resulted in Messrs. Obradovic's and Jovanovic's arrest and one-month detention on 28 December 2015 (along with six other accused),⁷⁰² for suspicion of committing the criminal offence of abuse of position.⁷⁰³ Their prosecution was actually part of a large scale anti-corruption operation "Shredder" in which 80 persons in total were arrested and prosecuted for various corruption-related criminal offences.⁷⁰⁴ After an extensive investigation, a 62-page indictment was raised against Messrs. Obradovic and Jovanovic, together with four other accused (two officials from the Ministry and two other employees of BD Agro).⁷⁰⁵ The trial for the said criminal act is still ongoing before the Special Court for Organized Crime in Belgrade. Messrs. Obradovic and Jovanovic are each facing potential sentences of up to 10 years in prison.⁷⁰⁶

4.1.3. Fraudulent construction works

415. On 8 December 2014, Mr. Markicevic, as the new CEO of BD Agro, filed a criminal complaint (on behalf of BD Agro) against Mr. Jovanovic and seven other persons for abuse of position and fraud.⁷⁰⁷ The charges related to the construction and reconstruction of buildings of BD Agro by a company named Vihor. Mr. Markicevic stated the works that BD Agro paid for substantially differed from the works that were

⁷⁰⁰ Order on Conducting Investigation no. KTI 460/15, Higher Public Prosecutor's Office, 9 December 2015, **RE-254**.

⁷⁰¹ Indictment of the Higher Public Prosecutor's Office no. KTO 93/18 dated 14 February 2018, **RE-426**.

⁷⁰² "They caused financial harm to the state in the amount of billion dinars!", Blic, 29 December 2015, **RE-124**.

⁷⁰³ Order on Conducting an Investigation no. KTI 40/15, Prosecutor's Office for Organized Crime, 27 December 2015, **RE-255**.

⁷⁰⁴ "Action "Shredder", detainment for the suspects", RTS, 28 December 2015, **RE-256**.

⁷⁰⁵ Indictment of the Prosecutor's Office for Organized Crime, no. KTI 65/16 dated 5 April 2017, **RE-399**.

⁷⁰⁶ Article 234(3) of the Criminal Code, **RE-257**.

⁷⁰⁷ Criminal Complaint against Mr. Jovanovic and others, 8 December 2014, **RE-258**.

actually conducted. An expert report confirmed that the damage which BD Agro suffered in this way amounted to EUR 2.775.549,58.⁷⁰⁸ This was apparently a consequence of misrepresentations and fraudulent conduct of BD Agro's and Vihor's top management. Therefore, contrary to Claimants' assertions now, not even BD Agro's management⁷⁰⁹ believed that "*BD Agro was not mismanaged*."⁷¹⁰ The prosecutor's office acted upon the complaint of Mr. Markicevic and initiated an investigation.⁷¹¹

4.1.4. Illicit operations while BD Agro's accounts were blocked

416. While Mr. Markicevic wrote the criminal complaint against Mr. Jovanovic, BD Agro's employees were writing a criminal complaint against him. On 26 November 2014, a criminal complaint was submitted against Mr. Markicevic and another official of BD Agro for the criminal offence of abuse of position in commerce, in relation to the mismanagement of BD Agro.⁷¹² The complaint alleged that the suspects engaged in illicit selling of BD Agro's movable and immovable property while the company's bank accounts were blocked, and that various related companies were used to effectuate illegal payments under the blockage, including in particular MDH Serbia. The prosecutor's office initiated the collection of necessary information upon the receipt of the complaint, and the proceedings are currently ongoing.⁷¹³

4.1.5. False presentation of facts in the pre-pack reorganization plan

417. On 24 November 2017, a criminal complaint was filed by BD Agro against Mr. Markicevic and his associates from Crveni Signal for the suspicion of committing the criminal offence of false presentation and concealment of facts in the pre-pack reorganization plan.⁷¹⁴ More specifically, the accused are suspected of intentionally misrepresenting *i.e.* disputing the RSD 65 million debt towards BD Agro in the pre-pack organization plan of Crveni Signal, in order to preclude BD Agro's voting rights

⁷⁰⁸ Criminal Complaint against Mr. Jovanovic and others, 8 December 2014, p. 5, **RE-258**.

⁷⁰⁹ *I.e.* Mr. Markicevic.

⁷¹⁰ Reply, Sec. II.F.3.

⁷¹¹ Request for Collection of Necessary Notifications no. KT 5765/14, Third Basic Public Prosecutor's Office, 19 August 2015, **RE-259**.

⁷¹² Criminal Complaint against Mr. Markicevic and others, 26 November 2014, **RE-260**.

⁷¹³ Request for the Collection of Necessary Notifications no. KTR 2960/14, Third Basic Public Prosecutor's Office, 4 December 2014, **RE-261**; Request for the Collection of Necessary Notifications no. KTR 2960/14, Third Basic Public Prosecutor's Office, 21 August 2019, **RE-262**.

⁷¹⁴ BD Agro's Criminal Complaint against Mr. Markicevic et al., 24 November 2017, **RE-263**.

(as a major creditor) in the adoption of the plan.⁷¹⁵ Therefore, these criminal proceedings directly relate to the damage caused to BD Agro. The prosecutor's office initiated investigative activities regarding this criminal complaint before the initiation of the present arbitration proceedings, and the process is still ongoing.⁷¹⁶

4.1.6. False testimony

418. Criminal proceedings against Mr. Markicevic are not limited solely to activities regarding BD Agro. Mr. Markicevic, one of Claimants' crucial witnesses in this arbitration, is also suspected of abusing his authority, giving false statements before courts and falsely accusing another person for criminal acts. The charges in question was submitted on 26 February 2019 by two individuals, Messrs. Samardzic, against whom Mr. Markicevic falsely testified before the court.⁷¹⁷ The First Basic Public Prosecutor's Office accordingly initiated investigative activities.⁷¹⁸ Interestingly, Messrs. Samardzic stated that the acts were just a small part of Mr. Markicevic's undue pressure against them in order to force them to sell their real estate to Mr. Markicevic "*and his affiliates*".⁷¹⁹

4.2. Claimants misuse the present arbitration to obstruct criminal prosecution

419. As it is clear from the above, a number of criminal proceedings are currently ongoing against the former management of BD Agro. Most of these proceedings are in the criminal investigation phase, some have even come to the trial phase, and virtually all⁷²⁰ of the proceedings pre-date the commencement of this arbitration.

420. Throughout the past years, the public prosecutor's office kept requesting information from the competent police authorities (both before and after the initiation of the present proceedings) and is still in the process of ongoing investigative activities, which are slowed down due to difficulties in obtaining the relevant information. This

⁷¹⁵ BD Agro's Criminal Complaint against Mr. Markicevic et al., 24 November 2017, **RE-263**.

⁷¹⁶ Report of Police Department for the Suppression of Economic Crimes dated 18 July 2019, **RE-195**; Request for Collection of Necessary Notifications no. KT 7123/17, First Basic Public Prosecutor's Office, 28 September 2018, **RE-264**; Official Note no. 7123/17, Deputy of the First Public Prosecutor, 28 September 2018, **RE-265**; Request for Collection of Necessary Notifications no. KT 7123/17, First Basic Public Prosecutor's Office, 26 December 2017, **RE-266**.

⁷¹⁷ Criminal Complaint against Mr. Igor Markicevic, 26 February 2019, **RE-267**.

⁷¹⁸ Judicial Summons for the Suspect Igor Markicevic no. KT 3849/19, 10 July 2019, **RE-270**.

⁷¹⁹ Criminal Complaint against Mr. Igor Markicevic, 26 February 2019, p. 2, **RE-267**.

⁷²⁰ Only the proceedings initiated by Messrs. Samardzic were initiated during the present proceedings.

is exactly what happened when police officers legitimately tried to obtain information from Mr. Markicevic regarding Crveni Signal in July 2019.⁷²¹ Instead of providing the officers with the requested information, as any citizen acting in good faith would do, Mr. Markicevic declined to do so and immediately tried to intimidate the Respondent by approaching the Tribunal.⁷²²

421. In their Reply, Claimants have misused and manipulated information about criminal proceedings by dedicating an entire section of their submission to the assertion that *“Serbia has been intimidating the Claimants’ Serbian witnesses in this arbitration”*.⁷²³ In this regard, Claimants knowingly make a series of inaccurate allegations, including that these investigations are sudden and new.⁷²⁴

422. However, the truth is that these investigations are anything but sudden or new. The first criminal complaints and investigations have been initiated as early as in 2009, and they have been ongoing throughout the past years, as it has been explained in greater detail above (Section I. F. 4.1). In fact, all criminal proceedings concerning BD Agro and other privatized companies were initiated before the initiation of the present arbitration proceedings.⁷²⁵ Claimants, their witnesses and their counsel must be well aware of these facts.

423. Therefore, instead of asking Serbia to explain why the Serbian police is doing its job, Claimants should explain the obvious mismanagement and the plethora of illicit activities conducted during their purported control of BD Agro.

424. Nevertheless, as evidenced by the Claimants’ 11 July 2019 letter and their Reply, any further action towards the suspects in relation to the mismanagement and fraudulent activities of Mr. Obradovic’s companies, would give rise to great opposition by Claimants and misused in the present arbitration. This certainly does not make easier

⁷²¹ Claimants’ Letter to the Tribunal, 11 July 2019; Respondent’s Letter to the Tribunal, 22 July 2019; Report of Police Department for the Suppression of Economic Crimes dated 18 July 2019, **RE-195** (noting that „police officers talked with director Igor Markicevic exclusively in order to obtain the documentation of the company “Crveni signal” a.d. and that documentation has not been delivered to them until this day.”).

⁷²² Claimants’ Letter to the Tribunal, 11 July 2019;

⁷²³ Reply, Section II.Z.

⁷²⁴ Reply, para. 482. Third Witness Statement of Mr. Igor Markicevic, 3 October 2019, para. 167; Second Witness Statement of Mr. Đura Obradovic, para. 95.

⁷²⁵ Only the investigation regarding the false testimony and accusation of Messrs. Samardzic was initiated in the period after the initiation the present arbitration proceedings, at the request of persons unrelated to this case.

the task of Respondent's criminal authorities, to say the least. On the contrary, it directly obstructs and interferes with Respondent's sovereign powers in the area of prosecution of criminal acts.

G. BD AGRO'S BANKRUPTCY

425. The core of Claimants' arguments concerning BD Agro's bankruptcy is that it is the Agency that should be blamed for managing BD Agro directly into the bankruptcy. In this section, Respondent will demonstrate that this is untrue, and that BD Agro would have gone bankrupt even if the Privatization Agreement had not been terminated. Respondent will also demonstrate that the sale of BD Agro in bankruptcy proceedings was done in accordance with the law. Before elaborating on these topics, Respondent will briefly explain relevant regulation of bankruptcy proceedings in Serbia.

1. Bankruptcy proceedings in Serbia

426. Bankruptcy proceedings (in Serbian "*stecajni postupak*") in Serbia are conducted against a legal entity when one of the bankruptcy reasons has been met. One of the bankruptcy reasons is permanent insolvency of bankruptcy debtor.⁷²⁶
427. Bankruptcy proceedings are initiated upon a proposal filed by a creditor, debtor or liquidation trustee ('**bankruptcy proposal**').⁷²⁷ Bankruptcy Law envisages several types of creditors, one of them being creditors who have secured their receivables, i.e. claims towards the bankruptcy debtor by constituting a pledge on bankruptcy debtor's assets, and who have priority in settlement (secured creditors).⁷²⁸

⁷²⁶ Article 11(2) stipulates that bankruptcy reasons are: (i) permanent insolvency; (ii) threatening insolvency; (iii) indebtedness; (iv) failure to comply with the approved reorganization plan and if the reorganization plan was fraudulently or illegally carried out. See Article 11(2) of Bankruptcy Law, **RE-445**.

⁷²⁷ Article 55 of Bankruptcy Law prescribes that:

"Bankruptcy proceedings are initiated by the proposal of a creditor, debtor or liquidation trustee.

The creditor files a proposal for initiating bankruptcy proceedings in the event of a permanent insolvency, failure to comply with the approved reorganization plan and if the reorganization plan was fraudulently or illegally carried out.

The bankruptcy debtor files a proposal for initiating bankruptcy proceedings in the event of one of the bankruptcy reasons referred to in Article 11, paragraph 2 of this Law.

The liquidation trustee files a proposal for initiating bankruptcy proceedings in cases prescribed by the law governing the legal status of companies." See Article 55 of the Bankruptcy Law, **RE-445**.

⁷²⁸ Articles 49(1) and (2), and 133(11) of Bankruptcy Law, **RE-445**.

428. Bankruptcy proceedings may be conducted in one of two possible ways: (i) "classic" bankruptcy ('**insolvency**' or '**bankruptcy**' – in Serbian '*bankrotstvo*'), and (ii) reorganization.⁷²⁹
429. **Insolvency v. Reorganization.** Insolvency represents disbursement of creditors by selling all of the debtor's assets, i.e. by selling the debtor as a legal entity.⁷³⁰ On the other hand, reorganization represents disbursement of creditors in accordance with the adopted reorganization plan, which entails redefining creditor-debtor relationship.⁷³¹
430. It is important to note that reorganization is conducted if it ensures more favorable disbursement of creditors in comparison to bankruptcy, especially if there are economically justified conditions for continuation of the debtor's business.⁷³² The court practice is on a stance that if both reorganization and insolvency proceedings are initiated towards the same bankruptcy debtor, reorganization proceeding shall prevail.⁷³³
431. **Insolvency.** After filing the bankruptcy proposal, bankruptcy judge renders a resolution on initiating preliminary bankruptcy proceedings, in order to examine whether any of the bankruptcy reasons exist in each particular case.⁷³⁴ If it does, the judge renders resolution on opening of bankruptcy proceedings,⁷³⁵ and makes the announcement on opening of bankruptcy proceedings, which, *inter alia*, contains invitation to all creditors to report their receivables towards the bankruptcy debtor.⁷³⁶
- In case the reorganization of the bankruptcy debtor is not an option, bankruptcy judge

⁷²⁹ Article 1(2) of Bankruptcy Law, **RE-445**.

⁷³⁰ Article 1(3) of Bankruptcy Law, **RE-445**.

⁷³¹ Article 1(4) of Bankruptcy Law, **RE-445**.

⁷³² Article 155(1) of Bankruptcy Law, **RE-445**.

⁷³³ This stance was also confirmed by the Serbian commercial courts. *See* Questions and Answers from the Commercial Appellate Court, Court Practice of Commercial Courts, Bulletin no. 4/2015, dated November 2015, p. 2, **RE-458**.

⁷³⁴ It should be noted that the bankruptcy judge does not have to render resolution on initiating preliminary bankruptcy proceedings. Instead, he may immediately render resolution on opening of bankruptcy proceeding, provided that: (i) bankruptcy debtor files the Proposal, with all necessary documents and appendices; (ii) creditor files the Proposal, and bankruptcy debtor admits the existence of a particular bankruptcy reason; (iii) in case of the existence of an assumption of permanent insolvency stipulated under the Article 12 of this Law. *See* Article 60 of Bankruptcy Law, **RE-445**.

⁷³⁵ Article 69(1) of Bankruptcy Law, **RE-445**.

⁷³⁶ After the expiration of the term for reporting receivables, bankruptcy trustee makes a list of all the accepted and disputed receivables which creditors have towards the bankruptcy debtor. Final list of all the reported receivables is made at the hearing for examination of creditors' receivables. Based on such final list, bankruptcy judge then renders a conclusion on the list of accepted and disputed receivables. *See* Articles 70(1)(5), 71, 113, 114(1) and 116 of Bankruptcy Law, **RE-445**.

renders the resolution on insolvency (i.e. resolution by which he confirms that the bankruptcy proceedings would be continued through classic bankruptcy).⁷³⁷

432. In the further course of the proceedings, bankruptcy judge and bankruptcy trustee undertake actions in order to cash-in the assets of bankruptcy debtor in the most favorable manner possible.⁷³⁸ One of possible ways to do so is selling bankruptcy debtor as legal entity,⁷³⁹ which was done in case of BD Agro.⁷⁴⁰ After cashing-in of assets is performed, creditors' claims are being settled (usually only partially, while claims secured by pledges are first settled from the receivables obtained through the sale of the pledged assets⁷⁴¹) and subsequently bankruptcy proceedings are terminated.⁷⁴²
433. **Reorganization.** Reorganization is initiated by filing a reorganization plan.⁷⁴³ Reorganization plan can be filed either along with the bankruptcy proposal (as a pre-pack reorganization plan) or after opening the bankruptcy proceedings.⁷⁴⁴ As will be explained hereunder, pre-pack reorganization plans were (unsuccessfully) filed in several occasions in BD Agro case.
434. Provided that the bankruptcy proposal, along with the pre-pack reorganization plan is prepared in accordance with the law,⁷⁴⁵ bankruptcy judge renders resolution on

⁷³⁷ Article 131 of Bankruptcy Law stipulates that resolution on insolvency shall be rendered by the bankruptcy judge if: (i) it is obvious that the bankruptcy debtor expresses no interest for reorganization within the deadline for filing the reorganization plan; (ii) at the first creditors' hearing, the appropriate number of bankruptcy creditors votes for that, in accordance with Article 36(4) of this Law; (iii) bankruptcy debtor fails to cooperate with the bankruptcy trustee or the creditors' committee in responding to reasonable requests for providing data and information in accordance with the provisions of this Law; (iv) bankruptcy debtor fails to follow orders of the bankruptcy judge; (v) no reorganization plan has been submitted in the prescribed deadline; (vi) no reorganization plan has been adopted at the hearing for considering reorganization plan. See Article 131 of Bankruptcy Law, **RE-445**.

⁷³⁸ Article 132(1) of Bankruptcy Law, **RE-445**.

⁷³⁹ Article 135 of Bankruptcy Law, **RE-445**.

⁷⁴⁰ Announcement of sale of BD Agro dated 7 March 2019, **RE-442**.

⁷⁴¹ Article 133(11) of Bankruptcy Law, **RE-445**.

⁷⁴² Articles 138, 140(1) and (4), 143(1), 148(1) and (7) of Bankruptcy Law, **RE-445**.

⁷⁴³ Article 161(1) stipulates that: "*Reorganization plan may be filed by the bankruptcy debtor, bankruptcy trustee, secured creditors having at least 30% of the secured receivables in relation to total receivables towards the bankruptcy debtor, bankruptcy creditors having at least 30% of the unsecured receivables in relation to total receivables towards the bankruptcy debtor, as well as persons owning at least 30% of the debtor's capital.*" See Article 161(1) of Bankruptcy Law, **RE-445**.

⁷⁴⁴ Article 155(3) of Bankruptcy Law, **RE-445**.

⁷⁴⁵ Pre-pack reorganization plan must contain, *inter alia*, an extraordinary auditor's report reflecting the state of business books established not later than 90 days before the date of filing of pre-pack reorganization plan (i.e. '**cut-off date**'), with an overview of all receivables and the percentage of participation of each creditor in the appropriate class of the plan. However, in case that more than nine months elapses from the cut-off date, until the date for which the hearing for voting on the pre-pack reorganization plan is scheduled, a new

initiating preliminary proceedings for examining whether conditions for opening bankruptcy proceedings in accordance with the pre-pack reorganization plan are fulfilled, and he schedules hearing for deciding and voting on the pre-pack reorganization plan.⁷⁴⁶ At the same time, bankruptcy judge makes the announcement by which he invites all interested persons to submit their objections to pre-pack reorganization plan.⁷⁴⁷

435. With respect to creditors' voting of the pre-pack reorganization plan, it should be noted that the creditors are voting for the plan within the class in which they are classified. The bankruptcy debtor is the one who defines classes of creditors in the pre-pack reorganization plan and classifies all the creditors thereunder.⁷⁴⁸ The plan is considered adopted in one class if the creditors having majority in that class voted for its adoption, while the plan will be adopted only if all the creditors' classes adopt the plan.⁷⁴⁹
436. If the pre-pack reorganization plan is adopted at the hearing, bankruptcy judge renders resolution by which he simultaneously opens bankruptcy proceedings, confirms the adoption of the pre-pack reorganization plan and discontinues bankruptcy proceedings.⁷⁵⁰ Bankruptcy debtor, bankruptcy trustee, and all creditors can file an appeal against this resolution.⁷⁵¹

extraordinary auditor's report must be submitted, which must reflect the state of the debtor's business books on the last day of the month preceding the month in which that order was given. *See* Articles 156(4)(5) and 160(3) of Bankruptcy Law, **RE-445**.

⁷⁴⁶ To the contrary, if the Proposal, along with the pre-pack reorganization plan, is not made in accordance with the law, bankruptcy judge will dismiss it. *See* Articles 158 and 159(1) of Bankruptcy Law, **RE-445**.

⁷⁴⁷ Article 159(6)(2) of Bankruptcy Law, **RE-445**.

⁷⁴⁸ Article 165(3) of Bankruptcy Law, **RE-445**. Notably, when it comes to the secured creditors, for the purpose of their voting for pre-pack reorganization plan, bankruptcy judge makes an estimation of likelihood of settlement of their receivables from the secured property. If the bankruptcy judge estimates that the likelihood of settlement is such that a secured creditor can settle its all of its receivables from the secured property, that creditor shall exercise its voting right solely in the class of secured creditors. To the contrary, if the bankruptcy judge estimates that the likelihood of settlement is such that a secured creditor can only partially settle its receivables from the secured property, that creditor shall exercise its voting right as follows – for the part of its receivables which could be settled from the secured property, that creditor shall exercise its voting right in the class of secured creditors; for the remaining part of its receivables which could not be settled from the secured property, this creditor shall exercise its voting right in the class of unsecured creditors. *See* Article 165(4) and (5) of Bankruptcy Law, **RE-445**.

⁷⁴⁹ It should be noted that reorganization plan is considered adopted in one class if creditors who have simple majority of receivables in the total amount of receivables of creditors belonging to that class of creditors, voted for the reorganization plan. If all the creditors' classes adopt the plan in this manner, the plan is considered adopted. *See* Article 165(10) and (12) of Bankruptcy Law, **RE-445**.

⁷⁵⁰ Article 160(4) of Bankruptcy Law, **RE-445**.

⁷⁵¹ Articles 160(7) and 166(1) and (4) of Bankruptcy Law, **RE-445**.

2. BD Agro would have gone bankrupt regardless of termination of the Privatization Agreement

437. As Respondent will explain, the reason for BD Agro's bankruptcy was not the Agency's lack of response to Mr. Markicevic's letter of 26 October 2015, as Claimants assert.⁷⁵² To the contrary, the real reason was BD Agro's permanent insolvency due to its management's machinations with its property;⁷⁵³ and Banca Intesa's repeated insistence on BD Agro going bankrupt. Chronology of events that preceded BD Agro's insolvency proves this best.

2.1. Chronology of relevant events

438. Despite the efforts BD Agro made for its reorganization both before and after termination of the Privatization Agreement, Banca Intesa, as one of BD Agro's major creditors, constantly insisted on BD Agro going bankrupt. Eventually, the bankruptcy was what happened.

2.1.1. Banca Intesa's receivables

439. Having in mind the role which Banca Intesa ultimately had in BD Agro's bankruptcy, Respondent hereby provides a brief overview of Banca Intesa's receivables towards BD Agro.

440. It should first be noted that it was Mr. Obradovic who made Banca Intesa BD Agro's creditor. In particular, Banca Intesa had receivable towards BD Agro on the basis of the Loan Agreement dated 29 December 2008, in the amount of app. EUR 9,5 million.⁷⁵⁴ The collaterals for this receivable were first ranked mortgages on 85 (out of 92) of BD Agro's cadastral parcels, as well as on 16 (out of 18) of BD Agro's buildings.⁷⁵⁵ Thus, Banca Intesa was a secured creditor of BD Agro.

⁷⁵² Reply, paras. 442-457.

⁷⁵³ See Section I(F) of Rejoinder; Email from I. Markićević to R. Waschuk, W. Rand et al. dated 18 December 2013, **CE-310**.

⁷⁵⁴ This was counter value of RSD 1,142,380,867, which consisted of RSD 1.064.236.390 being the principal debt, and RSD 78.144.477 being the interest. See Objections of Banca Intesa to Original pre-pack reorganization plan dated 6 January 2015, p. 2, **RE-459**; Amendment to the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 126, **CE-101**; Appeal of Banca Intesa dated 29 July 2015, p. 7, **CE-354**.

⁷⁵⁵ Appeal of Banca Intesa dated 29 July 2015, p. 5, **CE-354**.

441. Having in mind that BD Agro's accounts were permanently blocked from 8 March 2013,⁷⁵⁶ as well as that BD Agro could not have repaid the loan to Banca Intesa,⁷⁵⁷ Banca Intesa wanted BD Agro bankrupt.⁷⁵⁸

2.1.2. Events before termination of the Privatization Agreement

442. The reason for commencement of BD Agro's reorganization was the fact that as of 8 March 2013, BD Agro's account was blocked due to the enforced collection. The amount of money for which the collection was sought in November 2014 amounted to app. EUR 7 million.⁷⁵⁹ According to Bankruptcy Law, this reason was sufficient enough for opening bankruptcy over BD Agro.⁷⁶⁰ Thus, BD Agro's management commenced unsuccessful attempt of its reorganization.

443. **On 25 November 2014**, BD Agro filed a pre-pack reorganization plan with the Commercial Court (**'Original plan'**),⁷⁶¹ which was prepared based on the valuation of BD Agro's property made by the valuation company Adventis Real Estate Management doo (**'Adventis'**).⁷⁶² According to Adventis's valuation, the value of BD Agro's land and buildings amounted to EUR 20,770,561.⁷⁶³

444. The Original plan envisaged that out of these EUR 20,770,561, app. EUR 17,5 million represented the value of BD Agro's land and buildings encumbered with mortgages.⁷⁶⁴ This included real estate encumbered by Banca Intesa's mortgage, which, according to Banca Intesa, was valued at app. EUR 15 million.⁷⁶⁵ This meant that Banka Intesa

⁷⁵⁶ Original pre-pack reorganization plan, November 2014, p. 8, **CE-321**.

⁷⁵⁷ Email from K. Lutz to P. Djurišić attaching letter from Mr. Rand dated 2 June 2013, p. 3, **CE-295**.

⁷⁵⁸ It is important to note that Banca Intesa is not a state-owned entity. Instead, it is 100% owned by private entity Intesa Holding International S.A which means that it is not in any way under the control of Respondent. Thus, it was a completely private entity who opposed BD Agro's reorganization and insisted on it going bankrupt. See Print screen from the website of National bank of Serbia, dated 27 December 2019, **RE-446**.

⁷⁵⁹ At the time it was RSD 819,899,739. See Original pre-pack reorganization plan, November 2014, p. 8, **CE-321**.

⁷⁶⁰ Article 11(2)(1) of Bankruptcy Law, **RE-445**.

⁷⁶¹ BD Agro's submission accompanying the Pre-pack Reorganization Plan dated 25 November 2014, **CE-085**; Original pre-pack reorganization plan, November 2014, p. 8, **CE-321**.

⁷⁶² Reply, paras. 270-273; Third witness statement of Igor Markicevic, paras. 19-22; Valuation Report, Adventis Real Estate Management d.o.o., September 2014, **CE-508**.

⁷⁶³ Valuation Report, Adventis Real Estate Management d.o.o., September 2014, p. 2, **CE-508**.

⁷⁶⁴ Original pre-pack reorganization plan, November 2014, pp. 85-89, **CE-321**.

⁷⁶⁵ Appeal of Banca Intesa dated 29 July 2015, p. 7, **CE-354**; Objections of Banca Intesa to Amended pre-pack reorganization plan dated 7 May 2015, p. 9, **RE-460**.

would be the majority creditor in the class consisting of creditors who had secured receivables towards BD Agro (in the Original plan that was Class A⁷⁶⁶).⁷⁶⁷

445. However, Banca Intesa was not classified in the Class A,⁷⁶⁸ but instead its receivable was marked as ‘contentious’.⁷⁶⁹ Had Banca Intesa been classified in the Class A, it would have been the creditor with the majority vote in the Class A.⁷⁷⁰ This meant that adoption of the Original plan would depend on Banca Intesa.⁷⁷¹ This was obviously something that Mr. Obradovic and Mr. Markicevic wanted to avoid as they knew that Banca Intesa would never give its support to the Original plan. Namely, before Mr. Markicevic filed this plan to the Commercial Court, he sent its drafts to Banca Intesa;⁷⁷² however, Banca Intesa never responded to these e-mails, let alone showed any support for BD Agro’s reorganization.
446. **On 5 January 2015**, Banca Intesa filed its Objections to the Original plan. Among other, Banca Intesa argued: (i) that BD Agro wrongfully denied Banca Intesa’s right to vote on the Original plan by designating its claim as ‘contentious’;⁷⁷³ (ii) that by filing the Original plan, BD Agro is trying to prevent creditors from settling their

⁷⁶⁶ Creditors whose receivables were put in the Class A were: Nova Agrobanka, Galenika Fitofarmacija, Ekostep Petrol and Imlek. *See* Original pre-pack reorganization plan, November 2014, pp. 34 and 35, **CE-321**.

⁷⁶⁷ Appeal of Banca Intesa dated 29 July 2015, p. 7, **CE-354**; Objections of Banca Intesa to Amended pre-pack reorganization plan dated 7 May 2015, p. 3, **RE-460**.

⁷⁶⁸ Original pre-pack reorganization plan, November 2014, **CE-321**.

⁷⁶⁹ Original pre-pack reorganization plan stated that Banca Intesa’s receivable was contentious since BD Agro is in disputes concerning Banca Intesa’s receivable towards it, but that in case BD Agro finally lost these disputes, Banca Intesa’s receivable would be settled in the same manner and under the same conditions as receivables of other creditors in Class A. With this in mind, it should be noted that, in the document which Claimants filed as Original pre-pack reorganization plan (**CE-321**), pages 50 and 51 are missing from the Serbian original version (and consequently from the English translation). It is on the missing page 51 of the Serbian original version that Banca Intesa’s contentious receivable is mentioned. *See* Original pre-pack reorganization plan, November 2014, p. 28, **CE-321**; Original pre-pack reorganization plan, p. 51, dated November 2014, p. 2, **RE-463**; Objections of Banca Intesa to Original pre-pack reorganization plan dated 6 January 2015, pp. 2 and 3, **RE-459**; Amendment to the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 126, **CE-101**.

⁷⁷⁰ Article 165(4) of the Bankruptcy Law, **RE-445**; Original pre-pack reorganization plan, November 2014, pp. 85-89, **CE-321**; Appeal of Banca Intesa dated 29 July 2015, p. 7, **CE-354**; Objections of Banca Intesa to Original pre-pack reorganization plan, dated 6 January 2015, pp. 2 and 3, **RE-459**; Objections of Banca Intesa to Amended pre-pack reorganization plan, dated 7 May 2015, pp. 3 and 9, **RE-460**.

⁷⁷¹ Objections of Banca Intesa to Amended pre-pack reorganization plan, dated 7 May 2015, pp. 9 and 10, **RE-460**; Appeal of Banca Intesa dated 29 July 2015, pp. 7 and 8, **CE-354**.

⁷⁷² Email from I. Markićević to Banca Intesa dated 28 March 2014, **CE-297**; Email from I. Markićević to Banca Intesa dated 10 November 2014, **CE-298**; Email from I. Markićević to P. Djurišić dated 11 December 2013, **CE-296**.

⁷⁷³ Objections of Banca Intesa to Original pre-pack reorganization plan dated 6 January 2015, p. 2, **RE-459**.

receivables in the only way possible – by selling BD Agro’s real estate in enforcement or classic bankruptcy proceedings.⁷⁷⁴

447. Having in mind Banca Intesa’s objections, it is more than obvious that Banca Intesa was against BD Agro’s reorganization in the first place, and that it saw classic bankruptcy proceedings as the only option.
448. **On 6 January 2015**, regardless of the filed Original plan, Banca Intesa filed request for opening bankruptcy proceedings over BD Agro due to BD Agro’s permanent insolvency.⁷⁷⁵ **On 21 January 2015**, the Commercial Court accepted Banca Intesa’s request and rendered decision on initiating preliminary bankruptcy proceedings over BD Agro, in order to determine the existence of bankruptcy reasons.⁷⁷⁶
449. **On 8 January 2015**, Banca Intesa filed a submission with the Commercial Court, by which it proposed that the Court delivers subject case files to the Public Prosecutor’s office in order to be determined whether BD Agro, by filing the Original plan, committed criminal offence of Misrepresentation and concealment of facts in the Original plan.⁷⁷⁷ Banca Intesa argued that the Original plan contained misrepresentation and concealment of facts relevant for court’s decision and creditors’ voting on this plan.⁷⁷⁸
450. **On 18 February 2015**, Banca Intesa commissioned independent valuation company, Jones Lang LaSalle d.o.o. (**JLL**) for the purpose of considering BD Agro’s reorganization. As Banca Intesa noted, the purpose of JLL’s valuation was the assessment of the value of the real estate pledged in favor of Banca Intesa.⁷⁷⁹ According to JLL, the value of this real estate amounted to EUR 14,6 million.⁷⁸⁰ Thus,

⁷⁷⁴ Objections of Banca Intesa to Original pre-pack reorganization plan dated 6 January 2015, p. 5, **RE-459**.

⁷⁷⁵ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 8, **CE-109**.

⁷⁷⁶ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 8, **CE-109**.

⁷⁷⁷ This criminal offence incriminated misrepresentation and concealment of facts relevant for the court’s decision or creditors’ voting on the reorganization plan. *See* Banca Intesa’s Notification on technical mistake with the proposal for further conduct, dated 8 January 2015, **RE-464**.

⁷⁷⁸ Banca Intesa’s Notification on technical mistake with the proposal for further conduct, dated 8 January 2015, **RE-464**.

⁷⁷⁹ Appeal of Banca Intesa dated 29 July 2015, p. 6, **CE-354**; Objections of Banca Intesa to Amended pre-pack reorganization plan, pp. 3 and 4, **RE-460**.

⁷⁸⁰ Jones Lang LaSalle d.o.o., Report on the Valuation of Immovable Property of BD Agro, located in Dobanovci, Serbia, dated February 2015, p. 3, **CE-176**.

the valuation prepared by Adventis (who valued the same real estate at app. EUR 15 million)⁷⁸¹ and JLL valuation were almost the same.

451. **On 6 March 2015**, BD Agro filed the amended pre-pack reorganization plan (**‘Amended plan’**) based on a new valuation of its property (prepared by Mr. Mrgud).⁷⁸²
452. BD Agro stated that the Amended plan was submitted since, *inter alia*, Adventis’s valuation of the real estate, prepared for the Original plan, was extremely low.⁷⁸³ Mr. Markicevic explains in his witness statements that immediately after BD Agro received Adventis’s valuation, he had doubts about it,⁷⁸⁴ but that, since the Bankruptcy Law obliged BD Agro to submit reorganization plan until the end of November, they decided to go with Adventis’s valuation,⁷⁸⁵ and to subsequently submit the Amended plan with the proper valuation of BD Agro’s land.⁷⁸⁶ This is inaccurate. Rather, the goal was to prevent Banka Intesa to be the majority creditor in the Class A, because BD Agro new that Banka Intesa will not support the reorganization plan:
453. Banka Intesa’s clam was not included in the Class A in the Original plan, but was classified as contentious.⁷⁸⁷ As can be seen from Banca Intesa's submissions in the bankruptcy proceedings, the reason for this was that Banka Intesa would be the major creditor in the Class A according to Adventis’s valuation of the land submitted with the Original plan. This BD Agro wanted to avoid, because in that case the plan would not be adopted, since Banka Intesa would have prevented Class A from accepting it

⁷⁸¹ Appeal of Banca Intesa dated 29 July 2015, p. 7, **CE-354**; Objections of Banca Intesa to Amended pre-pack reorganization plan, dated 7 May 2015, pp. 3 and 4, **RE-460**.

⁷⁸² BD Agro’s submission to Commercial Court accompanying the Pre-pack Reorganization Plan, 6 March 2015, **CE-116**; Amendment to the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, **CE-101**.

⁷⁸³ BD Agro’s submission to Commercial Court accompanying the Pre-pack Reorganization Plan, 6 March 2015, pp. 5 and 6, **CE-116**.

⁷⁸⁴ Second witness statement of Igor Markicevic, para. 88; Third witness statement of Igor Markicevic, para. 21.

⁷⁸⁵ In particular, Mr. Markicevic states that the cut-off date stipulated in the Original pre-pack reorganization plan was 31 October 2014. Under the Bankruptcy Law, BD Agro had 90 days from the cut-off date to submit pre-pack reorganization plan, which means that it needed to submit it on or before 29 November 2014. In case BD Agro failed to do so, they would have had to set a new cut-off date and prepare new documentation. See Second witness statement of Igor Markicevic, para. 89; Third witness statement of Igor Markicevic, para. 22.

⁷⁸⁶ Third witness statement of Igor Markicevic, para. 23.

⁷⁸⁷ Original pre-pack reorganization plan, November 2014, p. 28, **CE-321**; Original pre-pack reorganization plan, p. 51, dated November 2014, p. 2, **RE-463**.

(the plan had to be adopted by all classes of creditors).⁷⁸⁸ This is why, in the Original plan, BD Agro decided to contest the claim of Banca Intesa instead of including it in the Class A.

454. Subsequently, however, BD Agro included Banca Intesa in the Class A of the Amended plan, even though there was no change with respect to contentiousness, i.e. probability of Banca Intesa's claim.⁷⁸⁹ Yet, BD Agro had to find another way to prevent Banca Intesa to be the one who would ultimately decide whether the Class A would accept the plan or not. It appears that this was achieved by BD Agro's obtaining valuation of Mr. Pero Mrgud for the purpose of the Amended plan. He valued the part of BD Agro's land at app. EUR 87 million⁷⁹⁰ (i.e. almost six times higher than Adventis and JLL). The consequence of this increase of the value of the land was that Banca Intesa's vote in the Class A would have no impact on the adoption of the Amended plan, as Nova Agrobanka and not Banca Intesa would be a major creditor in that class.⁷⁹¹ Thus, after obtaining this new valuation, it was now safe for BD Agro to include Banca Intesa in the Class A.
455. On a separate note, it should be noted the Claimants and Mr. Markicevic place great reliance on the fact that the Amended plan stipulated that Mr. Rand would provide additional financing as a support for BD Agro.⁷⁹² This is yet another misrepresentation of the facts. The Amended plan only stated: "*Attached to this Plan is the statement of one of the interested investors - Mr. William Rand from Canada, on general readiness for provision of financial support to the Company's business.*"⁷⁹³ The Amended plan does not even mention the amount which Mr. Rand was, in general, ready to provide.

⁷⁸⁸ Objections of Banca Intesa to Original pre-pack reorganization plan dated 6 January 2015, p. 2, **RE-459**; Objections of Banca Intesa to Amended pre-pack reorganization plan dated 7 May 2015, pp. 2-4 and 7-10, **RE-460**; Appeal of Banca Intesa dated 29 July 2015, pp. 7 and 8, **CE-354**.

⁷⁸⁹ BD Agro's court dispute with Banca Intesa was not yet decided. *See* Amended pre-pack reorganization plan dated 6 March 2015, p. 126, **CE-101**.

⁷⁹⁰ Report on the valuation of the market value of construction land in the BD Agro complex Zones A, B and C in the town of Dobanovci, pp. 3-4, **CE-175**.

⁷⁹¹ Objections of Banca Intesa to Amended pre-pack reorganization plan dated 7 May 2015, pp. pp. 2-4 and 7-10, **RE-460**; Appeal of Banca Intesa dated 29 July 2015, pp. 7 and 8, **CE-354**.

⁷⁹² Reply, para. 455; Third witness statement of Igor Markicevic, para. 118.

⁷⁹³ Amendment to the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, pp. 114 and 119, **CE-101**.

456. All the above machinations concerning pre-pack plan were noted and explained in Banca Intesa's Objections to Amended plan filed on **7 May 2015**.⁷⁹⁴ Interestingly, Banca Intesa also noted that BD Agro initiated reorganization proceedings with the only purpose of preventing the opening of classic bankruptcy proceedings, in which the bankruptcy trustee would have to examine the real reason for BD Agro's bankruptcy, which BD Agro obviously wanted to avoid.⁷⁹⁵ On 5 June 2015, Banca Intesa filed supplement to its Objections on Amended plan from 7 May 2015 where, among other things, it repeated that it is better for Banca Intesa to collect its receivable in classic bankruptcy.⁷⁹⁶
457. **On 25 June 2015**, the Commercial Court held a hearing on which the Amended plan was adopted.⁷⁹⁷ The majority of creditors voted for this plan, while Banca Intesa (as minority creditor in the Class A due to Mr. Mrgud's valuation of the property) and certain other minority creditors (in the Class D of creditors) voted against it.⁷⁹⁸ On the same day, the Commercial Court rendered resolution by which it confirmed the adoption of Amended plan.⁷⁹⁹
458. **On 30 July 2015**,⁸⁰⁰ Banca Intesa filed an appeal against the resolution of the Commercial Court from 25 June 2015, stating, *inter alia*, that the Amended plan used

⁷⁹⁴ In that sense, Banca Intesa argued: (i) that BD Agro was familiar with the fact that Banca Intesa was against the adoption of the Original pre-pack reorganization plan, and that it would not vote for it, so that it intentionally classified Banca Intesa's receivable as contentious in the Original pre-pack reorganization plan, by which it denied Banca Intesa the right to vote against the plan; (ii) that BD Agro classified Banca Intesa's receivable in the Class A of secured creditors in the Amended pre-pack reorganization plan when it realized that it could not legally prevent it to vote on BD Agro's reorganization plan, but at the same time based this plan on wrong and overestimated value of BD Agro's property, which in turn resulted in denying Banca Intesa the status of major creditor in the Class A; (iii) that by basing the Amended pre-pack reorganization plan on such wrong estimation, BD Agro wrongly determined that Nova Agrobanka had more votes in the Class A than it should have had, which resulted in Nova Agrobanka being the major creditor on whom the adoption of the plan depended; (iv) that BD Agro gave Nova Agrobanka larger percentage of votes in Class A, since it expected to obtain Nova Agrobanka's consent for its reorganization. *See* Objections of Banca Intesa to Amended pre-pack reorganization plan dated 7 May 2015, pp. 2-10, **RE-460**.

⁷⁹⁵ Objections of Banca Intesa to Amended pre-pack reorganization plan dated 7 May 2015, pp. 9 and 10, **RE-460**.

⁷⁹⁶ Banca Intesa's Supplement to the Objections to Amended pre-pack reorganization plan, dated 5 June 2015, p. 3, **RE-461**.

⁷⁹⁷ Court hearing minutes, 25 June 2015, **CE-039**.

⁷⁹⁸ Court hearing minutes, 25 June 2015, pp. 12 and 13, **CE-039**.

⁷⁹⁹ Resolution of the Commercial Court on adoption of BD Agro's Amended pre-pack reorganization plan, dated 25 June 2015, **RE-462**.

⁸⁰⁰ In July and August 2015, Tax Administration, City of Belgrade, Izoteks doo, Vihor doo, and Komercijalna Banka ad, also appealed the Amended plan. Conspicuously, as Mr. Markicevic noted, Tax Administration was one of BD Agro's major creditors. *See* Amendment to the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, pp. 131 and 133, **CE-101**; Email from I. Markićević to R. Waschuk, W. Rand et al. dated 18 December 2013, **CE-310**; Appeal of the Tax Administration of the Republic of Serbia dated 29 July 2015, **CE-041**. Appeal of the City Administration of the City of Belgrade, Secretariat for Finance dated

the wrong and overestimated valuation of BD Agro's property prepared by Mr. Mrgud;⁸⁰¹ and that it contained contradictory information in the part dealing with comparison of the reorganization and bankruptcy, as it essentially stipulated that the bankruptcy would be more favorable for creditors than the reorganization.⁸⁰² Notably, with respect to using Mr. Mrgud's valuation as a base for the Amended plan, Banca Intesa stated that this false valuation of BD Agro's property was obtained with the only intent of manipulating the votes in Class A of creditors.⁸⁰³

459. On a separate note, it should not be disregarded that Banca Intesa appealed against the Amended plan even though this plan stipulated that Mr. Rand would provide additional financing in case of BD Agro's reorganization. In other words, Banca Intesa wanted BD Agro's bankruptcy despite Mr. Rand's financing.
460. **On 6 August 2015**, the Commercial Court discontinued preliminary bankruptcy proceedings and dismissed the request of Banca Intesa for opening bankruptcy proceedings over BD Agro, since BD Agro's attempted reorganization was ongoing.⁸⁰⁴
461. **On 28 September 2015**, Notice on Termination of the Privatization Agreement was issued.⁸⁰⁵

2.1.3. Events after termination of the Privatization Agreement

462. **On 30 September 2015**, the Commercial Court of Appeals accepted Banca Intesa's appeal, revoked the court resolution confirming the adoption of the Amended plan, and returned the case for retrial.⁸⁰⁶ In particular, the second instance court stated: (i) that it was necessary that the data from the Amended plan be double-checked, as there was substantial difference between Adventis's valuation of BD Agro's property and

12 August 2015, **CE-040**. Decision of the Appellate Court dated 30 September 2015, p. 1, **CE-358**. Decision of the Appellate Court dated 30 September 2015, p. 1, **CE-358**.

⁸⁰¹ Appeal of Banca Intesa dated 29 July 2015, pp. 5-8, **CE-354**.

⁸⁰² Appeal of Banca Intesa dated 29 July 2015, pp. 8 and 9 **CE-354**.

⁸⁰³ Appeal of Banca Intesa dated 29 July 2015, pp. 6 and 8, **CE-354**.

⁸⁰⁴ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 8, **CE-109**.

⁸⁰⁵ Notice on Termination of the Privatization Agreement, **CE-50**.

⁸⁰⁶ In addition to accepting Banca Intesa's appeal, Commercial Appellate Court also accepted appeals filed by Izoteks, Vihor, City of Belgrade and Tax Administration. See Decision of the Appellate Court dated 30 September 2015, p. 9, **CE-358**.

Mr. Mrgud's valuation;⁸⁰⁷ (ii) that BD Agro needed to submit another extraordinary audit report and update Amended plan in accordance with that new audit report.⁸⁰⁸

463. **On 7 October 2015**, the Commercial Court of Appeals revoked the decision of the Commercial Court from 6 August 2015 dismissing Banca Intesa's request for opening bankruptcy proceedings over BD Agro.⁸⁰⁹
464. **On 16 October 2015**, the Commercial Court rendered Conclusion by which BD Agro, whose director was Mr. Markicevic, was ordered to act upon the instructions of the Commercial Court of Appeals from 30 September 2015, i.e. to submit another extraordinary audit report and update Amended plan in accordance with that new audit report.⁸¹⁰ BD Agro did not comply.⁸¹¹
465. **On 8 December 2015**, due to the fact that BD Agro did not comply with the court's order from 16 October 2015, the Commercial Court rendered the resolution by which it discontinued the proceedings and dismissed BD Agro's proposal for conducting bankruptcy proceedings in accordance with the Amended plan.⁸¹² On 5 January 2016, this resolution became final.⁸¹³
466. **On 11 January 2016**, BD Agro filed another proposal for initiation of the bankruptcy proceedings in accordance with the pre-pack reorganization plan ('**Second plan**').⁸¹⁴

⁸⁰⁷ Decision of the Appellate Court dated 30 September 2015, p. 9, **CE-358**.

⁸⁰⁸ Decision of the Appellate Court dated 30 September 2015, p. 8 **CE-358**.

⁸⁰⁹ Decision of the Commercial Appellate Court dated 7 October 2015, **RE-465**.

⁸¹⁰ Notice from the Commercial Court in Belgrade dated 16 October 2015, **CE-359**; Decision of the Appellate Court dated 30 September 2015, p. 8, **CE-358**.

⁸¹¹ See paras. 473-487 of Rejoinder.

⁸¹² Decision of the Commercial Court in Belgrade dated 8 December 2015, **CE-361**.

⁸¹³ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 9, **CE-109**.

⁸¹⁴ Second pre-pack reorganization plan dated 11 January 2016, **CE-369**.

467. **On 21 January 2016**, Imlek filed request for opening bankruptcy proceedings against BD Agro.⁸¹⁵ **On 2 February 2016**, the Commercial Court accepted this proposal and initiated preliminary bankruptcy proceedings upon Imlek's proposal.⁸¹⁶
468. **On 8 February 2016**, the Commercial Court dismissed BD Agro's proposal for initiation of the bankruptcy proceedings in accordance with the Second plan.⁸¹⁷ **On 24 March 2016**, the Commercial Court of Appeals confirmed this decision.⁸¹⁸
469. **On 17 February 2016**, the Agency sent a letter to the Ministry of Economy, in which it noted that it had previously addressed Banca Intesa as BD Agro's 'key' creditor, with respect to discussing Banca Intesa's acceptance on BD Agro's reorganization plan; however, Banca Intesa never responded.⁸¹⁹ Obviously, Banca Intesa continued to object to BD Agro being reorganized, even when the Agency installed BD Agro's new management.
470. **On 16 May 2016**, BD Agro filed new proposal for initiation of the bankruptcy proceedings in accordance with another pre-pack reorganization plan ('**Third plan**').⁸²⁰ **On 17 May 2016**, the Commercial Court rendered decision by which it

⁸¹⁵ It should be noted that, contrary to what Claimants and Mr. Markicevic argue, there is no evidence on the record that Imlek was very supportive of BD Agro's reorganization. In fact, Imlek's "support" boils down to e-mails which Mr. Markicevic sent to Imlek wherein he attached various versions of pre-pack reorganization plan and asked for Imlek's opinion in that regard. However, this is not enough to show that Imlek was strongly opposed to BD Agro going bankrupt, all the more so when Imlek, which is a private company, also wanted BD Agro bankrupt. In the same vein, it should be noted that, although Claimants and Mr. Markicevic state that other creditors as well, such as Mlekara Sabac, Somboled, Almex and Mivaka were very supportive of the idea of BD Agro's reorganization, they failed to prove this. Namely, Mr. Markicevic invokes e-mails which he sent to Imlek; however, it goes without saying that these e-mails do not even concern Mlekara Sabac or Somboled, let alone prove that these companies supported BD Agro's reorganization as opposed to its bankruptcy. Worse yet, when it comes to 'support' of Almex and Mivaka, Claimants produced no evidence whatsoever. Thus, Claimants' and Mr. Markicevic's arguments in this regard are meaningless. *See* Reply, para. 269; Third witness statement of Igor Markicevic, paras. 37-29; Email from I. Markićević to Nova Agrobanka dated 10 November 2014, **CE-290**; Email from I. Markićević to Imlek dated 19 December 2013, **CE-300**; Email communication between I. Markićević and Imlek dated 12-28 March 2014, **CE-301**; Email communication between I. Markićević and Imlek dated 10-25 November 2014, **CE-303**; Email from I. Markićević to B. Milojević dated 10 March 2015, **CE-341**; Print screen of the Central Securities Depository and Clearing House concerning Imlek's ownership structure, dated 28 December 2019, **RE-457**; Resolution on initiating preliminary bankruptcy proceedings upon Imlek's proposal, dated 2 February 2016, **RE-466**.

⁸¹⁶ Resolution on initiating preliminary bankruptcy proceedings upon Imlek's proposal, dated 2 February 2016, **RE-466**.

⁸¹⁷ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 10, **CE-109**.

⁸¹⁸ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 9, **CE-109**.

⁸¹⁹ Letter from R. Knežević to the Ministry of Economy, dated 17 February 2016, **CE-371**.

⁸²⁰ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 10, **CE-109**.

dismissed BD Agro's proposal, while on 13 July 2016, this decision was revoked by the second instance court and case was returned for a retrial.⁸²¹

471. Finally, **on 30 August 2016**, the Commercial Court rendered the decision on opening of bankruptcy proceedings over BD Agro. This decision was rendered upon the proposal of Banca Intesa from 6 January 2015,⁸²² and Imlek from 21 January 2016 (which were joined on 15 March 2016).⁸²³ The court noted that BD Agro's was facing permanent insolvency, as its account had been blocked for the period of over three years and for the amount of app. EUR 7,3 million.⁸²⁴ Interestingly, the court also noted that BD Agro was abusing its powers by repeatedly submitting pre-pack reorganization plans.⁸²⁵

2.2. The opening of the bankruptcy proceedings was not caused by the Agency

472. Claimants and Mr. Markicevic claim that it was the Agency that managed BD Agro into bankruptcy.⁸²⁶ This is untrue.

2.2.1. Mr. Markicevic could and should have acted upon Commercial Court order

473. Claimants state that after the Commercial Court ordered Mr. Markicevic to submit another extraordinary audit report and update the Amended plan accordingly, he sent a letter to Agency on 26 October 2015,⁸²⁷ requesting instructions on further steps but that the Agency never responded.⁸²⁸ They further argue that, without the Agency's prior instructions, Mr. Markicevic would have made several breaches of Article 47 of

⁸²¹ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 10, **CE-109**.

⁸²² After the Commercial Appellate Court revoked on 7 October 2015 the decision of the Commercial Court from 6 August 2015 by which Banca Intesa's request for opening bankruptcy proceedings over BD Agro was dismissed, proceedings for opening bankruptcy over BD Agro upon Banca Intesa's proposal were remanded for retrial in November 2015. See Decision of the Commercial Appellate Court dated 7 October 2015, **RE-465**.

⁸²³ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, **CE-109**; Print screen from the course of proceedings before Commercial Court in Belgrade, regarding bankruptcy proceedings no. St. 15/16, dated 20 January 2020, p. 2, **RE-467**.

⁸²⁴ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, p. 8, **CE-109**.

⁸²⁵ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, pp. 10 and 11, **CE-109**.

⁸²⁶ Reply, paras. 442-466; Third witness statement of Igor Markicevic, paras. 110-121.

⁸²⁷ Letter from I. Markićević to the Privatization Agency dated 26 October 2015, **CE-360**.

⁸²⁸ Reply, paras. 456 and 457; Third witness statement of Igor Markicevic, paras. 120 and 121.

the Law on Privatization, had he filed the updated Amended plan as per the court's order.⁸²⁹

474. All of these arguments are completely meritless. As Respondent already pointed out in its Counter-Memorial,⁸³⁰ the Agency had no authority to give the requested instructions. Namely, Article 47 of the Law on Privatization does not prescribe the obligation of obtaining the Agency's instructions for any actions of the subject of privatization after the privatization agreement is terminated, nor it gives the Agency the right to issue any instructions. On the other hand, Mr. Markicevic, as BD Agro's manager (i.e. director), was not only allowed, but also obliged to act as ordered by the court.

475. Under Article 61 of the 2015 Law on Companies, one of the persons who has special duties towards a company is its manager.⁸³¹ One of those duties is duty of care:

*“The persons referred to in Article 61(1)(4) [i.e. manager of the company] ... of this Law are in this capacity obliged to perform their duties bona fide, with the care of a good businessman, and in a reasonable belief that they are acting in the best interests of the company.”*⁸³²

476. According to Mr. Markicevic, the best interest of BD Agro was its reorganization. Thus, Mr. Markicevic, as BD Agro's manager, should have made every effort that its reorganization be eventually performed. In that sense, the Law on Privatization contained no provision which prevented him to obtain a new auditor's report and update the Amended plan accordingly. All Claimants' arguments to the contrary are completely meritless.

477. **First**, Claimants argue that the Law on Privatization obliged Mr. Markicevic to request Agency's approval for any action with respect to bankruptcy procedure, including the procedure for approval of the reorganization plan.⁸³³ They further state that Mr. Markicevic's submission of updated pre-pack reorganization plan would

⁸²⁹ Reply, paras. 450-457.

⁸³⁰ Counter-Memorial, paras. 199-204.

⁸³¹ Article 61 of the 2015 Law on Companies, **RE-443**.

⁸³² Article 63(1) of the 2015 Law on Companies, **RE-443**.

⁸³³ Reply, para. 445, 447 and 448; Second witness statement of Igor Markicevic, para. 195.

violate Article 47(3) of the Law on Privatization, which prohibits management from rendering decisions on reorganizations, because filing of the updated plan would be a decision on BD Agro's reorganization.⁸³⁴ This is incorrect.

478. Article 47(3)(3) of the 2014 Law on Privatization stipulates that:

“After termination of the agreement on sale of the capital, the management bodies of the subject of privatization cannot, prior to selection of new management bodies, render the decisions on the following:

- 1) decrease or increase of the capital of the company;*
- 2) acquisition or disposal of real estate or the high value property;*
- 3) reorganization of the company;*
- 4) pledging assets, mortgaging, and applying other kinds of property encumbrance;*
- 5) renting or leasing property;*
- 6) settlement with creditors.”⁸³⁵*

479. Therefore, in case privatization agreement is terminated, old management cannot decide to commence reorganization of the subject of privatization ("*render [...] the decision on... reorganization of the company*"). The quoted provision does not stipulate that the management cannot undertake any action with respect to already initiated bankruptcy, i.e. reorganization procedure.

480. Since BD Agro already decided to commence its reorganization at its shareholders assembly on 25 April 2014,⁸³⁶ the Agency's approval was redundant.

481. In fact, as Mr. Markicevic himself explained “*BD Agro only needed to submit a new extraordinary auditor's report and update the Amended pre-pack reorganization plan so that it would reflect accounting data that would be no older than nine months.*”⁸³⁷ And concluded: “*I considered these changes to be mere technicality.*”⁸³⁸

⁸³⁴ Reply, paras. 450 and 451.

⁸³⁵ 2014 Law on Privatization, Article 47(3), **CE-223**.

⁸³⁶ Decision of BD Agro's Shareholders Assembly dated 25 April 2014, **RE-468**.

⁸³⁷ Third witness statement of Igor Markicevic, para. 113.

⁸³⁸ Third witness statement of Igor Markicevic, para. 113.

482. A technical change in the Amended plan certainly does not amount to ‘*a decision on reorganization of the company*’, as Claimants wrongfully try to put.⁸³⁹
483. **Second**, Claimants argue that Mr. Markicevic’s submission of updated pre-pack reorganization plan would violate Article 47(2) of the Law on Privatization, which prohibits the management from rendering decisions on acquisition and disposal of high value property.⁸⁴⁰ Claimants’ argument is completely beside the point, as Mr. Markicevic was not supposed to decide about acquisition and disposal of the high value property. This was already done when the Amended plan was filed on 6 March 2015.
484. **Third**, Claimants argue that Mr. Markicevic’s submission of updated pre-pack reorganization plan would violate Article 47(6) of the Law on Privatization, which prohibits the management from rendering decisions on settlement with creditors, because the pre-pack reorganization plan is adopted for the very purpose of settling with creditors.⁸⁴¹ Again, Mr. Markicevic was not supposed to decide about settlement with creditors as the Amended plan already contained BD Agro’s decision on settlement of the creditors.
485. **Fourth**, Claimants aver that Mr. Markicevic could not have filed the updated pre-pack reorganization plan because the Amended plan was ‘*dependent upon*’ additional financing to be provided by Mr. Rand.⁸⁴²
486. This Claimants’ argument is erroneous as Mr. Rand never gave assurances that he will indeed invest a cent in BD Agro, but rather just noted his *general readiness for provision of financial support to the Company's business*.
487. Finally, what should also be noted is that although Mr. Markicevic asked for the Agency’s instructions with respect to the adoption of the Amended plan, he actually never bothered to send the Amended plan to the Agency.

⁸³⁹ Reply, paras. 450-452.

⁸⁴⁰ Reply, para. 453.

⁸⁴¹ Reply, Reply, para. 454.

⁸⁴² Reply, para. 455.

2.2.2. Agency wanted BD Agro's reorganization

488. Claimants further state that Agency wanted BD Agro bankrupt,⁸⁴³ and argue that on the meeting held on 16 January 2015, Ms. Mira Kostic, representative of the Agency stated that BD Agro should indeed be forced into bankruptcy.⁸⁴⁴
489. First of all, the Minutes from the meeting of 16 January 2015 do not mention that Ms. Kostic said this. Second and more importantly, even if she did, that is of no consequence, as the Agency obviously disagreed with such approach. After termination of the Privatization Agreement, BD Agro's management installed by the Agency after the termination submitted to the court two pre-pack reorganization plans.⁸⁴⁵ It is beyond any common sense that one wishes to force a debtor into bankruptcy and still initiates procedure for its reorganization.

2.2.3. Banca Intesa insisted on BD Agro's bankruptcy

490. The chronology of events clearly shows that BD Agro went bankrupt because of the persistent insisting on bankruptcy of one of its biggest creditors - Banca Intesa. Yet, Claimants state that Respondent's argument on BD Agro's going bankrupt because of Banca Intesa's request, does not make any sense.⁸⁴⁶
491. They submit that during the preparation of BD Agro's pre-pack reorganization plan, Mr. Markicevic was constantly communicating with Banca Intesa's management, who firstly expressed its support for BD Agro's reorganization, but shortly before the plan was submitted to the court, Banca Intesa suddenly changed its mind and started making requests that BD Agro could not fulfil.⁸⁴⁷ This very argument speaks for itself and confirms Respondent's stance that the bankruptcy was inevitable because Banka Intesa kept on insisting on it, no matter what.
492. The evidence shows that '*support of BD Agro's reorganization*'⁸⁴⁸ never actually came from Banka Intesa. What happened is that in May 2013, Banca Intesa gave BD Agro three months to come up with a business plan on settlement of its receivables;

⁸⁴³ Reply, para. 1295.

⁸⁴⁴ Reply, para. 1295.

⁸⁴⁵ Second pre-pack reorganization plan dated 11 January 2016, **CE-369**.

⁸⁴⁶ Reply, para. 463.

⁸⁴⁷ Reply, paras. 267 and 268.

⁸⁴⁸ Reply, para. 267.

however soon afterwards, Banca Intesa withdrew that proposal and blocked BD Agro's accounts.⁸⁴⁹ After that, Banca Intesa's 'support' boiled down solely to Mr. Markicevic's (unanswered) e-mails which he sent to Banca Intesa.⁸⁵⁰

493. After termination of the Privatization Agreement, Banca Intesa's position remained the same – it was still against BD Agro's reorganization.⁸⁵¹

2.2.4. Neither the assignment of Privatization Agreement to Coropi, nor Mr. Rand's financing, could have helped avoiding BD Agro's bankruptcy

494. As already noted, Banka Intesa was against reorganization under any circumstances – assignment of Privatization Agreement to Coropi, or Mr. Rand's financing were irrelevant and could not change its decision.
495. In addition to Banka Intesa, there were several other creditors (i.e. Izoteks, Vihor, City of Belgrade, Komercijalna banka ad, Tax Administration) that appealed and objected to the adoption of the Amended plan, the very plan that envisaged Mr. Rand's financing.⁸⁵² Moreover, there is not a single proof that any creditor of BD Agro voted for that plan because of Mr. Rand's financing, or that any creditor conditioned its support to the reorganization with the assignment of Privatization Agreement to Coropi.⁸⁵³
496. Nevertheless, Claimants and Mr. Markicevic state that Nova Agrobanka, as well as the Deposit Insurance Agency which is Nova Agrobanka's trustee, believed that the pre-pack reorganization plan would succeed only if the Privatization Agreement was

⁸⁴⁹ Email from K. Lutz to P. Djurišić attaching letter from Mr. Rand dated 2 June 2013, **CE-295**.

⁸⁵⁰ As evident from these e-mails, Mr. Markicevic addressed Banca Intesa in order to ask for a meeting to discuss the possibilities for restructuring BD Agro's debt, as well as to deliver drafts of pre-pack reorganization plan. *See* Email from I. Markićević to P. Djurišić dated 11 December 2013, **CE-296**; Email from I. Markićević to Banca Intesa dated 28 March 2014, **CE-297**; Email from I. Markićević to Banca Intesa dated 10 November 2014, **CE-298**.

⁸⁵¹ Letter from R. Knežević to the Ministry of Economy, dated 17 February 2016, **CE-371**.

⁸⁵² Decision of the Appellate Court dated 30 September 2015, p. 3, **CE-358**.

⁸⁵³ Claimants and Mr. Markicevic also conveniently omit to say who exactly were 'certain other creditors' who initially (apart from Nova Agrobanka) conditioned their approval of BD Agro's reorganization by prior resolving of BD Agro's ownership issues, but later gave up on it also 'due to the delays associated with assigning of Privatization Agreement and understanding of BD Agro's difficult position'. In fact, apart from making such vague assertion, Claimants neither state who those creditors were, nor do they provide any evidence for that matter. *See* Reply, para. 325; Second witness statement of Igor Markicevic, para 161.

assigned to Coropi and if Mr. Rand provided additional financing to BD Agro.⁸⁵⁴ This is not true.

497. Nova Agrobanka voted for the adoption of the Amended plan even though Privatization Agreement had not been assigned to Coropi.⁸⁵⁵ This is the best proof that assignment of Privatization Agreement was not a precondition for Nova Agrobanka's vote in favor of the Amended plan. When it comes to Mr. Rand's financing it was never mentioned by Nova Agrobanka. On 11 March 2015, Nova Agrobanka sent an e-mail to Mr. Markicevic, stating: "*We have received the Plan, thank you, but we are interested to know if consent is obtained from the Ministry for the change of the majority owner.*"⁸⁵⁶ Further, on 26 March 2015, Nova Agrobanka made a submission to the Commercial Court, stating that: "*The opinion of Nova Agrobanka is that it is not expedient to proceed with voting before solution of the ownership matters.*"⁸⁵⁷ As can be seen, all that Nova Agrobanka was inquiring about was the ownership status of BD Agro, but it did not say that without assignment to Coropi it would not vote for the plan and it certainly did not mention Mr. Rand's financing in any way.

498. The same goes for the Deposit Insurance Agency. On 11 June 2015, Director and Committee for monitoring of reorganization plans of the Deposit Insurance Agency issued their individual Consents, by which they stated that reorganization plan would be approved, provided that BD Agro accepts certain objections which related to the content of the plan.⁸⁵⁸ Had it been that the Deposit Insurance Agency conditioned its approval of the plan by prior assignment of Privatization Agreement, that condition would have also been mentioned in these two Consents. It was not.

2.3. Conclusion

499. Chronology of relevant events both prior, as well as after termination of Privatization Agreement, proves that the reason for BD Agro's bankruptcy had nothing to do with the Agency and its termination of Privatization Agreement, as Claimants wrongly argue. BD Agro would have gone bankrupt regardless of termination of Privatization

⁸⁵⁴ Reply, para. 266; Third witness statement of Igor Markicevic, para. 28.

⁸⁵⁵ Court hearing minutes, 25 June 2015, p. 13, **CE-039**.

⁸⁵⁶ Email communication between I. Markićević and Nova Agrobanka dated 10-11 March 2015, **CE-342**.

⁸⁵⁷ Nova Agrobanka's submission to Commercial Court Belgrade dated 26 March 2015, **CE-294**.

⁸⁵⁸ Consent of the Director of the Deposit Insurance Agency dated 11 June 2015, **CE-567**; Consent of the Committee for monitoring of reorganization plans, dated 11 June 2015, **CE-568**.

Agreement. The reason was quite simple - BD Agro was permanently insolvent, and Banca Intesa, as one of its major creditors, insisted on it going bankrupt. Thus, it consistently objected to its reorganization.

500. In so far as the Agency is concerned, it certainly did not want BD Agro to go bankrupt. The management appointed by the Agency after termination of the Privatization Agreement submitted two pre-pack reorganization plans after the shares were transferred to the Agency. However, apparently, bankruptcy was the inevitable result of devastating business policy of BD Agro's management, with Messrs. Obradovic⁸⁵⁹ and Markicevic on top of it.

3. Sale of BD Agro in bankruptcy proceedings was done in accordance with law

501. Claimants, Mr. Markicevic and Mr. Broshko imply that the sale of BD Agro in bankruptcy proceedings was improperly conducted.⁸⁶⁰ Notably, they do not point to a single provision of the law which was presumably breached. As will be explained hereunder, the announcement of BD Agro's sale, sales documentation, payment of deposit for participation in the sale, and the sale itself, was all done in accordance with law.

3.1. Mr. Rand never objected to sale of BD Agro

502. At the outset, it should be noted that one of BD Agro's creditors was Mr. Rand.⁸⁶¹ However, in the bankruptcy proceedings, Mr. Rand had never raised any objections concerning the sale of BD Agro, although he had the right to do so.

503. When a bankruptcy debtor is being sold as legal entity, bankruptcy trustee must make a so-called suitability assessment, which needs to show that it is more suitable to sell debtor as a legal entity, than to sell its assets separately.⁸⁶² In the present case, the

⁸⁵⁹ Even Mr. Markicevic confirmed that BD Agro was facing unmanageable debt obligations incurred by the previous management. *See* Email from I. Markićević to R. Waschuk, W. Rand et al. dated 18 December 2013, **CE-310**.

⁸⁶⁰ Reply, paras. 467-476; Third witness statement of Igor Markicevic, paras. 124-138; Third witness statement of Erinn B. Broshko, paras. 28-38.

⁸⁶¹ Commercial Court in Belgrade Decision number 9. St-321/2015, Decision on the List of Determined and Contested Claims, dated 30 March 2018, **CE-136**.

⁸⁶² In that sense, Article 132(2) of Bankruptcy Law states that:

“The bankruptcy trustee is obliged to assess the suitability of the sale of bankruptcy debtor as a legal entity, i.e. the entire assets of the bankruptcy debtor, in comparison with the sale of bankruptcy debtor's assets in parts, and to inform the creditors' committee thereof.”

suitability assessment showed that selling BD Agro as legal entity was more favorable way to settle the creditors than selling its assets separately, so BD Agro was sold as legal entity.⁸⁶³ Pursuant to Bankruptcy Law, before the sale is conducted, creditors and all other interested persons had the opportunity to object to the proposed sale.⁸⁶⁴ Yet, Mr. Rand never raised any objection. Much into the same vein, Mr. Rand, as creditor, could have objected to the sale of BD Agro after the sale was performed.⁸⁶⁵ Again, Mr. Rand did not bother to raise any objections.

504. Under the Bankruptcy Law, approval of creditors' committee for selling bankruptcy debtor as a legal person was a necessary precondition for the sale.⁸⁶⁶ In the present case, creditors' committee approved BD Agro's sale on 19 February 2019.⁸⁶⁷

In the same vein, Section VIII(2) of the National standard no. 5 of the Rulebook on the Establishment of National Bankruptcy Management Standards ('**National standard no. 5**'), prescribes that:

"In the case of sale of the bankruptcy debtor as a legal entity, the assessment must show that this type of sale is more favorable, i.e. that the assessed value of the legal entity is greater than the assessment of the total value of the individual parts of the property." See Article 132(2) of Bankruptcy Law, **RE-445**; Section VIII(2) of the National standard no. 5 of the Rulebook on the Establishment of National Bankruptcy Management Standards, **RE-444**.

⁸⁶³ Report on evaluation of market value of bankruptcy debtor's property and evaluation of debtor as legal entity "BD AGRO" AD DOBANOVCI IN BANKRUPTCY on the date of 30 June 2018 (Valuation team headed by Mr Tibor Bodolo) dated January 2019, p. 35, **CE-511**.

⁸⁶⁴ Namely, Article 133(1) of Bankruptcy Law stipulates that:

"Prior to the sale of the property, the bankruptcy trustee is obliged to submit to bankruptcy judge, creditors' committee, creditors who have their claim secured on the property that is subject to sale, and all those persons who have expressed their interest in the property, regardless of the basis, the notification on the manner, plan, terms, deadlines of sale, as well as the notice on the suitability assessment, referred to in Article 132(2) of this Law."

Article 133(7) of Bankruptcy Law further stipulates that:

"Creditors and other interested parties may object to the proposed sale not later than ten days before the proposed date of sale or transfer, if there is a proper basis for it..." See Article 133(1) and (7) of Bankruptcy Law, **RE-445**.

⁸⁶⁵ Article 133(9) of Bankruptcy Law prescribes that:

"Creditors may object to the performed sale if there are grounds for it. The objection does not affect the performed sale, but represents the basis for determining the liability of the bankruptcy trustee if the damage was caused by the bankruptcy trustee's action in the sale process. The basis for the complaint may be fraud, bias of the trustee, incomplete notification or any other reason for the trustee conducting the sale at the expense of the bankruptcy estate. Mere assertion that the price reached is too low is not a sufficient basis for raising objection." See Article 133(9) of Bankruptcy Law, **RE-445**. As stated in the Article 133(8) of Bankruptcy Law, one of the possible reasons for their objection could have been the incomplete notification by the bankruptcy trustee, or any other reason why the trustee conducted the sale at the expense of the bankruptcy estate. Likewise, all these creditors could have complained that trustee performed the sales procedure to the detriment of BD Agro's bankruptcy estate. See Article 133(9) of Bankruptcy Law, **RE-445**.

⁸⁶⁶ Article 135(1) of the Bankruptcy Law, **RE-445**.

⁸⁶⁷ Announcement of sale of BD Agro dated 7 March 2019, p. 1, **RE-442**.

3.2. Claimants concerns related to sale of BD Agro are all erroneous

505. The fact that Mr. Rand never used any of the legal means he could have used in the bankruptcy proceedings to object or at least comment on the sale of BD Agro and the manner in which the sale was conducted, does not stop Claimants to argue in the present proceedings that the sale was improperly conducted. They should not be allowed to do so.

3.2.1. Announcement of sale of BD Agro was done in accordance with law

506. Claimants state that, on 7 March 2019, BD Agro's bankruptcy trustee announced a public sale of BD Agro for an initial price of RSD 1,535,376,081.65 (EUR 13,012,000) and that the public auction was scheduled for 9 April 2019.⁸⁶⁸ They further state that the announcement was published on a single day, in Cyrillic, in two Serbian newspapers – 'Politika' and 'Novosti'.⁸⁶⁹

507. Although Claimants, Mr. Markicevic and Mr. Broshko seem to imply that there was something wrong with the fact that BD Agro's sale was announced in this manner, they do not say which regulation was breached. This does not surprise, since everything was done in accordance with the provisions of the Bankruptcy Law.

508. Article 132(6) of the Bankruptcy Law stipulates that:

*"If the sale is made through public bidding... the bankruptcy trustee is obliged to announce the sale in at least two high-circulation daily newspapers that are distributed throughout the territory of the Republic of Serbia, and on the website of the authorized organization, not later than 30 days before the date set for public bidding or submission of offers."*⁸⁷⁰

509. In the present case, all of these conditions were met. First, BD Agro's sale was published in newspapers 'Politika' and 'Novosti', which are both high-circulation daily newspapers, distributed throughout the whole territory of the Republic of

⁸⁶⁸ Reply, para. 467; Third witness statement of Igor Markicevic, para. 126; Third witness statement of Erinn B. Broshko, para. 31.

⁸⁶⁹ Reply, para. 467.

⁸⁷⁰ Article 132(6) of the Bankruptcy Law, **RE-445**.

Serbia.⁸⁷¹ Second, BD Agro's sale was also published on the website of the Agency for Licensing of Bankruptcy Trustees, which is the 'authorized organization' in the sense of Bankruptcy Law.⁸⁷² Third, the announcements of BD Agro's sale in 'Politika', 'Novosti', and on the website of Agency for Licensing of Bankruptcy Trustees were published on 7 March 2019, which was more than 30 days before 9 April 2019, as the date when the public bidding took place.⁸⁷³ Fourth, the official and commonly used script in the Republic of Serbia is Cyrillic, so there is nothing unusual in the fact that the state authorities and newspapers used it, on the contrary.

3.2.2. *Sale's documentation was in accordance with law*

510. Claimants further state that the documentation on sale of BD Agro contained outdated information about its land and that, due to the strike of the Cadastral Office, bidders interested in the purchase of BD Agro (i.e. Mr. Broshko) could not obtain real information about the land.⁸⁷⁴ Mr. Markicevic confirms this,⁸⁷⁵ and states that the bankruptcy trustee required the potential bidders to pay RSD 150,000, i.e. app. EUR 1,200 for a copy of the sales documentation, which could have been a nuisance for interested bidders mainly located outside of Serbia since Serbian banks do not accept payments in foreign currencies to accounts denominated in Serbia.⁸⁷⁶
511. First of all, Claimants provide no evidence that sale's documentation was indeed outdated,⁸⁷⁷ nor do they state which exact documentation was outdated. In any event, veracity of the documentation could have been verified on the website of the cadaster, which contains searchable information about land parcels.⁸⁷⁸ In addition, the potential

⁸⁷¹ Print screen from Politika's website, dated 20 January 2020, p. 1, **RE-447**; Print screen from Novosti's website, dated 29 December 2019, p. 1, **RE-448**.

⁸⁷² Print screen from Agency for Licensing of Bankruptcy Trustees's website, concerning announcement on sale of BD Agro, dated 29 December 2019, **RE-449**.

⁸⁷³ Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Novosti dated 7 March 2019, **CE-548**; Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Politika dated 7 March 2019, **CE-549**; Announcement of sale of BD Agro dated 7 March 2019, **RE-442**.

⁸⁷⁴ Reply, para. 472.

⁸⁷⁵ Third witness statement of Igor Markicevic, paras. 133-135.

⁸⁷⁶ Third witness statement of Igor Markicevic, para. 131.

⁸⁷⁷ Section III(3) of the National standard no. 5 prescribes:

"For the purposes of the sale, the bankruptcy trustee makes sales documentation that contains all the information on the subject of the sale." Thus, bankruptcy trustee is obliged to include in sales documentation all information on subject of sale. It goes without saying that this means that all information (including those concerning BD Agro's real estate) must be complete and up-to-date. *See* Section III(3) of the National standard no. 5 of the Rulebook on the Establishment of National Bankruptcy Management Standards, **RE-444**.

⁸⁷⁸ <http://www.rgz.gov.rs/usluge/ekatastar/po%C4%8Detna>, accessed on 15 January 2019.

buyers could have also contacted BD Agro's bankruptcy trustee, as his phone number was published in 'Politika' and 'Novosti' newspapers, and on the Agency for Licensing of Bankruptcy Trustees' website, for the very purpose of providing to potential buyers all relevant information concerning BD Agro.⁸⁷⁹

512. Finally, the argument concerning the alleged nuisance for interested bidders outside of Serbia to pay RSD 150,000 for a copy of sales documentation, is wrong and irrelevant. Dinar is the official currency in the Republic of Serbia, and all payments (with only few exceptions) must be made in dinars. Mr. Broshko also managed to pay the said amount in dinars.⁸⁸⁰

3.2.3. Requested deposit and its delivery were in accordance with the law

513. Claimants state that the potential bidders for BD Agro's sale had to make a deposit of RSD 614,150,432.66 (i.e. EUR 5,205,000) in cash or in the form of bank guarantee within less than four weeks, i.e. by 2 April 2019, while the newspaper announcements stated the wrong address for the delivery of bank guarantee.⁸⁸¹

514. **The deadline for paying the deposit was in accordance with law.** It should first be noted that the Bankruptcy Law does not stipulate the deadline for payment of deposit. This deadline is mentioned in by-law, i.e. in the Rulebook on the Establishment of National Bankruptcy Management Standards, which in National standard no. 5 prescribes that interested buyers are obliged to pay the deposit no later than three days before the date of the sale.⁸⁸²

515. BD Agro's sale was scheduled for 9 April 2019, which means that the deadline for the payment of the deposit could have been set at the latest on 6 April 2019. But there is nothing that prevented its setting before that day, i.e. on 2 April 2019, as was requested in BD Agro case. Thus, the fact that the interested bidders had deadline of less than

⁸⁷⁹ Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Novosti dated 7 March 2019, **CE-548**; Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Politika dated 7 March 2019, **CE-549**; Announcement of sale of BD Agro dated 7 March 2019, p. 4, **RE-442**.

⁸⁸⁰ Third witness statement of Erinn B. Broshko, para. 32.

⁸⁸¹ Reply, para. 471.

⁸⁸² In particular, National standard no. 5 prescribes that: "*the amount of deposit that interested buyers are obliged to deposit no later than three days before the date of the sale, as well as the date of depositing in cash or producing a bank guarantee with detailed conditions, including a notice on the manner and place of taking over the sales documentation;*" See Section V(3)(7) of the National standard no. 5 of the Rulebook on the Establishment of National Bankruptcy Management Standards, **RE-444**.

four weeks to pay the deposit is completely beside the point, as such deadline was in complete accordance with the law. In any case, potential bidders had more than three weeks to obtain and submit a bank guarantee which is more than reasonable time to do so.

516. **The address for the delivery of the bank guarantee.** The bank guarantee was supposed to be sent to the Financial Department of Agency for Licensing of Bankruptcy Trustees, located at the address Terazije 23, 6th floor, office no. 610. This exact address was stated in the announcements in ‘Politika’ and ‘Novosti’,⁸⁸³ but instead of the Agency for Licensing of Bankruptcy Trustees, the announcements stated that the guarantee should be delivered to the Privatization Agency. However, this mistake was remedied on the very next day, so both ‘Politika’ and ‘Novosti’ published announcements in which they correctly designated Agency for Licensing of Bankruptcy Trustees as the recipient of the bank guarantee.⁸⁸⁴ So this was an obvious error, which was immediately corrected.

517. It is completely unclear how could this unintentional error in the newspapers, which was immediately corrected, make the sale of BD Agro unlawful.

3.3. Selling BD Agro to Agrounija was in accordance with law

518. Claimants further state that creditors’ committee approved the sale of BD Agro in bankruptcy proceedings by 2:1 vote and that, while Imlek was voting against the sale, the "state managed" Nova Agrobanka and Agrounija voted in favor of the sale.⁸⁸⁵ Claimants also state that Agrounija was in clear conflict of interest when it voted for the sale of BD Agro, but never get to say explicitly why Agrounija was in conflict of interest. Instead, they only imply that this was because Agrounija was the one who at the same time voted for the sale and the one who was interested buyer.⁸⁸⁶ In addition, Claimants do not point to any provision of Bankruptcy Law which was supposedly breached due to the alleged ‘conflict of interest’. The reason for this is quite simple -

⁸⁸³ Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Novosti dated 7 March 2019, **CE-548**; Agency for Licensing of Bankruptcy Trustees, Announcement of the sale of BD Agro, Politika dated 7 March 2019, **CE-549**.

⁸⁸⁴ Announcement Correction published in Politika, dated 8 March 2019, **RE- 477**; Announcement Correction published in Novosti, dated 8 March 2019, **RE-478**.

⁸⁸⁵ Reply, para. 468.

⁸⁸⁶ Reply, paras. 468-470.

Bankruptcy Law does not forbid member of creditors' committee to buy the bankruptcy debtor or its property.

519. Claimants further argue that Mr. Miodrag Kostic, the ultimate owner of Agrounija, participated in the auction for privatization of BD Agro shares back in 2005.⁸⁸⁷ This only proves that he was interested to buy BD Agro even 14 years earlier, which is fully legitimate. Likewise, the fact that in 2016 Agrounija bought Banca Intesa's secured receivables towards BD Agro, in the amount of EUR 12,755,216⁸⁸⁸ (due to which fact it became member of creditors' committee),⁸⁸⁹ does not question the legality of the process of the sale. Private companies, which Intesa and Agrounija both are, are free to dispose with their receivables.
520. Claimants' *observation* that, at the auction held on 9 April 2019, Agrounija was 'accidentally' the only bidder, which is why it bought BD Agro for the opening price of EUR 13,012,000,⁸⁹⁰ - is pointless and irrelevant. Anyone could have participated in the auction, raised the winning bid and became BD Agro's new owner. There was nothing that prevented Mr. Broshko, any other member of Mr. Rand's entourage, or any third person, to participate in the sale of BD Agro and ultimately buy it. The bankruptcy proceedings of BD Agro lasted for years and it was publicly known that BD Agro possessed valuable land,⁸⁹¹ so it is not credible to argue that BD Agro's sale was a setup since there were not many interested buyers. What the lack of interest can indicate is only that the price of the land that was sold to Agrounija as part of BD Agro, was not underestimated during the sale, or otherwise there would have been more interested buyers. In fact, BD Agro was sold to Agrounija for the opening price of EUR 13,012,000, because other interested buyers (Mr. Broshko's company Maple Leaf Investments and MPZ Agrar doo⁸⁹²) ultimately decided not to participate in the auction.

⁸⁸⁷ Reply, para. 469.

⁸⁸⁸ Reply, para. 470.

⁸⁸⁹ Decision of the Commercial Court in Belgrade on Agrounija's receivables dated 30 March 2018, **CE-551**; Decision of the Commercial Court in Belgrade dated 21 June 2017, **CE-553**.

⁸⁹⁰ Reply, para. 476.

⁸⁹¹ "BD AGRO" from Dobanovci is building a modern cow farm, eKapija, dated 8 November 2007, **CE-757**; "BD Agro" got to 1% of Agrobanka's shares", eKapija, dated 27 July 2010, **RE-216**.

⁸⁹² Minutes from takeover of sales documentation, **RE-450**.

521. Also, Claimants' '*expectations*' that Agrounija will receive most of the purchase price it paid (app. EUR 13,012,000) as distribution from the bankruptcy estate on the basis of its receivables towards BD Agro (app. EUR 12,748,243),⁸⁹³ is completely beside the point. Agrounija has a secured claim towards BD Agro, so it is completely legal that its claim is settled from the proceeds received by selling the land pledged in its favor⁸⁹⁴ (i.e. in favor of Banka Intesa from whom Agrounija bought the receivable towards BD Agro).
522. Claimants and their witnesses also make much of the fact that it was not all of BD Agro's land that was put up for sale – according to them, coincidentally, only 70% of BD Agro's land was sold, just so that Agrounija could later on buy up the rest of the land and realize its full capacity value.⁸⁹⁵ This is nothing but a speculation and proves nothing even if it was true.
523. In reality, a part of BD Agro's land of app. 400 ha was not put up for sale because there were numerous disputes and other claims concerning that land, or because BD Agro was not its owner.⁸⁹⁶ It would be harder to find a buyer which would be interested to acquire also the land that is encumbered with numerous disputes and mortgages, and which could eventually be taken away from the buyer. In the same vein, there is no provision in the Bankruptcy Law which would mandate that selling of the bankruptcy debtor as legal entity means selling *all* of its assets. To the contrary, Article 136(2) of Bankruptcy Law prescribes that contract for sale of the bankruptcy debtor as a legal entity must contain a provision that the assets of the bankruptcy debtor that were not subject to the valuation (and consequently the sale), shall enter the bankruptcy estate.⁸⁹⁷ Had it been that *all* the debtor's assets must be sold in case the debtor itself is sold, Article 136 would be meaningless. In any event, at some point in time, bankruptcy trustee will have to sell all BD Agro's remaining assets. It is

⁸⁹³ Reply, para. 476.

⁸⁹⁴ When it comes to settlement of Agrounija after the sale of BD Agro, Article 136(5) prescribes that: "*In cases when the bankruptcy debtor is sold as a legal entity, secured and pledge creditors who had secured right over any part of the bankruptcy debtor's property, have the priority right in distribution of the proceeds from the sale, in accordance with the priority rank they had obtained in accordance with the law, and in proportion to the estimated share of the value of property that is subject of the secured right, when compared to the estimated value of the legal person.*" See Article 136(5) of Bankruptcy Law, **RE-445**.

⁸⁹⁵ Reply, paras. 473 and 474; Third witness statement of Igor Markicevic, para. 135; Third witness statement of Erinn B. Brosko, paras. 36 and 37.

⁸⁹⁶ List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

⁸⁹⁷ Article 136(2) of Bankruptcy Law, **RE-445**.

however unproven that selling BD Agro's assets in this way would be harmful in any way, including that selling all assets at once would achieve higher price for the assets.

524. Messrs. Markicevic and Broshko state that the price at which Agrounija bought BD Agro was very low.⁸⁹⁸ This argument is illogical from economic point of view. Should that be accurate, then it would be more potential buyers that would participate at the auction and try to acquire the valuable land for a low price. In any event, it should be noted that the purchase price Agrounija paid was determined in accordance with the relevant regulation. Section V(7) of the National standard no. 5, prescribes that:

*“The opening price is the value at which the public bidding procedure commences. At the first public bidding, the opening price amounts to 50% of the estimated value of the subject of sale.”*⁸⁹⁹

525. Also, Section V(11) of the National standard no. 5, stipulates that:

*“If there was only one person who acquired the status of participant in the public bidding, and that person accepts the opening price, that person shall be declared as the buyer, whereas the opening price shall be declared as the purchase price.”*⁹⁰⁰

526. Having in mind that the value of BD Agro was estimated at RSD 3,070,752,163.30 (i.e. EUR 26,008,423.68),⁹⁰¹ 50% of that amount was RSD 1,535,376,081 (i.e. EUR 13,012,000). That amount was set as the opening price. Also, as already stated, after the withdrawal of Mr. Broshko and MPZ Agrar, Agrounija was left as the only interested bidder at the auction. After Agrounija accepted the opening price of RSD 1,535,376,081, that price was declared as the purchase price, while Agrounija was declared BD Agro's owner.

⁸⁹⁸ Third witness statement of Igor Markicevic, para. 128; Third witness statement of Erinn B. Broshko, para. 35.

⁸⁹⁹ Section V(7) of the National standard no. 5 of the Rulebook on the Establishment of National Bankruptcy Management Standard, **RE-444**.

⁹⁰⁰ Section V(11) of the National standard no. 5 of the Rulebook on the Establishment of National Bankruptcy Management Standard, **RE-444**.

⁹⁰¹ Report on evaluation of market value of bankruptcy debtor's property and evaluation of debtor as legal entity "BD AGRO" AD DOBANOVCI IN BANKRUPTCY on the date of 30 June 2018 (Valuation team headed by Mr Tibor Bodolo) dated January 2019, **CE-511**.

3.4. Conclusion

527. Contrary to Claimants' and their witnesses' unsubstantiated insinuations, there was nothing ambiguous in BD Agro's sale. As Respondent demonstrated above, each step of the sale was done in accordance with the relevant regulations. Claimants provided no evidence showing the opposite.
528. Most importantly, Mr. Rand, who is the creditor of BD Agro, had the right to challenge the sale, both before and after it was completed, but he never did. Not a single decision or action in the bankruptcy proceedings was ever disputed by Mr. Rand. Consequently, Claimants complaints concerning the bankruptcy proceedings raised in this arbitration obviously lack any merit.

H. REPEATED PATTERN OF DESTRUCTION

529. Although Claimants are persistent in presenting Mr. Rand and his associates as a successful management team making wonders with their investments in Serbia,⁹⁰² the truth is obviously quite different, which can be seen from their other endeavors as well. It was only with their third submission that Claimants asserted that Mr. Rand is the beneficial owner of several other companies privatized by Mr. Obradovic *i.e.* Crveni Signal, Inex Nova Varos, Obnova, Beotrans and PIK Pester.
530. One would expect that the companies where Respondent did not "intervene" should be long "flourishing" under the allegedly exquisite managerial capabilities of Mr. Obradovic (or Mr. Rand according to Claimants' narrative) and his associates. However, this is far from the truth, as literally all of the mentioned companies are either bankrupt or in a disastrous financial condition today.
531. *First*, Crveni Signal is recording losses throughout the past years, ending the 2018 financial year with a loss of RSD 118.602.000 (approx. EUR 1.000.000).⁹⁰³ Its shattering financial condition has culminated in October 2017, when preliminary bankruptcy proceedings have been opened against the company.⁹⁰⁴ The accounts of

⁹⁰² Memorial, Section III.C; Reply, Section II.C.

⁹⁰³ Crveni Signal Balance Sheet for 2018, **RE-414**.

⁹⁰⁴ Decision of the Commercial Court in Belgrade No. 10 Reo-32/2017, 5 October 2017, **RE-413**.

Crveni Signal have mostly been blocked in the last nine years, and remain blocked until today.⁹⁰⁵

532. *Second*, publicly available annual reports of Inex show that the company was recording losses of RSD 42 million (approx. EUR 350.000) and RSD 60 million (approx. EUR 500.000) in 2012 and 2013, respectively.⁹⁰⁶ The accounts of Inex have been continuously blocked for the last eight years, and remain blocked until this day because of a debt in excess of RSD 100 million (approx.. EUR 900.000).⁹⁰⁷ Likewise, even Inex Napredak, a company within the Inex group,⁹⁰⁸ has remained inactive for the last couple of years after recording losses of nearly RSD 21 million in 2016.⁹⁰⁹
533. *Third*, PIK Pester, another major agricultural company privatized by Mr. Obradovic, has had the same fate as his other projects. The company has been recording losses throughout the past years, ending the 2018 financial year with a loss of almost RSD 350 million (approx. EUR 3,000,000).⁹¹⁰ Unsurprisingly, the accounts of PIK Pester have even been continuously blocked for the last six and a half years, and remain blocked until today, because of a debt of almost RSD 300 million (approx. EUR 2.500.000).⁹¹¹
534. *Fourth*, Obnova has also been recording losses throughout the past years, ending the 2018 financial year with a loss of RSD 110 million (nearly EUR 1.000.000).⁹¹² The accounts of Obnova have been blocked for the last eleven and a half years, and remain blocked until this day because of a debt of RSD 44 million (approx. EUR 350.000).⁹¹³

⁹⁰⁵ Report on illiquidity days for Crveni signal AD, 4 December 2019, **RE-302**.

⁹⁰⁶ Annual Financial Report of Inex for 2013, **RE-441**.

⁹⁰⁷ Report on illiquidity days for Inex Nova Varos, 4 December 2019, **RE-303**.

⁹⁰⁸ Already in July 2010, the employees of Inex Napredak, a company within the Inex group, organized a strike and blocked the entrance into Inex, accusing its majority owner (Mr. Obradovic) of not paying them as many as 16 monthly salaries. On the other hand, Mr. Obradovic accused the employees of being lazy and incompetent to make profit. *See* “Nova Varos: Agricultural Cooperative Workers’ Strike Continues”, Kurir, 6 July 2010, **RE-412**.

⁹⁰⁹ Inex Napredak Balance Sheet for 2016, **RE-416**; Statement of inactivity for 2017 for Inex Napredak, **RE-417**; Statement of inactivity for 2018 for Inex Napredak, **RE-418**.

⁹¹⁰ Annual financial report for 2018 for PIK Pester, **RE-419**.

⁹¹¹ Report on illiquidity days for PIK Pester Sjenica, 4 December 2019, **RE-305**.

⁹¹² Obnova Balance Sheet for 2018, **RE-420**.

⁹¹³ Report on illiquidity days for Obnova AD Beograd, 4 December 2019, **RE-304**.

535. *Fifth*, Beotrans' fate has been sealed when it was compulsorily erased from the companies' register in December 2018.⁹¹⁴
536. *Finally*, Messrs. Obradovic and Rand forgot to mention another company privatized by Mr. Obradovic in the 2000s - Uvac Gazela. That company was declared bankrupt and consequently erased from the companies' register in 2010.⁹¹⁵
537. The overview of Mr. Obradovic's other privatized companies only confirms that BD Agro's bankruptcy came as no surprise. Every company that was ever privatized by Mr. Obradovic was subsequently destroyed by a disastrous management and today is either bankrupt, on the verge of bankruptcy, or simply non-existent.
538. Yet, Claimants contend that BD Agro, whose accounts were also blocked for several years before its bankruptcy, who was heavily indebted towards banks and other creditors, whose employees were not receiving their salaries for years, and whose production overall was in a ruinous condition, was somehow just about to rise from the ashes, avoid bankruptcy and transform itself into a profit-making company. However, such a fictional scenario, amounting to a miracle, would obviously not have occurred, and has in fact never occurred when it comes to the companies privatized by Mr. Obradovic.
539. To illustrate the situation even better, Respondent submits some of the pictures of Mr. Rand's remaining business empire in Serbia today.⁹¹⁶

⁹¹⁴ Excerpt from the Serbian Companies' Register for Beotrans, **RE-421**; Report on illiquidity days for Beotrans AD Beograd, **RE-301**.

⁹¹⁵ Excerpt from the Serbian Companies' Register for Uvac Gazela, **RE-422**.

⁹¹⁶ Photographs of the premises of Crveni Signal, Inex and Obnova, **RE-423**.

II. JURISDICTIONAL OBJECTIONS

A. NO JURISDICTION RATIONE MATERIAE UNDER THE CANADA - SERBIA BIT

1. The Canadian Claimants did not acquire ownership of Mr. Obradović's shares in BD Agro

540. The Claimants case on jurisdiction rests primarily on the assertion that the Canadian Claimants (Rand Investments, Mr. Rand, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand) owned the shares in BD Agro acquired in the privatization process by Mr. Djura Obradović.⁹¹⁷

541. Under the Claimants' narrative, the Canadian Claimants acquired the shares by virtue of the share purchase agreement concluded between Marine Drive Holdings (MDH), a company incorporated in British Virgin Islands and owned by Mr. Rand, and Mr. Obradović on 19 September 2005 (**the Share Purchase Agreement**).⁹¹⁸ According to Claimants, Mr. Obradović transferred his ownership in shares yet again to a Cypriot company as a result of the agreement concluded on 22 February 2008 between Sembi Investment Limited and Mr. Obradović (**the Sembi Agreement**).⁹¹⁹

542. Neither of the two agreements was able to confer to the Canadian Claimants the right of ownership over "*a share, stock or other form of equity participation in an enterprise*" protected under Article 1 of the Canada – Serbia BIT. However, the preliminary problem with the Claimants' argument is the fact that it is in itself contradictory and irreversible flawed.

543. As already explained in Respondent's Counter-Memorial,⁹²⁰ Mr. Obradović was not able to transfer his ownership interest twice – first by concluding the Share Purchase

⁹¹⁷ Privatization Agreement, **CE-17**.

⁹¹⁸ Share Purchase Agreement dated 19 September 2005, **CE-15**. Although Claimants' Memorial designated the contract as Share Purchase Agreement, which corresponds with the document's title and content, Reply refers to the same document as "*MDH Agreement*."

⁹¹⁹ Agreement between D. Obradović and Sembi, 22 February 2008, **CE-29**.

⁹²⁰ Respondent's Counter-Memorial, paras. 330-333.

Agreement in 2005 with MDH, and afterwards by virtue of the Sembi Agreement in 2008.

544. Claimants attempt to deal with this contradiction in their Reply by admitting that the Share Purchase Agreement and the Sembi Agreement could not exist side by side and by arguing that the Share Purchase Agreement was terminated on 22 February 2008.⁹²¹ Claimants also assert that the existence of ownership must be established at the time of the alleged breach of the Canada – Serbia BIT.⁹²² Respondent agrees with this assertion.
545. According to Claimants, Respondent’s “*most serious breach*” of the BIT occurred on 21 October 2015.⁹²³ Thus, under Claimants’ own case, the Share Purchase Agreement was non-existent at the relevant time and the only instrument that could possibly give the Canadian Claimants the ownership of Mr. Obradović’s shares was the Sembi Agreement.
546. This removes the need to analyze the effects and validity of the Share Purchase Agreement and renders the issue moot. However, out of precaution, Respondent will here again explain why said agreement was unable to give to the Canadian Claimants the property right that they now invoke as a “*covered investment*” under the Canada – Serbia BIT.

1.1. Serbian law is applicable to the issue of ownership of “a share, stock or other form of equity participation in an enterprise” under the Canada – Serbia BIT

547. Claimants could not lose what they have never had. Therefore, in order to enjoy the protection under the Canada – Serbia BIT Claimants first need to prove that they had acquired rights defined as “*investment*” under the relevant BIT.
548. It is generally accepted by investment tribunals that international law does not create property rights as such:

⁹²¹ Claimants’ Reply, para. 543.

⁹²² Claimants’ Reply, para. 588.

⁹²³ Claimants’ reply, para. 748.

*“Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.”*⁹²⁴

549. The principle claim advanced in this arbitration is that Respondent expropriated shares in BD Agro held by Mr. Obradović and beneficially owned by the Canadian Claimants. The right of ownership is a property right, and not a contractual (personal) right, as Claimants apparently argue.⁹²⁵ In particular, the ownership over “*a share, stock or other form of equity participation in an enterprise*” referred to in Article 1 of the Canada Serbia BIT is by definition a right *in rem*. This is the only reading of the relevant provision that would be in accordance with the ordinary meaning of the terms used.⁹²⁶ The “*enterprise*” in this particular instance is BD Agro, a joint stock company with its seat in the Republic of Serbia and its shares listed at the Belgrade Stock Exchange.⁹²⁷ The only question that remains to be answered is following: what is the municipal law applicable to the issue of the acquisition and the substance of the ownership right with regards shares in BD Agro.
550. Respondent submits that whether the Canadian Claimants indeed acquired the ownership over the BD Agro’s shares must be determined in accordance with the relevant laws of Serbia.
551. When the jurisdiction of an investment tribunal depends on the acquisition by the putative investor of shares in a company incorporated in the host State, investment tribunals without exception apply the municipal law of that State. For example, in *Vestey v. Venezuela* the tribunal formulated the following test when deciding whether a UK investor had acquired shares in a local company:

⁹²⁴ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 162, **RLA-110**; *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017, paras, 168; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018, para. 231, **RLA-183**. 170, **RLA-2**.

⁹²⁵ Claimants’ Reply, para. 522.

⁹²⁶ Vienna Convention on the Law of Treaties, Article 31(1); **RLA-44**.

⁹²⁷ Claimants use the term “*shares*” in order to describe the equity participation in BD Agro. For the ease of reference and the convenience of the Tribunal, Respondent employs the same term in its written submissions. It should be said, however, that the correct term is “*stock*” since BD Agro is a joint stock company.

*“In the present case, the investment out of which the dispute arose is Vestey’s interest in the cattle farming enterprise, Agroflora, a company incorporated under Venezuelan law. The relevant inquiry is thus whether the Claimant held title to the shares in Agroflora under Venezuelan law.”*⁹²⁸

552. Similarly, in *Libananco v. Turkey* the tribunal applied the law of Turkey to establish whether certain acts were effective to transfer ownership of shares in two Turkish companies to the claimant, a company incorporated in Cyprus.⁹²⁹

553. The same reasoning was applied by the tribunal in *Gallo v. Canada*, where the main issue was whether the US claimant had acquired shares in the Canadian enterprise at the relevant date:

*“In accordance with the principle actori incumbit probatio, it is for the Claimant to marshal convincing evidence showing the date when he acquired ownership of the Enterprise’s share capital, in accordance with applicable law, in this case Ontario corporate law.”*⁹³⁰

554. Therefore, the Canadian Claimants’ status of “owners” of shares acquired by Mr. Obradović depends exclusively on the fact whether Serbian law recognized them as entities able to use their purported right of ownership against BD Agro and third persons, to collect the fruits of that ownership and to freely transfer the ownership to any third party. In other words, Serbian law defines a person who is the owner of shares in a joint stock company and which subjective rights belong to the owner.

555. At the very core of the Claimants’ jurisdictional argument is the assertion that the Canadian Claimants obtained the beneficial ownership of shares acquired by Mr. Obradović and that Serbian law is irrelevant for the existence of their alleged beneficial ownership of BD Agro’s shares. This is manifestly wrong. In order to succeed with the theory based on the beneficial ownership, Claimants must prove that

⁹²⁸ *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 195, **CLA-32**.

⁹²⁹ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 385, **RLA-181**.

⁹³⁰ *Vito G. Gallo v. The Government of Canada* (UNCITRAL), PCA Case No. 55798, Award, 15 September 2011, para. 284 (emphasis added), **RLA-6**.

the Serbian law recognizes and protects this particular kind of property rights and that the Serbian legal system perceives them rather than Mr. Obradović as owners of the shares.

556. Claimants argue that their ownership of BD Agro's shares was created under the laws of British Virgin Islands and Cyprus – the laws supposedly applicable to the Share Purchase Agreement and the Sembi Agreement.⁹³¹ This is wrong for at least two reasons.

557. First, the argument aims at confusing the issue at stake. Claimants would naturally very much prefer to debate whether the two Agreements validly create contractual rights between MDH/Sembi and Mr. Obradović under the laws governing two contracts. However, the discussion is off point and irrelevant.

558. The alleged investment, according to the case advanced by Claimants, is their right of ownership over BD Agro's shares. The only relevant question here regarding the Share Purchase Agreement/the Sembi Agreement is as follows – were the Agreements able to result in creating the right of ownership (as a *right in rem*) for the Canadian Claimants in respect to shares of BD Agro acquired by Mr. Obradović. The choice of law analysis offered by Claimants is wrong because it rests upon the wrong premise - the issue here is not whether the Canadian Claimants could hold Mr. Obradović responsible for the breach of the contract under the contractual statute, but whether the Share Purchase Agreement/the Sembi Agreement could have any effect with regard to the transfer of ownership of shares in a joint-stock company seated in Serbia. As further explained below, the answer is clearly no.

559. Second, application of the law governing the contractual relationship to the issue of acquisition of ownership would, in this particular instance, lead to an absurd result – whether an entity has acquired the ownership of shares in a Serbian joint stock company would depend on the application of a third State's law (the law of Cyprus or British Virgin Islands). This is virtually unheard of.

560. The right question is, therefore, what is the law that should govern the acquisition and transfer of ownership over the BD Agro's shares. The correct classification of the

⁹³¹ Claimants' Reply, paras. 509 and 538.

issue under the rules of Private International Law speaks in favor of the application of Serbian law as well. Since the right of ownership of shares is a right *in rem*, the governing law is the *lex rei sitae* – the law of the country in which shares are situated.⁹³² Shares of joint stock companies in Serbia are dematerialized and registered in Central Securities Registry.⁹³³ According to the case law of Serbian courts, shares of a joint stock company registered in Serbia are the property located in the territory of Serbia.⁹³⁴

561. In sum, whether the Share Purchase Agreement and the Sembi Agreement were effective to transfer ownership of shares in BD Agro from Mr. Obradović to any of the Claimants must be established according to Serbian law.

1.2. The Canadian Claimants did not acquire ownership of BD Agro's shares based on the Share Purchase Agreement

1.2.1. The Share Purchase Agreement did not result in the acquisition of ownership by the Canadian Claimants under the relevant rules of Serbian law

562. The Share Purchase Agreement could not and did not give the Canadian Claimants the ownership of shares in BD Agro acquired by Mr. Obradović in 2005. It was simply unable to make MDH the owner of the BD Agro's capital sold in the privatization process under Serbian law.

563. At the time the Share Purchase Agreement was concluded, the rules on the acquisition and transfer of ownership in shares of joint stock companies in Serbia were abundantly clear - a lawful owner of shares was the person registered as the owner in the Central Securities Registry.⁹³⁵ Accordingly, BD Agro's Articles of Association envisaged that the shareholders of the company shall be the persons registered in such capacity in the

⁹³² The Law on Resolution of Conflict of Laws with Regulations of Other Countries (1982), Article 18, **RE-315**.

⁹³³ First Expert Report of Professor Mirjana Radovic, para. 18.

⁹³⁴ Answers to questions of commercial courts defined at the session of the Commercial Disputes Section of the Appellate Commercial Court held on 3/11/2015, 4/11/2015 and 26/11/2015 and at the session of the Economic Offences and Administrative Accounting Disputes Section held on 30/11/2015 – Case Law of Commercial Courts – Bulletin no. 4/2015, p. 2, **RE-272**.

⁹³⁵ 2004 Law on Companies, Article 207(1), **RE-096**; 2002 Law on Market in Securities and other Financial Instruments, Article 11(3), **RE-119**

Central Securities Registry.⁹³⁶ The transfer of rights pertaining to shares was possible by transferring the shares to a new owner who acquired the ownership also by way of registration in the Central Securities Registry.⁹³⁷

564. The Claimants’ entire jurisdictional argument rests upon a single premise – Serbian law on the acquisition and transfer of ownership in shares of a joint stock company applies only to the so-called “*legal*” title.⁹³⁸ In its essence, the argument presupposes that the relevant rules of Serbian law represent a kind of a pseudo-legal system which regulates only the acquisition and transfer of the nominal title in shares, while allowing for the free disposition of legal rights representing the substance of ownership. Naturally, this cannot be correct.

565. At the relevant time, the status of a shareholder in a joint stock company, rights pertaining to shares and the way in which a shareholder can dispose of those rights were regulated by provisions of the 2004 Law on Companies and the 2002 Law on Market in Securities and other Financial Instruments.

566. According to the 2004 Law on Companies:

*“[I] A shareholder as against the joint stock company and third persons is the person entered into the Central Securities Registry, in accordance with the law regulating the market of securities.”*⁹³⁹

567. The same act listed the rights stemming from the ownership of shares:

“Each ordinary share of the joint-stock company gives the shareholder the same rights, in accordance with this law, the founding act of the company and its statute, which include, in particular the following:

right of access to legal acts and other documents and information on the company;

right of participation in the assembly of the company;

⁹³⁶ 2008 BD Agro’s Articles of Association, Article 25, **RE-300**.

⁹³⁷ 2002 Law on Market in Securities and other Financial Instruments, Article 11(5), **RE-119**.

⁹³⁸ Claimants’ Reply, para. 522.

⁹³⁹ 2004 Law on Companies, Article 207(1), **RE-096**.

voting rights in the assembly, such that one share gives the right to one vote;

right to the payment of dividends, after the dividends on all preferential shares had been paid in full;

right of participation in the distribution of liquidation surplus, after the payment of creditors and shareholders of any preferential shares;

right of pre-emption on all new emissions of shares and convertible bonds;

right of disposal of shares of all types in accordance with the law.

(2) Ordinary shares of a joint stock company cannot be converted into preferential shares or any other securities.

*(3) Rights referred to in Paragraph 1, Subparagraphs 4 and 5 of this Article can be transferred by contract from the shareholder to third parties.*⁹⁴⁰

568. Thus, the economic rights creating the substance of ownership belonged to the registered owner of shares under the relevant rules and, save from the very limited exceptions, could not be transferred by contract to third parties.

569. On a more general level, the issue was regulated by the 2002 Law on Market in Securities and other Financial Instruments

*“[5] Transfer of rights pertaining to securities shall be conducted by transferring the securities into the account of a new owner in the Central Securities Registry.”*⁹⁴¹

570. The conclusion that follows from the cited provisions is unambiguous: as a general rule, the economic rights arising from the registered ownership in shares of a joint stock company necessarily followed the ownership. To put it in Claimants’ way of speech – the nominal owner is the beneficial owner of shares under the Serbian law. In other words, “*the quintessential rights of the controlling shareholder*” supposedly

⁹⁴⁰ 2004 Law on Companies, Article 208 (emphasis added), **RE-320**.

⁹⁴¹ 2002 Law on Market in Securities and other Financial Instruments, Article 11(5), **RE-119**

vested in MDH through the Share Purchase Agreement⁹⁴² could not be acquired separately from the legal title and without MDH's registration as the new owner in the Central Securities Registry.

571. As explained by Professor Radovic in her Second Expert Report, unlike some other legal systems, Serbian law does not allow for the split of ownership between the legal owner and the beneficial owner.⁹⁴³

572. In order for the beneficial ownership to qualify as a property right (right *in rem*), the beneficial owner would need to have more than just personal rights against the holder of the title and to be able to enforce his rights against third parties as well.⁹⁴⁴ This is impossible under Serbian law. That is why, according to Professor Radovic, any contractual rights arguably acquired by Claimants through the Share Purchase Agreement and the Sembi Agreement cannot be deemed as ownership of shares in BD Agro, but only as personal rights against the contracting party (Mr. Obradović).⁹⁴⁵ For example, had Mr. Obradović decided to transfer his shares to a third party, the transfer could have been valid without Claimants' consent and even against their will.⁹⁴⁶ Claimants would not have any recourse under Serbian law and would not be able to recover the shares from a third party who acquired the shares.⁹⁴⁷ Thus, even if Claimants were able to acquire certain rights pertaining to shares through the contract with Mr. Obradović, those rights would still not qualify as "*ownership*."

573. Claimants argue that Serbian law does recognize the beneficial ownership in shares of a joint stock company⁹⁴⁸ and put forward several arguments in that regard. All of the Claimants' arguments are misplaced.

574. First, Claimants misinterpret the English translation of the 2002 Law on Market in Securities and other Financial Instruments. The Law stipulates, inter alia, that "[T]he owner of the securities account held with the Central Securities Registry shall be

⁹⁴² Claimants' Reply, paras. 514, 515.

⁹⁴³ Second Expert Report of Professor Mirjana Radovic, para. 58.

⁹⁴⁴ Second Expert Report of Professor Mirjana Radovic, para. 56.

⁹⁴⁵ Second Expert Report of Professor Mirjana Radovic, para. 58.

⁹⁴⁶ Second Expert Report of Professor Mirjana Radovic, para. 58.

⁹⁴⁷ Second Expert Report of Professor Mirjana Radovic, para. 58.

⁹⁴⁸ Claimants' Reply, para. 523.

*considered a legal title holder of securities (hereinafter: legal title holder).’’⁹⁴⁹ In Claimants’ reading, the provision means that “[t]he Central Security Registry only registers nominal owners, and not beneficial owners.”⁹⁵⁰ This is incorrect. As explained above, the Central Securities Registry registers lawful (legal) owners of shares who are, at the same time, enjoying economic rights pertaining to the ownership (i.e. beneficial owners). The fact that the beneficial ownership in shares is not registered separately speaks in favor of the fact that there is no separation of ownership between a “legal” and the beneficial owner. The word “legal” (in Serbian: *zakoniti*) is an adjective that describes the holder of securities and not the title.*

575. Second, Claimants rely on Article 2(34) of the 2011 Law on Capital Markets that allegedly introduces the term “beneficial owner” in Serbian law.⁹⁵¹ However, the Claimants’ translation of the relevant provision is incorrect and misleading.⁹⁵² Claimants’ translate Serbian phrase “*posredni vlasnik*” as “*beneficial owner*”. In reality, the correct translation of the phrase is “*indirect owner*”. The relevant provision, in the accurate translation, reads:

“indirect owner is the person who, even when it is not a lawful title holder of the financial instrument, enjoys the benefits of ownership over that financial instrument in whole or in part, including the ability to influence the voting, disposing with the financial instrument or enjoying the economic advantages of ownership over that financial instrument.”⁹⁵³

576. There is a perfect example of an “*indirect owner*” of BD Agro’s shares in the case at hand. Namely, it is Mr. Rand who was an indirect owner of 3.9% of BD Agro’s shares through his wholly-owned Serbian company (MDH Serbia). It was Mr. Rand who, although not being a holder of shares himself, was able to direct the voting of MDH Serbia’s shareholding, to ultimately receive the dividends paid to MDH Serbia or to have his company dispose of its shareholding. The provision does not mean, as it is apparently the Claimants’ position, that Mr. Rand was an indirect owner of shares

⁹⁴⁹ 2002 Law on Market in Securities and other Financial Instruments, Article 11(3) (emphasis added), **RE-119**

⁹⁵⁰ Claimants’ Reply, para. 522.

⁹⁵¹ Claimants’ Reply, para. 524.

⁹⁵² 2011 Law on Capital Markets, Arts. 2(33) and (34), **CE-728**.

⁹⁵³ Article 2(34) of the 2011 Law on Capital Markets, **RE-316**.

owned by another natural person (Mr. Obradović) or that he could, even indirectly, exercise proprietary rights that belonged to Mr. Obradović.

577. Third, Claimants' reliance on the 2018 Serbian Law on Central Record of Ultimate Beneficial Owners⁹⁵⁴ is inapposite as well, for several different reasons.

578. As evident from the proposal submitted to the Serbian Parliament by the Government of Serbia, the Law on Central Record of Ultimate Beneficial Owners was enacted based on the recommendation issued by the Financial Action Task Force (*FATF*), an inter-governmental body dedicated to fighting money laundering and financing of terrorism.⁹⁵⁵ The purpose of the law is explicitly stated in the Governmental proposal – an improvement of the existing system for the discovery and prevention of money laundering and financing of terrorism and the harmonization of Serbian law with all international standards in this area.⁹⁵⁶ The Law designates only natural persons as beneficial owners and does not establish any rights of such persons.⁹⁵⁷

579. Crucially, the Law on Central Record of Ultimate Beneficial Owners does not apply to public joint stock companies in Serbia. Article 2 (not included in the text submitted by Claimants as evidence) expressly excludes companies such as BD Agro from the obligation to record their beneficial owners:

“This Law shall apply to the following legal entities and other entities registered in the Republic of Serbia in accordance with the law (hereinafter referred to as: Registered Entities):

- 1) companies other than public joint stock companies;*
- 2) cooperatives;*
- 3) branch offices of foreign companies;*
- 4) business associations and associations other than political parties, trade unions, sports organisations and associations, churches and religious communities;*
- 5) foundations and endowments;*

⁹⁵⁴ Law on Central Record of Ultimate Beneficial Owners, **RE-519**.

⁹⁵⁵ Draft of the Law on Central Record of Ultimate Beneficial Owners, **RE-274**.

⁹⁵⁶ Draft of the Law on Central Record of Ultimate Beneficial Owners, **RE-274**.

⁹⁵⁷ Law on Central Record of Ultimate Beneficial Owners, Article 3, **RE-519**.

6) establishments;

7) representative offices of foreign companies, associations, foundations and endowments.

*This Law shall not apply to companies and establishments where the Republic of Serbia, an autonomous province or a local government is the sole member or founder.”*⁹⁵⁸

580. The reason for the exclusion of public joint stock companies from the scope of the Law was given in the Opinion on the application of the Law, adopted by the Serbian Ministry of Economy:

*“Considering the foregoing provisions of the Law, only public joint-stock companies registered in the Republic of Serbia are exempted from the obligation to identify and record the beneficial owner, for as their ownership structure is already registered in the relevant register i.e. the Central Securities Registry.”*⁹⁵⁹

581. Thus, the enactment of the Law on Central Record of Ultimate Beneficial Owners only serves to confirm the indisputable fact – under Serbian law, a person or an entity registered as the owner of shares in a public joint stock company is *both* nominal and the beneficial owner.

582. Fourth, Claimants’ state (relying on the expert report submitted by Mr. Milošević) that Serbian law “[i]mposes certain legal obligations on the basis of beneficial ownership and rights that form a part of or stem from beneficial ownership.”⁹⁶⁰ Neither Claimants nor Mr. Milošević offer an example of rights that would stem from the beneficial ownership of shares in the Serbian legal system. This is unsurprising since there are no such rights.

⁹⁵⁸ Law on the Central Record of Ultimate Beneficial Owners, Article 2 (emphasis added), **RE-519**.

⁹⁵⁹ Opinion of the Ministry of Economy, no. 011-00-000106/2018-10 of 16 July 2018, p. 2 (emphasis added), **RE-273**.

⁹⁶⁰ Claimants’ Reply, para. 523.

583. Even courts in other jurisdictions that were faced with the question of whether Serbian law recognized the concept of beneficial ownership answered the question in the negative. For example, the 2015 judgment of the High Court of Singapore records that a client in the commission agency agreement cannot be deemed as owner of funds deposited in his commission agent's bank account, although the funds were paid to the agent as a purchase price under the sale agreement it concluded "*for account*" of the client, precisely because Serbian law does not recognize beneficial ownership.⁹⁶¹
584. As explained above, the Share Purchase Agreement could not result in the transfer of ownership in BD Agro's shares. MDH (denoted as "Purchaser" in the Share Purchase Agreement)⁹⁶² could not be considered as the lawful owner of shares in BD Agro under Serbian law without the proper registration of its ownership in the Central Securities Registry. The requirement of registration is not merely a formality. It represents *modus acquirendi* (means of acquisition) of ownership in Serbian legal system.⁹⁶³ The beneficial ownership of shares in a public joint stock company could not be acquired without the simultaneous acquisition of the legal title. This should by itself be enough to put an end to the Claimants' jurisdictional theory based on the ownership of "*Beneficially Owned Shares*".
585. However, there are additional reasons why the Share Purchase Agreement was unable to create any effect with regards the transfer of ownership in shares held by Mr. Obradović.
586. The Share Purchase Agreement represented a sale of shares in a public joint stock company outside the organized market of shares, in blatant disregard of the mandatory rule contained in Article 52 of the 2002 Law on Market in Securities and other Financial Instruments:

[1] Securities shall be traded only through a public offer on an organized market, unless this law provides otherwise.

[2] Only broker-dealer companies and authorized banks that are members of the stock exchange may trade in securities on the organized market, while

⁹⁶¹ *Westacre Investments Inc v. the State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) and others*, [2015] SGHC 143, 27 May 2015, paras. 39, 47-57, **RE-319**.

⁹⁶² Share Purchase Agreement dated 19 September 2005, **CE-15**.

⁹⁶³ Second Expert Report of Professor Mirjana Radovic, para. 124.

*other persons may trade only through the mediation of stock exchange members.*⁹⁶⁴

587. This provision was, without any doubt, mandatory in its nature. Claimants' legal expert, Professor Grušić agrees that Article 52(1) of the 2002 Law on Market of Securities and other Financial Instruments represented an overriding mandatory rule of Serbian law - parties trading in securities in Serbia could not exclude the application of said provision.⁹⁶⁵
588. The Supreme Court of Serbia considers the sale of shares in public joint stock companies outside the organized market as null and void.⁹⁶⁶ Claimants attempt to refute the relevance of the Supreme Court's decision *Prev. 438/2007* by arguing that, in the particular case, "[t]he Supreme Court considered a share purchase agreement null and void not because it was agreed outside the BSE, but because it provided for the actual transfer of shares in a public joint stock company outside the BSE."⁹⁶⁷
589. Professor Radovic explains that this is simply wrong – Serbian law does not differentiate between a share purchase agreement and a "share transfer agreement".⁹⁶⁸ The transfer of shares is effectuated based on a valid share purchase agreement concluded over the stock exchange.⁹⁶⁹ In this particular case, the Share and Purchase Agreement between MDH and Mr. Obradović was concluded outside the stock exchange and it did not fall under any exception to the mandatory trade over the stock exchange.⁹⁷⁰ Equally, the fact that the 2001 Law on Privatization was amended in 2008 to repeal Article 59 by which shares in privatized companies had to be traded in the organized market (stock exchange) is of no importance and does not affect the reasoning adopted by the Supreme Court. The shares of BD Agro remained listed at the BSE and the trading in shares of the company still had to be conducted under the mandatory provision of the 2002 and the 2006 Law on Market in Securities and other Financial Instruments, i.e. over the stock exchange.⁹⁷¹

⁹⁶⁴ 2002 Law on Market in Securities and other Financial Instruments, Article 52 (emphasis added), **RE-119**.

⁹⁶⁵ Grušić ER, para. 75.

⁹⁶⁶ Decision of the Supreme Court of Serbia, *Prev. 438/2007*, March 19, 2008, **RE-2**.

⁹⁶⁷ Claimants' Reply, para. 531.

⁹⁶⁸ Second Expert Report of Professor Mirjana Radovic, para. 128.

⁹⁶⁹ Second Expert Report of Professor Mirjana Radovic, para. 128.

⁹⁷⁰ Second Expert Report of Professor Mirjana Radovic, para. 128.

⁹⁷¹ Second Expert Report of Professor Mirjana Radovic, para. 131.

590. In dealing with this obstacle, Claimants argue that the option to purchase shares from Mr. Obradović established for the benefit of MDH in Article 1 of the Share Purchase Agreement was valid under Serbian law, since “[S]erbian law does not prevent shareholders in listed privatized joint stock companies from selling their shares to a specific buyer and on negotiated terms.”⁹⁷² Relying on the Expert Opinion of Ms. Tomić Brkušnin, Claimants assert that such transactions could be effectuated by: “(i) a block trade transaction on the BSE; (ii) an in-kind contribution of the shares into a LLC and subsequent transfer of the shares of the LLC to the buyer; or (iii) after 3 January 2008, by delisting the shares and subsequently transferring them to the buyer outside of the BSE.”⁹⁷³

591. The argument is entirely misplaced.

592. First, all of the hypotheticals offered here presuppose that the parties to the Share Purchase Agreement conclude one or several additional contracts or enter into additional transactions in order to effectuate the transfer of ownership.⁹⁷⁴ For example, in order to execute a block trade transaction, the parties would need to reach a preliminary agreement outside the BSE and to give their coordinated trade orders through a stock exchange member.⁹⁷⁵ If the block trade transaction is approved by the BSE (depending on the fulfilment of conditions envisaged in the BSE Rules), the block trade transaction is concluded at the stock exchange session.⁹⁷⁶ However, the relevant issue here is not whether Claimants were able to conclude a contract that would have valid effects under Serbian law in an undetermined future, but whether the particular contract that already existed – the Share Purchase Agreement – could have resulted in transfer of ownership in BD Agro’s shares.

593. Second, none of the methods referred to by Claimants could have been used under the terms of the Share Purchase Agreement in any case.

594. The requirements for block trade transactions were at the time regulated by the 2004 and the 2009 BSE Rules.⁹⁷⁷ The relevant Rules proscribed, *inter alia*, that the block

⁹⁷² Claimants’ Reply, para. 529.

⁹⁷³ Claimants’ Reply, para. 530.

⁹⁷⁴ Second Expert Report of Professor Mirjana Radovic, para. 125.

⁹⁷⁵ Second Expert Report of Professor Mirjana Radovic, para. 109.

⁹⁷⁶ Second Expert Report of Professor Mirjana Radovic, para. 109.

⁹⁷⁷ Second Expert Report of Professor Mirjana Radovic, para. 108.

trade was possible only if the price for shares agreed between the parties did not deviate more than 20% from the average price of shares during the last three trading days.⁹⁷⁸ The requirement was obviously not met by the Share Purchase Agreement which provided that Mr. Obradović was under the obligation to sell his 70% shareholding in BD Agro to MDH for the price of only EUR 1,000.⁹⁷⁹ Although Ms. Tomić Brkušnin implies that the BSE Board of Directors had a discretionary power to allow for a larger discrepancy in price,⁹⁸⁰ this could not have been done on case-by-case basis, but only through the amendment of the requirements for block trade in general.⁹⁸¹

595. As for the contribution in kind as a purported method of transferring the ownership to MDH – this option would entail Mr. Obradović setting up a new limited liability company, transferring his shares in BD Agro as a contribution to this newly founded company and selling the shares in limited liability company to MDH.⁹⁸² As a result, an elaborate scheme would mean that the hypothetical limited liability company (and not MDH) would become the owner of shares in BD Agro. If MDH would want the limited liability company to transfer its shares in BD Agro to MDH (in accordance with the terms of the Share Purchase Agreement), such transfer would again need to fulfill all of the requirements proscribed in the Law on Market in Securities and other Financial Instruments, since BD Agro remained a public joint stock company with shares listed at the BSE.⁹⁸³

596. Furthermore, delisting of shares in BD Agro was never an option that was available to Mr. Obradović as the potential seller of shares. As explained by Professor Radovic, during the lifetime of the Share Purchase Agreement, the 2004 Law on Companies specifically prohibited the transformation of public joint stock companies with more than 100 shareholders (which BD Agro was) to closed joint stock companies or limited liability companies.⁹⁸⁴

⁹⁷⁸ Article 109(1)(3) of the 2004 BSE Rules, **RE-323**; Article 110(1)(3) of the 2009 BSE Rules, **RE-324**.

⁹⁷⁹ Share Purchase Agreement dated 19 September 2005, Article 1, **CE-15**.

⁹⁸⁰ Tomić Brkušnin ER, para. 31.

⁹⁸¹ Second Expert Report of Professor Mirjana Radovic, para. 111.

⁹⁸² Second Expert Report of Professor Mirjana Radovic, para. 113.

⁹⁸³ Second Expert Report of Professor Mirjana Radovic, para. 116.

⁹⁸⁴ Second Expert Report of Professor Mirjana Radovic, paras. 119, 120.

597. Third, none of the hypothetical methods of transferring the ownership in shares owned by Mr. Obradović has ever been used by the parties to the Share Purchase Agreement. Therefore, the issue is anyhow moot. The Claimants' argument essentially boils down to the conclusion that MDH could have validly acquired shares in BD Agro under Serbian law but it did not do so.
598. There are several additional reasons why the Share Purchase Agreement could not have resulted in the valid acquisition of ownership under Serbian law. The 2002 Law on Market in Securities and other Financial Instruments, in force at the time, contained a number of provisions aimed at protecting the integrity of the market and rights of shareholders in joint stock companies. For example, it proscribed that a person acquiring certain percentages of shares and corresponding voting rights had to notify the body in charge for the protection of competition and the Securities Commission about the acquisition, under the penalty of losing the voting rights.⁹⁸⁵ A person or an entity intending to acquire more than 25% of voting shares in a joint stock company was required to issue a take-over bid previously approved by the Securities Commission and directed towards all shareholders of a joint stock company.⁹⁸⁶
599. Claimants' response to this has been consistent and uniform – the rules at stake did not apply to them since Claimants did not acquire *nominal* ownership of shares.⁹⁸⁷ In reality, Claimants argue that it was open to them to acquire every prerogative of ownership without being under an obligation to follow any restriction imposed by Serbian law. If Claimants could indeed be deemed as owners of Mr. Obradović's shares that would render any restriction on the acquisition and trading of shares in joint stock companies virtually meaningless.
600. Finally, in an attempt to defend the validity of the Share Purchase Agreement, Claimants resort to their fall back argument – the contract was governed by British Columbia law.⁹⁸⁸ As already explained, the argument is inapposite since the real issue here is whether the conclusion of the Share Purchase Agreement could have effectuated the transfer of ownership in accordance with Serbian law.

⁹⁸⁵ 2002 Law on Market in Securities and other Financial Instruments, Article 59, **RE-119**.

⁹⁸⁶ 2002 Law on Market in Securities and other Financial Instruments, Article 67(1), Article 69(1) and 69(2), Article 70, **RE-119**.

⁹⁸⁷ Claimants' Reply, para. 527.

⁹⁸⁸ Claimants' Reply, para. 533.

601. In any event, under Serbian rules of Private International Law, Serbian law is applicable to the Share Purchase Agreement. Contrary to the opinion of Claimants' legal expert, Dr. Grušić,⁹⁸⁹ parties to the Share Purchase Agreement made neither express nor tacit choice of British Columbia law as the governing law for their contract. In the absence of parties' choice, the law governing the contract of sale is the law of the seller's (Mr. Obradović's) domicile,⁹⁹⁰ which in this case was Serbia. In addition, Serbian courts would not even engage into the conflict of laws analysis, since the Share Purchase Agreement contradicted relevant provisions of the 2002 Law on Market in Securities and other Financial Instruments. As expressly recognized by Claimants' legal expert, Dr. Grušić,⁹⁹¹ Article 52(1) of that Law represents an overriding mandatory provision – a provision which must be applied even if the foreign law is otherwise applicable to the transaction by virtue of a relevant choice of law rule.
602. Claimants also argue that, under Serbian law, the Share Purchase Agreement would survive the nullity of Article 2.⁹⁹² Claimant's expert on Serbian law asserts that the nullity of the call option contained in Article 2 would not release Mr. Obradović from the obligation to transfer his shareholding to MDH, by a method possible under Serbian law.⁹⁹³ However, as it was demonstrated above, no such method was ever available to Claimants under the terms of the Share Purchase Agreement.
603. In conclusion, the Share Purchase Agreement did not result in the acquisition of ownership in BD Agro by MDH. Consequently, Mr. Rand did not acquire the right of ownership protected under Article 1 of the Canada – Serbia BIT.

⁹⁸⁹ Grušić ER, paras. 24, 43.

⁹⁹⁰ Private International Law Act, Article 20(1), **CE-445**.

⁹⁹¹ Grušić ER, para. 76.

⁹⁹² Tomić Brkušnin ER, para. 59. Article 2 of the Share Purchase Agreement reads: “*Upon the exercise of the option, the Seller shall deliver the Shares and debt instruments in negotiable form (the “Share Transfer Materials”) to the order of the Purchaser. The Share Transfer Materials shall consist of share certificates duly indorsed for transfer and guaranteed or in street of bearer form and shall be in a form sufficient to enable the Purchaser to become the registered and beneficial owner of the Shares. At the Purchaser's request, at any time during the term of the option, the Share Transfer Materials shall be executed by the Seller and lodged with a trustee appointed by the Purchaser.*”

⁹⁹³ Tomić Brkušnin ER, para. 59.

1.2.2. The Share Purchase Agreement was concluded in contravention with the Privatization Agreement

604. The Privatization Agreement prohibited Mr. Obradović from concluding the Share Purchase Agreement.
605. Under Article 5.3.1. of the Privatization Agreement, the buyer (Mr. Obradović) undertook an obligation not to “sell, assign or otherwise alienate shares in the period of 2 years as of the day of conclusion of the agreement.”⁹⁹⁴
606. Claimants argue that the conclusion of the Share Purchase Agreement did not constitute a breach of Article 5.3.1. of the Privatization Agreement. According to Claimants, the Privatization Agreement restricted only alienation of “legal ownership” (“*a change of a legal owner*”) of shares.⁹⁹⁵ The argument seems to be that, because the Privatization Agreement did not restrict the transfer of beneficial ownership, Mr. Obradović was free to alienate all of the substantive rights stemming from ownership except his nominal title in shares.
607. Claimants’ legal expert Mr. Milošević asserts that, under Serbian law, “*alienation denotes a change of legal owner.*”⁹⁹⁶ However, the provision of the Privatization Agreement is unequivocal – it prohibits any kind of disposition of shares acquired by Mr. Obradović. It does not distinguish between nominal and beneficial ownership of shares and certainly it does not allow Mr. Obradović to alienate all of the attributes of ownership, to divest his ownership of any practical significance and to keep the mere nominal title in shares.
608. As Professor Radovic explains, constitution of MDH’s beneficial ownership (even if it was possible under Serbian law) would indisputably be regarded as a disposition of shares, bearing in mind that it would lead to stripping all material elements of ownership from Mr. Obradović and leaving him with only *nuda proprietas*.⁹⁹⁷
609. An interpretation offered here by Claimants – that the Privatization Agreement prohibits Mr. Obradović from transferring a legal title over the shares but somehow

⁹⁹⁴ Privatization Agreement, Article 5.3.1. (emphasis added), **CE-17**.

⁹⁹⁵ Claimants’ Reply, para. 518.

⁹⁹⁶ Milošević Second ER, para. 188.

⁹⁹⁷ Second Expert Report of Professor Mirjana Radovic, para. 71.

allows him to strip his ownership of any rights that would have practical meaning – is a travesty and would make the prohibition of Article 5.3.1. virtually without any significance.

610. Claimants’ assertion that the Privatization Agreement did not restrict the transfer of the beneficial ownership in BD Agro’s shares by virtue of the Share Purchase Agreement is contradictory as well.
611. Claimants explicitly admit that Article 5.3.1. prohibited the conclusion of the Sembi Agreement while the provision was in effect.⁹⁹⁸
612. It is the Claimants’ case that the purpose of the Share Purchase Agreement and the Sembi Agreement was identical – the transfer of the beneficial ownership in BD Agro to Mr. Rand (his companies). It is beyond comprehension how the same provision could prohibit the transfer of the beneficial ownership under the Sembi Agreement and, at the same time, allow for the very same thing when it comes to the Share Purchase Agreement.
613. This demonstrates that the Claimants’ argument with regard to the relationship of Article 5.3.1. of the Privatization Agreement and the Share Purchase Agreement is illogical and disingenuous and it must be rejected.
614. Finally, Mr. Obradović was unable to sell what he did not own. Article 2.1. of the Privatization Agreement contains the following provision:

“With conclusion of this agreement, which has the effect of the articles of incorporation of the subject, the buyer acquires the right of management, participation in profit and the right to a part of the liquidation mass, proportionately to the amount of purchased capital. The right to free disposal of purchased capital is acquired by the buyer pursuant to the provisions of Article 456 of the Company Law and provisions of the agreement, and in proportion to paid value of sale and purchase price.”⁹⁹⁹

⁹⁹⁸ Claimants’ Reply, para. 126.

⁹⁹⁹ Privatization Agreement, Article 2.1. (emphasis added), **CE-17**.

615. Clearly, the provision entails that Mr. Obradović was free to alienate the entire shareholding in BD Agro acquired in the privatization process only after 8 April 2011, when he paid the last installment of the purchase price.¹⁰⁰⁰

616. Therefore, the Share Purchase Agreement was concluded in clear contradiction with terms of the Privatization Agreement and had no effect on the transfer of ownership in shares held by Mr. Obradović.

1.2.3. Under the Share Purchase Agreement itself, the transfer of both nominal and beneficial ownership was conditioned upon the exercise of the call option by MDH

617. The Share Purchase Agreement was evidently concluded with the idea that Mr. Obradović would acquire both nominal and beneficial ownership in shares of BD Agro during the privatization.

618. Article 3 of the Share Purchase Agreement stipulated:

“The Seller [Mr. Obradović] represents that he is, or will become, subject to being successful at the upcoming auction, the sole and beneficial owner of the Shares and, on and after September 29, 2006, will have the exclusive right to sell and transfer same to the Purchaser [MDH] as herein provided.”¹⁰⁰¹

619. Article 1 of the same Agreement established an option for MDH (“the Purchaser”) to acquire all of the interest in BD Agro held by Mr. Obradović (“the Seller), during the time period stipulated in the Share Purchase Agreement.¹⁰⁰²

620. Article 2 specifies that Mr. Obradović would deliver his shares to MDH in the form that would enable the Purchaser to become both “*the registered and beneficial owner of the Shares*.”

621. As explained by Respondent in its Counter-Memorial, the call option gave MDH a power to cause creation of the share purchase agreement in the future.¹⁰⁰³ MDH has

¹⁰⁰⁰ Confirmation of the Privatization Agency on the Buyer’s full payment of the Purchase Price, 6 January 2012, **CE-19**.

¹⁰⁰¹ Share Purchase Agreement dated 19 September 2005, Article 3 (emphasis added), **CE-15**.

¹⁰⁰² Share Purchase Agreement dated 19 September 2005, Article 1, **CE-15**.

¹⁰⁰³ Respondent’s Counter-Memorial, para. 230.

never exercised the option and the option anyway ceased to exist together with the rest of the contract on 22 February 2008. The argument that Mr. Rand, acting through MDH, automatically obtained beneficial ownership of BD Agro's shares at the date Mr. Obradović concluded the Privatization Agreement with the Privatization Agency contradicts the clear language of the Share Purchase Agreement.

622. The Claimants' Reply does not deal with this contradiction and does not explain why Article 2 of the Share Purchase Agreement conditions the acquisition of *both registered and beneficial ownership* in shares on the exercise of the option that has never been exercised. Instead, they choose to pretend that Article 2 of the SPA relates only to the transfer of the registered ownership and does not include the word "*beneficial*" in its text. Claimants state that "[T]his provision, however, does not contradict Mr. Obradović's obligation to transfer beneficial ownership to MDH under Article 4 and 5 immediately upon acquiring the Beneficially Owned Shares, even without MDH's exercise of the call option."¹⁰⁰⁴ The argument simply ignores the content of Articles 2 and 3 of the Share Purchase Agreement.

1.2.4. MDH has never considered itself to be beneficial owner of BD Agro

623. During the document production phase of the proceeding, Respondent requested submission of MDH financial documents for the period between 2005 and 2008, recording its alleged ownership interest in BD Agro. No such documents were ever produced by Claimants.
624. In addition, on 22 February 2008, Mr. Rand, Mr. Obradović, Sembi and the Lundin Family entered into an agreement by which Sembi Investments Limited (designated as "Purchaser") agreed to repay the Lundin Family the loan that Mr. Obradović had taken for the purpose of the acquisition of BD Agro.¹⁰⁰⁵
625. Although the Agreement was concluded almost three years after the Share Purchase Agreement, it does not refer to the alleged MDH's beneficial ownership in BD Agro's shares acquired by Mr. Obradović. Instead, it specifically refers to "*Mr. Obradović's*

¹⁰⁰⁴ Claimants' Reply, para. 519.

¹⁰⁰⁵ Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, CE-28.

interest in the Contract [The Privatization Agreement]” as a security for funds provided by the Lundin family to Mr. Obradović.¹⁰⁰⁶

626. This clearly demonstrates that not even MDH has ever considered itself to be beneficial owner of BD Agro and casts serious doubts on the Claimants’ version of events – that the Share Purchase Agreement was the instrument that created MDH’s beneficial ownership in shares obtained by Mr. Obradović.

1.2.5. In any event, MDH has never paid any consideration for the purported acquisition of Mr. Obradović’s shares

627. There is no evidence on the record that would suggest that MDH paid any consideration at the time it supposedly acquired shares from Mr. Obradović under the Share Purchase Agreement.

628. It seems that Claimants are not disputing that no considerable consideration was ever paid. Apart from the statements of Messrs. Rand and Obradović that Mr. Obradović received ten Canadian dollars from Mr. Rand at the time the Share Purchase Agreement was concluded, there are no evidence confirming that any payments were made by MDH.¹⁰⁰⁷

629. In a recent award in *Anglo Adriatic v. Albania*, the tribunal explained that “[S]everal investment tribunals have concluded that investors who had not paid any consideration, or only a nominal price, were not entitled to investment protection.”¹⁰⁰⁸

630. Relying on awards of the tribunals in *KT Asia v. Kazakhstan*¹⁰⁰⁹ and *Quiborax v. Bolivia*,¹⁰¹⁰ the *Anglo Adriatic* tribunal sided with Albania and concluded that the claimant in that case was unable to prove that it had paid any consideration in return

¹⁰⁰⁶ Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, Recitals, para. B, **CE-28**.

¹⁰⁰⁷ Rand Second WS, para. 19; Obradović Second WS, para. 14.

¹⁰⁰⁸ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, February 7, 2019, para. 246, **RLA-7**.

¹⁰⁰⁹ *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, para. 206, **RLA-95**.

¹⁰¹⁰ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 232, **RLA-24**.

for receiving beneficial ownership of shares in an Albanian investment fund (AAIF).¹⁰¹¹ Accordingly, the claim was dismissed for lack of jurisdiction.¹⁰¹²

631. Respondent respectfully submits that since MDH did not pay any consideration in exchange for beneficial ownership in shares it allegedly received from Mr. Obradović, the Tribunal should find that there was no transfer of beneficial ownership based on the Share Purchase Agreement.

1.3. The Sembi Agreement did not result in transfer of ownership in BD Agro's shares from Mr. Obradović to Sembi

1.3.1. The Sembi Agreement was unable to create the right of ownership for the Canadian Claimants under Serbian law

632. In their Reply, Claimants again venture to explain that the Canadian Claimants were the owners of BD Agro's shares ("*Beneficially Owned Shares*") as a result of the Sembi Agreement, concluded between Sembi and Mr. Obradović on 22 February 2008.¹⁰¹³ By virtue of the Agreement, Sembi (designated as the "*Purchaser*") assumed all of Mr. Obradović's obligations towards the Lundin Family and the PA in connection with his investment in BD Agro and the Privatization Agreement.¹⁰¹⁴ In turn, Mr. Obradović's obligation was stipulated in Article 4 of the Sembi Agreement:

*"Mr. Obradović, in consideration for the Purchaser assuming such obligations, has agreed to transfer to the Purchaser all his right, title and interest in and to the Contract. Mr. Obradović agrees to sign any such documents and do all such things as may be necessary to effect the transfer to the Purchaser of the Contract together with any other assets whatsoever held by Mr. Obradović which are related to the business of BD Agro."*¹⁰¹⁵

633. The Sembi Agreement provides for the application of the Cypriot law.¹⁰¹⁶

¹⁰¹¹ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, February 7, 2019, para. 245, **RLA-7**.

¹⁰¹² *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, February 7, 2019, para. 247, **RLA-7**.

¹⁰¹³ Claimants' Reply, paras. 536-544.

¹⁰¹⁴ Articles 1-3, Agreement between D. Obradović and Sembi, 22 February 2008, **CE-29**.

¹⁰¹⁵ Article 4, Agreement between D. Obradović and Sembi, 22 February 2008, **CE-29**.

¹⁰¹⁶ Article 9, Agreement between D. Obradović and Sembi, 22 February 2008, **CE-29**.

634. Claimants go to great lengths to explain how the law of Cyprus governs the issue of whether the contract can result in transfer of ownership over the shares in joint stock company seated in Serbia, simply because the contracting parties (Sembi and Mr. Obradović) opted for the application of that law to their contract. However, this is an impossible task. As already submitted by Respondent, whether a right of property (ownership of shares in a company) is validly created, what is the content of that right and how and if it can be transferred to a third person are all questions governed exclusively by the law of the host State.¹⁰¹⁷
635. Claimants' analysis tends to unnecessary complicate and to obscure a question that it is otherwise quite simple. The question is clear – who would be considered an owner of BD Agro under Serbian law (Mr. Obradović or Sembi) and can the Sembi Agreement, after its conclusion, affect the answer to that question in any way? The answer is also straightforward – Mr. Obradović remained the owner of BD Agro's shares after 22 February 2008 since the Sembi Agreement could not result in transfer of ownership in shares under Serbian law. This is for the same reasons that prevented Mr. Obradović from transferring his shares in BD Agro to Marine Drive Holding almost three years earlier.
636. According to Professor Emilianides, an expert in Cyprus contract and Private International Law, Serbian law would also be applied by a Cypriot court to the issues of acquisition and transfer of ownership in BD Agro's shares, as the law of the *situs* of shares.¹⁰¹⁸
637. In an attempt to circumvent the fact that the property right they invoke as “*covered investment*” never existed under Respondent's law, Claimants simply argue that Mr. Obradović acquired BD Agro's shares in accordance with the Serbian law.¹⁰¹⁹ The argument is inapposite. The issue here is whether the Canadian nationals who act as claimants in this proceeding acquired BD Agro in accordance with the law of Serbia

¹⁰¹⁷ Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017, paras, 168, 170, RLA-2; Gambrinus, Corp. v. Bolivarian Republic of Venezuela ICSID Case No. ARB/11/31, Decision on Annulment, October 3, 2017, para. 202, **RLA-2**.

¹⁰¹⁸ Expert Report of Professor Achilles C. Emilianides, para. 25.

¹⁰¹⁹ Claimants' Reply, para. 575, 576.

i.e. whether the Sembi Agreement in particular was able to confer on them the right of ownership under Serbian law.

638. As explained above, ownership of shares protected under Article 1 of the Canada – Serbia BIT relates to right in *rem*. By definition, a shareholder in a joint stock company (as an owner of shares) is able to invoke his ownership and to use rights stemming from ownership towards the company itself and all third parties. Claimants, on the other hand, submit that their ownership does not “*hinge on the enforceability of the Claimants’ beneficial ownership against BD Agro or against the Privatization Agency.*”¹⁰²⁰ Claimants also assert that “[T]here is no requirement under international law that the bundle of rights creating beneficial ownership be enforceable against anyone other than the nominal owner.”¹⁰²¹ This cannot be correct with regard to the ownership of shares in a company. The ownership of BD Agro’s shares that cannot be enforced against BD Agro is not ownership at all, at least not in the meaning contemplated by Article 1 of the BIT. In support of their contention Claimants rely on *Occidental v. Ecuador* and *Saghi v. Iran*.¹⁰²²

639. Contrary to the Claimants’ interpretation, the Committee in *Occidental* did not conclude that the AEC’s contractual rights, created under the Farmout Agreement, must enjoy protection regardless of whether such rights are enforceable against PetroEcuador or Ecuador.¹⁰²³ The Annulment Committee did not decide on whether the hypothetical claim of AEC against Ecuador would be justified since AEC did not participate in the arbitration. All that can be inferred from the decision on annulment in *Occidental* is a general proposition that AEC can enjoy protection of its beneficial interest under the relevant BIT concluded by its home state.¹⁰²⁴ The Committee did not in any way suggest that AEC’s potential claim would be sustained and, most importantly, it did not opine that economic rights acquired in breach of contract or the host State’s law must be protected, regardless of whether or not those rights are enforceable against the State, which seems to be the Claimants’ understanding.

¹⁰²⁰ Claimants’ Reply, para. 563.

¹⁰²¹ Claimants’ Reply, para. 563.

¹⁰²² Claimants’ Reply, para. 563.

¹⁰²³ Claimants’ Reply, para. 563.

¹⁰²⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, para. 272, **CLA-5**.

640. Claimants' reliance of the Iran – US Claims Tribunal's (IUSCT) award in *Saghi v. Iran* is equally misplaced. Claimants invoke *Saghi* in an attempt to prove that the protection of beneficial ownership of shares does not depend on whether or not such form of ownership exists under particular national law.¹⁰²⁵ However, the offered analysis is fatally flawed since it fails to account for crucial differences between the instrument that served as a jurisdictional basis in *Saghi* and the Canada – Serbia BIT. The Iran – US Claims Tribunal drawn its jurisdiction from the Claims Settlement Declaration (CSD) between the US and Iran.¹⁰²⁶ The CSD established the jurisdiction of the IUSCT for outstanding claims of nationals of the two respective countries against the other, arising out of “*debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights...*”.¹⁰²⁷ The instrument in question, therefore, creates *ratione materiae* jurisdiction of the IUSCT that is particularly broad – it includes all claims with regard the measures affecting any property right. The IUSCT itself in *Saghi* recognized that the tribunal's jurisdiction is broad enough to include the beneficial ownership within the definition of “*ownership interest*” referred to in the CSD.¹⁰²⁸
641. In contrast, the consent to arbitration offered by Canada and Serbia in Article 1 of the BIT is much narrower. The consent only relates to “*covered investments*” within the meaning of the relevant provision. In the dispute at hand, Claimants' case depends on whether they are able to prove the acquisition of ownership with regard “*share, stock or other form of equity participation in an enterprise.*”¹⁰²⁹ As already elaborated earlier, Claimants can be considered to be the owners of shares in a joint stock company in Serbia, only if they have fulfilled the conditions for the acquisition of those shares proscribed by Serbian law.
642. However, even if it is accepted, for the sake of the argument, that the ownership of “*a share, stock or other form of equity participation in an enterprise*”¹⁰³⁰ could have some universal meaning, rather than be interpreted in accordance with the law of

¹⁰²⁵ Claimants' Reply, para. 564.

¹⁰²⁶ Iran – US Claims Settlement Declaration, **RLA-173**.

¹⁰²⁷ Article II of the Iran - US Claims Settlement Declaration, **RLA-173**.

¹⁰²⁸ James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran, IUSCT Case No. 298, Award, para. 24, **CLA-80**.

¹⁰²⁹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, **CLA-1**.

¹⁰³⁰ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, **CLA-1**.

Respondent, the Sembi Agreement is simply not an instrument which could result in transfer of beneficial ownership to Sembi and the Canadian Claimants, regardless of the law applicable to it (Serbian or the law of Cyprus). This is explained in detail below.

1.3.2. The Sembi Agreement was concluded in breach of the prohibition of assignment from the Law on Privatization

643. Under the scenario offered by Claimants, the alleged transfer of beneficial ownership here was a result of the assignment of the “*rights, title and obligations*” in the Privatization Agreement by Mr. Obradović to Sembi. The law applicable to the Privatization Agreement specifically prohibited such assignment without the prior authorization of the Privatization Agency:

*“Subject to prior consent of the Agency, the buyer of the capital (hereinafter: assignor) may assign the agreement on sale of the capital or property to a third party (hereinafter: assignee) under the conditions stipulated by this law and the law on obligations.”*¹⁰³¹

644. The way in which Claimants deal with this obstacle in their submission is peculiar.

645. First, Claimants admit that the *assignment of the Privatization Agreement and the Beneficially Owned Shares was thus never effective vis-à-vis the Privatization Agency, or BD Agro.*¹⁰³² Respondent does not dispute this contention.

646. However, Claimants do not explain how exactly the Agency (to which Claimants refer as the organ of Serbia) could be held responsible towards Claimants for the termination of the Privatization Agreement or for its refusal to release the Pledge on Mr. Obradović’s shares in BD Agro, if the assignment of the Agreement and the BD Agro’s shares was never effective in relation to the Agency. The premise on which the Claimants’ argument rests is genuinely nonsensical: the Agency (and Respondent) should be responsible for the alleged breach of the contract assigned to a third party (Sembi), even though it was unaware of Sembi’s existence and regardless of the fact that it did not authorize the assignment of the Privatization Agreement, based on the

¹⁰³¹ 2001 Law on Privatization, Article 41ž (emphasis added), CE-220.

¹⁰³² Claimants’ Reply, para. 541.

choice of law clause from the Sembi Agreement which the Agency did not conclude. This is beyond absurd.

647. The Canada – Serbia BIT excludes situations such as this from its scope. Article 2(1) of the BIT reads:

“This Agreement shall apply to measures adopted or maintained by a Party relating to:

(a) an investor of the other Party; and

(b) a covered investment.”¹⁰³³

648. A similar provision contained in Article 1101(1) of the North American Free Trade Agreement (NAFTA) has been interpreted by NAFTA tribunals as demanding a legally significant connection between the measure and the investor for the application of the treaty.¹⁰³⁴

649. Since the assignment of the Privatization Agreement to Sembi was not effective *vis-à-vis* the Agency, the measures complained of – termination of the Privatization Agreement and refusal to lift the pledge over the shares – were adopted in relation to the other contractual party *i.e.* Mr. Obradović, and not Claimants. The Agency cannot be held responsible because its lawful termination of the Privatization Agreement indirectly affected Mr. Obradović’s contractual relationship with a third party (Sembi/MDH). It would not be reasonable to interpret the Canada – Serbia BIT in a way that Respondent intended to subject itself to arbitration based on a measure taken in relation to a domestic investor, regardless of incidental effects that the measure may or may not have on Mr. Obradović’s contracts with third parties.

650. Liability of a third party for interference with the contract can be established on the basis of actual notice, *i.e.* only if a third party (in this case: the Agency) has an actual knowledge that the contractual relationship with which its actions interfere actually

¹⁰³³ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 2(1), **CLA-1**.

¹⁰³⁴ *Methanex Corporation v. United States of America* (UNCITRAL), Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, para. 139, **RLA-187**; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, para. 240, **RLA-169**.

exists. The difference between property rights (such as rights in *rem*) and contractual rights in the context of expropriation was given by the tribunal in *Accession Danubius v. Hungary*.¹⁰³⁵ The tribunal explained the difference in the following manner:

*“It is widely accepted that a state can be liable for an indirect or de facto expropriation regardless of whether the state intended to expropriate the rights in question or whether it even had actual knowledge of the existence of the investor’s rights to property. This is defensible because everyone, including the state and its organs and officials, has constructive notice of property rights. Property rights are good against the whole world. For this reason, in many national legal systems, liability for the usurpation of control over someone else’s property does not require actual notice of the rights to that property and liability for damage to someone else’s property is also imposed without the requirement of actual notice.”*¹⁰³⁶

651. The tribunal continued to make a distinction with regards contractual rights:

“150. This is not defensible, however, in relation to rights that are not property rights, such as pure contractual rights.

151. A contractual right is a right to the performance of someone. The characteristics of that someone, the dutyholder, are of fundamental importance to the rightholder. Is the dutyholder good for the money? Does the dutyholder have the necessary expertise or qualifications or resources or reputation or experience to give the performance that the rightholder has bargained for? In contrast, the holder of a property right has no means of ascertaining the identity of the potential dutyholders and their personal attributes ex ante. For this reason, the obligations of third parties in respect of property rights are simple and straightforward: property rights always generate duties of abstention.

152. In national legal systems, liability for interferences with contractual rights can only be imposed on the basis of actual notice; whereas in relation

¹⁰³⁵ *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyongkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, **RLA-148**.

¹⁰³⁶ *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyongkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, para. 149, **RLA-148**.

to property rights there is no requirement for actual notice. In the contractual context, a party to a contract has actual notice of its counterparty's rights under the contract and of course can be liable for breaching its corresponding obligations. In the limited circumstances in which a third party can be liable for interferences with contractual rights, there must also be actual notice of such rights in the form of a specific intent to cause prejudice to them; this is domain of the intentional tort for procuring a breach of contract that exists in many national legal systems."¹⁰³⁷

652. The Agency in the case at hand neither knew nor ought to have known that, by declaring termination of its contract with Mr. Obradović, it affects the performance of Mr. Obradović's contractual obligations towards Sembi. This is why no liability of Respondent can arise under international law in such circumstances.
653. The second step of the Claimants' analysis is a contention that, although the assignment was prohibited by the Law on Privatization, the prohibition relates only to the assignment of legal title to the Privatization Agreement, and not to the transfer of beneficial ownership in any rights/assets.¹⁰³⁸
654. The Claimants' argument in reality rests, once again, on the assumption that the prohibition of assignment in the Law on Privatization does not relate to the assignment of economic rights of a contractual party and does not affect the validity of the assignment of those rights between Mr. Obradović and Sembi.
655. This kind of interpretation would effectively mean that any agreement for sale of socially-owned entities during the privatization process in Serbia could be transferred (together with the right of ownership acquired by the privatization agreement) despite the explicit prohibition on assignment under the Serbian legal framework for privatization. The buyer (in this case, Mr. Obradović) would retain only a nominal title in the agreement, while all his interest and rights would be transferred to a third party. All that would be required is that an assignor and an assignee make a provision for the application of the law of Cyprus in their contract. The argument is not only absurd but it fails simply because the prohibition of assignment in Article 41ž means

¹⁰³⁷ *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyongkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015 (Emphasis added), **RLA-148**.

¹⁰³⁸ Claimants' Reply, paras. 116-119.

prohibition on assignment of *both nominal and beneficial interest* in the Privatization Agreement. There are two main points to be made here.

656. First, the contention similar to the one used here by Claimants was already tested and rejected by the tribunal in the case on which Claimants heavily rely – *Occidental v. Ecuador*.¹⁰³⁹
657. In *Occidental v. Ecuador*, claimants argued that the contract concluded between Occidental and AEC, a Bermudan company (the Farmout Agreement), by which Occidental assigned 40% of its economic interest in, *inter alia*, the Participation Contract that it had previously entered into with PetroEcuador, a national oil company of Ecuador, did not represent an assignment of contractual rights.¹⁰⁴⁰ The assignment was specifically prohibited by the Participation Contract, without prior authorization from the relevant Ministry.¹⁰⁴¹ Claimants contended that the Farmout Agreement contemplated two different phases – first, in which Occidental would transfer 40% of its *economic interest* in the Participation Contract, and second, in which the assignment of the *legal title* to the Participation Contract would be assigned to AEC, subject to the prior governmental approval. Claimants in *Occidental* argued that the restriction on assignment from the Participation Contract applied only to the transfer of the nominal legal title in interest of a contracting party.¹⁰⁴² The argument was met with the outright rejection by the tribunal:

“Although the Farmout was sometimes characterized by the Claimants as “merely” transferring to AEC, in 2000, a 40% economic interest in Block 15, as opposed to legal title to an interest in Block 15, the Tribunal does not accept that the transaction, whatever may have been the parties’ intention, did not serve to effectuate a transfer of rights and obligations requiring authorization on the part of the Ecuadorian authorities. As noted above, neither the Participation Contract nor the HCL allow a narrow reading of

¹⁰³⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, **CLA-75**.

¹⁰⁴⁰ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 213, **CLA-75**.

¹⁰⁴¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 299, **CLA-75**.

¹⁰⁴² *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 213, **CLA-75**.

*the concepts of transfer or assignment. They must be read as including all forms of such transfers or assignments, be they total or partial in nature.”*¹⁰⁴³

658. Just as it was the case with the Farmout Agreement in *Occidental*, contractual parties to the Sembi Agreement clearly intended for Sembi to take place of Mr. Obradović in the Privatization Agreement and to acquire all of Mr. Obradović’s “*right, title and interest*” in the Agreement. Article 41ž of the Law on Privatization cannot be interpreted as to allow a buyer of the privatized entity to transfer all of his rights and interest in the privatization agreement to a third party and to retain only a formal position of a contractual party. For that reason only, Claimants’ contention that the Sembi Agreement resulted in the acquisition of the beneficial title to the Privatization Agreement and to BD Agro’s shares¹⁰⁴⁴ must fail.

659. Second, Claimants allege that Serbian law recognizes the concept of beneficial ownership and the division between the nominal and beneficial title over property.¹⁰⁴⁵ If this contention, *arguendo*, is accepted as correct, this would only imply that the prohibition stipulated in Article 41ž of the Law on Privatization must be interpreted in that context as well – as a prohibition of transfer of *both nominal title and economic interest* in the Privatization Agreement without the proper authorization. Provisions of Serbian law regulating the ownership of property cannot be interpreted sometimes as referring only to the nominal ownership (when Claimants attempt to avoid restrictions on transfer imposed by relevant laws) and sometimes as denoting both the beneficial and nominal ownership (when it suits the Claimants’ attempts to prove that Serbian law allows for the acquisition of the beneficial ownership). Claimants simply cannot have it both ways.

1.3.3. The prohibition from the Law on Privatization invalidates the assignment of rights created under the Privatization Agreement

660. The prohibition of assignment of the Privatization Agreement without prior approval from the Agency is, in this particular instance, fatal for the Sembi Agreement even under the rules of Cyprus law.

¹⁰⁴³ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 306, **CLA-75**.

¹⁰⁴⁴ Claimants’ Reply, para. 542.

¹⁰⁴⁵ Claimants’ Reply, para. 523.

661. First, under the Cypriot choice of law rules, the assignability of claims stemming from the Privatization Agreement is governed by Serbian law.
662. As explained by Professor Emilianides, Article 14(2) of the Rome I Regulation on the law applicable to contractual obligations, applied by courts in Cyprus, envisages that the law governing the assigned claim shall be applicable to its assignability.¹⁰⁴⁶ In the case at hand, the object of the purported assignment are claims from the Privatization Agreement, and the Privatization Agreement is governed by Serbian law.¹⁰⁴⁷ Parties to the Sembi Agreement (Sembi and Mr. Obradović) were free to designate the law of Cyprus as applicable to their contractual relationship.¹⁰⁴⁸ Nevertheless, the assignability of claims from the Privatization Agreement is not governed by the same law: “[t]he question whether a right is capable of assignment, and if so under what conditions, is governed by the law applicable to the claim and not the law of the contract of assignment.”¹⁰⁴⁹ Consequently, as long as the law applicable to the assignability of claims (i.e. Serbian law) contained prohibition on assignment (which it did), such assignment would not be recognized as effective and legally binding by Cypriot courts.¹⁰⁵⁰
663. Second, based on the expert report submitted by Mr. Georgiades, Claimants argue that even when the original contract prohibits assignment, the assignment is still valid “*in equity*” between the assignor (Mr. Obradović) and the assignee (Sembi).¹⁰⁵¹ This argument is misplaced even *prima facie* since, as explained, the validity of the assignment (assignability of claims) is governed, according to the choice of law rules applicable in Cyprus, not by the law of Cyprus but by Serbian law.
664. However, even if accepted, for the sake of the argument, that the substantive law of Cyprus is relevant in this particular instance, the argument raised by Claimants is still fatally flawed since it fails to mention the crucial caveat - the prohibition from the original contract invalidates the assignment even under the rules of equity invoked here by Claimants, if the identity of the original contractual party (the assignor) is of

¹⁰⁴⁶ Expert Report of Professor Achilles C. Emilianides, para. 14.

¹⁰⁴⁷ Expert Report of Professor Achilles C. Emilianides, para. 17.

¹⁰⁴⁸ Expert Report of Professor Achilles C. Emilianides, para. 17.

¹⁰⁴⁹ Expert Report of Professor Achilles C. Emilianides, para. 19.

¹⁰⁵⁰ Expert Report of Professor Achilles C. Emilianides, para. 23.

¹⁰⁵¹ Claimants’ Reply, para. 541.

importance to the debtor.¹⁰⁵² Here, the identity of the buyer as a contracting party under the terms of the Privatization Agreement was of particular importance for the Agency. The Privatization Agreement could not have been concluded with just any person or an entity. As explained previously by Professor Radovic, the agreement for sale of socially-owned capital in privatization could have been concluded only with the winner of public auction and the buyer had to fulfill certain conditions from the Law on Privatization and to submit certain statements and certificates.¹⁰⁵³ Hence, even application of the rules of equity would not render valid the assignment under the Sembi Agreement.

665. Third, Professor Emilianides also explains that, according to the Cypriot contractual law, a contract that is considered void under the relevant statutory rules cannot create any rights in equity.¹⁰⁵⁴ The assignment agreement is void if the assignment prejudices the interest of the debtor and cannot create any effect, even between the assignor and the assignee.¹⁰⁵⁵
666. Fourth, relaying on the expert report of Mr. Georgiades,¹⁰⁵⁶ Claimants argue that the prohibition of assignment in the original contract (the Privatization Agreement) would not prevent the interpretation of the Sembi Agreement as a declaration of trust between the assignor and the assignee.¹⁰⁵⁷ The obvious problem with the Claimants' theory is that such declaration by Mr. Obradović is nowhere to be found in the Sembi Agreement. In addition, the construction of a transaction as a declaration of trust is impossible when it is inconsistent with wording or purpose of the original contract¹⁰⁵⁸ which was certainly the case with the Privatization Agreement.
667. In sum, even if the Claimants' contention that Claimants' alleged beneficial ownership depends solely on whether their rights under the Sembi Agreement are enforceable against Mr. Obradović under the law of Cyprus¹⁰⁵⁹ is accepted as correct, Claimants' case still fails when measured against the standard suggested by Claimants – rights

¹⁰⁵² Expert Report of Professor Achilles C. Emilianides, para. 35.

¹⁰⁵³ First Expert Report of Professor Mirjana Radovic, para. 89.

¹⁰⁵⁴ Expert Report of Professor Achilles C. Emilianides, paras. 30, 31.

¹⁰⁵⁵ Expert Report of Professor Achilles C. Emilianides, para. 31

¹⁰⁵⁶ Georgiades Second ER, para. 3.20.

¹⁰⁵⁷ Claimants' Reply, para. 541.

¹⁰⁵⁸ Expert Report of Professor Achilles C. Emilianides, para. 34.

¹⁰⁵⁹ Claimants' Reply, para. 563.

supposedly conferred upon Sembi under the Sembi Agreement are not enforceable under the Cypriot law.

668. Accordingly, the Sembi Agreement was unable to confer any rights upon Claimants, irrespective of the applicable law (Serbian or the law of Cyprus).

669. Claimants are again unable to point to a single award of an investment tribunal in which it was accepted that the beneficial ownership of shares in a joint stock company, “*nominally*” owned by a natural person that is a citizen of a respondent state, was a valid jurisdictional basis. Instead, Claimants offer repeated reliance on *obiter* from the Annulment Committee’s decision in *Occidental Petroleum v. Ecuador*.¹⁰⁶⁰ Apart from the general proclamation that “*neither the international law principles nor the Committee’s decision imply that investors holding beneficial ownership are left unprotected from interferences by host States*”, the decision does little to help Claimants’ case. In fact, the analogy works directly against it.

670. Both the Committee’s decision and the award of the tribunal in *Occidental* clearly suggest that the beneficial interest in a contract cannot validly be acquired if the contractual framework prohibits assignment of contractual rights and duties. The major difference and the point of disagreement between the tribunal and the Committee was the issue of whether the nullity of the assignment must be declared by a judge under the law of Ecuador: while the tribunal held that the Farmout Agreement, because it was concluded without proper governmental authorization, “*lacked an essential element required for life*” and that there was no requirement that the assignment be declared invalid by a judge,¹⁰⁶¹ the Committee disagreed and held that the Ecuadorian Civil Code requires the nullity of the contract to be declared by a judge “*in order to produce the voidance of a validly executed contract.*”¹⁰⁶²

¹⁰⁶⁰ Claimants’ Reply, paras. 549-555.

¹⁰⁶¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 626, **CLA-75**.

¹⁰⁶² *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, para. 233, **CLA-5**.

671. Under Serbian law, the contract concluded in breach of an imperative rule of law is null and void *ab initio*, and has no effect whatsoever without the need for the declaration of the competent court.¹⁰⁶³ Claimants do not argue otherwise.
672. Instead, Claimants engage into unnecessary debate on whether private parties to a contract can designate the law applicable to their contractual relationship.¹⁰⁶⁴ It is one thing to state that the parties to a contract can select the law that will govern their contractual relationship *inter partes*. It is another thing completely to claim that the designation of foreign law can somehow dispose of requirements of Serbian law for the acquisition of shares in joint stock companies or nullify an imperative rule contained in Article 41Ž of the Law on Privatization.
673. Claimants submit, *inter alia*, that “*Contracts governed by “foreign law” are routinely accepted as protected investment and their validity is not being tested against the host State’s law.*”¹⁰⁶⁵ This contention is naturally correct with regards investment contracts entered into by an investor and a host state or a state-owned company. In fact, all authorities relied on by Claimants in order to support their argument fall into this category.¹⁰⁶⁶ More importantly, none of those cases is analogue to the case at hand and to the Sembi Agreement – designation of a foreign law as applicable in a contract between two private parties, with an aim to circumvent and replace mandatory rules on acquisition of proprietary rights in place in Serbia with the law of Cyprus. A state is obviously free to designate foreign law as applicable to its contractual relationship with the other contracting party. However, it does not follow from this that two private parties (Mr. Obradovic and Sembi) could opt for the applicability of any national law to their contract and that such choice of law could (unbeknownst to Respondent)

¹⁰⁶³ First Expert Report of Professor Mirjana Radovic, para. 83.

¹⁰⁶⁴ Claimants’ Reply, paras. 572, 573.

¹⁰⁶⁵ Claimants’ Reply, para. 574.

¹⁰⁶⁶ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, paras. 12, 13, **CLA-67** (designation of English law as applicable in a Heading Agreement between *Deutsche Bank* and *Ceylon Petroleum Corporation* (CPC), Sri Lanka’s national petroleum company); *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 48-51, **CLA-81** (sovereign bonds issued by Argentina in international financial markets, denominated in foreign currency and governed by the laws of different jurisdictions); *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, para. 5.1., **CLA-82** (the Offtake Agreement concluded between the claimant (*Koch Nitrogen International*) and *Petroquímica de Venezuela* (a wholly-owned subsidiary of Venezuela’s state-owned oil company, designating the New York law as applicable).

render mandatory rules of the Law on Privatization inapplicable or create proprietary effects that otherwise would not exist under Serbian law.

674. In any event, the argument made by Claimants is irrelevant since, as previously noted, neither the application of Serbian nor the law of Cyprus could result in Sembi's acquisition of Mr. Obradovic's rights under the Privatization Agreement, including the ownership of BD Agro's shares.

1.3.4. The transfer of beneficial ownership does not follow from the text of the Sembi Agreement

675. Finally, perhaps the most significant deficiency of the Claimants' jurisdictional theory is the fact that the Sembi Agreement on its face does not purport to transfer beneficial ownership from Mr. Obradović to Sembi. The Sembi Agreement only focuses on assignment of the Privatization Agreement and does not contain any provisions on voting at the shareholders meetings of BD Agro, transfer of risk or transfer of income from shares etc. This is why it cannot serve as basis for establishing beneficial ownership.¹⁰⁶⁷

676. Claimants rely on *Anglo – Adriatic v. Albania* as an authority for the proposition that “*even where an instrument conferring beneficial ownership contains significant deficiencies—including an allegedly incorrect identification of who transfers the shares to whom—the tribunal should examine whether the subsequent conduct of the parties confirms their alleged intention to create such a beneficial ownership.*”¹⁰⁶⁸ Claimants' interpretation of the *Anglo – Adriatic* award is utterly wrong. In fact, the tribunal's award demonstrates precisely the opposite – whether an instrument can be seen as transferring beneficial ownership in shares is the fact that needs to be discerned objectively, based on the text of the instrument and not on the investor's after-the-fact interpretation of his own intent.

677. In *Anglo – Adriatic*, the tribunal analyzed the Trust Deeds that supposedly vested the beneficial ownership of shares in the claimant (*Anglo – Adriatic Group* or *AAG*). Although *AAG* claimed that its designation as both the settlor and the beneficiary in

¹⁰⁶⁷ Second Expert Report of Professor Mirjana Radovic, para. 73.

¹⁰⁶⁸ Claimants' Reply, para. 570.

the Trust Deeds was “*a mistake*”¹⁰⁶⁹ and submitted expert opinions that the Trust Deeds were valid and enforceable under the English law that governed them,¹⁰⁷⁰ the tribunal still deemed the beneficial ownership of the claimant as nonexistent.¹⁰⁷¹ This is despite the fact that AAG submitted that the intent of the parties was always to establish a relationship in which trustees would hold shares for the benefit of AAG.¹⁰⁷² The tribunal’s finding was not affected by testimonies of supposed trustees that they held their shares in trust for AAG.¹⁰⁷³ The tribunal simply concluded that: “*this is not the reality which the Trust Deeds represent.*”¹⁰⁷⁴

678. The main problem which Claimants face with regard to the Share Purchase Agreement and, more importantly, the Sembi Agreement is to explain why those instruments are not even cryptic but virtually silent when it comes to the alleged transfer of the beneficial ownership from Mr. Obradović to Mr. Rand (MDH and Sembi). In all awards that Claimants invoke in support of their beneficial ownership argument, legal instruments used as basis of investors’ supposed acquisition of beneficial ownership were at least unequivocal about parties’ intention to create such an effect.

679. For instance, in *Occidental v. Ecuador*, the Farmout Agreement clearly acknowledged the transfer of “*economic interest*” previously acquired by *Occidental* by way of its contract with the Ecuadorian national oil company to *AEC*, and specifically stated that *Occidental* would continue to hold that economic interest as a “*nominee*” or “*bare trustee*” for the benefit of *AEC*.¹⁰⁷⁵

¹⁰⁶⁹ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, para. 235, **RLA-7**.

¹⁰⁷⁰ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, para. 229, **RLA-7**.

¹⁰⁷¹ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, para. 247, **RLA-7**.

¹⁰⁷² *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, para. 235, **RLA-7**.

¹⁰⁷³ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, para. 200, **RLA-7**.

¹⁰⁷⁴ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, para. 232, **RLA-7**.

¹⁰⁷⁵ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 128, **CLA-75**.

680. In *Anglo – Adriatic*, the claimant’s case rested on trust deeds which (although not accepted by the tribunal as validly transferring the beneficial ownership in that case) expressly designated settlors, the beneficiary and trustees.¹⁰⁷⁶
681. In *Saghi v. Iran*, the claimants transferred shares in an Iranian company (*N.P.I.*) to the company’s nineteen employees and provided them with loans to buy the shares, by way of shareholder’s agreements.¹⁰⁷⁷ Those agreements were straightforward about the claimants withholding the beneficial ownership. The agreements stipulated that the Claimants would hold the shares in custody until the full repayment of loans and that the claimants would retain rights that “*shall be similar and equivalent to the owner of said shares in all respects and with no limitation*” including the right to transfer shares to third parties while the debts were outstanding.¹⁰⁷⁸
682. In the case at hand, the Sembi Agreement is anything but clear and unambiguous with regard to the alleged separation of the nominal and beneficial title in BD Agro’s shares and respective roles of Mr. Obradović and Claimants in those transactions. The Agreement, crucial for the establishment of Claimants’ alleged beneficial ownership at the time of the purported breach of the BITs, does not say anything about it. It does not stipulate that the economic interest in the Privatization Agreement or beneficial ownership of BD Agro would be held by Sembi. Nor does it designate Mr. Obradović as a nominee or a trustee for the benefit of Sembi. It is a typical agreement of assignment, concluded in breach of the legal rules applicable to the Privatization Agreement. Claimants invest considerable efforts to explain that the Sembi Agreement established a trust relationship between contractual parties even though the plain wording of the Agreement contradicts that argument. On its face, the Sembi Agreement simply does not say what Claimants wish it would. Just as in *Anglo – Adriatic v. Albania*, the reality that the Sembi Agreement presents is different.
683. For this reason alone, the assertion that the Sembi Agreement created beneficial ownership for Claimants must fail.

¹⁰⁷⁶ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, para. 228, **RLA-7**.

¹⁰⁷⁷ *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran*, IUSCT Case No. 298, Award, para. 30, **CLA-80**.

¹⁰⁷⁸ *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran*, IUSCT Case No. 298, Award, para. 30, **CLA-80**.

2. The issue of the alleged disclosure of Claimants' purported beneficial ownership

684. Claimants once again reiterate that they disclosed their beneficial ownership to Serbia and offer a list of governmental officials, as well as employees of the Agency that supposedly knew about the business arrangement between Mr. Obradovic and Mr. Rand.¹⁰⁷⁹ There are numerous problems with the Claimants' contentions.
685. First, documentary evidence on the record simply do not support Claimants' assertions. For instance, in order to prove that Mr. Bubalo, then the Minister of Economy, was aware of Mr. Rand's alleged beneficial ownership of BD Agro, Claimants rely on several documents which, for example, prove only that Mr. Bubalo had met with Mr. Rand who professed his interest to buy BD Agro before the public auction,¹⁰⁸⁰ that Mr. Bubalo discussed with Mr. Rand the possibility of Mr. Rand's acquisition of another company (Centroprom) in 2004,¹⁰⁸¹ or that Mr. Rand was in a possession of Mr. Bubalo's phone number.¹⁰⁸²
686. Second, there are no documents to prove that such disclosure was ever made in Claimants' *direct communication* with any governmental official. Claimants seem to argue that the Agency should consider itself duly notified about Mr. Rand's position as a contractual counter-party in the Privatization Agreement simply because Mr. Rand's claim on beneficial ownership of BD Agro was allegedly communicated to certain officials by third persons. For example, Claimants rely on the e-mail sent on 18 December 2013 by Mr. Kostić, a person acting without any official capacity, to Mr. Radulović, who was at the time Minister of Economy, asking Mr. Radulović to schedule a meeting with Mr. Rand's representatives.¹⁰⁸³ Mr. Radulović considered this matter to be in the competence of SIEPA (Serbian Investment and Export Promotion Agency) and immediately forwarded the e-mail to Mr. Vladimir Milenković who was at the time the director of the SIEPA.¹⁰⁸⁴

¹⁰⁷⁹ Claimants' Reply, paras. 581, 501-503.

¹⁰⁸⁰ E-mail from W. Rand to P. Bubalo dated 4 June 2005; **CE-14**.

¹⁰⁸¹ Letter from W. Rand to P. Bubalo, 1 November 2004, **CE-581**.

¹⁰⁸² E-mail from Aleksandra Janićić to Mr. Rand, 16 July 2008, **CE-704**.

¹⁰⁸³ Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, p. 3, **CE-769**.

¹⁰⁸⁴ Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, p. 1, **CE-769**.

687. The only written evidence that records Claimants' understanding of the ownership structure with regard to the BD Agro investment is an e-mail sent by Mr. Goran Džafić, an assistant director of SIEPA, to Mr. Milenković on 19 December 2013, describing the content of the Mr. Džafić's meeting with Messrs. Broshko and Markićević.¹⁰⁸⁵ However, the e-mail contains one crucial statement that was not mentioned in witness statements of Mr. Markićević and Mr. Broshko or in the Claimants' submissions: Mr. Rand's representatives explained that Mr. Obradović, although he had purchased BD Agro „in the name and for the account“ of Rand Investment, was registered as the owner “[S]ince our [Serbian] law does not recognize ownership in this form...”.¹⁰⁸⁶ Claimants were, therefore, perfectly aware that they could not be considered as owners of BD Agro under Serbian law.
688. This explains why Claimants were, while communicating directly with the Government and the Agency, rather discrete about their purported ownership. Respondent has already explained in its Counter-Memorial the way in which Claimants negotiated with the Agency and the Ministry of Economy in an attempt to take over Mr. Obradović's role in the Privatization Agreement.¹⁰⁸⁷ The negotiations took place between 2013 and 2015. During this time several letters were sent by Mr. Rand and Mr. Markićević to different Serbian officials, proclaiming Mr. Rand's intention to take over Mr. Obradović's ownership in BD Agro¹⁰⁸⁸ or his readiness to invest in BD Agro, once the privatization process is concluded or the Privatization Agreement assigned to one of his companies.¹⁰⁸⁹ There is not one reference to Mr. Rand's ownership of BD Agro in the entire communication on the record. This casts serious doubts on Claimants' contention that Mr. Rand's beneficial ownership was well known to the Agency and Respondent.
689. In Mr. Rand's letter of 18 September 2014 to the Serbian Prime Minister and the Minister of Economy there is no even a hint of the possibility that this could be a letter

¹⁰⁸⁵ Email communication between G. Džafić and I. Markićević, 19 December 2013, **CE-311**.

¹⁰⁸⁶ Email communication between G. Džafić and I. Markićević, 19 December 2013, p. 2, **CE-311**.

¹⁰⁸⁷ Respondent's Counter – Memorial, paras. 256-274.

¹⁰⁸⁸ Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, **CE-38**.

¹⁰⁸⁹ Letter from BD Agro to Privatization Agency dated 2 July 2015, **CE-46**; Letter from BD Agro to the Ministry of Economy and Privatization Agency dated 5 November 2014, p. 1, **CE-320**; Letter from BD Agro to the Privatization Agency dated 13 August 2014, **CE-316**.

of BD Agro's owner.¹⁰⁹⁰ Mr. Rand asked for the Ministry of Economy's approval for the transfer of ownership in BD Agro to Mr. Rand or one of his companies.¹⁰⁹¹ He pointed to the fact that he had financially supported BD Agro since the summer 2013 in the amount of approximately 450,000 euros.¹⁰⁹² The letter does not contain the assertion Claimants are making in the present arbitration – that Mr. Rand provided financing for the acquisition of BD Agro – let alone any statement that BD Agro was, in fact, in his ownership all along.

690. Claimants apparently consider that the lack of any indication of Mr. Rand's status as the owner was justified since "*the Privatization Agency already knew about Mr. Rand's beneficial ownership and obviously did not have any issue with it.*"¹⁰⁹³ This statement is disingenuous. Claimants were well aware that the Agency had no way of knowing about the arrangement between Mr. Obradović and Mr. Rand at the time. It should be noted that some of the "evidence" supposedly supporting Claimants' contention are genuinely bizarre. For instance, Claimants introduced as evidence a photograph of Mr. Obradović greeting Mr. Bubalo, during the official visit of the company by members of Serbian government in 2007, showing that several flags (Canadian included) were displayed at the entrance of the company.¹⁰⁹⁴ It seems that Claimants suggest that the presence of the Canadian flag should have serve as a formal notice that the owner of the company is Canadian and that the Agency (apparently, by way of association with Mr. Bubalo), should have known this. Respondent respectfully submits that this kind of arguments cannot be taken into serious consideration.

691. Third, even if Claimants' assertions that some governmental officials knew about Mr. Rand's role as a "true" owner of BD Agro are taken on their face as correct – that fact alone is still not able to create his right of ownership in BD Agro under Serbian law. The existence of a claim for the deprivation of property under international law depends on whether Claimants were holding that property in accordance with

¹⁰⁹⁰ Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, **CE-38**.

¹⁰⁹¹ Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, pp. 1-2, **CE-38**.

¹⁰⁹² Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, p. 2, **CE-38**.

¹⁰⁹³ Claimants' Reply, para. 590.

¹⁰⁹⁴ Claimants' Reply, para. 2.

applicable rules of Serbian law.¹⁰⁹⁵ By Claimants' own admission, this was not the case with BD Agro's shares.¹⁰⁹⁶

692. Fourth and most importantly, contrary to Claimants' assertions,¹⁰⁹⁷ Mr. Rand's alleged beneficial ownership was never disclosed to the Agency. In an effort to refute Respondent's arguments, Claimants resort to blatant mischaracterization of Respondent's statements. Respondent does not assert, as Claimants now suggest, that Serbia heard for Mr. Rand for the first time in 2013.¹⁰⁹⁸ However, it is certainly true that **the Agency** was presented with "*natural person from Canada who is interested in investing in the company BD Agro... and in this respect, interested to take over the Privatization Agreement of that company from the current majority shareholder*"¹⁰⁹⁹ and the Canadian investor who "...expressed serious interest in taking over the majority shareholding in BD Agro..." in 2013,¹¹⁰⁰ eight years after the Privatization Agreement was concluded.

693. Claimants now assert that Messrs. Broshko and Markićević disclosed Mr. Rand's beneficial ownership during the 30 January 2014 meeting with the Agency and argue against the nonexistent contention of Respondent that they cannot rely on the alleged disclosure because their representative did not offer any proof of ownership.¹¹⁰¹ To be clear – Respondent does not submit that Mr. Broshko's disclosure needed to be supported with evidence of ownership. It submits that such disclosure was never made. According to the Minutes of the meeting, Mr. Broshko stated that he represented the company which had provided all of the funds invested into BD Agro.¹¹⁰² He offered no proof to support that statement while the issue of ownership was never mentioned. To expect that the Agency should have somehow inferred from this statement that Mr. Rand was the beneficial owner of BD Agro under the law of British Columbia, at the time the Agency was negotiating about the transfer of ownership from Mr. Obradović to Rand Investment, is clearly absurd. It should be

¹⁰⁹⁵ *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April, 2016, para. 257, **CLA-32**.

¹⁰⁹⁶ Email communication between G. Džafić and I. Markićević, 19 December 2013, p. 2, **CE-311**.

¹⁰⁹⁷ Claimants' Reply, para. 588.

¹⁰⁹⁸ Claimants' Reply, para. 10.

¹⁰⁹⁹ E mail from Mr. Jakovljević to the Privatization Agency of 16 April 2013, **RE-108**.

¹¹⁰⁰ Letter from BD Agro to the Ministry of Economy and Privatization Agency dated 5 November 2014, p. 1, **CE-320**.

¹¹⁰¹ Claimants' Reply, para. 588.

¹¹⁰² Minutes of the meeting in the Privatization Agency of 30 January 2014; **RE-28**.

noted, however, that even this statement of Mr. Broshko was not correct. It contradicts the witness statement of Mr. Obradovic who himself testifies that the necessary funds were obtained through the loan agreement concluded between Mr. Obradović and the Lundin Family.¹¹⁰³

694. Obviously displeased with the content of minutes and other documents created by the Agency during the course of the Agency's contractual relationship with Mr. Obradović, Claimants suggest that the Tribunal should take a peculiar approach when assessing the evidentiary value of documents. Since those documents are "*in stark contradiction*" with witness statements of Mr. Broshko and Mr. Markićević, the Tribunal should, in Claimants' opinion, accept the witness statements of two individuals materially interested in the outcome of the proceeding as true and disregard the documents provided by Respondent.¹¹⁰⁴ Respondent submits that such innovative approach in determination of probative value of documents should not be followed by the Tribunal.

695. In any event, even the evidence submitted by Claimants themselves reveals that Claimants never communicated the alleged beneficial ownership of Mr. Rand to the Agency. In September 2015, more than a year and a half after the purported disclosure of Mr. Rand's beneficial ownership in the January 2014 meeting, Mr. Obradović sent a letter to the Agency asking it to release the pledge on his shares and to issue a decision on the successful completion of the privatization process.¹¹⁰⁵ In the letter (supposedly drafted by, *inter alia*, Messrs. Broshko and Markićević and approved by Mr. Rand)¹¹⁰⁶ Mr. Obradović once again refers to Mr. Rand as "*reputable Canadian investor*" ready to invest in BD Agro once the privatization process is finalized:

*"However, a precondition for Mr. Rand (as well as for any other serious investor) to invest money in BD Agro is 1) completion of the BD Agro privatization procedure and 2) deletion of pledge on shares. These are minimal security conditions that every serious investor will need in order to invest money in BD Agro."*¹¹⁰⁷

¹¹⁰³ Second Witness Statement of Mr. Obradovic, 3 October 2019, paras 19 and 20.

¹¹⁰⁴ Claimants' Reply, paras. 322, 323.

¹¹⁰⁵ Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, **CE-48**.

¹¹⁰⁶ Claimants' Reply, para. 615.

¹¹⁰⁷ Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, p. 5, **CE-48**

696. It seems, therefore, that the role of Mr. Rand regressed once more from the “beneficial owner of BD Agro” in January 2014, to a potential Canadian investor in September 2015. This again clearly demonstrates the disingenuous character of Claimants’ assertions with regards the communication with the Agency.
697. Furthermore, the Agency would not enter into the Privatization Agreement with Mr. Obradović, had it known that it was in fact selling BD Agro to a third person (MDH/Mr. Rand). This is for the simple reason that such arrangement would be illegal under Serbian legal framework for privatization. As previously explained, agreements for sale of socially-owned capital were agreements concluded with the winner of the public auction. The buyer had to fulfill certain legal prerequisites in order to participate in auction and to make several warranties and disclosures when entering the contract.¹¹⁰⁸ In addition, some options and incentives were offered exclusively to buyers who possessed Serbian citizenship and were indeed used by Mr. Obradović. The option to pay the purchase price in installments could not be given to Mr. Rand without the breach of the legislation in force at the time.¹¹⁰⁹ Therefore, the assertion that “[M]r. Rand’s role did not contravene the Law on Privatization in any manner”¹¹¹⁰ is clearly inapposite.
698. Fifth, Claimants apparently attempt to downplay the importance of the disclosure to the Agency by stating that the disclosure of the transfer of beneficial ownership to a third party does not invalidate the transfer of ownership. Relying on *Anglo – Adriatic* case, Claimants invoke the principle that cannot be found in the text of the tribunal’s award: a deficient contract allegedly establishing beneficial ownership can still create the effect of transfer if this was the intention of the parties.¹¹¹¹ In this paradigm, a disclosure of transfer is only one of the factors in determining the intention.¹¹¹² In the cases such is the present one – in which the transfer of ownership should have been authorized by the other contracting party in the Privatization Agreement – the issue of the disclosure is far more important. The issue of the disclosure (or rather the lack of it) goes to the heart of the matter in the dispute at hand. The undeniable fact is that the Agency never accepted, acknowledged or considered Mr. Rand or Sembi to be the

¹¹⁰⁸ Respondent’s Counter – Memorial, para. 246.

¹¹⁰⁹ See above, para. 68.

¹¹¹⁰ Claimants’ Reply, para. 589.

¹¹¹¹ Claimants’ Reply, para. 591.

¹¹¹² Claimants’ Reply, para. 591.

contractual party to the Privatization Agreement. This is why any measure that the Agency adopted with regard to the Privatization Agreement, including its termination, was a measure relating to Mr. Obradović and not to Claimants. This puts measures that Claimants are complaining of outside of the Canada – Serbia BIT’s scope under Article 2.

3. The Canadian Claimants did not control BD Agro’s shares owned by Mr. Obradović

699. In their Reply, Claimants once again assert that Mr. Rand controlled shares of BD Agro owned by Mr. Obradović.¹¹¹³ Jurisdiction of the Tribunal depends on Claimants’ ability to prove the existence of control over the investment under article 1 of the Canada – Serbia BIT,¹¹¹⁴ at the time of the alleged breach.¹¹¹⁵ For reasons set out below it is clear that Claimants failed to meet the burden of proof in this regard.

700. First, Claimants built their case arguing that Mr. Rand exercised *control over BD Agro*. However, this is irrelevant in the case at hand. Claimants’ purported investment is “*a share, stock or other form of equity participation in an enterprise*” in the meaning of the Canada – Serbia BIT. Consequently, Claimants need to establish the existence of control over shares (stock) acquired by Mr. Obradović.

701. In order for the control over the investment to be protected under the BIT, Claimants must first demonstrate that they invested funds in the acquisition of the investment. Otherwise, the mere fact that Claimants controlled the investment would not qualify such control for the protection under the BIT. This was the reasoning adopted by the *B Max v. Mexico* tribunal in a similar context of control over an enterprise under NAFTA Article 1117:

“Article 1117 cannot be read as allowing the nationals of one NAFTA Party to pursue Treaty claims on behalf of an enterprise of another NAFTA Party if they cannot show to have an investment in that enterprise. If the Claimants were right, it might be possible, for example, for a Mexican company to

¹¹¹³ Claimants’ Reply, Section III.A.1.e.

¹¹¹⁴ *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, para. 401, **RLA-11**.

¹¹¹⁵ *Vito G. Gallo v. The Government of Canada* (UNCITRAL), PCA Case No. 55798, Award, 15 September 2011, para. 325, **RLA-6**;

*appoint a US national as its sole director and for that director then to pursue claims under the Treaty on behalf of the Mexican company against Mexico, claiming that she need not be an “investor” herself to pursue such Treaty claim if she exercises de facto control. That proposition runs counter not only to the terms of Chapter 11, but also to its fundamental object and purpose, which is the protection of investments by investors of another NAFTA Party.”*¹¹¹⁶

702. Evidence on the record show that Mr. Rand did not invest in the acquisition of Mr. Obradović’s shares. In fact, funds necessary for the purchase of those shares were obtained partially from the loan taken by Mr. Obradović from the Lundin family.¹¹¹⁷ The largest ammount of the purchase price for the BD Agro’s capital was paid using BD Agro’s funds.¹¹¹⁸ What Claimants now ask is to be afforded the protection of the Canada – Serbia BIT simply based on the Mr. Rand’s alleged *de facto* control over shares bought and partially paid for by Mr. Obradović. This cannot be in accordance with the object and purpose of the BIT: the promotion and the protection of investments of investors of one Party in the territory of the other Party.¹¹¹⁹
703. Second, “control” necessarily means a legal capacity to control investment under the applicable law.¹¹²⁰ Relaying on the *B Mex* award, Claimants plead for the application of the criterion of *de facto* control.¹¹²¹ According to Claimants, an investor can establish control even without owning a single share in the company, as long as it is “otherwise able to exercise *de facto* control.”¹¹²² This is the test so broad that its application would widen the consent of Parties beyond any reasonable limits.
704. Applied to the circumstances of the particular dispute, *de facto* control advocated by Claimants suggests that just any person able to even informally influence Mr. Obradović’s decision making process could be considered protected investor under

¹¹¹⁶ B-Mex, LLC and others v. United Mexican States, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, para. 246, **CLA-83**.

¹¹¹⁷ Second Witness Statement of Mr. Obradovic, 3 October 2019, paras 19 and 20.

¹¹¹⁸ See above, paras. 327, 328.

¹¹¹⁹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Preamble, **CLA-1**

¹¹²⁰ 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, para. 264, **RLA-10**.

¹¹²¹ Claimants’ Reply, para. 601.

¹¹²² Claimants’ Reply, para. 601.

the BIT. It does not come as a surprise that no investment tribunal has ever accepted jurisdiction based on such subjective criterion alone: *de facto* control of one natural person over the other.

705. Claimants again rely on two paragraphs in the decision on annulment rendered by the Annulment Committee in *Caratube v. Kazakhstan* in support for their assertion that *de facto* control over an entity can be sufficient for establishing jurisdiction.¹¹²³ The Claimants' argument based on the Committee's decision is again equally misplaced.
706. The Committee in *Caratube* interpreted Article 25(2)(b) of the ICSID Convention (allowing parties to treat any juridical person of Contracting State party to the dispute as a national of another Contracting State, based on "*foreign control*"). It concurred with the finding of the *Caratube* tribunal that "control" represents *actual control* of an entity and that a tribunal may investigate whether actual control exists,¹¹²⁴ in addition to the legal control:

"Under Article 25(2)(b) a local juridical person, to have access to the ICSID adjudication mechanism, must be under "foreign control". For these purposes, control is the capacity of a person or a company to decide the main actions to be undertaken by a juridical person. Such juridical persons are usually governed by a corporate body (e.g., the general shareholders meeting), in which decisions are taken by votes. Control is premised on the right to cast a majority of votes in such main corporate body.

...

Control is a factual element. The ownership of a majority of the share capital, granting the capacity to cast a majority of the votes, constitutes circumstantial evidence of control and even creates a presumption of control. But, when applying Article 25(2)(b) of the Convention, tribunals may have to establish whether the presumption of control corresponds to the real situation or, in other words, whether

¹¹²³ Claimants' Reply, paras. 602, 603; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, paras. 253-254, **CLA-16**.

¹¹²⁴ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, para. 250, **CLA-16**.

*the formal majority owners of a company also exercise actual control over the company.”*¹¹²⁵

707. Therefore, the decision in *Caratube* clearly suggests that the actual control test is used in order to restrict jurisdiction of an ICSID tribunal (when the owner of an entity does not engage in actual control), not to broaden it based on *de facto* control.
708. Third, Mr. Rand did not have a legal capacity to control Mr. Obradović’s shares at the relevant time. Since control over the investment must exist at the time of the alleged breach,¹¹²⁶ and since the Share Purchase Agreement was terminated on 22 February 2008,¹¹²⁷ the only legal instrument that could possibly establish Mr. Rand’s capacity to control Mr. Obradović’s shares is the Sembi Agreement.¹¹²⁸ However, the Sembi Agreement was without effect under Serbian and the law of Cyprus and could not vest in Mr. Rand control over shares belonging to Mr. Obradović. As explained earlier, it is nothing more than a defective contract on assignment. As such, it could not prevent Mr. Obradović from voting his shares in any way he deemed appropriate, nor could it restrict Mr. Obradović in disposing of shares. Simply put – had there been no pledge over shares that Mr. Obradović purchased from the Privatization Agency, he would be entirely free to transfer those shares to any third person, and Mr. Rand would not be able to do anything to stop it.
709. Moreover, the plain reading of the text does not reveal how exactly the Sembi Agreement confers the control over Mr. Obradović’s shares to Mr. Rand. There are no provisions stipulating that, for example, Mr. Obradović assigns his voting rights to Mr. Rand or that Mr. Obradović is restricted in disposing of his shares. Claimants’ attempt to retrospectively read into the Sembi Agreement what simply is not there is of no avail.

¹¹²⁵ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, paras, 252, 255, **CLA-16**.

¹¹²⁶ *Vito G. Gallo v. The Government of Canada* (UNCITRAL), PCA Case No. 55798, Award, 15 September 2011, para. 325, **RLA-6**;

¹¹²⁷ Claimants’ Reply, para. 543.

¹¹²⁸ Agreement between D. Obradović and Sembi, 22 February 2008, **CE-29**.

710. Fourth, Claimants assert that Mr. Rand's control over BD Agro existed under criteria of Serbian law, relaying on certain provisions of the 2006 Takeover Law and the 2018 Law on Central Record of Ultimate Beneficial Owners.¹¹²⁹
711. This is again a discussion that is irrelevant for the Claimants' case on jurisdiction. What Claimants actually argue here is that the Tribunal should accept jurisdiction based on a premise that Mr. Rand indirectly controls Mr. Obradović's shares, by directly controlling Mr. Obradović. Serbian law does not allow for control of one natural person over the other. For example, the 2006 Takeover Law defines control (as a basis for acting in concert solely for the purpose of that Law) and allows for the control only over a legal person.¹¹³⁰ Likewise, Claimants' reliance on the Law on Central Record of Ultimate Beneficial Owners in support of the proposition that Serbian law allows for *de facto* control over joint stock companies is misplaced as well. This is so since the Law expressly excludes type of companies such as BD Agro (open joint stock companies) from its scope of application.¹¹³¹
712. As Professor Radovic explains in her expert report, relevant provisions for establishment of control over companies in Serbia are contained in the 2004 and the 2011 Law on Companies.¹¹³² Since neither MDH nor Sembi ever acquired shareholding in BD Agro, the only way in which Mr. Rand could indirectly and lawfully acquire control over BD Agro was through concluding a contract with BD Agro itself. Because the Share Purchase Agreement was concluded between MDH and Mr. Obradović (and not BD Agro), the contract was unable to validly give control of the company to MDH (Mr. Rand).¹¹³³ The same goes for the control supposedly obtained through the Sembi Agreement.¹¹³⁴
713. In any event, the Share Purchase Agreement and the Sembi Agreement could not serve as a valid basis for Mr. Rand's control after 9 December 2005 when Mr. Rand became a member of BD Agro's Board of Directors, since the contract by which a shareholder undertakes to use his voting rights upon the instructions of the company's director is

¹¹²⁹ Claimants' Reply, paras. 606-609.

¹¹³⁰ Second Expert Report of Professor Mirjana Radovic, para. 100.

¹¹³¹ Law on the Central Record of Ultimate Beneficial Owners, Article 2, **RE-519**.

¹¹³² Second Expert Report of Professor Mirjana Radovic, para. 75.

¹¹³³ Second Expert Report of Professor Mirjana Radovic, para. 85.

¹¹³⁴ Second Expert Report of Professor Mirjana Radovic, paras. 94, 95.

considered null and void according to the express stipulation of both the 2004 and the 2011 Law on Companies.¹¹³⁵

714. Fifth, even if it is accepted, *arguendo*, that the Tribunal’s jurisdiction depends on Claimants’ ability to demonstrate that Mr. Rand controlled BD Agro (and not Mr. Obradović’s shares as purported “investment”) and even if such control could exist without valid legal grounds for control (*de facto* control), Respondent submits that Claimants did not succeed in discharging the burden of proof in this matter.
715. Mr. Obradović’s ownership of BD Agro’s equity creates presumption of his control. This rule has been accepted by two different ICSID Annulment Committees. The *Caratube* Annulment Committee held, for instance, that the ownership of majority stake in the company’s capital, together with the right to cast a majority of votes in corporate bodies, creates such presumption.¹¹³⁶ The Annulment Committee in *Occidental v. Ecuador* confirmed that in, absence of special circumstances, the owner of a company must be deemed to control it as well.¹¹³⁷
716. It is up to Claimants to prove the existence of “*special circumstances*” which would rebut the presumption of Mr. Obradović’s control. In doing so, Claimants’ evidence must reach a threshold that is exceptionally high. In *Thunderbird v. Mexico*, the tribunal discussed the meaning of the term “control” contained in Article 1117 of NAFTA and held that the legal control over the company can be substituted by *de facto* control only if such control is proven beyond any reasonable doubt:

“The term “control” is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or “de facto” control is, in the Tribunal’s view, sufficient for the purposes of Article 1117 of the NAFTA. In the absence

¹¹³⁵ 2004 Law on Companies, Article 295, **RE-320**; 2011 Law on Companies, Article 359, **RE-321**; Second Expert Report of Professor Mirjana Radovic, paras. 90-92.

¹¹³⁶ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, para. 255, **CLA-16**.

¹¹³⁷ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, November 2, 2015, para. 104, **CLA-5**.

*of legal control however, the Tribunal is of the opinion that de facto control must be established beyond any reasonable doubt.*¹¹³⁸

717. The application of the *Thunderbird* standard of proof is particularly warranted here, since Claimants not only ask the Tribunal to accept jurisdiction based on Mr. Rand's informal influence over Mr. Obradović and his business, but, at the same time, to ignore the fact that the owner of BD Agro's majority capital had the full legal capacity to control the investment.
718. One of the key factors in establishing the existence of *de facto* control is the economic exposure to the business.¹¹³⁹ A person who is receiving an economic return from investment and can eventually be held responsible for improper decisions is the one controlling the investment.¹¹⁴⁰ In the case at hand, as shown by evidence that Respondent marshaled, it was Mr. Obradović who received economic gains from his business venture and it was Mr. Obradović who suffered both legal and economic consequences of decisions with regard to the BD Agro's business.
719. The record demonstrates that Mr. Obradović received and kept considerable sum of money from BD Agro. The constant flow of BD Agro funds to his personal accounts is comprehensively documented by Respondent in this proceeding.¹¹⁴¹ Most notable example is the payment that eventually resulted in the termination of the Privatization Agreement and was only discovered during the course of this arbitration.¹¹⁴²
720. Mr. Obradović used BD Agro's funds for his personal gain and for the benefit of his other companies.¹¹⁴³ Claimants attempted to rebut this fact by stating that other Mr. Obradović's companies to which he channeled BD Agro's assets were in fact beneficially owned by Mr. Rand.¹¹⁴⁴ However, this contention is easily disproved by documentary evidence.

¹¹³⁸ *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 106, **CLA-95**.

¹¹³⁹ *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, para. 240(e), **CLA-83**.

¹¹⁴⁰ *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 108, **CLA-95**.

¹¹⁴¹ See above, paras. 330-372.

¹¹⁴² See above, paras. 359, 360.

¹¹⁴³ See above, paras. 352-372.

¹¹⁴⁴ Rand Second WS, para. 6.

721. Shares of joint stock companies bought by Mr. Obradović in the privatization process (*Crveni Signal*, *PIK Pešter*, *Inex* and *Obnova*) were all transferred to the Cypriot limited liability company Kalemegdan Investments Ltd.¹¹⁴⁵ The same Cypriot company is also the sole shareholder of the Serbian limited liability company Kalemegdan Investments DOO. Mr. Obradović is registered as the beneficial owner of Kalemegdan Investments DOO under the Law on Central Record of Ultimate Beneficial Owners.¹¹⁴⁶ More importantly, according to the data from the Cypriot Department of Registrar of Companies and Current Receiver, Mr. Obradović is a sole shareholder and owner of Kalemegdan Investments Ltd.¹¹⁴⁷ Therefore, all of those companies are at this time owned by Mr. Obradović. The fact that Mr. Obradović was receiving economic returns from his ownership of shares attest to the fact that he was the one to control them. In addition, it demonstrates (coupled with other circumstances of this case)¹¹⁴⁸ that it was Mr. Obradović who held both nominal ownership and economic rights stemming from the ownership of shares in BD Agro.
722. On the other hand, Claimants' extensive submissions in the present proceeding offer next to nothing in terms of shading light onto Mr. Obradović's exact role in the acquisition and activities of BD Agro. Under the Claimants' narrative Mr. Obradović was no more than one of Mr. Rand's employees who was working *pro bono* for *ten years*. Witness statements of Messrs. Rand and Obradović reveal that he received ten Canadian dollars for his efforts in "overseeing" BD Agro's business *for ten years*.¹¹⁴⁹
723. The precise details of the arrangement between Mr. Rand and Mr. Obradović remain obscure. In his two witness statements Mr. Obradović is silent about his motives to enter such arrangement. Claimants have also failed to submit any documents that would attest to the particulars of the venture with regards BD Agro. The lack of persuasive explanation as to Mr. Obradović's part in this endeavor does not speak

¹¹⁴⁵ See List of shareholders of Crveni Signal, 20 June 2014, CE-759; List of shareholders of Obnova ad Beograd, 11 June 2012, CE-760; List of shareholders of Beotrans Beograd 10 June 2012, **CE-761**; List of shareholders of Inex, 22 January 2020, **RE-491**; List of shareholders of PIK Pester, 22 January 2020, **RE-492**.

¹¹⁴⁶ Excerpt from the Register of Real Owners for Kalemegdan Investments doo, 22 January 2020, **RE-493**.

¹¹⁴⁷ List of Shareholders of Kalemegdan Investments Ltd, website of the Cyprus Department of Registrar of Companies and Official Receiver, **RE-513**.

¹¹⁴⁸ Respondent's Counter-Memorial, paras. 287-290.

¹¹⁴⁹ Rand Second WS, para. 16; Obradović Second WS, para. 14.

favorably about truthfulness of Claimants' contention that it was Mr. Rand who both owned and controlled Mr. Obradović's shares.

724. Respondent does not contest that Mr. Rand was involved to an extent in BD Agro's business. At certain point he was a creditor of BD Agro and, together with Mr. Lucas Lundin (who actually provided Mr. Obradović with the loan for the purchase of BD Agro's capital), was a member of BD Agro's management.¹¹⁵⁰ This, however, does not mean that it was Mr. Rand who solely controlled Mr. Obradović's shares. Since Mr. Obradović was a lawful owner of BD Agro's shares and since he was using rights originating from the ownership (most notably the right to acquire profit from BD Agro's business), Respondent respectfully submits that the Tribunal should conclude that Claimants failed in discharging the burden of proof as regards the criterion of control under the Canada – Serbia BIT.

4. The Canadian Claimants' "indirect interest" in the Sembi Agreement is not an investment protected under the Canada – Serbia BIT

725. As explained earlier, the Sembi Agreement did not result in the transfer of ownership of Mr. Obradović's shares to Sembi. That is why the Canadian Claimants did not obtain the ownership rights that would enjoy protection under Article 1 of the Canada – Serbia BIT. In addition to this and as a separate purported "investment", Claimants argue that the Sembi Agreement vested upon them "*indirect interest*" in Sembi's rights under the Sembi Agreement.¹¹⁵¹

726. However, Claimants are simply unable to explain to which "*indirect interest*" they are referring to, in addition to Sembi's alleged ownership of Mr. Obradović's shares. Their argument to this regard is nothing more than mere repetition of the assertions based on the ownership of "*Beneficially Owned Shares*". For example, Claimants argue that the Sembi Agreement gave Sembi "*an interest in the enterprise that entitles the owner to share in income or profits of the enterprise*".¹¹⁵² Obviously, Sembi was never entitled to share in income of BD Agro since it never acquired Mr. Obradović's shares.

¹¹⁵⁰ Claimants' Reply, para. 77.

¹¹⁵¹ Claimants' Reply, paras. 622-630.

¹¹⁵² Claimants' Reply, para. 624.

727. In a similar fashion, Claimants assert that the Sembi Agreement resulted in Sembi's acquisition of "*an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory.*"¹¹⁵³ Again, Claimants do not venture to explain which interest precisely this is, if not the alleged ownership of BD Agro's shares held by Mr. Obradović.
728. In any event, to whichever Sembi's interest Claimants now refer, it is certain that no "indirect interest" of the Canadian Claimants could arise if Sembi itself could not obtain any rights based on the Sembi Agreement. Put differently, the existence of Sembi's purported contractual interest hinges upon the validity and effects of the Sembi Agreement.
729. The purpose of the Sembi Agreement was to transfer, by way of assignment, Mr. Obradović's "*right, title and interest in and to the [Privatization Agreement].*"¹¹⁵⁴ This was against the express prohibition of assignment without the prior approval of the other contracting party – the Privatization Agency – contained in Article 41ž of the Law on Privatization, as the law applicable to the Privatization Agreement.¹¹⁵⁵ Article 41ž(1) reads:
- Subject to prior consent of the Agency, the buyer of the capital (hereinafter: assignor) may assign the agreement on sale of the capital or property to a third party (hereinafter: assignee) under the conditions stipulated by this law and the law on obligations.*¹¹⁵⁶
730. Claimants' attempt to argue that the Sembi Agreement is not in conflict with Article 41ž of the Law on Privatization¹¹⁵⁷ is inapposite.
731. First, Claimants in essence assert that the purpose of the Sembi Agreement was to transfer Mr. Obradović's rights and obligations from the Privatization Agreement *without assigning the Privatization Agreement itself*. Under this interpretation, the Sembi Agreement only contemplates a possibility of the future assignment.¹¹⁵⁸

¹¹⁵³ Claimants' Reply, para. 625.

¹¹⁵⁴ Article 4 of the Sembi Agreement, **CE-29**.

¹¹⁵⁵ Recitals of the Privatization Agreement, **CE-17**.

¹¹⁵⁶ 2001 Law on Privatization, Article 41ž(1), **CE-220**.

¹¹⁵⁷ Claimants' Reply, para. 626.

¹¹⁵⁸ Claimants' Reply, para. 626.

732. The Claimants' effort to read into the Sembi Agreement what it does not say is obviously made with the purpose of serving Claimants' interest in this arbitration and it is unpersuasive as much as it is original. Had the parties to the Sembi Agreement indeed intended to transfer the economic interest in the Privatization Agreement separately from the "nominal" position of the contracting party, this could have been stated expressly, as it was, for example, the case with the Famout Agreement that was in the center of the dispute in *Occidental v. Ecuador*.¹¹⁵⁹ The text of the Sembi Agreement simply does not say what Claimants wish it does. Claimants' peculiar interpretation of the Sembi Agreement is merely a *post hoc* intellectual construct.
733. Second, even if Claimants' interpretation of the Sembi Agreement could be accepted as correct for the sake of the argument, the Sembi Agreement would still be in conflict with Article 41ž(1) of the Law on Privatization. Under Claimants' reading of Article 41ž(1), the provision prohibits the assignment of the Privatization Agreement without prior approval of the Privatization Agency and yet, somehow, it allows Mr. Obradović to freely transfer his rights and obligations stemming from the same contract. Such interpretation would not only render any prohibition on assignment meaningless but it is also in direct contravention with the text of the Law on Privatization.
734. Article 41ž(4) reads:

*After the assignment of agreement on sale of the capital or property, the assignee shall attain all the rights and obligations from the agreement on sale.*¹¹⁶⁰

735. Therefore, the acquisition of the rights and obligations from the Privatization Agreement is subject to the prior assignment of the Agreement. In turn, the assignment is subject to the prior approval of the Agency.¹¹⁶¹ To argue that the economic rights from the Privatization Agreement could have been transferred separately from the Agreement itself to a third party (Sembi) and that such transfer was in conformity with the Law on Privatization is obviously misplaced.

¹¹⁵⁹ Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 128, **CLA-75**.

¹¹⁶⁰ 2001 Law on Privatization, **CE-220**.

¹¹⁶¹ 2001 Law on Privatization, Article 41ž(1), **CE-220**.

736. As explained earlier, the fact that Mr. Obradović attempted to transfer his rights and obligations from the Privatization Agreement without the prior approval from the Agency is also fatal for the Claimants’ argument that the Sembi Agreement transferred equitable title to the Privatization Agreement and Mr. Obradović’s shares to Sembi, based on the law of Cyprus.¹¹⁶²

737. In sum, the Sembi Agreement did not result in Sembi’s acquisition of any “*right, title and interest*” held by Mr. Obradović as a party to the Privatization Agreement. Consequently, the Canadian Claimants did not obtain an indirect interest in Sembi’s rights.

738. Alternatively, even if the Sembi Agreement could create any contractual rights for Sembi, the fact remains that the Canadian Claimants are not entitled to make a direct claim based on the contractual rights belonging to Sembi. This was explained, for example, by the tribunal in *ST-AD v. Bulgaria*:

*“It has been repeatedly held by arbitral tribunals that an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares.”*¹¹⁶³

739. The proposition was accepted by the tribunal in *Karkey v. Pakistan*:

*“Moreover, the Tribunal finds that Karkey is not entitled as a matter of international law to make a direct claim in relation to Karpak’s contractual rights, as Karkey does not have standing to assert claims based on the host-State’s treatment of the contracts and assets of the company in which it holds shares.”*¹¹⁶⁴

740. This is by itself enough to put an end to the Claimants’ case based on the “*indirect interest*” of Sembi allegedly created under the Sembi Agreement.

¹¹⁶² Claimants’ Reply, para. 627.

¹¹⁶³ *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL), PCA Case No. 2011-06, Award on Jurisdiction, para. 278, **RLA-79**.

¹¹⁶⁴ *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 716, **RLA-178**.

5. Mr. Rand's payments for the benefit of BD Agro do not qualify as an investment under the Canada – Serbia BIT

741. In their Reply, Claimants reiterate the assertion that Mr. Rand's payments to BD Agro's Canadian suppliers, as well as certain payments to consultants for services provided to the company, represent a protected investment under the Canada – Serbia BIT.¹¹⁶⁵ However, Claimants' reading of Article 1 of the BIT is wrong as a matter of law.
742. First, although Claimants now characterize all of those payments (at least initially) as "*a loan to an enterprise*"¹¹⁶⁶ it follows from the rest of their submission that they are unable to decide whether the payments should indeed be treated as such or rather as expenses aimed at securing the continuity of BD Agro's business operations.¹¹⁶⁷ Respondent submits that those payments certainly cannot be both. This is the essence of the reasoning offered by the *Inmaris v. Ukraine* tribunal - payments made in furtherance of the investment are not investments themselves.¹¹⁶⁸ Thus, if Claimants were the owners of BD Agro and its business, as they claim, the payments made and expenses incurred in day to day operations of BD Agro cannot be regarded as a separate investment under the Canada – Serbia BIT.
743. Second, Claimants also submit that payments made for the benefit of BD Agro gave rise to Mr. Rand's monetary claim against the company and that such claim is an asset that represents an investment. The problem with Claimants' reasoning is the fact that not all monetary claims are included into the ambit of the Canada Serbia BIT. In reality, most of those claims are expressly excluded from the protection offered by the BIT.
744. Article 1 of the BIT contains clarifications as to what does not represent an investment:

“but “**investment**” does not mean:

¹¹⁶⁵ Claimants' Reply, para. 632.

¹¹⁶⁶ Claimants' Reply, para. 633.

¹¹⁶⁷ Claimants' Reply, para. 638.

¹¹⁶⁸ *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 101, **RLA-13**.

(k) a claim to money that arises solely from:

a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing; or

(l) **any other claim to money;**

that does not involve the kinds of interests set out in subparagraphs (a) to (j);¹¹⁶⁹

745. If Claimants now argue (as they apparently do) that all of these payments must be characterized as “*a loan to an enterprise*” in accordance with item (d) of the Canada – Serbia BIT’s definition of investment, it is up to them to provide the evidence in support of such characterization. However, they offered no evidence to this regard. There are no documents on the record that would serve as evidence of the agreement on and terms of “loans” between Mr. Rand and BD Agro. For example, the large majority of Mr. Rand’s payments – nearly EUR 2.2 million according to Claimants¹¹⁷⁰ – were made for the purchase and transport of heifers to BD Agro. Those payments were recorded as Mr. Rand’s monetary claim against BD Agro in the bankruptcy proceedings.¹¹⁷¹ However, the Decision of the Commercial Court in Belgrade records specifically that “[T]he Creditor [Mr. Rand] did not make payments on grounds of an agreement concluded with the bankruptcy debtor [BD Agro].”¹¹⁷² The payments for the purchase of livestock were recorded in bankruptcy as “*unofficial uncommanded agency under Article 220 of the Law on Contracts and Torts [Law on Obligations]*.”¹¹⁷³ As a result, those payments must be treated as “*any other claim to money*” under item (l), expressly excluded from the scope of protection offered by the

¹¹⁶⁹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1; emphasis added, **CLA-1**.

¹¹⁷⁰ Claimants’ Reply, para. 632.

¹¹⁷¹ Commercial Court in Belgrade Decision number 9. St-321/2015 (30 March 2018), Decision on the List of Determined and Contested Claims, p.2 (English translation), **CE-136**.

¹¹⁷² Commercial Court in Belgrade Decision number 9. St-321/2015 (30 March 2018), Decision on the List of Determined and Contested Claims, p.2 (English translation), **CE-136**.

¹¹⁷³ Commercial Court in Belgrade Decision number 9. St-321/2015 (30 March 2018), Decision on the List of Determined and Contested Claims, p.2 (English translation), **CE-136**. The Law on Obligations also refers to this form of quasi-contractual liability as “carrying out the transaction of another person, without order or authority.” See Article 220 of the Law on Obligations, **RE-32**.

Canada – Serbia BIT. The same applies to the payments made to the BD Agro’s consultants Messer. Wood and Calin.¹¹⁷⁴

746. Third, even if the payments could be considered as loans, such loans are explicitly excluded from the definition of investment under the Canada – Serbia BIT. Under item (k)(ii) of Article 1, “investment” does not mean “*the extension of credit in connection with a commercial transaction, such as trade financing.*” What is a commercial transaction can be deduced from item (k)(i) of Article 1 which defines commercial contract as a “*contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party.*”¹¹⁷⁵ If Mr. Rand’s payments for the purchases of livestock from the Canada – based suppliers were indeed loans extended to BD Agro, those loans fit squarely into the exception mentioned above.

747. Apart from the clear wording used in Article 1 of the Canada – Serbia BIT, the negotiating history of the BIT also confirms that it was the Parties’ intention to exclude transaction such as loans for the purchase of goods and services from the Treaty’s protection. The Report of the Serbian Ministry of Trade from the second round of negotiations between representatives of Serbia and Canada, held in Ottawa from 23 to 25 May 2013, records the understanding with regard to the meaning of certain provisions of the Canada - Serbia BIT’s final text (excluding Annexes).¹¹⁷⁶ Paragraph 5 of the Report discusses the exceptions contained in items (k) and (l) of Article 1:

“Based on the past practice it may be stated that it is a very important fact that, also at the proposal of the Serbian side, the wording incorporates that a claim to money that arises from receivables as a result of a commercial contract for the sale of a good or service between economic entities of the two parties or loans taken out in order to perform such contracts shall not be deemed an investment, securing so additional protection from a possible dispute, i.e. from a situation in which a Canadian investor could claim

¹¹⁷⁴ Claimants’ Reply, para. 632.

¹¹⁷⁵ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, **CLA-1**.

¹¹⁷⁶ Report from the negotiations regarding conclusion of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, held in Ottawa, from 23 – 25 May 2013, **RE-271**.

*protection of its rights from the so-called commercial risks which is not the purpose or aim of this Agreement.”*¹¹⁷⁷

748. Therefore, the negotiating history testifies to the existence of an unequivocal understanding that the loans referred to by Claimants are not to be considered as investment under the Canada – Serbia BIT. This is why the Claimants’ argument that Mr. Rand’s payments for the benefit of BD Agro represent an investment must be dismissed.

B. NO JURISDICTION RATIONE MATERIAE UNDER THE CYPRUS – SERBIA BIT

749. Article 1(1) of the Cyprus – Serbia BIT defines the term “investment” in the following manner:

2. The term "investment" shall mean any kind of assets invested by investor of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations and in particular, though not exclusively, shall include:

a) movable and immovable property and any other in rem property rights such as mortgages, liens or pledges;

b) shares, bonds and other form of securities;

c) claims to money or to any performance under contract having economic value;

d) intellectual property rights such as copyrights and other related rights and industrial property rights such as patents, licences, industrial designs and models, trade marks, as well as goodwill, technical processes and know-how;

¹¹⁷⁷ Report from the negotiations regarding conclusion of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, held in Ottawa, from 23 – 25 May 2013, para. 5 (emphasis added), **RE-271**.

*e) concessions in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made, including concessions to search for, extract and exploit natural resources.*¹¹⁷⁸

750. The provision explicitly requires that an investment is made *in accordance with laws and regulations* of the Contracting Party receiving investment. Unlike the Canada – Serbia BIT, the Cyprus – Serbia BIT does not extend protection to investments controlled by natural persons or entities of the other Contracting Party.

751. Claimants assert that Sembi’s purported investment comprises of assets listed under items b) and c) of Article 1(1).¹¹⁷⁹ However, Sembi has never acquired shares owned by Mr. Obradović or claims under the Sembi Agreement.

1. Sembi has never owned Mr. Obradović’s shares in BD Agro

752. In order to reach the jurisdictional threshold, Claimants must be able to prove that Sembi acquired the ownership of BD Agro’s shares. Set on this task, Claimants are unbothered by the clear and unambiguous text of the Cyprus – Serbia BIT. The cornerstone of their case is the contention that the word “*shares*” contained in Article 1(1)(b) should be read as “*Beneficially Owned Shares*”.¹¹⁸⁰ Respondent respectfully submits that Article 1(1) of the Cyprus – Serbia BIT means what it says – the protection under the BIT is offered to assets such as shares, acquired in conformity with Serbian laws and regulations. To be clear: the fact that the BIT contains the so-called in conformity clause only reiterates the principle generally accepted by investment tribunals - international law does not create property rights. It simply offers protection to such rights created under the municipal law of the Host State.¹¹⁸¹

753. The Sembi Agreement did not result in Sembi’s acquisition for reasons already explained above. In a nutshell, at the time the Sembi Agreement was concluded, only a person registered in the Central Securities Registry was considered to be a lawful

¹¹⁷⁸ Article 1 of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, dated 23 December 2005, **CLA-2**.

¹¹⁷⁹ Claimants’ Reply, para. 644.

¹¹⁸⁰ Claimants’ Reply, para. 646.

¹¹⁸¹ Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 162, **RLA-110**.

holder of equity in a Serbian joint stock company.¹¹⁸² Contrary to what Claimants now suggest,¹¹⁸³ the registration of ownership did not imply only nominal ownership of shares. It gave to the registered owner full benefits of ownership and corresponding rights.¹¹⁸⁴ Those economic rights linked to the ownership of shares could not be transferred to a third party by a contract.¹¹⁸⁵ In sum, to use the Claimants' paradigm, the beneficial ownership of shares could not be validly transferred to another person or an entity *without and independently from* the legal title on shares. Transfer of those rights was possible (with minor exceptions) only by transferring securities into the account of the new owner.¹¹⁸⁶ Thus, the Sembi Agreement was not only unable to transfer the nominal ownership from Mr. Obradović to Sembi under Serbian law, but it was incapable to result in transfer of right comprising the beneficial ownership as well.

754. The Claimants' argument on Sembi's purported acquisition of BD Agro's shares is, therefore, fatally flawed. However, it is utterly absurd when put in the context of other assertions Claimants made in their submission. In essence, Claimants argue that both Mr. Rand (the Canadian Claimants) and Sembi were beneficial owners of Mr. Obradović's shares *at the same time*. The purpose of the beneficial ownership doctrine, as submitted by Claimants themselves,¹¹⁸⁷ is to establish "*the real and equitable owner of an international claim*".¹¹⁸⁸ It is simply impossible that each and every entity up the corporate chain hold the position of an equitable owner of the same asset simultaneously. As already explained by Respondent, the notion of the beneficial owner, by definition, means that there cannot be "direct" and "indirect" beneficial owners of an asset. Claimants attempt to deal with this problem by arguing that "[U]ltimate beneficial owner" is not a pleonasm and "direct beneficial owner" is not an oxymoron."¹¹⁸⁹ This is hardly a legal argument and it certainly cannot support the assertion that defies common sense and basic legal logic.

¹¹⁸² Article 19(1) of the 2006 Law on Market in Securities and other Financial Instruments, **RE-111**.

¹¹⁸³ Claimants' Reply, para. 660.

¹¹⁸⁴ 2004 Law on Companies, Article 2008(1), **RE-96**.

¹¹⁸⁵ 2004 Law on Companies, Article 208(3), **RE-96**.

¹¹⁸⁶ Article 19(3) of the Law on Market in Securities and other Financial Instruments (2006), **RE-111**.

¹¹⁸⁷ Claimants' Reply, para. 547.

¹¹⁸⁸ David J. Bederman, "Beneficial Ownership of international Claims," *International and Comparative Law Quarterly*, Vol. 38, 1989, p. 936, **CLA-78**.

¹¹⁸⁹ Claimants' Reply, para. 661.

2. Sembi has never acquired claims under the Sembi Agreement

755. Claimants' argument with regards the alleged acquisition of "*claims to money or to any performance*" under the Sembi Agreement is a simple reiteration of their argument based on Sembi's purported beneficial ownership of BD Agro's shares. Claimants argue, for example, that Sembi acquired the beneficial ownership of Mr. Obradović's shares and, consequently, a right to compel Mr. Obradović "*to vote the Beneficially Owned Shares as instructed by Sembi.*"¹¹⁹⁰ This is wrong as a matter of law.
756. First, Sembi could not have acquired the beneficial ownership of BD Agro's shares based on the Sembi Agreement under Serbian law, as expressly required by the Cyprus – Serbia BIT. Mr. Obradović was prohibited from transferring his economic interest (including the right to vote the shares) to any third party.¹¹⁹¹ Simply put, the Sembi Agreement did not give Sembi any claims under Serbian law. Even if the Cypriot law would be relevant for the matter at hand (which it is not), the result would remain the same. As explained by professor Emilianides, the Sembi Agreement did not result in transfer of the equitable title over Mr. Obradović's shares even under the law of Cyprus.¹¹⁹²
757. Second, the Sembi Agreement was unable to convey upon Sembi any other right or interest of Mr. Obradović stemming from the Privatization Agreement. Mr. Obradović entered the Sembi Agreement without the prior approval of the PA, in direct contravention with the Law on Privatization.¹¹⁹³ As explained earlier, the Claimants' argument that the prohibition of assignment from the Law on Privatization did not apply to the Sembi Agreement is without any merit.
758. To conclude – Sembi has never possessed any claim based on the Sembi Agreement that would come under the scope of Article 1(1) of the Cyprus – Serbia BIT.

¹¹⁹⁰ Claimants' Reply, para. 647.

¹¹⁹¹ 2004 Law on Companies, Article 208(3), **RE-96**.

¹¹⁹² Expert Report of Professor Achilles C. Emilianides, paras. 26-37.

¹¹⁹³ 2001 Law on Privatization, Article 41ž(1), **CE-220**.

3. Sembi did not invest in the territory of Serbia

759. The fact that Sembi has never acquired any asset in accordance with Serbian laws and regulations is alone and of itself enough to put an end to Claimants' case on jurisdiction *ratione materiae* under the Cyprus – Serbia BIT. However, in addition to this, Claimants are unable to demonstrate that Sembi invested anything of value in the territory of Serbia.
760. Article 1(1) of the Cyprus – Serbia BIT affords protection to “*any kind of assets invested by investor of one Contracting Party in the territory of the other Contracting Party...*”.¹¹⁹⁴ The term “invested” necessarily implies an active contribution of a putative investor. In other words, a simple fact that the investor holds shares in a local company does not make the ownership of shares “investment” if the acquisition of an asset was not the result of the contribution made by the investor.
761. This was the conclusion recently reached by the tribunal in *Clorox v. Venezuela*.¹¹⁹⁵ The tribunal in this case interpreted Article I(2) of the Spain – Venezuela BIT, containing the language similar to Article 1(1) of the Cyprus – Serbia BIT,¹¹⁹⁶ and found that the phrase “*invested by investors of one Contracting Party in the territory of the other Contracting Party*” to require an act of investing by the investor.¹¹⁹⁷ The tribunal declined jurisdiction over the claim submitted by a Spanish entity (*Clorox Spain*) which owned 100% of shares in a local company (*Clorox Venezuela*) based on the fact that the claimant did not pay any consideration for the shares it received and did not make any contribution after it had acquired *Clorox Venezuela*.¹¹⁹⁸
762. Similarly, in *Alapli v. Turkey*, the tribunal denied protection of the Netherlands – Turkey BIT to a Dutch entity which made no meaningful contribution to Turkey:

¹¹⁹⁴ Article 1(1) of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

¹¹⁹⁵ *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Award, 20 May 2019, **RLA-170**.

¹¹⁹⁶ *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Award, 20 May 2019, para. 799, **RLA-170**.

¹¹⁹⁷ *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Award, 20 May 2019, para. 815, **RLA-170**.

¹¹⁹⁸ *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Award, 20 May 2019, paras. 831, 834, **RLA-170**.

“To be an investor a person must actually make an investment, in the sense of an active contribution.¹¹⁹⁹ Status as a national of the other contracting state is not in itself enough. The Dutch entity, [the First Project Company], has not demonstrated that it actually made any investment in Turkey, in the sense of a meaningful contribution to Turkey. To the extent that contributions were made, they came from nationals or companies of the United States and Turkey.”¹¹⁹⁹

763. The tribunal in *Alapli* particularly emphasized the fact that the claimant served only as a “conduit” through which US entities financed the local company whose shares were held by the Dutch claimant and that the claimant itself did not make any monetary contribution:

“Claimant served as a conduit through which [X], in particular [...] and [...], funneled financial contributions to [the Second Project Company], such contributions comprising the entirety of that entity’s statutory capital. [X], not Claimant, funded all capital for the corporate interest characterized as “shares of stock” by Netherlands-Turkey BIT Article 1(b)(ii) and “shares, stock or other form of equity” in ECT Article 1(6)(b).”¹²⁰⁰

764. Just as in *Standard Chartered Bank v. Venezuela*,¹²⁰¹ the tribunal in *Alapli* held that, in order for an investment to be “of” the investor, the investor must be able to show that it transferred something of value from one treaty party to another:

“Put differently, the treaty language implicates not just the abstract existence of some piece of property, whether stock or otherwise, but also the activity of investing. The Tribunal must find an action transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to another.”¹²⁰²

¹¹⁹⁹ *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, para. 350, **RLA-166**.

¹²⁰⁰ *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, para. 340, **RLA-166**.

¹²⁰¹ *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case no. ARB/10/12, Award, 2 November 2012, para. 232; **RLA-15**.

¹²⁰² *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, para. 360 (emphasis added), **RLA-166**.

765. In the case at hand, Sembi did not make any active contribution in the territory of Serbia.
766. First, even if the Sembi Agreement could have led to Sembi's acquisition of shares in BD Agro (which it could not), the purported purchase of Mr. Obradović's shares was not financed by Sembi. By Claimants' own admission, the funds for the entire operation were "*ultimately committed*" by Mr. Rand.¹²⁰³ It was Mr. Rand, a Canadian national, who apparently repaid Mr. Obradović's debt to the Lundin Family, using the Sembi's bank account merely as a conduit for such payments. Contrary to the Claimants' assertions,¹²⁰⁴ those payments cannot be regarded as Sembi's contribution.
767. Second, there is no evidence that Sembi ever made any contribution *after* its purported acquisition of Mr. Obradović's shares. In particular, Claimant are obviously incapable to produce any document proving that it was Sembi who paid more than EUR 2 million owed by Mr. Obradović to the PA which was Sembi's obligation under the Sembi Agreement.¹²⁰⁵ It is certainly peculiar that a company does not possess financial records for the payment of such a large sum of money. On the other hand, the record indicates that it was Mr. Obradović who paid remaining installments of the purchase price to the PA¹²⁰⁶ (albeit using BD Agro's funds, as demonstrated by Respondent).¹²⁰⁷ In addition, Claimants have never even asserted that Sembi made its contribution through other, non-monetary forms such as contribution in know-how or expertise.
768. Third, Claimants cannot rely on the fact that BD Agro's business activities were conducted in Serbia in order to prove that Sembi's purported investment was made in the territory of Serbia.¹²⁰⁸ BD Agro, as a Serbian company, obviously did engage into activities in Serbian territory. However, the fact that a business project is located in

¹²⁰³ Claimants' Reply, para. 625.

¹²⁰⁴ Claimants' Reply, para. 651.

¹²⁰⁵ Agreement between D. Obradović and Sembi, 22 February 2008, **CE-29**.

¹²⁰⁶ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

¹²⁰⁷ See above, paras. 374-387

¹²⁰⁸ Claimants' Reply, paras. 652, 653.

Serbia means only that there is an investment in the territory of Serbia and not that the investment was made by Sembi.¹²⁰⁹

769. Finally, the fact relied on by Claimants – that BD Agro’s business was regularly discussed during the meetings of Sembi’s directors¹²¹⁰ - does not add anything to the Claimants’ argument. Holding discussion about BD Agro’s activities is not the same as making an active contribution to the investment and it cannot replace the requirement of contribution.

770. To conclude, even if Sembi was the owner of Mr. Obradović’s shares in BD Agro (which it was not), Claimants would still fail to prove that Sembi invested in the territory of Serbia.

C. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE VOLUNTATIS* UNDER THE TREATIES

1. Respondent did not consent to arbitrate disputes about investments made in breach of its laws

771. In case the Tribunal finds that Claimants are investors who made an investment in the meaning of the Treaties, the case at hand must nevertheless be dismissed for lack of jurisdiction *ratione voluntatis*, due to its illegal nature. Claimants have shown utter disrespect to the Serbian law and legal system, and their entire purported investment is tainted with unlawfulness, fraud and deceit, due to which it is unworthy of protection.

772. In this section, Respondent will show that: (i) legality of an investment is a prerequisite for investment protection under both Treaties; and that (ii) Claimants’ purported investments are suffused by unlawful and deceitful conduct, which renders them irrefutably illegal.

¹²⁰⁹ See *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Award, 20 May 2019, para. 814, **RLA-170**.

¹²¹⁰ Claimants’ Reply, para. 659.

1.1. Legality of an investment is a prerequisite for protection under the Treaties

773. In their fleeting response to this objection, Claimants do not seem to have disputed that legality is a prerequisite for protection under the Treaties. In fact, they provide no response in that regard. Yet, for the sake of precaution, Respondent explains the content of this standard below.

1.1.1. Subject matter of the legality requirement

774. As Respondent already explained,¹²¹¹ various ICSID tribunals have so far found that the breach of the Host State's law in making of investment removes the offer to arbitrate previously given by the state.

775. This is the case under both the Cyprus-Serbia BIT, which contains an explicit legality requirement,¹²¹² and the Canada-Serbia BIT, which contains an implicit legality requirement.¹²¹³ Likewise, it is generally established that access to protection under the ICSID Convention itself is also restricted by an implicit legality requirement.¹²¹⁴

776. Furthermore, the legality requirement is not limited to a breach of strictly national laws and regulations. It also relates to the breach of general international legal principles, such as the principle of good faith (e.g. by fraudulent conduct).¹²¹⁵ Specifically, as elaborated by the tribunal in *Hamester v. Ghana*, the legality requirement means that:

“An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host

¹²¹¹ Counter-Memorial, Section III.B.1.

¹²¹² Article 1(1) of the Cyprus-Serbia BIT **RLA-130** (“The term “investment” shall mean any kind of assets invested by investor of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations” [emphasis added])

¹²¹³ Counter-Memorial, paras. 355, 358-359 (citing *Fraport II*, *Mamidoil v. Albania* and *Cortec v. Kenya*).

¹²¹⁴ Counter-Memorial, para. 356 (citing *Phoenix v. Czech Republic*).

¹²¹⁵ Jean Engelmayr Kalicki, Dmitri Evseev, et al., ‘Chapter 9: Legality of Investment’, in Meg Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International (2015), p. 127 **RLA-182** (“The underlying theory is that treaty protection does not attach to, and investor-State arbitration is unavailable for, investments that: (1) are inherently illegal as a matter of host State law or international public policy; or (2) were procured only as the result of illegality or misconduct”).

State's law (as elaborated, e.g. by the tribunal in *Phoenix*). These are general principles that exist independently of specific language to this effect in the Treaty”¹²¹⁶

777. Likewise, as stipulated in *Minnotte v. Poland*:

“it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's law”¹²¹⁷

778. A number of other tribunals have taken the same approach.¹²¹⁸ Recently, the stance was also confirmed by the Annulment Committee in *Teinver v. Argentina*, by stating:

“The fact for an investor to use the investment to commit a fraud to the detriment of the host State may be considered as depriving the investment from the protection granted to it by international law”¹²¹⁹

779. Therefore, as summed up by the tribunal in *Metal-Tech v. Uzbekistan*, on the basis of the existing case law:

“the subject-matter scope of the legality requirement covers: (i) non-trivial violations of the host State's legal order [...], (ii) violations of the host State's foreign investment regime [...], and (iii) fraud – for instance, to

¹²¹⁶ *Hamester*, Award, paras. 123-124 **RLA-115**.

¹²¹⁷ *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, 16 May 2014, para. 131. **RLA-159**.

¹²¹⁸ *Getma International and others v. Republic of Guinea [II]*, ICSID Case No. ARB/11/29, Award, 16 August 2016, para. 174, **RLA-160** (“only legal investments, carried out in good faith, are to be protected by the ICSID arbitration, and that the Arbitral Tribunal must decline jurisdiction, if it appears that the investment was made fraudulently or as a result of corruption”); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 16 December 2016, para. 504, **RLA-131** (“The theory of abuse of process, which is a variation of the prohibition of abuse of rights and, like the latter, an emanation of the principle of good faith also found application in the context of inadmissible corporate restructurings. That theory is another manifestation of the general principle that one does not benefit from treaty protection when underlying conduct is deemed improper.”);

¹²¹⁹ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's application for annulment para. 129, **RLA-162**.

*secure the investment [...] or to secure profits. There is no doubt that corruption falls within one or more of these categories.”*¹²²⁰

780. Furthermore, the Tribunal should not limit its scrutiny solely to one aspect of the investment. The best (and often the only) way of determining unlawfulness, misrepresentation and fraud is when analyzing the acquisition of an investment within a larger context. Therefore, the investor’s conduct must be assessed comprehensively throughout the relevant period. As the tribunal rightly determined in *Yukos v. Russia*:

*“an examination of the legality of an investment should not be limited to verifying whether the last in a series of transactions leading up to the investment was in conformity with the law. The making of the investment will often consist of several consecutive acts and all of these must be legal and bona fide”*¹²²¹

781. Applied to this case that would require the Tribunal to determine whether investment in BD Agro was legal and bona fide throughout the relevant period, as Claimants’ purported investment was not a one-time act conducted on a single day. To the contrary, this was a complex transaction starting from the initial privatization process (before the auction), which continued in the years that followed through the payment of the purchase price and the alleged investments into BD Agro.

782. It should also be noted that an investor does not have to be the direct perpetrator of the illegal or fraudulent conduct. The specific act or acts may have been committed by a third person, while the investor should have been in a position in which he should have known or inquired about the illegalities in question.¹²²² In the present case,

¹²²⁰ *Metal-Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, para 165 **RLA-161**; See also *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, para. 266 **RLA-24**.

¹²²¹ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, para. 1369, **RLA-163** (emphasis added).

¹²²² *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, 16 May 2014, para. 163, **RLA-159** (“There may be circumstances in which the deliberate closing of eyes to evidence of serious misconduct or crime, or an unreasonable failure to perceive such evidence, would indeed vitiate a claim”) (emphasis added); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 16 December 2016, para. 504, **RLA-131** (“[...] the so-called ‘head-in-the-sand problem’, also sometimes referred to as ‘Nelsonian knowledge’, where a claimant knew or should have known of third-party wrongdoing in connection with an investment and still chose to do nothing (as opposed to just failing to take due care)”) (emphasis added); *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, paras. 55, **RLA-164** (“If the transaction by which the Villalobos acquired the deposit was illegal, it follows that the acquisition

Claimants' responsibility seems unquestionable as it is far above the mentioned threshold. As Claimants' themselves stipulate:

*"Mr. Rand had full control over the investment. Mr. Rand directed Mr. Obradovic on all important matters relating to BD Agro, and Mr. Obradovic always followed Mr. Rand's directions"*¹²²³

783. In their Reply, Claimants described this relationship in ever more detail and, among other things, state:

*"For ten years Mr. Rand directed Mr. Obradovic and BD Agro's management on all important matters relating to BD Agro and for ten years they have always followed his instructions."*¹²²⁴

784. Therefore, in case the Tribunal accepts Claimants' argument that they were the actual owners of BD Agro who exercised full control over BD Agro, then it is simply impossible to find that they were unaware of the gross irregularities in the management of BD Agro.

1.1.2. Timing of the legality requirement

785. Besides the scope, another important element of the legality requirement is its timing. More specifically, the question is what is the moment in which legality affects the protection of the investment itself. Investment arbitration practice has firmly established that an illegality occurred at the time of making the investment deprives the investor of protection under the relevant treaty as a matter of jurisdiction.¹²²⁵

by each Claimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica. Although the Claimants may not have committed a crime by entering into a transaction with the Villalobos, the fact that they gained ownership of the asset in violation of the Organic Law of the Central Bank means that their ownership was not in accordance with the laws of Costa Rica and that therefore each of their deposits and resulting relationships with Villalobos did not constitute an "investment" under the BIT) and 58 („prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable.“) (emphasis added).

¹²²³ Counter-Memorial, para. 310 (emphasis added) (referring to the witness statements of Messrs. Obradovic and Rand).

¹²²⁴ Reply, para. 610.

¹²²⁵ *Fraport v. Philippines II*, Award, para. 467, **RLA-18** (“The illegality of the investment at the time it is made goes to the root of the host State’s offer of arbitration under the treaty. [...] Lack of jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement.”); *Oxus v. Uzbekistan*, Final Award, para. 707,

786. However, illegality conducted or occurred during the performance of the investment is far from being irrelevant. On the contrary, notable tribunals and scholars have found that such illegality could nevertheless defeat the claims as a matter of merits.¹²²⁶ This line of reasoning also finds support in the jurisprudence of the International Court of Justice, which established that:

*“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.”*¹²²⁷

787. As Respondent will further explain below, the illegality existing in the present case spans through the entire period of *making* Claimants’ purported investment, and even continues thereafter, during the performance of the investment. Having that in mind, the preponderance of irregularities that pervade Claimants’ conduct, should be fatal to their case not only as a matter of jurisdiction, but also as regards admissibility and merits.¹²²⁸

RLA-123 (“In order to lose the protection under the BIT, it is however necessary [...] that the illegality affects the “making”, i.e. arises when initiating the investment itself and not just when implementing and/or operating it”) *Hamester v. Ghana*, Award, para. 123, **RLA-115** (“An investment will not be protected if it has been created in violation of national or international principles of good faith”); *Minnotte v. Poland*, Award, para. 131, **RLA-159** (“investments made on the basis of fraudulent conduct cannot benefit from BIT protection”).

¹²²⁶ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, para. 129 **RLA-108** (“To the extent that the Respondent’s allegations refer to the operation or performance of the investment (Bolivia’s allegations of “ongoing illegality”) [...] they are matters for the merits which the Tribunal will address when determining whether the Respondent breached its BIT obligations” (emphasis added)); *Kim v. Uzbekistan*, Decision on Jurisdiction, ICSID Case No. ARB/13/6, para. 377, **RLA- 165** (“The Tribunal therefore holds that the scope of application of the BIT is limited by a legality requirement that an investment must be “in compliance with [Host State] legislation” at the time that the investment is made. This limitation does not discount the possibility that there may be illegal action by Claimants at a later date or an illegal action unrelated to the making of the investment, but any such later illegality would be a matter for the Tribunal to consider at the merits stage of these proceedings.” (emphasis added)) *Hamester v. Ghana*, Award, para. 127, **RLA-115** (“on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investors conduct during the life of the investment is a merits issue”); Jean Engelmayr Kalicki, Dmitri Evseev, et al., ‘Chapter 9: Legality of Investment’, in Meg Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International (2015), p. 127, **RLA-182** (“illegality or misconduct during the life of an investment may give rise to a merits defense” (emphasis added)).

¹²²⁷ *Nuclear Tests (New Zealand v. France)*, Judgment, [1974] I.C.J. Reports 457, para. 49, **RLA-179** (emphasis added).

¹²²⁸ *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, para. 7.48 **RLA-180** (“the effect of international public policy under the Treaty as a matter of international law and also as a matter of Egyptian law, proven corruption by the Claimant in procuring the SPA would be fatal to the Claimant’s claims derived from the SPA in this arbitration, as regards jurisdiction, admissibility and the merits.” (emphasis added)).

1.1.3. Standard of proof

788. With respect to the standard of proof to be applied to allegations of illegality, Respondent asserts that the regular evidentiary threshold applied in investment arbitration is not heightened in any way. On the contrary, having in mind the inherent difficulties of proving fraudulent behavior, circumstantial evidence is often the only available way of doing so.

789. For instance, as it was clarified in *Libananco v. Turkey*:

*“the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof.”*¹²²⁹

790. In fact, as stipulated by the tribunal in *Union Ferosa v. Egypt*:

*“the standard of proof remains “the balance of probabilities.” As has long been recognised, corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence. Circumstantial evidence of corruption is as good as direct evidence in proving corruption. There is no reason in this arbitration, which is not a criminal proceeding, to impose a higher standard of proof”*¹²³⁰

791. Likewise, when determining whether there were illegal activities regarding the investment, the tribunal in *Glencore v. Colombia* endorsed:

*“time-honoured methodology followed by tribunals in all jurisdictions to establish truth based on indicia or circumstantial evidence: if a party marshals evidence that proves the existence of certain indicia, and it is possible to infer from these indicia (using experience and reason) that a certain fact has occurred, the tribunal may take such fact as established.”*¹²³¹

¹²²⁹ Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Award, para. 125 **RLA-181**.

¹²³⁰ Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, para. 7.52, **RLA-180**

¹²³¹ Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award. 27 August 2019, para. 670, **RLA-176**.

792. Many other renowned tribunals have applied the same approach.¹²³²

793. Furthermore, it should also be noted that, as inferred from the *Union Ferosa* quote above, the standard of proof in investment arbitration is not the same as the standard of proof in criminal proceedings. Therefore, if an illegal activity alleged in investment arbitration proceedings could qualify as a criminal act under national law, it is not required that the same act has already been punished, put to trial or even investigated by domestic criminal authorities. As recently established by the tribunal in *Glencore v. Colombia*:

*“The Criminal Complaint and this procedure operate in different legal spheres, are subject to diverging standards of proof, and may reach conflicting results. The fact that the Colombian criminal system has not punished (in fact, in accordance with the available record, has not even investigated) the alleged corrupt practices [...] does not preclude a hypothetical finding by this Tribunal that corruption has occurred. And vice-versa.”*¹²³³

794. Other tribunals have recently also endorsed the same line of reasoning.¹²³⁴

795. However, regardless of the above described standard of proof, the Tribunal in the present case has an overwhelming evidentiary record before it, which devastatingly reveals many severe illegalities undermining the entire investment that Claimants

¹²³² *Getma International and others v. Republic of Guinea [II]*, ICSID Case No. ARB/11/29, Award, paras. 181-184 **RLA-160**; *Metal-Tech v. Uzbekistan*, Award, para. 243, **RLA-161** (“the Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence”); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 479, **RLA-18** (“considering the difficulty to prove corruption by direct evidence, the same may be circumstantial” (emphasis added)).

¹²³³ *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 673, **RLA-176** (emphasis added).

¹²³⁴ *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*, ICSID Case No. ARB/10/18, Decision on Corruption Claims, 25 February 2019, para. 804, **RLA-175** (“The Tribunals have pointed out repeatedly that they are not a criminal court; their findings on corruption thus do not necessarily require application of the exacting standards of proof that justify criminal sanction.”); *Lao Holdings N.V. v. Lao People’s Democratic Republic (I)* ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019, para. 110, **RLA-177** (“[...] whether the alleged act of corruption is established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt, although of course proof beyond a reasonable doubt would be conclusive”).

ostensibly made. Hence, the probative threshold achieved in this instance is far beyond the standard required by investment arbitration practice.

1.1.4. Burden of proof

796. Finally, as for the burden of proof, the starting point for proving allegations of illegality is the standard one – each party has the burden of proving the facts on which it relies. Therefore, Respondent bears the initial burden for presenting facts and evidence which prove or indicate that certain illegalities exist in relation to an investment.¹²³⁵ Respondent has done so in its Counter Memorial,¹²³⁶ and all Claimants had to say is that assertion with regard to illegality of their investments are pure fiction.¹²³⁷

797. However, if the respondent party proves sufficient facts in order to raise suspicions of fraudulent *i.e.* unlawful behavior, the investor bears the burden of proof to prove otherwise. As the tribunal in *Karkey v. Pakistan* stated:

*“Respondent bears the burden of proof with respect to its allegations of corruption pursuant to the well-established principle onus probandi incumbit actori (the party that asserts must prove). However, the Tribunal finds that it can shift the burden of proof with respect to corruption and fraud to [the claimant] should the Tribunal be satisfied that there is unequivocal (or unambiguous) prima facie evidence in this regard.”*¹²³⁸

798. Having in mind that the Respondent provided an abundance of documentation which directly proves that the alleged investment is illegal, the burden of proof now undoubtedly lies with Claimants.

1.2. Illegality of Claimants’ investment

799. The described facts of the case should leave no doubt that the severe illegality existing in Claimants’ investment warrants complete dismissal of their case. As Respondent

¹²³⁵ Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award, para. 497, **RLA-178**.

¹²³⁶ Counter-Memorial, Section III.B.1.

¹²³⁷ Reply, paras. 697-698.

¹²³⁸ Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award, para. 497, **RLA-178**. See also Metal-Tech v. Uzbekistan, Award, para. 239, **RLA-161**.

explains below, Claimants' purported investment was rendered unlawful due to illicit and deceitful conduct present in the: (i) participation in the public auction for BD Agro and conclusion of the Privatization Agreement; (ii) payment of the Purchase Price; (iii) fulfilment of investment obligations; (iv) disposal of BD Agro's land; and (v) the overall asset extraction scheme applied against BD Agro.

1.2.1. Acquisition of the shares through the public auction

800. In this section, Respondent demonstrates that the initial step in the acquisition of the shares was rendered illegal due to the fact that : (i) the true bidder *i.e.* owner of the shares was concealed *i.e.* misrepresented in bad faith; and (ii) the arrangement used to create Mr. Rand's "beneficial ownership" severely violated Serbian law.

a) Misrepresentation of the true bidder i.e. owner

801. The first and the most noticeable misrepresentation made by Claimants was in the previously described approach to the acquisition of BD Agro. Assuming that Mr. Rand's story is true, he then avoided *i.e.* abused the legal framework applicable to the privatization in Serbia by acquiring BD Agro through a natural person with Serbian citizenship – Mr. Obradovic.

802. Motive behind this abuse was twofold:

803. A legal entity always has an owner which can be traced (more or less easily), but a natural person is where the ownership chain always ends. A natural person does not have a shareholder. A natural person does not have a parent company. A natural person cannot be owned or controlled. Thus, it is practically impossible to even discover (let alone prove) that a company owned by a natural person is actually owned or controlled by another person or entity. This kind of arrangement would be quite useful in case a person would wish to engage in illegal activities with the company in question. In the event that the illegalities were to be discovered by the authorities, any criminal prosecution would be directed towards the "nominal" controlling owner and manager of the company (as it indeed happened in the numerous criminal proceedings against BD Agro). In other words, in case an investor wanted to purchase a company

in order to engage in lawful business activities, it would do so in a transparent manner – not under share purchase agreements shrouded in secrecy.¹²³⁹

804. Besides the evasion of liability, another substantial motive behind the described arrangement was also deceit for the purpose of acquiring a significant advantage available exclusively to Serbian nationals. As already explained above (*see* Section I.B), according to Serbian law, only Serbian natural persons acting alone were allowed to buy companies in the process of privatization through payment of the purchase price in six installments.¹²⁴⁰ The legislator's intention to provide this possibility only to Serbian nationals was more than evident as this advantage was not possible even for foreign nationals bidding through the companies they own in Serbia (Serbian companies also had to pay the price at once). However, Mr. Rand decided to evade the law and acquire an advantage otherwise not available to him by hiding behind Mr. Obradovic.
805. And he did not do this once – he, at least according to Claimants, admittedly acquired six Serbian companies in total by misrepresenting the actual buyer and consequently paying out the purchase price in six installments.¹²⁴¹
806. The tribunal in *Inceysa v. El Salvador* faced a very similar situation. In that case, the investor also committed misrepresentations and falsified the facts during the bidding process for the investment in question.¹²⁴² More specifically, the investor breached the bidding rules and misrepresented his financial and other characteristics relevant for the public tender in which he participated. Therefore, just like Claimants, he deceived the other parties and gained rights which were otherwise not accessible to him. Consequently, the tribunal established that:

¹²³⁹ *See e.g. Metal-Tech v. Uzbekistan*, Award, para. 202, **RLA-161** („if the Consultants had engaged in lawful lobbying, they would have rendered their services in a transparent manner – not under consulting contracts shrouded in secrecy. Payments too could have been made and received directly rather than through interconnected offshore companies.“).

¹²⁴⁰ Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Article 39 (1), **RE-218**.

¹²⁴¹ Assignment agreement between V. Vukelic and D. Obradovic, 2 March 2007, Article 1, **CE-565**; Privatization Agreement (Crveni Signal), 21 February 2003, Article 4, **RE-210**; Privatization Agreement (Inex), 26 November 2004, Article 1.3, **RE-220**; Privatization Agreement (PIK Pester), 3 March 2006, Article 1.3, **RE-210**; Privatization Agreement (Beotrans), 14 March 2007, Article 1.3, **RE-221**; Privatization Agreement (Uvac Gazela), 18 March 2003, Article 4, **RE-222**. Although the Regulation on Sale changed in 2005, the provision in question remained the same throughout the time of the conclusion of all of these privatization agreements (2001-2008). *See* Regulation on the Sale of Capital and Property at a Public Auction (45/2001), Article 31, **RE-218**.

¹²⁴² *Inceysa v. El Salvador*, Award, para. 236, **RLA-19**.

“El Salvador gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors. El Salvador did not have any basis to suppose that Inceysa would submit false information and would commit fraudulent acts for the purpose of establishing a legal relationship with MARN, which was embodied in the Contract that gives rise to this dispute.

*By falsifying the facts, Inceysa violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadoran law. Faced with this situation, this Tribunal can only declare its incompetence to hear Inceysa's complaint, since its investment cannot benefit from the protection of the BIT, as established by the parties during the negotiations and the execution of the agreement.”*¹²⁴³

807. In the present case, Mr. Rand deceived the authorities that he was not the actual bidder *i.e.* buyer of BD Agro. Instead, Mr. Obradovic was presented as the person bidding at the auction for BD Agro in his own name and on his own behalf,¹²⁴⁴ enabling payment of the purchase price for the shares in six installments. As it later turned out, the advantage of paying in instalments was actually used as the basis for the money siphoning operation, enabling Mr. Obradovic's abuse of BD Agro's assets to fraudulently pay the Purchase Price and fulfil his investment obligations.¹²⁴⁵
808. Therefore, Mr. Rand's acquisition of shares in BD Agro through Mr. Obradovic, was done by committing a fraud, by breaching Serbian laws and by taking unlawful advantage over other participants at the auction for Privatization. Mr. Rand effectively had a grace period of one year following the auction,¹²⁴⁶ after which he had to pay the remaining Purchase Price in five equal annual installments, with no interest. Had the other participants (one domestic and one foreign company) enjoyed the same advantage as Mr. Rand, one could only guess what would be the highest amount that they would be ready to offer for BD Agro.¹²⁴⁷ On the other hand, had Mr. Rand been in the same position as the other participants (as he should have been), it is also likely

¹²⁴³ Inceysa v. El Salvador, Award, paras. 238-239, **RLA-19**.

¹²⁴⁴ Minutes of the public auction nos. 4 and 5, 29 September 2005, **RE-213**.

¹²⁴⁵ See above para. 795.

¹²⁴⁶ As the previously paid deposit for participation was counted as the first installment. See Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, 15 October 2015, **RE-33**.

¹²⁴⁷ Minutes of the public auction nos. 4 and 5, 29 September 2005, **RE-213**.

that he would not be ready to offer the same amount as he was with Mr. Obradovic's participation. It is thus doubtful whether Mr. Obradovic *i.e.* Rand would be able to prevail in the auction had there not been for their unequal position with the other bidders. In other words, in case the Tribunal accepts that Mr. Rand (*i.e.* Claimants) was the actual owner of the shares in BD Agro, then it must also accept that such ownership was acquired through a severe misrepresentation which obviously had bad faith motives behind it. Consequently, Claimants should be deprived of protection under the Treaties as their investment is illegal.

b) Unlawfulness of the acquisition under Serbian law

809. As Respondent already explained in greater detail (*see* Section II.2.A&B), the beneficial ownership over the shares in BD Agro was not a valid property right under Serbian laws and regulations. Consequently, Claimants did not obtain any property right protected as an investment (*i.e.* there is a lack of jurisdiction *ratione materiae*). However, Respondent also noted¹²⁴⁸ that, in case the Tribunal would consider that the purported beneficial ownership asserted by Claimants is capable of protection under the Treaties, it should be regarded that the acquisition *i.e.* the making of the investment was nevertheless conducted contrary to Serbian laws and regulations. This deficiency deprives the Tribunal of jurisdiction *ratione voluntatis*.

810. Obviously struggling to understand the difference between these two concepts, Claimants chose the easy way out – they completely avoided to respond to Respondent's objection *ratione voluntatis*. More specifically, Claimants' merely stated that:

*"[...] substituting the words "materiae" for "voluntatis" is not a sufficient ground for creating a new jurisdictional battlefield. [...] Accordingly, Serbia's first ratione voluntatis objection must be dismissed for the same reasons as Serbia's ratione materiae objection"*¹²⁴⁹

811. This is an evidently frivolous comment. Respondent's *ratione materiae* objection relates to the existence of an investment in terms of recognized property rights, while the *ratione voluntatis* objection stems from the fact that illegal investments do not

¹²⁴⁸ Counter-Memorial, Section III.B.1.

¹²⁴⁹ Reply, paras. 697-698.

deserve investment treaty protection. For example, if an investor obtains a license by bribing a state official, it may have acquired a license as a matter of property law *i.e.* it may have made an investment (*ratione materiae*). However, since the investment was made in breach of the host State's law (and the international public policy), it is deprived of investment treaty protection (*ratione voluntatis*). Likewise, if Claimants obtained beneficial ownership over BD Agro's shares by breaching Serbian law, the Tribunal could find (although that would be incorrect) that they acquired ownership as a matter of property law *i.e.* that they have made an investment (*ratione materiae*). However, as it is evident from the expert reports of Prof. Radovic,¹²⁵⁰ in this particular case the violations of the Serbian law and regulations were far from trivial which means that even if Claimants acquired BD Agro's shares as a matter of property law, they nevertheless made an investment in breach of the host State's law, which is why they are deprived of investment treaty protection (*ratione voluntatis*).

812. The Share Purchase Agreement entered into by MDH and Mr. Obradovic was contrary to the imperative provisions of the Law on Market in Securities and other Financial Instruments (2002) and the Law on Privatization (2001), while the Second Sembi Agreement entered into by Sembi and Mr. Obradovic was in breach of the mandatory norms of the Law in Market of Securities and other Financial Instruments (2006), the Law on Privatization (2001) and the Law on Takeovers of Joint Stock Companies (2006).

813. In response to the allegation of these serious breaches, the Claimants' fragile defense essentially came down to three feeble grounds:

¹²⁵⁰ Expert Report of Prof. Mirjana Radovic, 19 April 2019, paras. 54, 81; Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, Sections II.7 and II.8.

- i. ownership over a Serbian company is governed by British Columbia¹²⁵¹ and Cypriot¹²⁵² laws - hence, all restrictions under Serbian law are completely evaded as Serbian law should not be applied;
- ii. the violated Serbian mandatory provisions relate to nominal ownership, but not to beneficial ownership¹²⁵³ - hence, all restrictions are completely evaded as provisions on acquisition of beneficial ownership do not even exist in Serbian law; and
- iii. MDH *never exercised* its purported call option and the agreed manner of effectuating the transfer was not even possible under Serbian law,¹²⁵⁴ but, had MDH exercised the option, there were some other ways of potentially executing the transfer (subject to further mandatory restrictions).¹²⁵⁵ Likewise, Mr. Obradovic *was not able to assign* the Privatization Agreement *nor transfer* the shares to Sembi under Serbian law, but Sembi nevertheless acquired equity rights towards Mr. Obradovic under Cypriot law¹²⁵⁶.

¹²⁵¹ Reply, para. 533 („Serbia’s assertion that the MDH Agreement is null and void under Serbian law is incorrect. The MDH Agreement was not governed by Serbian law, but rather by British Columbia law. [...] despite the fact that the method of transfer of shares stipulated under Article 2 of the MDH Agreement could not be effectuated under Serbian law—the MDH Agreement is perfectly valid under the laws of British Columbia. [...] Accordingly, even if any provision of the MDH Agreement conflicted with the mandatory provisions of Serbian law, this would still have no bearing on the validity of the MDH Agreement.”)

¹²⁵² Reply, para. 544 („Even if the Sembi Agreement conflicted with a mandatory provision of Serbian law (quod non), the issue of the validity of the Sembi Agreement and mutual obligations between Mr. Obradovic and Sembi would still fall to be assessed under its governing law, that being the Cyprus law.”)

¹²⁵³ Reply, paras. 522 (“The cited provisions do not purport to regulate any contractual arrangements relating to exercise of voting rights attached to the registered shares, composition of board of directors or transfer of economic benefits stemming from the shares to other shareholders or third parties. In other words, the Central Security Registry only registers nominal owners, and not beneficial owners”), 526 (“Claimants were never registered in the Central Securities Registry only proves the uncontested fact that they have never acquired nominal ownership of the Beneficially Owned Shares. It is wholly irrelevant to the existence of the Claimants’ beneficial ownership”), 527 (“the takeover rules under the 2002 Securities Law only applied to transfer of nominal ownership in a joint stock company. The conclusion of the MDH Agreement did not cause transfer of nominal ownership to any shares and thus did not trigger any takeover-bid obligation.”),

¹²⁵⁴ Reply, para. 511 (“Article 2 of the MDH Agreement contemplated that, upon MDH’s exercise of the call option, Mr. Obradovic would transfer the Beneficially Owned Shares to MDH by endorsing share certificates. Such a method of transfer of shares could not be performed under Serbian law because shares of Serbian joint stock companies, including BD Agro, may only be issued in a dematerialized form.”)

¹²⁵⁵ Reply, para. 511 (“had MDH exercised the call option, Mr. Obradovic would have been required to perform his obligation to transfer the legal title to the Beneficially Owned Shares in any manner compliant with Serbian law.”).

¹²⁵⁶ Reply, para. 541 („[...] under Article 41z of the 2001 Law on Privatization, the assignment of the Privatization Agreement required prior approval of the Privatization Agency. Such an approval was never granted by the Privatization Agency, and the assignment of the Privatization Agreement and the Beneficially Owned Shares was thus never effective vis-à-vis the Privatization Agency, or BD Agro. Nevertheless, under Cyprus law, a restriction on assignment contained in the original contract—here the

814. Although Respondent already explained¹²⁵⁷ why each of these grounds of defense fails as a matter of jurisdiction *ratione materiae*, it must be noted that each of them also fails under additional reasons as a matter of jurisdiction *ratione voluntatis*.

1. Legality is a matter of the host state's law

815. First, illegality of investments is always determined in accordance with the host state's law (and international public policy and principles). This position has been widely accepted in investment arbitration practice.¹²⁵⁸ There is no application of conflict of law provisions in that regard, and the Claimants' convenient attempt to avoid mandatory Serbian regulation by resorting to Cypriot or British Columbia law - is of no avail to them in this instance either.

2. Mandatory provisions of Serbian law cannot be evaded by simply qualifying the ownership as "beneficial"

816. Claimants also wrongly consider that they can avoid all mandatory restrictions of Serbian law (company, privatization, financial and securities) as long as their purported ownership is unrecognized by the Serbian legal system. According to their position, all the investor has to do in order to avoid applicability of the host state mandatory legal provisions, is to use a legal concept unknown to the host state's legal system. This is on its face erroneous. An illustrative example of this reckless behavior is given by Mr. Rand himself, who stated that:

"The MDH Agreement contemplated a potential transfer of the BD Agro shares by the endorsement of the certificates representing such shares. I included this provision only because endorsement of share certificates was the common way of transfer of shares pursuant to British Columbia law. In

Privatization Agreement—does not invalidate the assignment as between the assignor and assignee. Instead, the assignment is fully effective between them in equity.")

¹²⁵⁷ See Sec.II.A.

¹²⁵⁸ *Hamester v. Ghana*, Award, paras. 122-123, **RLA-115** ("An investment will not be protected if [...] it is made in violation of the host State's law"); *Metal-Tech v. Uzbekistan*, Award, para. 165, **RLA-161** ("(i) non-trivial violations of the host State's legal order [...], (ii) violations of the host State's foreign investment regime [...], and (iii) fraud [...]"); *Quiborax v. Bolivia*, Decision on jurisdiction, para. 266, **RLA-24** (same definition as in *Metal-Tech*); *Mamidoil v. Albania*, para. 359, **RLA-20** ("investments are protected by international law only when they are made in accordance with the legislation of the host State"); *Saluka v. Czech Republic*, para. 204, **RLA-73** ("an investment must have been made in accordance with the provisions of the host State's laws"); *Phoenix v. Czech Republic*, para. 101, **RLA-5** ("States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws").

*reality, I did not really care about the specific way in which the shares would be transferred, as long as it would allow MDH to be registered as the owner of the Privatized Shares.”*¹²⁵⁹

817. This statement demonstrates the complete lack of due diligence and respect for the laws of the Republic of Serbia. Mr. Rand apparently did not think of Serbian law when intending to invest millions of euros in Serbia. For some inexplicable reason, he only thought of British Columbia law when concluding an agreement with a Serbian national regarding shares in a Serbian company. Mr. Rand did not even inquire about the allowed manner of transferring shares in BD Agro to him, let alone whether the MDH Agreement actually acquired him any rights under Serbian law.
818. One of the fundamental principles on which the Serbian company law system rests is the transparency and publicity of the ownership structure of companies.¹²⁶⁰ With respect to shareholding companies, the restrictions upon the ownership and transfer of shares are the highest. As Prof. Radovic has explained, the restrictions applicable here are contained in three different laws and are evidently highly mandatory in nature.¹²⁶¹
819. However, Claimants downplay the significance of these strict limitations by treating nominal ownership as a mere formality. More specifically, they consider that the cited rules relate only to *nominal*, as opposed to *beneficial* ownership. And yet, Claimants ignore the fact that there is no such distinction in Serbian law. Serbian law recognizes only “nominal” ownership over shares. What Claimants subsume under this expression is actually legal ownership – the only kind of ownership that Serbian law gives effect to. Therefore, if one wishes to legally *i.e.* lawfully own or transfer shares of a Serbian company, it must comply with the applicable legal requirements established under Serbian law.
820. These requirements also relate to the notion of “control”, contrary to Claimants’ contentions. According to the Law on Companies (2004) applicable at the time the MDH and Sembi agreements were concluded, control over a company is always

¹²⁵⁹ Second Witness Statement of Mr. William Rand, 3 October 2019, para. 17.

¹²⁶⁰ Evident from the insistence upon registration of all relevant information. *See e.g.* Articles 3 and 6 of the Law on Companies (2011), **RE-321**; Articles 8 and 10 of the Law on Companies (2004), **RE-320**.

¹²⁶¹ Expert Report of Prof. Mirjana Radovic, 19 April 2019, paras. 54, 81.

associated with the legal title over the shares *i.e.* a direct legal connection with the company itself.¹²⁶² Furthermore, the only kind of a control agreement allowed under this law was between two affiliated companies – and even this agreement had to be registered in order to be considered valid.¹²⁶³

821. Claimants’ reference to the introduction of the notion of “indirect owner” in the 2011 Law on Capital Markets and “actual owner” in the 2018 Law on Centralized Records of Real Owners is of no help either, but this is already explained in Section II.A. dealing with *ratione materiae* objection and thus will be no repeated here.
822. Furthermore, it is particularly ironic that Claimants invoke these rules to show that they have lawfully acquired the shares as no restrictions were applicable to “beneficial owners”, since Claimants’ have not even followed the obligations required by the laws “recognizing” such ownership.
823. For instance, as the Claimants’ own expert confirms, if Mr. Rand would be considered as the owner of the shares held by Mr. Obradovic (*quod non*), then MDH doo’s acquisition of 3.9% of BD Agro's shares triggered an obligation to issue a mandatory takeover bid for the remainder of BD Agro's shares not yet held by them.¹²⁶⁴ However, as no such bid was ever issued, this would mean that Mr. Rand committed a punishable commercial offence under the Serbian law, while making his respective investment.¹²⁶⁵ As Prof. Radovic explains, the consequence of this offence was much more severe than Ms. Tomic Brkusanin tries to present it. Specifically, the ensuing sanction for this offence meant that “*not only MDH Serbia, but also Mr. Obradović would have lost all their voting rights in BD Agro*”.¹²⁶⁶ Consequently, had this offence been discovered, Messrs. Obradovic and Rand would completely lose control over BD Agro. Therefore, the indirect acquisition of 3,9% of the shares in BD Agro by Mr.

¹²⁶² Law on Companies (2004), Article 367, **RE-320** (“A controlling shareholder of a limited liability company or a joint stock company, within the meaning of this law, is the person who alone or with other persons who act together with him (acting in concert): 1) has more than 50% of voting rights in the company, which in case of a joint stock company means ownership and voting rights from more than 50% of ordinary shares (majority shareholding); 2) in another way exercises controlling influence over management and conducting business of the company on the basis of his capacity as a member or a shareholder (or on the basis of a contract concluded in accordance with this law).” The situation remained the same in the new version of the law. See Article 62 of the Law on Companies (2011), **RE-321**. See also Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, Section II.6.1.

¹²⁶³ Law on Companies (2004), Articles 373-376, **RE-320**.

¹²⁶⁴ Expert Report of Mrs. Bojana Tomic Brkusanin, 3 October 2019, paras. 110-112.

¹²⁶⁵ Expert Report of Mrs. Bojana Tomic Brkusanin, 3 October 2019, para. 113.

¹²⁶⁶ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, para. 136.

Rand was obviously made in breach of mandatory rules of Serbian law, and is as such – illegal.

824. On a separate note, it should also be noted here that despite the newly-introduced obligation to report and register the “actual” (*i.e.* ultimate) owners of companies in Serbia, the public registries still lead only to Mr. Obradovic as the ultimate owner of all of the other companies which Mr. Rand purportedly acquired through Mr. Obradovic. Although these entities, as public joint-stock companies, are not obliged to report on their ultimate owner, their shareholders are publicly listed. Thus, it can be easily traced that Kalemegdan Investments Inc. is their majority shareholder,¹²⁶⁷ while the registered “ultimate owner” of Kalemegdan Investments Inc. is none other than Mr. Obradovic.¹²⁶⁸ Therefore, Mr. Rand is again nowhere to be found, although he claims to be their “beneficial owner” under the 2018 Law on Centralized Records of Real Owners. This once again demonstrates that Claimants have absolutely no respect for the Serbian legal system in which they purportedly invest.

1.2.2. Acquisition of the shares through payment of the purchase price

825. The acquisition *i.e.* making of Claimants’ purported investment was not a one-time act. It was to be conducted in accordance with the Privatization Agreement as an underlying legal instrument governing the ownership over BD Agro. Hence, the legality of the investment must be viewed throughout the period of *making* the investment in accordance with the Privatization Agreement.

826. The most notable activity inseparably tied to the acquisition of the shares was the contribution *i.e.* the payment of the purchase price. Therefore, the making of the investment lasted throughout the payment of each installment of the purchase price.

827. According to Article 2 of the Privatization Agreement:

¹²⁶⁷ See List of shareholders of Crveni Signal, 20 June 2014, CE-759; List of shareholders of Obnova ad Beograd, 11 June 2012, CE-760; List of shareholders of Beotrans Beograd 10 June 2012, **CE-761**; List of shareholders of Inex, 22 January 2020, **RE-491**; List of shareholders of PIK Pester, 22 January 2020, **RE-492**.

¹²⁶⁸ Although Kalemegdan Investments Inc. is a company registered in Cyprus, its wholly owned subsidiary in Serbia – Kalemegdan Investments doo, had an obligation to register their ultimate owner. See Excerpt from the Register of Real Owners for Kalemegdan Investments doo, 22 January 2020, **RE-493**; See also List of Shareholders of Kalemegdan Investments Ltd, website of the Cyprus Department of Registrar of Companies and Official Receiver, 12 March 2019, **RE-513**.

“With conclusion of this agreement, which has the effect of the articles of incorporation of the subject, the buyer acquires the right of management, participation in profit and the right to a part of the liquidation mass, proportionately to the amount of purchased capital. The right to free disposal of purchased capital is acquired by the buyer pursuant to the provisions of Article 456 of the Company Law and provisions of the agreement, and in proportion to paid value of sale and purchase price.”¹²⁶⁹

828. Therefore, the Privatization Agreement leaves no doubt that the buyer acquired certain ownership rights over BD Agro only in proportion to the price *i.e.* the installments paid. Furthermore, having in mind that the established pledge over the shares prevented free disposal of the shares, full ownership rights were to be acquired only after the fulfillment of all buyer’s obligations as only in that moment the condition for removing the pledge would be fulfilled.¹²⁷⁰

829. This understanding is also confirmed in the preamble of the Sembi Agreement, which states:

“Mr. Obradovic entered into an agreement (the "Contract") with the Privatization Agency of the Government of Serbia and Montenegro in October of 2005, pursuant to which he could acquire, by making payments over a period of six years, 70% of the shares of the agricultural business known as "BD Agro"”¹²⁷¹

830. This reveals that Mr. Obradovic and the Claimants were fully aware that there was no acquisition of the shares (*i.e.* the investment) without the payments being made under the Privatization Agreement.

831. However, as it was explained above in more detail, the payment of the purchase price was completely contaminated by deceit and fraud.

¹²⁶⁹ Article 2.1 of the Privatization Agreement, 4 October 2005, **CE-17**.

¹²⁷⁰ Second Expert Report of Prof. Mirjana Radovic, 24 January 2020, Section II.4.

¹²⁷¹ Agreement between Mr. Obradović and Sembi, 22 February 2008, **CE-29**.

832. *First*, if Mr. Rand was the beneficial owner *i.e.* buyer of the shares in BD Agro, then he was not entitled to pay the purchase price in installments. Serbian regulation applicable at the time of the auction was clear:

*“If the declared buyer at the auction is a domestic individual, he may pay the purchase price in up to six annual installments.”*¹²⁷²

833. As Mr. Rand was definitely not a domestic individual *i.e.* a citizen of the Republic of Serbia, he could not have paid the purchase price in six annual installments. Instead, his only option was to pay the entire price at once, immediately after the auction. Therefore, Mr. Rand deceitfully used a right which did not belong to him under Serbian law. Furthermore, this presented a significant advantage in the auction itself, as Mr. Obradovic *i.e.* Rand was consequently in a better starting position to offer a higher price than all the other bidders (none of which was a domestic individual). This already renders the acquisition of the investment *i.e.* the shares in BD Agro, illegal.

834. *Second*, payment of the Purchase Price was the obligation of the buyer. Therefore, using *i.e.* siphoning funds and assets of the privatized company to pay for the purchase price would undoubtedly present a fraud. However, this is exactly what happened in the case of BD Agro. As Respondent explained above, most of the installments were effectuated by siphoning funds and assets from BD Agro. More specifically, documentary evidence indisputably demonstrates that:

- i. the third installment was paid out of the loan which was transferred to BD Agro from NLB Bank, and on that same day simply forwarded from BD Agro's to Mr. Obradovic's bank account immediately before the price was transferred to the Privatization Agency;
- ii. the fourth installment was paid out of the funds acquired from the sale of BD Agro's land, a loan from Agrobanka and a loan from Banka Intesa, which were transferred from BD Agro's to Mr. Obradovic's bank account immediately before the according part of the Purchase Price was transferred to the Privatization Agency;
- iii. the fifth installment was paid out of the loan which was transferred to BD Agro from Agrobanka, and on that same day simply forwarded from BD

¹²⁷² Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Article 39 (1), **RE-220**.

- Agro's to Mr. Obradovic's bank account immediately before the price was transferred to the Privatization Agency; and
- iv. the sixth installment and the interest for its belated payment was paid out of the funds transferred from BD Agro's to Inex's and Mr. Obradovic's bank accounts before the according part of the price was transferred to the Privatization Agency.

835. The above instances are only examples which are directly visible from bank account statements. However, as Mr. Obradovic's asset extraction scheme had a much broader impact *i.e.* caused much greater damage, it can be considered that virtually all of the installments were ultimately paid using BD Agro's funds (*See* Section I.F).

836. In summary, Mr. Rand falsely presented Mr. Obradovic as the purchaser in order to be able to pay the Purchase Price for BD Agro in installments, which then enabled him to commit yet another deceit by paying out the installments from the funds and assets of BD Agro. Needless to say, the described misrepresentations render the *making of the investment* completely fraudulent and, consequently, illegal.

1.2.3. Acquisition of the shares through the fulfillment of investment obligations

837. The *making of the investment* was not limited solely to the bidding process *i.e.* payment of the purchase price. The acquisition of the shares in BD Agro came with another mandatory financial requirement: fulfillment of minimum investment obligations.

838. Namely, when the public call for the auction in BD Agro was published, it was explicitly stated that: (i) the starting price for BD Agro was approx. EUR 4.3 million, and that (ii) the minimum investment obligation was approx. EUR 2 million.¹²⁷³ Therefore, all potential investors *i.e.* bidders were informed that the minimum amount of money necessary for the acquisition of the shares in BD Agro was approx. EUR 6.3 million. The investment obligation was thus an inseparable part of the contribution for the shares purchased at the auction.

¹²⁷³ Public Call for the Auction in BD Agro, 26 August 2005, **RE-397**; Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

839. Furthermore, it was through the purported fulfillment of mandatory investment obligations that Mr. Obradovic increased his shareholding in BD Agro from 70% to 75.8719%.¹²⁷⁴ Thus, execution of these investments was even a direct contribution for at least 5.8719% of the shares held by Mr. Obradovic.
840. Lastly, the investments in BD Agro are also presented as an additional form of Claimants' investment under the Treaties, besides the beneficial and indirect ownership of shares in BD Agro.¹²⁷⁵
841. Therefore, other than the payment of the Purchase Price, illegality in investing further funds into BD Agro also presents a jurisdictional impediment for Claimants' case, having in mind that these actions must be considered as the *making of the investment*.
842. In that regard, Respondent already explained that Mr. Obradovic's *i.e.* Claimants' purported investments into BD Agro were only illusory. More specifically, Mr. Obradovic made sure that any funds and assets that entered BD Agro in this way, were not there to stay for long, as they were ultimately recorded as shareholder loans. The astoundingly high number of the loans was thus "repaid" to Mr. Obradovic, thereby negating all "investments" in this regard. Not only did these actions eliminate the contribution as an essential element of an "investment", but they have also rendered it unlawful as the Privatization Agency and the minority shareholders of BD Agro were obviously defrauded in this manner.
843. Another previously described way of misrepresenting the fulfilled investment obligations occurred through the unlawful alienation of the invested assets for the personal benefit of Mr. Obradovic (*i.e.* Mr. Rand) and/or one of his affiliated companies. An investment would thus enter BD Agro, but was in fact used by a third person. In other words, many "investments" in BD Agro were actually investments into another entity, which undoubtedly amounts to fraud and deception as well.
844. Therefore, the Tribunal should accordingly deny protection to Mr. Obradovic's *i.e.* Mr. Rand's investments into BD Agro, as they were evidently unlawful.

¹²⁷⁴ Memorial, para. 11; Reply, para. 97.

¹²⁷⁵ Claimant's Memorial, para. 299.

1.2.4. Fraudulent disposal of BD Agro's land

845. One of the most devastating types of asset extraction and fraud conducted by Mr. Obradovic in BD Agro was through his land machinations.
846. First, as explained in more detail above, Mr. Obradovic was able to fraudulently extract for himself and his associates between approx. EUR 1.4 and 3.3 million from only two of such machinations that were discovered.¹²⁷⁶ Likewise, there was another attempt at extracting even higher multimillion values from a land disposal that was, however, successfully prevented by the Agency.
847. Besides the obvious purpose of fraudulently earning enormous amounts of money at the expense of BD Agro, these types of activities also helped Mr. Obradovic finance his obligations under the Privatization Agreement (including the Purchase Price and investment obligations). Likewise, by concealing the actual value of the disposed land, Mr. Obradovic effectively prevented the Agency to comprehensively control the fulfillment of the Privatization Agreement (in particular, Article 5.3.3.).
848. Not only were the minority shareholders and the Agency defrauded by land machinations, but Mr. Obradovic made sure to directly damage Respondent as well.¹²⁷⁷ Namely, as it was explained above, one of the obligations of the buyer under the Privatization Agreement was restitution of land to its previous owners. However, Mr. Obradovic, together with Mr. Jovanovic and several other accomplices (including certain State officials), fraudulently managed to exchange the land that BD Agro was supposed to return to certain individuals, with completely unburdened State land.¹²⁷⁸
849. He did so contrary to legal regulation and contrary to Article 6.3.1 of the Privatization Agreement. Again, this breach was never alleged by the Privatization Agency simply because it was only after termination of the Privatization Agreement that the pertinent corruption scandal was revealed to the public.¹²⁷⁹ The breach of legal regulation was far from trivial, as there was simply no legal basis nor approval to conduct the

¹²⁷⁶ See Sec.I.F.

¹²⁷⁷ Although, by abusing BD Agro in order to fulfill the Privatization Agreement, Respondent was already indirectly damaged as the holder of the social capital being privatized.

¹²⁷⁸ Indictment no. KTI 65/16, 5 April 2017, **RE-399**.

¹²⁷⁹ "Action "Shredder", detainment for the suspects", RTS, 28 December 2015, **RE-256**.

exchange, while the land in question was valued at RSD 622.852.000¹²⁸⁰ (approx.. EUR 5,3 million according to the current exchange rate¹²⁸¹).

850. Mr. Obradovic is currently being prosecuted in criminal proceedings for all of the above land disposals.¹²⁸² He is facing up to 10 years in prison in each case.¹²⁸³ The illicit acquisition of the land and evasion of restitution obligations also denies protection to Claimants' investment, as the described frauds breached the Privatization Agreement and attempted to increase the investment in an unlawful manner.

1.2.5. Asset stripping of BD Agro

851. Having in mind the above, it should be completely evident by now that the described conduct of Mr. Obradovic and his associates was aimed at stripping the assets and siphoning funds out of BD Agro.

852. Not only does this kind of activity (i) eliminates contribution as an element of an investment and (ii) renders the specific investments made in that manner illegal, it also (iii) independently denies the legality of the whole investment regardless of its connections to the payment of the purchase price and investment obligations. This is because the asset stripping practice demonstrates that Mr. Obradovic *i.e.* Mr. Rand had an obvious bad faith motive when investing in Serbia and had in fact used the investment as a vehicle for the realization of his illicit goals.

853. Thus, it is more than obvious that such an investment cannot benefit from the protection of the Treaties.

¹²⁸⁰ Indictment no. KTI 65/16, 5 April 2017, **RE-399**.

¹²⁸¹ Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

¹²⁸² Indictment of the Higher Public Prosecutor's Office no. KTO 93/18 dated 14 February 2018, **RE-426**.

¹²⁸³ Article 234 of the Criminal Code, **RE-257**.

2. Respondent did not consent to arbitrate dispute with regard damage allegedly suffered by MDH Serbia

854. Respondent hereby reiterates that Mr. Rand should not be allowed to submit a claim on his own behalf for harm allegedly suffered by his Serbian subsidiary – MDH Serbia. It is Claimants’ case that MDH Serbia’s shares in BD Agro were indirectly expropriated by Serbia. It follows from here that the damage allegedly suffered was inflicted directly to the company owned by Mr. Rand (MDH Serbia), while Mr. Rand’s loss was merely of reflective nature. In such circumstances, the Canada – Serbia BIT requires that both the investor and his local subsidiary waive their right to instigate proceedings before the court of the Respondent Party. Since Claimants omitted to submit a proper waiver issued by MDH Serbia at the relevant time, the Tribunal does not have jurisdiction to adjudicate the claim relating to the MDH Serbia’s 3.9% shareholding in BD Agro.

2.1. Mr. Rand cannot claim damages on his own behalf for loss suffered directly by MDH Serbia

855. The Canada – Serbia BIT allows the investor to submit a claim on his own behalf, for loss or damage suffered by the investor (Article 21(1) of the BIT) or on behalf of an enterprise of a Respondent Party, when the loss or damage was incurred to the enterprise (Article 21(2) of the BIT).¹²⁸⁴

856. Claimants argue that it is up to the investor to freely choose between the two options.¹²⁸⁵ Specifically, Claimants assert that Mr. Rand has brought a claim on his own behalf pursuant to article 21(1) of the Canada-Serbia BIT, and that, consequently, they did not need to submit any waiver issued by MDH Serbia in accordance with Article 22(2)(f) of the BIT.

857. However, Respondent submits that Mr. Rand’s claim with regard to the loss of MDH Serbia’s shareholding in BD Agro should be properly characterized as a claim on behalf of MDH Serbia.

¹²⁸⁴ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; emphasis added, **CLA-1**.

¹²⁸⁵ Claimants’ reply, para. 707.

858. The relevant provisions of the Canada-Serbia BIT are same in wording as provision of NAFTA on the same issue. Namely, article 21(1) of the Canada-Serbia BIT directly corresponds to article 1116 of NAFTA, and article 21(2) of the Canada-Serbia BIT directly corresponds to article 1117 of NAFTA. Therefore, the findings of the NAFTA tribunals can serve as guidance for interpretation of Articles 21(1) and 21(2) of the Canada – Serbia BIT. However, neither the practice of NAFTA tribunals nor the position taken by NAFTA’s contracting Parties support the Claimants’ assertion that an investor can simply choose to submit a claim on his own behalf for *any loss or damage* suffered directly by his local subsidiary.¹²⁸⁶
859. The relationship between NAFTA Articles 1116 and 1117 has been discussed by tribunals in the context of recovery of damages. The tribunal in *Mondev v. USA* warned that “a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor.”¹²⁸⁷ The tribunal also emphasized the important distinction between claims advanced under the two provisions: *[T]he principal difference relates to the treatment of any damages recovered. If the claim is brought under Article 1117, these must be paid to the enterprise, not to the investor (see Article 1135(2)). This would enable third parties with, for example, security interests or other rights against the enterprise to seek to satisfy these out of the damages paid. It could also make a difference in terms of the tax treatment of those damages.*¹²⁸⁸
860. Respondent does not contend that Mr. Rand was indeed allowed to submit the claim on his own behalf. However, his claim in accordance with Article 21(1) of the BIT can encompass only loss that was inflicted to his property interests directly. Claims for indirect (reflective) loss suffered by shareholders as a result of direct losses incurred to their subsidiaries falls out of Article 21(1).
861. The main reason why an investor cannot claim damages on his own behalf for loss that is merely consequential upon harm inflicted on his subsidiary (for example, destruction of assets belonging to the subsidiary) is to be found in the relationship

¹²⁸⁶ Claimants’ Reply, para. 708.

¹²⁸⁷ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 22 October 2002, para. 86, **RLA-39**.

¹²⁸⁸ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 22 October 2002, para. 84, **RLA-39**.

between Article 21(1) and 21(2) of the BIT and their interpretation in light of Article 31 of the VCLT. Namely, if an investor would be allowed to submit a claim on his own behalf for any loss suffered by an enterprise, Article 21(2) of the Canada – Serbia BIT would be obsolete.

862. This was the conclusion reached most recently by the tribunal discussing the relationship between NAFTA Articles 1116 and 1117. The tribunal in *Clayton v Canada* analyzed meaning of the phrase “*the investor has incurred loss or damage*” from Article 1116 (identical to the text of Article 21(1) of the Canada – Serbia BIT) and made a series of observation applicable to the issue at stake here:

“371. The starting point for the interpretation of Articles 1116 is Article 31(1) of the VCLT under which treaties are to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The critical question in this case is the meaning of “the investor has incurred loss or damage” arising out of the breach. The terms of Article 1116 do not make clear whether they are limited to direct loss or they can include indirect loss that is, reflective loss.

372. However, if the words of Article 1116 are to be read “in their context” then Article 1117 has to be considered. This provision allows an investor to claim for loss to an enterprise thus providing for the recovery of reflective loss. As a result, to permit reflective loss to be recovered under Article 1116 would raise questions about the relationship between the two provisions perhaps rendering Article 1117 inutile. This is the point made by the Respondent. The Investors argue that the potential for conflict only arises when claims are brought under both Article 1116 and Article 1117, but this only reinforces the question of why Article 1117 was included into NAFTA if claims can be brought for reflective loss under Article 1116.

373. Both the Respondent and the United States in their submissions argue that the inclusion of separate provisions in Article 1116 and Article 1117 was deliberate. Article 1116 gave effect to the traditional rule of customary international law that a party can sue for its losses arising out of the breach

of an international obligation. Article 1117 was designed to permit claims by an investor on behalf of its investment, thus permitting a claim for reflective loss. In the absence of that provision a claim for reflective loss would otherwise be barred under customary international law by virtue of the ICJ judgment in Barcelona Traction, which rejected the right of shareholders to bring claims in place of the corporation.

374. The Tribunal finds this to be a plausible explanation for the existence of the two separate provisions in NAFTA Chapter Eleven, which would argue against overlap between them and would mean that reflective loss could not be recovered under Article 1116.”¹²⁸⁹

863. The tribunal in Clayton NAFTA jurisprudence on the issue (including the award in *UPS v. Canada*, relied on by Claimants in their submission)¹²⁹⁰ and concluded that “[n]o consistent position on the distinction in the scope of application of Article 1116 and Article 1117 has emerged in the Chapter Eleven cases.”¹²⁹¹ The tribunal, however, endorsed the position espoused by the *Mondev* tribunal about importance of distinguishing between claims brought by investor on his own behalf and claims submitted as a result of reflective loss:

“In light of the above, the Tribunal is persuaded that the Respondent and the United States are in principle correct. Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116. This follows from the wording of Article 1116 in its context, which includes Articles 1121 and 1135. Moreover, the Tribunal takes account of the common position of the NAFTA Parties in their submissions to Chapter Eleven tribunals.”¹²⁹²

864. Respondent submits that Mr. Rand cannot advance the claim for indirect loss suffered directly by MDH Serbia under Article 21(1) of the Canada Serbia – BIT. Mr. Rand

¹²⁸⁹ *Bilcon of Delaware et al. v. The Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019 (emphasis added), **RLA-154**.

¹²⁹⁰ Claimants’ Reply, para. 709.

¹²⁹¹ *Bilcon of Delaware et al. v. The Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 387, **RLA-154**.

¹²⁹² *Bilcon of Delaware et al. v. The Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 389, **RLA-154**.

cannot escape the obligation to sue on behalf of the enterprise (MDH Serbia) by simply labeling MDH Serbia's assets (3.9% shareholding in BD Agro) as his own. If that would be indeed possible, an investor could claim for loss or damage to any tangible asset of his subsidiary, merely because he "indirectly owns" the asset.

865. It does not follow otherwise from the findings of the tribunal in *Copper Mesa v. Ecuador*, another case Claimants rely on in their submission.¹²⁹³ There, the claimant argued that Ecuador indirectly expropriated the claimant's shares in a local subsidiary by taking the subsidiary's assets and destroying the value of shares entirely. Thus, the claimant in *Copper Mesa* grounded its claim on damage inflicted *on its property* (shares in *Ascendant Ecuador*) and not on the property of its local subsidiary.¹²⁹⁴
866. To be clear – Respondent does not dispute that Mr. Rand was free to submit a claim on his own behalf for loss or damage affecting the value of *his* shareholding in MDH Serbia. In such scenario, the requirement of waiver by MDH Serbia applies as well.¹²⁹⁵ What he cannot do under Article 21(1) of the Canada – Serbia BIT is to treat MDH Serbia's assets (its shareholding in BD Agro) as his own for the purpose of that provision. To claim for indirect damage suffered by MDH Serbia directly is possible only under Article 21(2) of the BIT.

2.2. Claimants' claim with regard to MDH Serbia's shareholding in BD Agro does not fulfill requirements from Article 22 of the Canada – Serbia BIT which leaves the Tribunal without jurisdiction

867. As explained above, Mr. Rand's claim in relation to MDH Serbia's shareholding can be properly qualified as either the claim on his own behalf for loss or damage to his interest in MDH Serbia (in accordance with Article 21(1) of the BIT), or as the claim submitted on behalf of MDH Serbia for loss or damage incurred by the company (in accordance with Article 21(2) of the BIT).
868. In both of those instances, Claimants were under obligation to submit a proper waiver of MDH Serbia's right to initiate proceeding before administrative tribunal or court

¹²⁹³ Claimants' Reply, para. 710.

¹²⁹⁴ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, 15 March 2016, Award, para. 6.6., **RLA-120**.

¹²⁹⁵ Article 22(2)(e)(iii) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CLA-1**.

under Serbian law or to use any other dispute settlement procedure to remedy the damage allegedly suffered.¹²⁹⁶

869. Claimants do not dispute that no waiver from MDH Serbia was ever submitted. Instead, they argue that, even if the Canada – Serbia BIT did require Claimants to include the waiver, the absence of waiver cannot affect jurisdiction of the Tribunal.¹²⁹⁷ Claimants put forward two main arguments in support of the proposition, both equally flawed.

870. First, Claimants assert that MDH Serbia effectively fulfills the requirement of waiver since it cannot seek redress for the alleged expropriation of its shareholding in any other proceedings.¹²⁹⁸ This is evidently wrong. The fact that MDH Serbia is not a contracting party in the Privatization Agreement does not prevent it in any way to pursue redress for the allegedly wrongful act of the Agency before Serbian courts based on general rules on torts from the Law on Obligations.¹²⁹⁹ If what Claimants assert would be correct – that only persons/entities in privy to contractual arrangement with the Agency could initiate proceedings before local courts – the requirement of waiver would be hypothetically applicable only to Mr. Obradović and could not affect any of the Claimants. This is naturally not so.

871. Second, Claimants relay on *Thunderbird v. Mexico* in order to prove that “the requirement of a waiver is merely procedural and its initial absence does not deprive the investment tribunal of jurisdiction.”¹³⁰⁰ The argument is made in clear contradiction with Article 25(1) of the Canada – Serbia BIT. Any discussion on whether the absence of waiver is procedural or jurisdictional issue is unnecessary in light of unequivocal provision of the BIT:

¹²⁹⁶ Article 22(2)(e)(iii) and Article 22(2)(f)(ii) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; emphasis added, **CLA-1**. In case of submission of a claim on behalf of the enterprise, the investor is required to submit a document recording consent of the enterprise to arbitration as well (Article 22(2)(a)).

¹²⁹⁷ Claimants’ Reply, para. 718.

¹²⁹⁸ Claimants’ Reply, para. 718.

¹²⁹⁹ Law on Obligations, Section 2 (Torts), **RE-32**.

¹³⁰⁰ Claimants’ Reply, para. 724.

*Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. Failure to meet a condition precedent listed in Article 22 nullifies that consent.*¹³⁰¹

872. Third, in line with Article 22(4) of the Canada – Serbia BIT, the waiver and consent referred to in paragraph 2 of the same Article must be enclosed together with a submission of a claim to arbitration. The relevant provision uses the word “*shall*” which clearly implies the mandatory character of the obligation to submit waivers at the time the claim is submitted to arbitration. The waiver which was submitted by Claimants with their Reply does not comply with this requirement.¹³⁰² Thus, Claimants cannot unilaterally “cure” inexistence of waiver at the relevant time. Absence of formally valid waiver means that the precondition for Respondent’s consent to arbitrate and a valid arbitration agreement did not materialize. This was precisely the position of the tribunal in *Renco v. Peru*, relied on by Claimants in their submission.¹³⁰³ In that case *Renco* argued that it is allowed to cure deficiencies in its waiver by submitting a new one.¹³⁰⁴ The dispute was arbitrated under the United States – Peru Trade Promotion Agreement which contains in Article 10.18(2). a provision eliminating consent to arbitrate in absence of required waivers at the time a claim is submitted to arbitration, in a way similar to Article 22 of the Canada – Serbia BIT.¹³⁰⁵ The tribunal held that, as a result of deficient waiver, no arbitration agreement ever came into existence:

“Under Article 10.18, the submission of a valid waiver is a condition and limitation on Peru’s consent to arbitrate. This is a precondition to the initial existence of a valid arbitration agreement, and as such leads to a clear timing issue: if no compliant waiver is served with the notice of arbitration, Peru’s

¹³⁰¹ Article 25(1) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; emphasis added, **CLA-1**

¹³⁰² See Claimants’ Reply, para. 723.

¹³⁰³ *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 135, **CLA-97**.

¹³⁰⁴ *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 127, **CLA-97**.

¹³⁰⁵ *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 67, **CLA-97**.

*offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever.”*¹³⁰⁶

873. Therefore, in line with the clear language of Article 22 of the Canada – Serbia BIT, the initial absence of a waiver that should have been submitted by MDH Serbia nullifies Respondent’s consent to arbitrate the dispute about the company’s shareholding in BD Agro. Subsequent submission of waiver by Claimants cannot cure inexistence of consent at the relevant time.

2.3. Respondent’s objection was submitted in due time and does not represent abuse of process

874. In their last argument with regard absence of valid waiver issued by MDH Serbia, Claimants essentially ask the Tribunal to divest Respondent of its procedural rights under the ICSID Arbitration Rules and Procedural Order No. 1. According to Claimants, the objection with regard to the lack of proper waiver was submitted belatedly.¹³⁰⁷ This is manifestly incorrect.

875. Respondent’s objection was submitted (together with other jurisdictional objection) in full compliance with ICSID Arbitration Rule 45(1):

*Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the countermemorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.*¹³⁰⁸

876. In addition, the objection was raised in accordance with the procedural calendar envisaged in Annex A of the Procedural Order No. 1.¹³⁰⁹ Respondent had previously announced to the Tribunal and Claimants its intention to submit preliminary

¹³⁰⁶ *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 158 (emphasis added), **CLA-97**.

¹³⁰⁷ Claimants’ Reply, para. 729.

¹³⁰⁸ ICSID Arbitration Rules, Rule 41(1), emphasis added, **CLA-17**.

¹³⁰⁹ Procedural Order No. 1 of 28 November 2018, Annex A.

objections on jurisdiction and the procedural calendar was clearly drafted with this in mind.¹³¹⁰

877. Although the fact that Respondent intended to raise all of its jurisdictional objections in its Counter-Memorial was well known to Claimants, they now argue that Respondent should have made the objection during the pre-arbitration communications.¹³¹¹ The argument presupposes that the text of ICSID Arbitration Rule 41(1) instructing respondent States to make jurisdictional objections “*as early as possible*” defines the moment in which any objection must be raised, while the precise time limit from the same provision (*no later than the expiration of the time limit fixed for the filing of the counter-memorial*) is only an *additional time limit*, operating as a *secondary rule*.¹³¹² This kind interpretation basically means that the time limit posed in Article 41(1) bears no significance. That cannot be correct.

878. First, the role of the time limit designated specifically in said provision is explained by the tribunal in *Urbaser v. Argentina*: „[c]laimants rightly observe that for Arbitration Rule 41(1) the primary rule is that jurisdictional objections be made “*as early as possible*.” However, the secondary rule is that such objections shall be raised *no later than at the end of the time-limit for the counter-memorial*. This second rule overrides any possible sanction of an objection for not having been raised as early as possible but still within this second time-limit.“¹³¹³ In that case the tribunal did not find that Argentina’s had submitted two jurisdictional objections belatedly even though the State submitted its new objections only during the exchange of second round of submissions on jurisdiction.¹³¹⁴

879. Indeed, ICSID tribunals are rightfully hesitant to deny respondents the right to object the existence of jurisdiction when the objection itself was submitted in accordance with time limit set in ICSID Arbitration Rule 41(1). The only case that Claimants rely on in their submission in which the tribunal had found that objections raised in the

¹³¹⁰ Procedural Order No. 1 of 28 November 2018, Annex A.

¹³¹¹ Claimants’ Reply, para. 729.

¹³¹² Claimants’ Reply, para. 730.

¹³¹³ *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 257, **RLA-192**.

¹³¹⁴ *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 258, **RLA-192**.

State's counter-memorial were submitted belatedly is *Pac Rim v. El Salvador*.¹³¹⁵ However, Claimants' reliance on that case is obviously misplaced. In *Pac Rim* the tribunal decided to bifurcate the proceedings and to decide on El Salvador's jurisdictional objections preliminary. The State submitted its preliminary objections to jurisdiction in 2010, parties to the dispute exchanged written submissions on the issue and the tribunal rendered the decision on jurisdiction in June 2012. El Salvador then raised new objections to jurisdiction in its *counter-memorial on the merits*, *three-and-a half years* after its initial objections to jurisdiction were submitted and *more than one-and-a half years* after the tribunal issued its decision on jurisdiction.¹³¹⁶ Why the reasoning of the *Pac Rim* tribunal is not applicable to the circumstances of the present dispute warrants no further explanation.

880. Claimants also rely on *Desert Line v. Egypt* in support of proposition that jurisdictional objections must be made "*as early as possible*."¹³¹⁷ Claimants omit to note that the tribunal in that case, although declaring that it saw no reason why the objections of Egypt could not have been submitted earlier, accepted to examine the objections.¹³¹⁸
881. Claimants' reliance on the award in *AMTO v. Ukraine* is inapposite as well.¹³¹⁹ The dispute in AMTO concerned the application of Article 26(2) of the Energy Charter Treaty (the provision on amicable settlement procedure prior to arbitration) and, in particular, the issue of whether letters sent by the claimant to Ukraine were sufficient to trigger the start of the cooling off period, in circumstances in which Ukraine was already aware that the dispute existed.¹³²⁰ The reasoning of the AMTO tribunal – that Ukraine was under obligation to immediately communicate to the claimant that the requirements under Article 26(2) of the Energy Charter Treaty were not fulfilled – clearly does not apply to the case at hand, in light of unequivocal provision of ICSID

¹³¹⁵ Claimants' Reply, para. 731.

¹³¹⁶ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, para. 5.40, **CLA-99**.

¹³¹⁷ Claimants' Reply, para. 733.

¹³¹⁸ *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, paras. 97, 98, **CLA-100**.

¹³¹⁹ Claimants' Reply, para. 734.

¹³²⁰ *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, paras. 49, 52, **RLA-99**.

Arbitration rule 41(1) – Respondent is allowed to submit any jurisdictional objection within the time limit set by the Tribunal for submission of counter-memorial.

882. Second, ICSID tribunals have in the past accepted to deal with jurisdictional objections raised even after passage of the time limit set in ICSID Arbitration Rule 41(1). This is because ICSID Arbitration Rule 41(2) allows the tribunal to decide, on its own initiative, whether the dispute is within its competence or jurisdiction of the Centre.¹³²¹ Most prominent example of such approach is recent award in *Besserglik v. Mozambique*.¹³²² The tribunal in that case dismissed the claimant’s claim for lack of jurisdiction based on Mozambique’s objection that the BIT was not in force, submitted *six years* after it was first notified about the dispute, almost *three years* after the registration of the request for arbitration and only after the State had submitted its counter-memorial and rejoinder in the proceeding.¹³²³ In applying Article 45(3) of ICSID Additional Facility Rules (the text of which corresponds to ICSID Arbitration Rule 41(2)), the tribunal decided to dismiss the claim for lack of consent to arbitrate:

*“The Tribunal would have been inclined to rule the objection out of consideration had the matter been one where Respondent by its delay had secured a procedural advantage or raised a defense of a non-fundamental nature. The objection in this case, however, is that the BIT is not in force. If that be the case, then Respondent cannot be said to have given its consent to ICSID arbitration. Without consent there can be no ICSID arbitration. The objection, therefore, goes to the very root of the jurisdiction of this Tribunal.”*¹³²⁴

883. Thus, even if the Respondent’s objection was belated (which evidently it was not), the absence of proper waiver nullifies Respondent’s consent to arbitrate¹³²⁵ the claim with

¹³²¹ ICSID Arbitration Rules, Rule 41(2), **CLA-017**.

¹³²² *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, **RLA-167**.

¹³²³ *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, paras. 245, 257, 261, 262, **RLA-167**.

¹³²⁴ *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, para. 315 (emphasis added), **RLA-167**.

¹³²⁵ Article 25 in connection to Article 22 of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CLA-1**

regard MDH Serbia's shareholding in BD Agro and the Tribunal would had to examine the issue on its own initiative.

884. Third, Claimants advance utterly unsubstantiated assertion that the Republic of Serbia, by invoking provisions of the Canada – Serbia BIT that unequivocally nullify its consent to arbitrate in absence of MDH Serbia's waiver, committed the abuse of right.¹³²⁶ Respondent resolutely rejects such accusations.
885. Claimants' *abus de droit* theory falls flat primarily because it rests on the wrong premise – MDH Serbia “*substantively fulfills the purpose of a waiver*” since it cannot theoretically pursue any remedy before Serbian courts for the alleged expropriation of its shares.¹³²⁷ As it was explained above, that is plainly wrong. MDH Serbia does not “*substantively*” fulfill the purpose of waiver any more than any of the Claimants. Yet, Claimants did not see any problem with “*purely formalistic*” requirement of waiver from Article 22 of the Canada – Serbia BIT when it comes to them.
886. Claimants' attempt to question Respondent's motives for raising jurisdictional defense is of no avail. The issue at stake is not overly complicated: the Canada – Serbia BIT contains an arbitration agreement. Respondent's consent to arbitrate was given with certain qualifications and conditioned with several requirements. If any of those requirements is not met, Respondent has no duty to arbitrate. In *Renco v. Peru* the tribunal accepted Peru's objection grounded on absence of formally valid waiver and submitted *four years* after the notice of arbitration.¹³²⁸ Claimants rely on certain fragments of the *Renco* award in support of their assertion that jurisdictional objection based on waiver, in theory, could be abusive.¹³²⁹ What they neglect to mention is that the tribunal in that case rejected the claimant's argument on abuse, with rationale that can be applied here as well:

„Having considered the issue with great care, the Tribunal has concluded that, in raising its waiver objection, Peru has sought to vindicate its right to receive a waiver which complies with the formal requirement of Article 10.18(2)(b) and a waiver which does not undermine the object and purpose

¹³²⁶ Claimants' Reply, paras. 739-744.

¹³²⁷ Claimants' Reply, para. 739.

¹³²⁸ *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 123, **CLA-97**.

¹³²⁹ Claimants' Reply, para. 743.

*of that Article. In so finding, the Tribunal does not accept the contention that Peru's waiver objection is tainted by an ulterior motive to evade its duty to arbitrate Renco's claims. Indeed, Peru has no duty to arbitrate Renco's claims under the Treaty unless Renco submits a waiver which complies with Article 10.18(2)(b).*¹³³⁰

887. Thus, if Claimants' formal acceptance of Respondent's standing offer to arbitrate does not fulfil all of requirements envisaged in the Canda – Serbia BIT, there can be no Respondent's attempt to "*evade its duty to arbitrate*"¹³³¹ simply because there is no duty to arbitrate.

888. Finally, no prejudice to Claimants' interest whatsoever followed from the Respondent's decision to submit all of its jurisdictional objections simultaneously and in its Counter-Memorial. Claim about alleged expropriation of MDH Serbia's shareholding in BD Agro is just one of many claims put forward in this arbitration. Even if the objection had been submitted in earlier stage of the proceeding and accepted by the Tribunal, that would still not dispose of other claims raised by Claimants. If anything, the way in which Respondent decided to use its procedural rights reduces costs and time. It would not be in interest of efficiency for the Parties to discuss merely one of several jurisdictional objections separately.

889. In sum, Respondent submits that it did not give consent to arbitrate claims with regards MDH Serbia's shareholding in BD Agro. Respondent's jurisdictional objection was submitted in due time, fully in conformity with the applicable procedural rules and procedural calendar established by the Tribunal and does not represent abuse of rights.

¹³³⁰ *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 186 (emphasis added), **CLA-97**.

¹³³¹ Claimants' Reply, para. 744.

D. NO JURISDICTION RATIONE TEMPORIS UNDER THE CANADA – SERBIA BIT

890. In the Counter-Memorial Respondent submitted two separate *ratione temporis* preliminary objections.¹³³² In their Reply, Claimants extensively argued against these objections.¹³³³ Hereby Respondent reiterates its preliminary objections and arguments to refute Claimant's arguments and prove that the tribunal lacks *ratione temporis* jurisdiction. The Respondent's first *ratione temporis* objection is based on Article 22 of the Canada – Serbia BIT whereas the second is based on the general principle of non-retroactivity envisaged by general international law and Article 28 of the Vienna Convention on the Law of Treaties (VCLT). Respondent also submits that it is entitled to argue facts underpinning its preliminary objections, in general, but especially because of the directions embedded in the Tribunal's Procedural Order No. 3 dated 24 June 2019.

1. The Tribunal does not have jurisdiction because the three-year limitation period set forth in Article 22 of the BIT elapsed before the submission of the Claim to Arbitration.

1.1. Legal framework

891. In its Counter-Memorial Respondent argued that conditions set forth in Article 22 of the Canada-Serbia BIT are imperative conditions for the existence of consent within the meaning of Article 25 of the same BIT. Without such consent there is no jurisdiction of the Tribunal. Claimants agree with the existence of these conditions as a matter of principle but deny that the conditions set forth in this provision were not met.

892. Article 22 of the Canada-Serbia BIT unconditionally sets forth the preclusive three-year limitation period within which the investor/enterprise must submit claim from the date on which the investor/enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor/enterprise has

¹³³² Respondent's Counter-Memorial, Section III C., paras. 377-424.

¹³³³ Claimants' Reply, Section III E., paras. 745-834.

incurred loss or damage thereby.¹³³⁴ According to Article 25 of the Canada-Serbia BIT “[F]ailure to meet a condition precedent listed in Article 22 nullifies that consent.”¹³³⁵

893. Respondent has already provided extensive overview of other international agreements containing the same provision, as well as commentaries and case-law unequivocally reaffirming both the relevance and interpretation of this provision, which Respondent hereby reasserts.¹³³⁶ Mandatory and categorical conditions set forth in Article 22 are vital for consent,¹³³⁷ and consequently for the jurisdiction of arbitral tribunals. Given that Article 22 of the Canada-Serbia BIT was drafted in line with the Canada Model BIT, the following commentary is equally applicable in this case:

*“It would appear that this express provision has been added to address conflicting NAFTA jurisprudence on whether procedural conditions for bringing a claim are also jurisdictional requirements. The additions to the Model can be explained in light of NAFTA arbitrations in which investor compliance with time and waiver requirements were at issue and in which tribunals suggested that non-compliance with procedural requirements should not be treated in an overly strict or technical manner. In contrast, the Model expressly provides that non-compliance with the required conditions nullifies consent, in which case the tribunal would have no jurisdiction.”*¹³³⁸

894. Other sources as well as relevant case law, such as awards in cases *Corona v Dominican Republic*,¹³³⁹ *Feldman v Mexico*¹³⁴⁰ or *Ansung v China*,¹³⁴¹ demonstrate

¹³³⁴ Articles 21(1)(2) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CLA-1**.

¹³³⁵ Article 25 of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CLA-1**.

¹³³⁶ Respondent’s Counter-Memorial, paras. 379-403.

¹³³⁷ “Having regard to the ordinary meaning of the terms, read in their context and in light of the Agreement’s object and purpose, the DR-CAFTA Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration.” – *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, para. 191, **RLA-28**.

¹³³⁸ Céline Lévesque, Andrew Newcombe, Canada, in: Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford University Press, 2013, p. 109, **RLA-1**.

¹³³⁹ *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, paras. 191-192, **RLA-28**.

¹³⁴⁰ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 58, **RLA-29**.

¹³⁴¹ *Ansung Housing Co., Ltd. v. People’s Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, para. 29, **RLA-30**.

that the three-year limitation period is clear and rigid rule not subject to any suspension, prolongation, or other qualification. In *Ansung v China* the Tribunal refused to rely solely on the presentation of claim as submitted by the claimant and found that the facts presented, even only to the most minimal extent for the purposes of Rule 41(5) procedure, paint a picture different to the one the claim asserts, i.e. that the knowledge of loss and breach occurred earlier than claimed by the claimant: “*After these multiple and clear pleadings, the Tribunal cannot accept Ansung’s attempts to characterize these pre-October 2011 dates in its Observations and at the Rule 41(5) Hearing as mere background information.*”¹³⁴² This is relevant for the case at hand for several reasons: if facts presented by Claimants even *prima facie* disclose the existence of potential loss and alleged breach earlier than asserted by Claimants such facts can be treated as moving the cut-off date further back than it is formally claimed by Claimants. The Claimants’ facts, as presented in all pleadings, can equally work against them. Second, in *Ansung v China*, despite the fact that the claim passed the critical date for only couple of days, the rigidity of the time-limitation rule still prevented the tribunal to even minimally extend the prescribed deadline.

895. The same conclusion was arrived at by the tribunal in *Spence International (Berkowitz) v Costa Rica*, where two temporal issues were combined: the compliance with the limitation period provision and temporal application of the CAFTA which entered into force after the claimants first acquired knowledge of the measures constituting the cause of action of their international arbitration claim. Practically all claims were dismissed on the basis of the time limitation clause and the case was subsequently terminated. In this case more than one finding of the tribunal elucidates the interpretation and scope of the limitation clause and relevance of the treaty’s entry into force with regard to the acts possibly constituting breach. First, it is not the last measure but the time when the claimants first acquired the knowledge of the breach that is relevant for assessment of the limitation period clause.¹³⁴³ Second, if the challenged conduct following the effective date of the treaty is rooted in and cannot be separated from the conduct after the treaty’s entry into force, this is relevant for the

¹³⁴² *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, para. 108, **RLA-30**.

¹³⁴³ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, para. 213, **RLA-31**.

temporal application of the treaty.¹³⁴⁴ Third, for whether the consequence of the post-effective date conduct was separable from the earlier acts of which the claimants were aware: the final point was that the limitation clause is not just plain formality or undue formalism but rigid rule to be given full effect by way of the proper interpretation and application of the treaty.¹³⁴⁵ Despite the fact that the claimants were close to the cut-off date the tribunal did not alter its position.

896. Case law testifies that the tribunals search for the “*earliest possible date*”¹³⁴⁶ or “*the first date*”¹³⁴⁷ of the knowledge of potential breach causing loss or damage. Tribunals also agree that no “*tolling*” or “*prolongation*” of the relevant dates is possible. The recent arbitral practice demonstrates that in relation to the loss or damage “*the limitation clause does not require full or precise knowledge of the loss or damage... such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred.*”¹³⁴⁸ Therefore, the Claimants’ arguments that it is “*the first day when the Claimants acquired definitive knowledge that they had incurred loss*”¹³⁴⁹ and that what is relevant is the fact that “[t]he Claimants’ claim on quantum quantifies their loss as of the same date 21 October 2015”¹³⁵⁰ are plainly contrary to the established standard according to which “*[t]he limitation period begins with an investor’s first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage*”¹³⁵¹. Equally flawed is the Claimants’ argument “*that actual damage, rather than predicted future*

¹³⁴⁴ “*In any event, as the Tribunal has observed in its preceding discussion, the alleged conduct on which the Claimants found the claims is deeply and inseparably rooted in the Respondent’s pre-CAFTA entry into force conduct.*” - *Ibid.*, para. 298, **RLA-31**.

¹³⁴⁵ *Ibid.*

¹³⁴⁶ “The Tribunal shall thus proceed in two steps: First, it shall determine the earliest possible date on which the Claimant would be permitted to have acquired actual or constructive knowledge of the alleged breach of the Treaty and of the incurred loss or damage for the Claimant’s claims to have been submitted within the time limit for the purpose of Article 10.18.1.” - *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, para. 196, **RLA-28**.

¹³⁴⁷ “The limitation period begins with an investor’s first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage.” - *Ansung Housing Co., Ltd. v. People’s Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, para. 110 (emphasis original), **RLA-30**.

¹³⁴⁸ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, para. 213, **RLA-31**.

¹³⁴⁹ Claimants’ Reply, para. 749 (emphasis added).

¹³⁵⁰ Claimants’ Reply, para. 749.

¹³⁵¹ *Ansung Housing Co., Ltd. v. People’s Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, para. 110 (emphasis original), **RLA-30**.

damage, is required to trigger the three year limitation period”¹³⁵² is refuted by the recent case law. This was the original position of Respondent that was incorrectly reproduced in the Claimants’ Reply. Claimants argue: “*Remarkably, Serbia completely failed to discuss the requirement of the Claimants’ knowledge of loss in its ratione temporis objection based on the three-year time limit.*”¹³⁵³ To prove this false accusation Claimants quote only the half of the Respondent’s statement. The full argument demonstrates that Respondent raised the issue of loss, on the basis of the recent and pertinent case law, in the following terms:

“The knowledge of the possible breach and loss must have been triggered at that point – it is not required to have loss at that time. The first appreciation that such loss may occur triggers the limitation clause: ‘*the limitation clause does not require full or precise knowledge of the loss or damage.... such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result.*’”¹³⁵⁴

897. Therefore, Respondent argues now, as it has argued in its previous pleadings, that the issue of loss is to be relevant with either actual or constructive knowledge at earliest possible date of the first appreciation that loss or damage will be incurred.

1.2. The Canadian Claimants failed to observe the three-year limitation period in the Canada-Serbia BIT

898. Respondent hereby reasserts its arguments set forth in its Counter-Memorial that the Canadian Claimants do not meet the requirement of the three-year limitation period set out in Article 22 of the Canada-Serbia BIT which leaves the Tribunal without jurisdiction on the basis of the lack of consent to arbitrate within the meaning of Article 25 of the Canada-Serbia BIT.

899. In order to assess the three-year limitation period there are several dates which need to be determined in relation to the date of knowledge of breach causing the loss. The claim must be submitted within the three years from “*the date on which the investor*

¹³⁵² Claimants’ Reply, para. 805.

¹³⁵³ Claimants’ Reply, para. 802.

¹³⁵⁴ Respondent’s Counter-Memorial, para. 401 (citing *Spence v. Costa Rica*, para. 213).

[and/or the enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby.”¹³⁵⁵ Given that the Request for Arbitration was received by the ICSID Secretariat on 14 February 2018 it follows that the cut-off date is 14 February 2015. Therefore, the earliest possible date of knowledge, either actual or constructive, of a potential breach causing loss, is set forth at 14 February 2015. Accordingly, if the knowledge, either constructive or actual, originates in the period preceding the cut-off date it follows that the claim is time-barred no matter how close it is to the cut-off date. Claimants agree that the cut-off date is 14 February 2015.¹³⁵⁶

900. The issue of knowledge is not necessarily as easy to resolve as relevant critical and cut-off dates because, even when the knowledge is to be constructed, it is based on a number of subjective but presumably identifiable elements. In *Grand River v. United States* the tribunal found that “‘Constructive knowledge’ of a fact is imputed to person if by exercise of reasonable care or diligence, that person would have known of that fact. Closely associated is the concept of ‘constructive notice.’ This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge.”¹³⁵⁷ In *Grand River* the tribunal rejected the claimants’ claim of the actual knowledge but established instead that, given that investors were experienced and substantial participants in the market, it is the constructive knowledge test that was to be applied.¹³⁵⁸ The constructive knowledge of loss coincided with the constructive knowledge of the act that eventually (although much later) caused the alleged loss – the claimants simply should have known all the implications of the act the moment it was adopted.¹³⁵⁹ Similarly, in *Mercer v Canada*, the tribunal found that the claimant knew the implications of the electricity procurement agreement when that particular contract was entered into and not after the measures complained of took

¹³⁵⁵ Article 22 of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CLA-1**

¹³⁵⁶ Claimants’ Reply, paras. 781, 789, 798, 809.

¹³⁵⁷ *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, (NAFTA/UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, para. 59 (references omitted), **RLA-32**.

¹³⁵⁸ *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, (NAFTA/UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, para. 71, **RLA-32**.

¹³⁵⁹ *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, (NAFTA/UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, paras. 73, 82-83, **RLA-32**.

effect.¹³⁶⁰ Therefore, the moment the breach was notified to Mr. Obradović, he must have been aware of the potential loss as the Notice represented sufficient knowledge inevitable loss. In line with the finding of the *Corona* tribunal, which refused the following claimant's argument:

*“based on what he was told he still believed that there was a possibility that the Environmental Ministry may reconsider its Negative Environmental Decision and issue an Environmental Decision for the Project”*¹³⁶¹ it follows that the similar argument of Claimants in the case at hand may not stand: *“the Claimants obviously believed that the Privatization Agency would rectify its incorrect assessment and recognize that there was no breach of the Privatization Agreement.”*¹³⁶²

901. The Respondent's position is that Claimants were well aware of all circumstances leading to the alleged breach and loss given that all facts constituting their cause of action were familiar to them well before the cut-off date. In the words of *Mercer* tribunal, the Claimants had sufficient knowledge of the immediate implications of notices of and other information regarding the breach. In the words of *Grand River* case it is unreasonable to assume the irrelevance of the notices of breach leading to the inevitable termination of the contract given the extensive and substantial experience of Mr. Obradović in privatizations in Serbia. In the words of the *Spence* case Mr. Obradović's *“knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result.”*¹³⁶³

902. Claimants place much emphasis on the First Notice of Breach, dated 25 February 2011 and received by BD Agro on 1 March 2011,¹³⁶⁴ for the pretense argument that: *“Indeed, while the Privatization Agency erred in its assessment of the existence of a breach of the Privatization Agreement already on 1 March 2011, the Claimants could*

¹³⁶⁰ *Mercer International Inc. v. Canada*, (ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para. 6.16., **RLA-185**.

¹³⁶¹ *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, para. 47, **RLA-28**.

¹³⁶² Claimants' Reply, para. 826.

¹³⁶³ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, para. 213, **RLA-31**.

¹³⁶⁴ Notice of the Privatization Agency on Additional Time Period dated 24 February 2011, **CE-31**.

not have conceivably expected that this erroneous assessment of the fulfillment of the Privatization Agreement would lead to outright violations of Serbia's investment obligations several years later."¹³⁶⁵ In other words, Claimants argue they could not possibly know, on 1 March 2011 or at any point before the cut-off date, that the Privatization Agreement would be terminated due to the substantial breach of the contract.

903. It is worth here to be reminded of the content of the First Notice.¹³⁶⁶ The Privatization Agency informed the Buyer of several breaches of the Privatization Agreement and of multiple breaches of Article 5.3.4. thereof together with reasons for this decision and evidence for establishing these breaches. The Privatization Agency provides for the period of 60 days for remedying the breach, and states clearly what the consequences would be:

*"In the event of failure to comply with the above stated contractual obligations within the additionally granted term as per this Notice, the Privatization Agency will undertake the measures under Article 41a of the Law on Privatization ("Official Gazette of RS", Nos. 38/01, 18/03, 45/05 and 123/07)."*¹³⁶⁷

904. Three clarifications are mandated here. First, it was indeed possible to avoid termination by way of remedying the breach, i.e. by reinstating the funds that were unlawfully loaned to third parties but this was completely within the powers and duties of Mr. Obradović. Second, there were no fewer than seven notices of breach before the cut-off date and several meetings where it was directly conveyed to Mr. Obradović or to representatives of BD Agro that the existence of unremedied breach was the major issue between the parties to the contract. Therefore, documentary evidence amply demonstrates that on at least dozen occasions preceding the cut-off date Mr. Obradović (and presumably thus the Claimants) knew the very same breach was the major issue for the performance, termination and assignment of the Privatization Agreement. Third, Mr. Obradović was experienced and substantial participant in

¹³⁶⁵ Claimants' Reply, para. 774.

¹³⁶⁶ Notice of the Privatization Agency dated 25 February 2011 received by BD Agro on 1 March 2011, **CE-31**.

¹³⁶⁷ Notice of the Privatization Agency dated 25 February 2011 received by BD Agro on 1 March 2011, p. 3, **CE-31**

privatizations in Serbia who should have known from the first (if not from the seventh) notice of what was going to happen if he failed to remedy the breach.

905. Therefore, it was not only the First Notice of Breach that must have triggered the knowledge of breach and consequential loss. Following the “First Notice” dated 25 February 2011 (received by BD Agro on 1 March 2011),¹³⁶⁸ there were six more notices of breach before the cut-off date: Notice of 24 June 2011,¹³⁶⁹ Notice of 7 October 2011,¹³⁷⁰ Notice of 27 December 2011,¹³⁷¹ Notice of 22 June 2012,¹³⁷² Notice of 3 August 2012,¹³⁷³ Notice of 9 November 2012.¹³⁷⁴ In between these formal notices and around the same time there were a series of other events that revolved around the same facts – breach, remedy and termination. Most notably, two meetings shortly after the Notice of 7 October 2011,¹³⁷⁵ and the meetings held on 2 November 2012¹³⁷⁶ and on 4 February 2014.¹³⁷⁷ In the course of these meetings, Mr. Obradović and/or his representatives conceded to the breach and were requesting further extensions in order to remedy the breach. On 23 July 2012 Mr. Obradović requested further extension and again conceded to the breach.¹³⁷⁸ On 23 December 2013 Ministry of Economy launched inquiry into privatization of BD Agro upon the request of employees/stockholders who submitted complaints regarding unpaid salaries and fears that BD Agro was being stripped of its assets contrary to the Privatization Agreement.¹³⁷⁹ Also, during the same period, Mr. Obradović was resending the

¹³⁶⁸ Notice of the Privatization Agency on Additional Time Period, dated 24 February 2011, **CE-31**.

¹³⁶⁹ Notice of 24 June 2011 reconfirmed the breach and found that no remedy was put in place. The Privatization Agency extended the period for remedying the breach for 60 days, **CE-96**.

¹³⁷⁰ Notice of 6/7 October 2011 repeated its conclusions and instructions giving a further extension of 30 days for remedying the breach. – **CE-97**.

¹³⁷¹ Notice of 27 December 2011 again confirmed the existence of the very same breach of Article 5.3.4 of the Privatization Agreement and requested the Buyer to provide evidence that the breach was remedied, **CE-32**.

¹³⁷² Notice on Additional Time Period of 22 June 2012, p. 1, **RE-15**.

¹³⁷³ This as all other previous notices confirmed the fact that the original breach remained unremedied referring back to 24 February Notice and breach of Article 5.3.4. of the Privatization Agreement, **CE-78**.

¹³⁷⁴ Reaffirming earlier decisions and granting upon the request of the Buyer additional extension of 60 days for remedying the very same breach as before. *See* Notice of the Privatization Agency on Additional Time Period, dated 8 November 2012, **CE-79**.

¹³⁷⁵ Proposal of the Center for Control for the session of the Commission for Control of 21 December 2011, **RE-71**.

¹³⁷⁶ Proposal of the Centre for Control for BD Agro of 7 November 2012, **RE-75**.

¹³⁷⁷ Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

¹³⁷⁸ Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

¹³⁷⁹ Decision of the Ministry of Economy, dated 23 December 2013, **CE-206**.

misleading and often identical audit reports in order to buy more time and manipulatively responded to the requests for remedying the breach.¹³⁸⁰

906. Mr. Obradović was substantial and experienced participant in the privatization in Serbia. Given his experience in the privatizations in Serbia he must have known well what the consequence of both the breach and failure to remedy the breach was: termination of the contract. He knew that from the very first to the very last notice of breach. This plain and simple illustration proves that Mr. Obradović knew all too well the whole structure of the legal framework for privatization, applicable law and consequences of the breach, which in turn makes the Claimants' pretense statement that *Claimants could not have conceivably expected* the consequences patently unconvincing.
907. By all notices and directly at the meetings the Buyer was informed over and over again of the same breach and the consequences that were to follow. All these events took place well before the cut-off date. If not from the First Notice than from the later chain of events Mr. Obradović (Claimants) should have gained knowledge of the facts that were major issues for performance of the Privatization Agreement. Claimants for the first time in their Reply come up with the dates of their alleged actual knowledge of the breach and loss.¹³⁸¹ However, Respondent submits that the Mr. Obradović's constructive knowledge, especially taking into account the proficiency of Mr. Obradović in privatizations in Serbia, evidently came into existence long before the cut-off date.
908. All the information and the events, together with the information that the pledge on shares would not be removed until the breach is remedied,¹³⁸² are the dates of constructive knowledge – dates on which Claimants should have been put on alert of both constructive breach and constructive loss. These are the dates when diligent and informed businessman, with extensive experience in Serbian privatization program, could predict consequences and undertake all possible legal actions to vindicate its rights under the contract. This is a self-standing obligation and may not be in any case

¹³⁸⁰ See above, para. 156.

¹³⁸¹ Claimants' Reply, paras. 817-819.

¹³⁸² Minutes from meeting held at the Privatization Agency on 4 February 2014, p.1, **RE-36**.

removed by the fact that effective date was posterior to the loss that now figures as the cause of action before this Tribunal.

909. Throughout their earlier pleadings Claimants conveniently avoided to state clearly the relevant dates with regards conditions set forth in Article 22 of the Canada-Serbia BIT. It was not until the last of the Claimants' pleadings, in their Reply, and at the end of the lengthy *ratione temporis* section, to finally come up with the dates when they allegedly acquired actual knowledge of the claimed breaches of the BIT. There Claimants concede that claims are based on acts preceding the effective date of the Canada-Serbia BIT but equally that these are separate facts and circumstances leading to different claims arising under the Canada-Serbia BIT.¹³⁸³

910. Claimants admit that their claims are based on separate alleged breaches:¹³⁸⁴ “[A]nd the Claimants argue in this arbitration that the following three instances of conduct violated Serbia’s obligations under the Canada-Serbia BIT: First, Serbia’s continuous refusal of the Privatization Agency to release the pledge over the Privatized Shares, second, the unjustified and arbitrary investigation of BD Agro by the Ombudsman and his unlawful issuance of his “recommendations, and third, Serbia’s unlawful termination of the Privatization Agreement and the subsequent unlawful transfer of BD Agro shares.”¹³⁸⁵ Also: “It is true that the expropriation was not Serbia’s first breach because Serbia had already been in breach of its obligation to release the pledge over BD Agro’s shares...”¹³⁸⁶

911. Therefore, it is justified to assess these alleged breaches separately. Claimants pursue different, separate breaches out of which one should be of a continuous character, such as the refusal of the Privatization Agency to release the pledge under the contract. Before going to the heart of the Claimants’ argument regarding the construct of the “continuous act” which presumably constitutes an internationally wrongful act under

¹³⁸³ Claimants’ Reply, paras. 817-819.

¹³⁸⁴ *Inter alia*: “Serbia’s most serious breach of its obligations under the Canada-Serbia which eventually prompted this arbitration occurred with Serbia’s direct expropriation of BD Agro’s shares...” (Claimants’ Reply, para. 748); “It is true that the expropriation was not Serbia’s first breach because Serbia had already been in breach of its obligation to release the pledge over BD Agro’s shares since the Privatization Agreement expired on 8 April 2011.” (Claimants’ Reply, para. 750); “Serbia’s single most important breach of the Canada-Serbia BIT – the expropriation of the Claimants’ investment in BD Agro – occurred on 21 October 2015...” (Claimants’ Reply, para. 753); Also: paras. 765

¹³⁸⁵ Claimants’ Reply, para. 769.

¹³⁸⁶ Claimants’ Reply, para. 750. Similarly, paras. 753, 765, 817-819.

international law, Respondent would like to illustrate the artificiality of the Claimants' "continuous act" case. The Claimants say that "*Serbia violated its obligations under the Canada-Serbia BIT by continuous refusal of the Privatization Agency to release the pledge of the Privatized Shares. This breach was ongoing when the Canada-Serbia BIT entered into force and lasted until the expropriation of the Claimants' investment.*"¹³⁸⁷ Therefore, Claimants believe that the first moment of refusal to release the pledge was unlawful and started before the effective date. For Claimants it was so manifest that it was marked as illegal from its inception and spotted as unlawful on the very same date the Canada-Serbia BIT entered into force.¹³⁸⁸

912. Against this amazing diligence and prompt qualification starkly stands the unpersuasive argument of Claimants according to which the "*none of Serbia's later violations of the Canada-Serbia BIT could have realistically have been foreseeable to the Claimants at the time that the Privatization Agency sent its First Notice to Mr. Obradović on 1 March 2011.*"¹³⁸⁹ So, the contractual refusal to release the pledge was imminently suspicious of international illegality but it was never suspicious as being contrary to contract law – Mr. Obradović has never challenged the retention of pledge as a contractual breach before the competent forum agreed upon in the Privatization Agreement. Equally unsuspicious were numerous notices on the breach of the very same contract leading to its termination and they allegedly could not have been "*realistically foreseeable*" to Claimants. It is simply impossible that dozens of warnings did not put Mr. Obradović on alert. This is not plausible and illustrates how Claimants manipulatively construct their case in order to overcome the *ratione temporis* hurdle.

913. Therefore, Claimants argue that the date of the actual knowledge of the possible separate breach and loss arising under the heading of the alleged breach due to the decision of the Privatization Agency not to release pledge over the shares/stocks in BD Agro is the very same date on which the Canada-Serbia BIT entered into force: "*First, the Claimants acquired knowledge of the loss caused by Serbia's refusal to release the pledge over the BD Agro's shares on 27 April 2015, i.e. after the cut-off*

¹³⁸⁷ Claimants' Reply, para. 790.

¹³⁸⁸ "*First, the Claimants acquired knowledge of the loss caused by Serbia's refusal to release the pledge over the BD Agro shares on 27 April 2015, i.e. after the cut-off date of 14 February 2015.*" Claimants' Reply, para. 809.

¹³⁸⁹ Claimants' Reply, para. 774.

date of 14 February 2015.”¹³⁹⁰ and “Serbia was thus in breach of this obligation [Serbia’s continuous refusal to release the pledge over BD Agro’s shares] on the cut-off date of 27 April 2015 and subsequently”.¹³⁹¹ Claimants continue with the argument of a continuous act which as such, in their opinion, overcomes equally and simultaneously both the effective date of the Canada-Serbia BIT and the cut-off date envisaged in Article 22 of the same BIT. However, this argument may not stand for several reasons.

914. First, this pledge was agreed upon in the contract and the Agency, as a party to the contract, conditioned the release by the fulfillment of obligations agreed upon in the contract. Therefore, this was a contractual relationship between two parties to the contract. Additionally, there was no definite and categorical refusal to release the pledge but simply the reliance of one party to the contract on its right to secure the performance of the contract – once the performance of Mr. Obradović was completed the pledge would have been removed – it is a very simple contractual axiom. Finally, had the decision of the Agency to secure its rights under the contract by withholding the pledge over the shares been so egregious, it should have been challenged before the Commercial Court in Belgrade, the forum agreed upon in Article 9 of the Privatization Agreement.¹³⁹² Mr. Obradović deliberately failed to challenge the contractual acts before the competent forum, while these contractual acts now figure as a basis of the Claimants’ claims under the BIT. Such failure has several repercussions for the case at hand. Contractual act is not in itself a wrongful act and as such cannot qualify for a continuing wrongful act under international law. Therefore, the continuing act, in terms of the retention of the pledge as a security for the performance under the contract, has never come into existence under international law as it has never reached the threshold of an internationally wrongful continuing act. As plainly explained by the tribunal in the *Generation Ukraine* case:

¹³⁹⁰ Claimants’ Reply, para. 809 (emphasis added).

¹³⁹¹ Claimants’ Reply, para. 817 (emphasis original). This is probably a *lapsus calami* because 27 April 2015 is effective and not a cut-off date. Elsewhere the Claimants argue that the cut-off date is 14 February 2015 (e.g. paras. 781, 789, 798, 809 of the Claimants’ Reply).

¹³⁹² Share Pledge Agreement is Appendix 1 to the Privatization Agreement pursuant to Article 11 thereof. Privatization Agreement’s Article 8.2 (Entire Agreement) provides that “*the Agreement with annex and appendices (which make its integral part) and documentation which refers to auction procedure and which was signed by the Buyer constitute the entire agreement which refers to this transaction and they are the only ones binding for contracting parties.*” – CE-17.

*“an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction.”*¹³⁹³

915. This conclusion was reaffirmed by other tribunals as well, such as in *Parkerings v. Lithuania*.¹³⁹⁴ Applied to this case it follows that failure of Mr. Obradović to challenge and demonstrate before the competent courts that the pledge was unlawfully withheld is fatal to the qualification of a contractual act as internationally wrongful, *i.e.* as a breach of the BIT. As *Parkerings* tribunal observed: “*the Claimant failed to show that the Municipality of Vilnius terminated the Agreement wrongfully and therefore breached the Agreement.*”¹³⁹⁵ Mr. Obradović never explained why he failed to challenge the acts under the Share Pledge Agreement or Privatization Agreement if the Agency so “*blatantly disregarded the terms of these contracts.*”¹³⁹⁶ A single contractual act, such as the retention of the pledge, without having been challenged before the forum to which the Buyer expressly consented in the contract, is ineligible for any internationally wrongful act of any type including a continuing one. It is *prima facie* evident that no judicial challenge regarding the pledge was ever instituted by the Buyer.

916. Given that Mr. Obradović was substantial and experienced participant in Serbia’s privatizations he knew that the pledge was a legal entitlement of a contracting party to preserve its rights under the contract as this is precisely the purpose of any pledge. The refusal to remove the pledge should have been alarming then for both Mr. Obradović and Claimants, alarming enough to judicially protect their rights. Now Claimants engineered the argument that the very same Agency’s legitimate act around

¹³⁹³ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September, 2003, para. 20.30., **RLA-74**.

¹³⁹⁴ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 316-320, 448-454, **RLA-114**.

¹³⁹⁵ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 319, **RLA-114**.

¹³⁹⁶ Claimants’ Reply, para. 1260.

which this case revolves continued conveniently just long enough to cross two hurdles: effective date of the Canada-Serbia BIT and Article 22 cut-off date.

917. Therefore, Mr. Obradović failed to undertake any available act that any prudent investor would have almost instinctively made. Instead, Claimants rely on the continuous act argument in order to revive the alleged right which have lost its force due only to the fault of Mr. Obradović and his failure to act.
918. Respondent therefore submits that so-called refusal to release the pledge over the shares cannot be treated as a continuous act due to its genuine contractual nature, failure of the Claimants to challenge these acts before the competent forum, but also because the combination of several facts, including Mr. Obradović's indolence to remedy the alleged breaches, taken together with manipulative promises addressed to the Agency, demonstrate the case of "*tolling, extension....modification....*" of the cut-off date. Respondent submits that it is not acceptable that Claimants base their claim on their own failures.
919. Respondent respectfully submits that the failure to meet a condition precedent, including the preclusive three-year limitation period, which does not allow suspensions, extensions or other modifications,¹³⁹⁷ nullifies the consent. Respondent submits that this is exactly the case here: Claimants, even if taken as investors, failed to observe the three-year limitation period with the effect of nullifying the consent leading to the lack of jurisdiction of the Tribunal. The claims submitted simply lie outside of the BIT's Article 22 three-year period which in turn nullifies the Republic of Serbia's consent to this arbitration under Article 25 of the BIT.

¹³⁹⁷ "*In substance, in view of the Tribunal, such suspension or "tolling" of the period of limitation is unwarranted. NAFTA Article 1117(2) does not provide for any suspension of the three-year period of limitation.*" - *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 59, **RLA-29**.

2. The principle of non-retroactivity prevents the Tribunal from exercising jurisdiction over claims based on acts or facts, and constituting dispute preceding the Canada-Serbia BIT's entry into force

2.1. The principle of non-retroactivity is enshrined in the Canada-Serbia BIT and its application removes from the jurisdiction of the Tribunal the claims based on acts and facts preceding the Canada-Serbia BIT's entry into force

920. In its objection *ratione temporis* Respondent has relied on the principle of non-retroactivity, which has been well-established in international law as evidenced by Article 28 of the VCLT and Article 13 of the ILC's Articles on State Responsibility.¹³⁹⁸ Hereby Respondent reiterates this claim and submits that the application of this principle leaves this Tribunal without jurisdiction. This principle equally excludes application of the BIT to all acts and disputes preceding its effective date.

921. The principle of non-retroactivity was not dispensed with by the Canada-Serbia BIT. BIT was drafted on prospective basis and its Article 42 does not provide for retroactive application of the BIT. In the absence of any provision that effectively enables application of a treaty to acts or facts preceding its effective date, the basic principle of non-retroactivity is to be applied.¹³⁹⁹ In line with abundant case law,¹⁴⁰⁰ the principle is that legal obligations arising under the international agreement may not bind parties with respect to acts or facts that existed before the legal obligation came into existence. This equally applies to disputes that arose before the entry into force of the applicable treaty.¹⁴⁰¹ Accordingly, the principle of non-retroactivity operates

¹³⁹⁸ Respondent's Counter-Memorial, paras. 404-416.

¹³⁹⁹ Mark Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Martinus Nijhoff 2009, p. 384, **RLA-37**.

¹⁴⁰⁰ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 11.2., **RLA-74**; *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, pp. 179-180, **RLA-38**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 22 October 2002, paras. 57-75, **RLA-39**; *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID, Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, **RLA-33**; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, para. 431, **RLA-36**; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007; *Marvin Roy Feldman Karpa v. United Mexican States*, paras. 61-62, **RLA-29**.

¹⁴⁰¹ "The Tribunal observes that a prior dispute may evolve into a new dispute, but the fact that this new dispute has arisen does not change the effects of the non-retroactivity of the BIT with respect to the dispute prior to its entry into force. Prior disputes that continue after the entry into force of the BIT are not covered

indirectly to limit *ratione temporis* the application of the jurisdictional clause in the applicable treaty: “*The reason is that the ‘disputes’ with which the clause is concerned are ex hypothesi limited to ‘disputes’ regarding the interpretation and application of the substantive provisions of the treaty which [...] do not normally extend to matters occurring before the treaty came into force.*”¹⁴⁰²

922. As Respondent has amply demonstrated, all Claimants’ claims are based on the acts and facts which either existed before the effective date or were nothing but direct and imminent result of Mr. Obradović’s breach of the Privatization Agreement that occurred in December 2010.¹⁴⁰³ This was notified to Mr. Obradović on 1 March 2011. The formal notice of breach was not submitted only once before the effective date but on seven occasions coupled with numerous meetings where the very same message was conveyed to Mr. Obradović. Therefore, the violation of the Privatization Agreement, formal and other notifications presented to the buyer on the existence of breach, pledge over the shares and its retention by the other party to the contract, as well as the concern of the employees/stockholders over their status and property rights that gave rise to their complaint to the Ombudsman did exist before the effective date.
923. The Respondent’s position is that not only these acts cannot serve as the ground for responsibility under the Canada-Serbia BIT but that all these events demonstrate that the alleged conduct on which Claimants found their claims is deeply and inseparably rooted in the pre-BIT entry into force events. Also, the proven and undisputed facts unequivocally show that the termination of the Privatization Agreement was perfected and inevitable before the effective date while its formalization was postponed solely due to the manipulation of Mr. Obradović. Finally, all together they indeed show that the claim is deeply rooted in and inseparable from the facts that existed before the effective date.
924. Therefore, the acts or facts that took place before 27 April 2015, which is the effective date of the Canada-Serbia BIT, cannot constitute breach of the BIT because neither

by the BIT.” – *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 66, **RLA-34**.

¹⁴⁰² Cited from: *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 466, **RLA-36**.

¹⁴⁰³ Report of the Privatization Agency on Control of BD Agro of 25 February 2011, p. 12, **CE-30**.

the standards of protection nor the jurisdictional clause became binding and legally enforceable before that date.

925. The main argument of Claimants regarding the non-retroactivity hurdle is that some of these acts are either conveniently continuous or they are indeed momentous but originated just after the effective date of the Canada-Serbia BIT. For example, Claimants argue, although in a meandering fashion and often conflating two different temporal objections, that the relevant dates for the alleged expropriation are 27 July 2015¹⁴⁰⁴ and 21 October 2015.¹⁴⁰⁵ Then for the retention of the pledge, Claimants set the date at (pre-effective date) 4 February 2014 but then claim that the refusal to be of continuous character.¹⁴⁰⁶ The Claimants concede that the Ombudsman's control was initiated in late 2014 but claim that it was not known to them until 23 June 2015.¹⁴⁰⁷
926. The Respondent rejects the Claimants' arguments as they cannot withstand the test of facts. The Respondent submits that all the acts and circumstances complained of in this arbitration originated in the period prior to the effective date. The circumstances complained of belong to the pre-effective date period and they inevitably led to the termination of the Privatization Agreement which could have been avoided solely by Mr. Obradović's remedial action he deliberately chose not to employ.

2.2. Termination of the Privatization Agreement was inevitable before the effective date while its formalization was postponed solely due to the manipulation of Mr. Obradović

927. As already explained by Respondent, following the breach of the Privatization Agreement, the following sequence of events was foreseeable and inevitably led to the termination of the Privatization Agreement. Foreseeability is evidenced by numerous letters exchanged between Mr. Obradović and the Agency, existing legal framework and previous experience of Mr. Obradović. Therefore, he knew what consequences of the breach of contract would inevitably follow.

¹⁴⁰⁴ "Thus, it is the date of the actual expropriation of the BD Agro shares which falls to be assessed for the purpose of assessing the compliance with the principle of non-retroactivity." – Claimants' Reply, para. 831.

¹⁴⁰⁵ Claimants' Reply, para. 817.

¹⁴⁰⁶ Claimants' Reply, para. 832.

¹⁴⁰⁷ Claimants' Reply, para. 818.

928. Once the breach was declared and remedies suggested, there were only two possible options: termination by the Agency or performance by Mr. Obradović. During the whole period Mr. Obradović was conceding to the breach and remedy, but would then send wrong audit reports to falsely present the fulfilment of the remedy,¹⁴⁰⁸ would then argue against the breach in order to achieve the removal of the pledge,¹⁴⁰⁹ and then would again reassure the Agency of its full commitment to the Privatization Agreement.¹⁴¹⁰ While some of these letters disclose his discontent, Mr. Obradović failed to challenge any of these acts before the competent forum.
929. Position of the Agency was clear and repeated on numerous occasions. Formality of terminating the contract that had already collapsed happened to occur after the effective date but only because Mr. Obradović constantly manipulated with false promises that the contract would be remedied. On different occasions he was assuring the Agency (and never challenged its acts before the court) that the restoration of the removed assets was about to happen.¹⁴¹¹ He failed to remedy the contract but postponed the termination with false promises that these remedies would be in place. He simply misled the Agency and on this basis now the Claimants are seeking international protection. Needless to say, the Claimants in this case never even attempted themselves to either remedy the breach.
930. Thus, the only effort that Mr. Obradović invested was to postpone the decision of the Agency to formalize the termination. In other privatization engagements, Mr. Obradović remedied the breaches when warned by the Agency about possible termination.¹⁴¹² Interestingly, only in this case he was diligent only in furnishing false promises. Had he felt that there was no breach he could have challenged the suggested remedy before the contractually agreed forum. Failure to do so equally proves his understanding of the causes and consequences of the contractual breach.
931. Therefore, the sole reason why the formalization of terminating the Privatization Agreement happened to occur after the effective date was the false pretenses of Mr.

¹⁴⁰⁸ Letter from Mr. Obradovic to the Privatization Agency attaching the statement from BD Agro's director of 9 November 2011, **RE-60**.

¹⁴⁰⁹ Letter from Mr. Djura Obradović to the Ministry of Economy, 2 April 2012, **CE-77**.

¹⁴¹⁰ Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

¹⁴¹¹ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72**; Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

¹⁴¹² See above, para. 187.

Obradović that the breach would be remedied. The postponement was granted by the Agency on numerous occasions – this in itself is a solemn proof of the Agency’s intent to keep the contract in force once remedy was in force. This is also the reason why the Claimants’ argument is nothing short of cynical - only because of false promises of Mr. Obradović, the formal termination of the Privatization Agreement was postponed. As a result, Claimants are able to relay on formal termination occurring after the effective date (27 April 2015) in their *ratione temporis* argument. However, the manipulation should not now bear fruit for the Claimants’ temporal jurisdiction argument and the Respondent submits that on this ground alone it should be rejected.

2.3. The acts for which the Claimants argue to be of continuous character do not qualify for a continuous act under international law and therefore fall out of the temporal jurisdiction of the tribunal

932. Retention of the pledge is the only continuous act argued by Claimants. As already explained by Respondent, retention of pledge was undertaken under the contract and not as a matter of governmental authority. Contractual act is not in itself a wrongful act and as such cannot qualify for a continuing act under international law. As clearly stated in the ILC Draft Articles on State Responsibility: “*Of course the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.*”¹⁴¹³

933. Therefore, the retention of the pledge as a security for the performance under the contract cannot constitute a wrongful act under international law in the absence of judicial challenge or a specific treaty provision raising the contractual obligations to the level of treaty obligations. None of these conditions exist in the case at hand. Respondent has already argued against the continuous character of the retention of pledge on the basis of the *Generation Ukraine v. Ukraine*¹⁴¹⁴ and *Parkerings v.*

¹⁴¹³ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, p. 41 (commentary to Article 4, para. 6), **CLA-24**

¹⁴¹⁴ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September, 2003, para. 20.30., **RLA-74**.

Lithuania cases,¹⁴¹⁵ and these arguments are equally applicable here. Regardless of the issue of attribution the contractual acts as such cannot constitute international wrongful act: “*Attribution does not change the extent and content of the obligation arising under the ASRO Contract and the Sky Contract, that remain contractual, nor does it make Romania party to such contracts.*”¹⁴¹⁶ Unchallenged contractual acts in relation to pledge are not eligible for any internationally wrongful act and as such cannot constitute continuing wrongful act under international law.

934. Claimants indirectly concede that it is the breach of contract that lies at the heart of their claim: “*the Privatization Agency was in continuous breach of its obligation to release the pledge over the BD Agro shares from the moment when it first refused to release the pledge after the full purchase price under the Privatization Agreement was paid on 8 April 2011 until the shares of BD Agro were expropriated on 21 October 2015. Serbia.*”¹⁴¹⁷ Claimants clearly point to the breach of contract which it herein designates as continuous. This proves the contractual character of the retention of pledge. Entry into force of the BIT could not change the contractual character of the pledge nor could it rectify the failure of Mr. Obradović and Claimants to dispute the retention as a matter of contractual breach under the contract and governing law. Performance under the contract bears no relationship at all to the concept of an internationally wrongful act. Therefore, falling short of the threshold for internationally wrongful act the alleged conduct of the Agency equally falls short of a continuous act under international law. In addition, it is the Claimants’ case that the refusal to release the pledge occurred on 4 February 2014¹⁴¹⁸ which is both before the cut-off date and effective date.

935. The cases on which Claimants rely in relation to the concept of continuous acts amply prove such conclusion because they do not demonstrate the existence of a contractual act or a continuing breach of contract. In *Société Générale v. Dominican Republic*, on which Claimants heavily rely,¹⁴¹⁹ the acts complained of were those of regulatory

¹⁴¹⁵ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, **RE-114**..

¹⁴¹⁶ *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para 319, **RLA-87**.

¹⁴¹⁷ Claimants’ Reply, para. 817.

¹⁴¹⁸ Claimants’ Reply, para. 832.

¹⁴¹⁹ Claimants’ Reply, pp. 217-219.

framework governing the electricity sector: “*The measures the Claimant alleges that have been at the root of this situation relate to the Respondent’s regulatory framework governing the electricity sector and the changes that it argues have taken place or other related aspects.*”¹⁴²⁰ *The Feldman v. Mexico* case, on which the Claimants also rely,¹⁴²¹ was about the tax rebates for exported cigarettes,¹⁴²² and therefore unrelated to any contractual issues – it was the regulatory governmental framework that might have been susceptible for a continuous act contrary to the NAFTA.

936. Respondent does not contest the existence of the concept of internationally wrongful acts of a continuous character nor Article 14 of the ILC Draft Articles. Respondent disputes that continuous act exists in this case for the various reasons already explained. Finally, Claimants do not spend much of their arguments on explaining why the refusal to release the pledge under the contract should be of a continuous character as such. For example, in *Impregilo v. Pakistan* claimant argued that respondent’s failure to pay the price continued up to the treaty’s entry into force and then breached the treaty. The *Impregilo* tribunal dismissed this argument finding that “*the acts in question had no ‘continuing character’ ...; they occurred at a certain moment and their legality must be determined at that moment, and not by reference to a Treaty which entered into force at a later date.*”¹⁴²³ Therefore, failure to pay the price under the contract did not amount to a continuing act contrary to the applicable BIT. Failure to release the pledge patently falls into the same category.

937. In *M.C.I. Power Group and New Turbine v. Ecuador* the tribunal found that it lacked jurisdiction *ratione temporis* to entertain the claim that Ecuador failed to pay its contractual debt. The first refusal to pay debt occurred before the effective date while the last refusal occurred after the effective date. The ground for the claimants’ argument was that these refusals represented continuous and/or composite acts. The M.C.I. tribunal refused this argument and declined jurisdiction with respect to these

¹⁴²⁰ *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, dated 19 September 2008, para. 63, **CLA-106**.

¹⁴²¹ Claimants’ Reply, paras. 791-792.

¹⁴²² *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 7, **RLA-29**.

¹⁴²³ *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID, Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 312, **RLA-33**.

specific acts, despite the fact that the final refusal did occur after the BIT entered into force. During the annulment procedure, the Annulment Committee upheld the award denying temporal jurisdiction and clarified the position of the *M.C.I. Group* tribunal: “*It thus appears that the Tribunal did regard Ecuador’s refusal to pay the alleged accounts receivable as an instantaneous act occurring before the date of the entry into force of the BIT rather than as a continuing omission extending beyond that date.*”¹⁴²⁴

938. Therefore, the refusal to release the pledge authorized under the contract cannot amount to a continuing act contrary to the applicable BIT.

2.4. The alleged conduct on which Claimants found their claims is deeply and inseparably rooted in the Respondent’s pre-BIT entry into force conduct – the non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force

939. As already argued by Respondent, in *Spence International (Berkowitz) v Costa Rica* the tribunal found that the alleged conduct on which the claimants found their claims were “*deeply and inseparably rooted in the Respondent’s pre-CAFTA entry into force conduct.*”¹⁴²⁵ The facts of the case at hand demonstrate that Claimants’ claims are essentially based on and deeply and inseparably rooted in the conduct that predates the Canada-Serbia entry into force. The breach of contract, dozens of notices and warnings that the contract would be terminated, the pledge retention, all predate the effective date of the Canada-Serbia BIT and, despite the Claimants’ argument that these events represent only factual background to the alleged subsequent breaches, they patently demonstrate what the causes and roots of this case are – it is impossible to divorce termination of the contract from its breach, or to divide the retention of pledge from the performance under the contract, or equally to delineate breaches of contract and interests of BD Agro’s employees and minority shareholders initiating the procedure with Ombudsman. The Claimants’ argument that the case is rooted in a mere formal act of termination, the act announced on dozens occasions, and the only

¹⁴²⁴ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, para. 48, **RLA-35**.

¹⁴²⁵ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal, 30 May 2017, para. 298, **RLA-31**.

act that falls after the effective date is artificial and purposefully tailored to overcome the temporal impediment. Respondent respectfully submits that the non-retroactivity principle guards temporal jurisdiction and prevents the Tribunal from examining such facts and entertaining the dispute.

940. In line with the *Spence* case it is not necessary that all facts underlying the ongoing dispute occur before the effective date to exclude the jurisdiction of international tribunals and courts to entertain the dispute as a whole. This is the principle known to other international courts as well. For example, in the *Blečić v. Croatia* case, the European Court of Human Rights found that it lacked temporal jurisdiction and dismissed the case on that ground, despite the fact that the last of the decisions, the decision of the Constitutional Court of Croatia, confirming the deprivation of property rights of the applicant, was adopted after the European Convention on Human Rights entered into force for Croatia. The ECtHR opined:

“77. It follows from the above case-law that the Court’s temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court’s temporal jurisdiction.

...

79. Therefore, in cases where the interference pre-dates ratification while the refusal to remedy it post-dates ratification, to retain the date of the latter act in determining the Court’s temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention came into force in respect of that State. However, this would be contrary to the general rule of non-retroactivity of treaties (see paragraphs 45 and 70 above).“¹⁴²⁶

941. In the *M.C.I. Power Group and New Turbine v. Ecuador* case the tribunal found that it did not have jurisdiction over disputes which arose before the applicable treaty came into force. In reaching this decision the tribunal did not rely on any provision in the

¹⁴²⁶ *Blečić v. Croatia*, European Court for Human Rights, App. no. 59532/00, Grand Chamber, Judgment of 8 March 2006, paras. 77, 79.

applicable treaty but it relied on general international law.¹⁴²⁷ The tribunal said: “*The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties.*”¹⁴²⁸

942. Therefore, the non-retroactivity of the Canada-Serbia BIT excludes its application to disputes arising prior to 27 April 2015. Any dispute arising prior to that date may not be capable of being submitted to the dispute resolution system established by the BIT. The silence of the text of the Canada-Serbia BIT with respect to its scope in relation to disputes prior to 27 April 2015 does not alter the effects of the principle of the non-retroactivity of treaties. Respondent has already argued that the dispute had arose before 27 April 2015 because the acts and facts on which Claimants essentially base their claim demonstrate the existence of a dispute prior to 27 April 2015 – the breach of the Privatization Agreement, numerous notices on breach, meetings in relation to the breach, requests to the buyer to remedy the breach, inquiries of Ombudsman,¹⁴²⁹ requests and refusals in relation to the pledge, etc. All the arguments of Respondent in relation to the knowledge of the Claimants in relation to Article 22 BIT are submitted here as they plainly demonstrate the existence of a dispute before the effective date.

943. All these events prove both the existence of a dispute and how Claimants’ claims are deeply and inseparably rooted in the pre-BIT entry into force conduct. Respondent has already made this submission relying on the *Spence International (Berkowitz) v Costa Rica*.¹⁴³⁰ The Claimants’ sole argument was that “Serbia can neither find solace in *Spence v. Serbia* which stated that ‘*the tribunal cannot evaluate conduct on which the Claimants found their claims because these claims are deeply and inseparably rooted in the pre-BIT entry into force conduct.*’ Respondent agrees with this finding of the *Spence v. Costa Rica* tribunal.

¹⁴²⁷ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 59, **RLA-34**.

¹⁴²⁸ *M.C.I. Power Group*, para. 61, **RLA-34**.

¹⁴²⁹ See Opinion of the Ombudsman dated 19 June 2015, **CE-42**.

¹⁴³⁰ Respondent’s Counter-Memorial with Preliminary Objections, para. 416.

944. The relevance of the “*real cause*” of a dispute for assessing when the dispute came into existence was recently reaffirmed in the *EuroGas & Belmont v. Slovakia* case. The tribunal first reviewed abundant and long-standing case law on this issue to conclude that “*What matters is the real cause of the dispute.*”¹⁴³¹ In searching for the real cause of the dispute the *EuroGas* tribunal reached for the *first act* of one of the officials of Belmont to find the discontent which would later on develop into a chain of events.¹⁴³² However, this development did not transform the real cause of the dispute – the reassignment – that remained as a crucial event despite that local courts decided on the issue after the effective date. In terms of the case at hand, the real cause of the dispute was the breach of the Privatization Agreement and all events that ensued were a consequence of this event: notices of breach, suggested remedy, retention of the pledge, numerous meetings, requests for assignment of the Privatization Agreement to Mr. Rand (Coropi), inspection of the Ministry of Economy, inquiries of Ombudsman, and termination of the Privatization Agreement. Mr. Obradović disputed the position of the Agency about the breach of the Privatization Agreement in April 2012.¹⁴³³ However, as the *EuroGas* tribunal observed, relying on a string of cases: “*The Tribunal does not accept that an investor may invoke the last event in a series of related or similar actions by the State to claim the benefit of the treaty.*”¹⁴³⁴
945. Respondent has already relied on the *EuroGas & Belmont v. Slovakia* award in arguing that the principle of non-retroactivity prevents the Tribunal to establish jurisdiction over dispute that arose before the effective date because it falls outside the temporal scope of the Canada-Serbia BIT.¹⁴³⁵ Claimants disputed the relevance of the *EuroGas & Belmont* for the case at hand because of “*a wholly different wording of the provision setting the relevant time limitation*”¹⁴³⁶ so “*this Tribunal is faced with a wholly different issue – whether the Claimants brought their claims under the Canada-Serbia BIT no later than three years after they acquired knowledge of*

¹⁴³¹ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, para. 453, **RLA-43**.

¹⁴³² *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, para. 454, **RLA-43**.

¹⁴³³ Letter from Mr. Djura Obradović to the Ministry of Economy of 2 April 2012, p. 2, **CE-77**.

¹⁴³⁴ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, para. 460, **RLA-43**.

¹⁴³⁵ Respondent’s Counter-Memorial, Sec. III.C.2 (The principle of non-retroactivity prevents the Tribunal from exercising jurisdiction), paras. 418-419.

¹⁴³⁶ Claimants’ Reply, para. 822.

Serbia's breach of that treaty and the resulting loss."¹⁴³⁷ However, Respondent has not relied on *EuroGas & Belmont* in relation to the three-year limitation period but with respect to the issue that is exactly the same in *EuroGas* and in the case at hand: existence of the real cause of a dispute prior to the critical date under a treaty leaves a treaty-based tribunal without *ratione temporis* jurisdiction to decide the case. Therefore, Claimants deliberately imputed the false arguments to the Respondent in order to engineer their own response. Finally, there was indeed difference in dispute settlement clauses between the Canada-Slovakia and the Canada-Serbia BITs but that difference is without relevance for the issue here. The Canada-Slovakia BIT differentiated between the effective and critical dates, the first being the date of entry into force whereas the second is the date before which the dispute should not have arisen (three years before the effective date). The Canada-Slovakia BIT deliberately departed from the general principle of non-retroactivity by setting up the deadline for prior disputes that otherwise would not have been eligible for settlement under the treaty. This is of no relevance for the Canada-Serbia BIT where effective and critical dates coincide given that no exception was agreed upon. Under rules of general international law and the principle of non-retroactivity, and in line with the finding of the *M.C.I. Power* tribunal that "*silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties.*"¹⁴³⁸ Therefore, the findings of the *EuroGas & Belmont* award are apposite for the case at hand.

946. Finally, the existence of a dispute prior to the effective date is confirmed by Claimants in their Reply. Claimants concede that the refusal to release the pledge was found by one of the Claimants (Sembi) to be "*a violation of the Cyprus-Serbia BIT before it became a violation of the Canada-Serbia BIT.*"¹⁴³⁹ Owners of Sembi are Canadian nationals who figure in this arbitration also as Claimants in their own right. It follows that it is the Claimants' case that there was a dispute preceding the effective date of the Canada-Serbia BIT.

¹⁴³⁷ Claimants' Reply, para. 823.

¹⁴³⁸ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 61, **RLA-34**.

¹⁴³⁹ Claimants' Reply, FN 812 (emphasis added).

947. Therefore, Respondent submits that Claimants' claims are deeply and inseparably rooted in the pre-BIT entry into force acts and facts. Respondent also submits that it has been demonstrated that the dispute arose before the effective date of the Canada-Serbia BIT and that the principle of non-retroactivity excludes its application to this dispute and leaves this Tribunal without *ratione temporis* jurisdiction.

3. The Respondent is entitled to argue both facts and law underlying its preliminary objections

948. In an apparent attempt to achieve a cursory dismissal of the Respondent's *ratione temporis* objection, Claimants suggest that it is for them – exclusively – to determine the factual basis for the Tribunal's jurisdiction. This assertion is not only incorrect, but also downright illogical, in light of the proceedings as they stand thus far. Moreover, it is contradictory to the Claimants' own previous arguments, as well as unsupported by the very case law they cite.

949. First, Respondent would like to remind Claimants that there was a request for bifurcation in this proceeding. Yet, it was rejected. In line with the Claimants' request, by Procedural Order no. 3, the Tribunal decided to join the jurisdictional and merits phases: this incontrovertibly shows the Tribunal to believe the facts underlying jurisdiction to be such as to necessitate full consideration which may only be achieved by hearing both parties – and decidedly not by merely *relying on what the Claimants allege*, to cite their pleadings.¹⁴⁴⁰

950. This reasoning is supported by the Order, which expressly states that the facts likely to be involved in determining the Respondent's jurisdictional objections appear wide ranging and intertwined with the merits.¹⁴⁴¹ The Tribunal repeats this twice and it is indeed worth stressing: the facts regarding jurisdiction do not appear separate and discrete or unrelated to the merits.¹⁴⁴² The Tribunal further specifies that the *ratione temporis* objection under the Canada-Serbia BIT would involve not only an analysis of the relevant Treaty provisions, but also a review of the record.¹⁴⁴³ It is – plain and

¹⁴⁴⁰ Claimants' Reply, para. 764.

¹⁴⁴¹ Procedural Order no. 3, para. 18 (b).

¹⁴⁴² Procedural Order no. 3, para. 18 (b).

¹⁴⁴³ Procedural Order no. 3, para. 17.

simple – evident that the facts must be argued, and that they must be done so now: there is no later.

951. Second, the Claimants' argument on this point reveals itself particularly unsound when considering the views they express in the Reply to the Request for Bifurcation. Namely, not too long ago, they believed the factual basis of most of the Respondent's jurisdictional objections to be "*inextricably intertwined*" with the merits of the case, as they saw "*clear, from even a cursory review of the objections*"¹⁴⁴⁴. *A fortiori*, according to them, the scope of evidence and arguments in the merits phase would be "*almost identical*" to those pleaded at the hypothetical jurisdictional stage.¹⁴⁴⁵ The Claimants fail to state why this has all suddenly become unclear or why they would now like a *de facto* bifurcation: carrying on as if there were a separate jurisdictional phase.

952. A further distinction must be made here. Contrary to what Claimants suggest, Respondent does not argue against the principle that it is for the claimant, in general, to formulate the *alleged breaches*¹⁴⁴⁶ at the outset of the proceedings. However, a respondent in turn has the undeniable procedural right to dispute what a claimant presents as *facts* – including "*those factual measures that the Claimants allege constitute Serbia's breaches*"¹⁴⁴⁷. In light of the joint proceedings, requesting the Tribunal to simply accept the factual basis of jurisdiction as formulated by the Claimants is tantamount to outright asking it to take the Claimants' word on merits and decide in their favour.

953. In almost identical wording, the *PSEG Global v. Turkey* and *Joy Mining v. Egypt* tribunals plainly demonstrated the inequitable consequences of the Claimant's proposed approach:

"If, as in the present case, the parties have such divergent views about the meaning of the dispute in the light of the Contract and the Treaty, it would not be appropriate for the Tribunal to rely only on the assumption that the contentions presented by the Claimant are correct. The Tribunal necessarily

¹⁴⁴⁴ Claimants' Reply to the Request for Bifurcation, para. 7.

¹⁴⁴⁵ Claimant's Reply to the Request for Bifurcation, para. 12.

¹⁴⁴⁶ Claimants' Reply, para. 763.

¹⁴⁴⁷ Claimants' Reply, para. 764.

has to examine the contentions in a broader perspective, including the views expressed by the Respondent, so as to reach a jurisdictional determination. This is the procedure the Tribunal will adopt.”¹⁴⁴⁸

954. Finally, to buttress their longshot attempt at a claim, the Claimants resort to the straw man fallacy. They rely on *Infinito v. Costa Rica*, *Glamis Gold v. USA* and *Eli Lilly v. Canada*, that all explicitly confirm principles which Respondent never disputed: the Claimants' right to (a) formulate its *claims* (i.e. *alleged breaches*)¹⁴⁴⁹ and (b) have its arguments *prima facie* accepted as valid at *the jurisdictional stage*¹⁴⁵⁰. Yet, importantly, none of these tribunals – nor any other tribunal – expressed the view that it is the Claimants' prerogative to formulate the *facts* and have them not be disputed *when preliminary issues are joined with the merits*. The implausibility of this argument is indicated further by the Claimants' relying predominantly on *Infinito*, wherein the proceedings were, unlike these, bifurcated, and the cited reasoning stems from the respective tribunal's Decision on Jurisdiction, not on merits.
955. Claimants were free to submit that the Tribunal has jurisdiction *ratione temporis* and furnish their *claim* with proof of measures which are – allegedly – within the Canada-Serbia BIT's temporal application and which made them *factually* “aware of the breach and loss”. Having done so, they tilted the balance of evidence to Respondent's side. The Respondent would, however, be unable to challenge jurisdiction in any capacity, were it not itself free to dispute the Claimants' proposition and prove the *facts* with its own evidence. Not only were the actual or constructive knowledge acquired at an earlier date, falling outside the time limit, but the dispute and the alleged wrongful acts were, in any event, existent and perfected before the effective day of the treaty – thus precluding jurisdiction on the grounds of the principle of non-retroactivity.

¹⁴⁴⁸ *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 30, **RLA-94**; *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, paras. 64, 65, **RLA-189**.

¹⁴⁴⁹ Claimants' Reply, para. 763.

¹⁴⁵⁰ Claimants' Reply, para. 760.

E. NO JURISDICTION RATIONE PERSONAE UNDER THE CYPRUS – SERBIA BIT

956. In the present proceedings, the Tribunal lacks jurisdiction *ratione personae* over the claims of Sembi, having in mind that Sembi does not represent qualified investor pursuant to Article 1(3)(b) of the BIT which defines investor as:

*“a legal entity incorporated, constituted or otherwise duly organised according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party”.*¹⁴⁵¹

957. Evidently, the BIT requires three criteria to be met by the investor: **first**, that it is incorporated, *constituted or otherwise duly organised according to the laws and regulations of Contracting Party*; **second**, that it *has its seat in the territory of that same Contracting Party*; and **third**, that it is *investing in the territory of the other Contracting Party*. Contrary to Claimants’ assertions, Sembi does not meet the criteria set out for the notion of “investor”, given that it does not have its seat in Cyprus.

958. It is undisputed between the Parties that incorporation and seat represent two distinct criteria for a company to be regarded as investor under the BIT.¹⁴⁵² However, if the term “seat” was to be equated with the term “registered office” (as Claimants seek to do), it would mean that the wording “*having its seat in the territory of that Contracting Party*” – would be superfluous, since the requirement of a registered office is already encompassed by the requirement that the legal entity is “*incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party*”. Hence, as will be elaborated in this Section below, requirement of “seat” should be considered separately from incorporation, *i.e.* registered office.

¹⁴⁵¹ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

¹⁴⁵² Request for arbitration, para. 185.

1. Incorporation and seat under the BIT

959. According to Article 1(3)(b) of the BIT, criteria of incorporation should be interpreted according to the laws and regulations of a Contracting Party (in this case Cyprus), whereas, such determination is not made when it comes to the criteria of seat. However, what is determined in Article 9(4) of the BIT is application of international law in case of disputes under the BIT. Therefore, the notion of incorporation must be assessed from the perspective of the Cyprus law while the notion of seat must be assessed from the perspective of international law.

1.1. Registered office is subsumed under incorporation as per the laws and regulations of Cyprus

960. Under Cypriot law, a company must have a registered office to which all communication and notices may be addressed. Registered office is an element of incorporation of a company in Cyprus, i.e. registered office is a formal prerequisite for legal existence of a company under Cypriot law and cannot be regarded as separate criterion from incorporation. No company can be incorporated in Cyprus without at the same time having its seat there. This is confirmed by Professor Papadopoulos:

“Companies established in Cyprus are obliged to have a registered office. Without a registered office, a company cannot be considered as lawfully established in Cyprus and could not start doing business in Cyprus. The most important provision is Art. 102 of the Cyprus Companies Law. Art. 102 was amended significantly by Law 89(I)/2015. The major change brought by Law 89(I)/2015 to Art. 102 is that the completion of the incorporation of a company in Cyprus entails simultaneously the establishment and acquisition of a registered office. In case the requirements of Art. 102 for notification regarding the registered office are not fulfilled, the Registrar of Companies could remove/strike-off this company from its registry.”¹⁴⁵³

¹⁴⁵³ Expert Report of Dr. Thomas Papadopoulos, para. 14.

1.2. The term “seat” represents a separate criterion and means effective management under international law

961. In the Reply, Claimants assert that the meaning of the term “seat” as provided by Cyprus – Serbia BIT is not governed by international, but municipal, *i.e.* Cyprus law. Claimants justify such point of view by claiming that: (i) international law does not include an autonomous definition of “seat” and that, hence, the subject term should be interpreted by *renvoi* to municipal law, (ii) findings of investment tribunals under different treaties are not determinative for the analysis of the applicable BIT due to their different wording, as well as that (iii) the international law does not allow for the importation of the requirement of effective management into the definition of investor, since such interpretation of Article 1(3)(b) of the BIT would be contrary to good faith.¹⁴⁵⁴ As will be shown in this Section below, all of Claimants’ arguments in this particular case are misplaced.

962. Respondent will show that, contrary to Claimants’ assertions: (1) term “seat” has its own meaning in international law, (2) *renvoi* to Cyprus law cannot be applied for interpreting the term “seat” under Article 1(3)(b) of the BIT, (3) findings of tribunals in other investment arbitration cases to which Respondent referred in Counter-Memorial can and should be applied, (4) treaty practice of Serbia and Cyprus show that “seat” entails something more than incorporation, *i.e.* registered office (5) requirement of “seat” within the meaning of place of effective management represents inherent component of Article 1(3)(b) of the BIT, as well as that (6) conclusions of *Mera* tribunal are incorrect and thus, cannot be applied in this case.

1.2.1. Term “seat” has its own meaning in international law

963. Claimants assert that the international law does not provide for an autonomous definition of the term “seat”.¹⁴⁵⁵ This statement is not supported by Separate Opinion of Professor Park in *CEAC* case, nor with findings of the tribunal in *Mera* case to which they refer. What those authorities state is that there are no international *rules* providing the definition of “seat”, as well as that it is not defined in *ICSID Convention*

¹⁴⁵⁴ Reply, paras. 841-874.

¹⁴⁵⁵ Counter-Memorial, para. 843.

or in the *BIT*.¹⁴⁵⁶ However, that does not mean that international law does not provide adequate basis for interpretation of the term when it is used in treaties.

964. As already elaborated in detail in Counter Memorial,¹⁴⁵⁷ as well as in this Section above, the meaning of the term “seat” should be looked for in international law and Respondent demonstrated that arbitral practice is on the stance that seat connotes the place of effective management (see *AFT* and *Tenaris Talta* awards).¹⁴⁵⁸ Respondent has also offered several scholarly writings which clearly indicate that international law recognizes the term ‘seat’ and gives it the meaning of place of effective management.¹⁴⁵⁹ Apart from stating that “compelling authority” is absent,¹⁴⁶⁰ Claimants never addressed these scholarly positions, let alone attempted to dispute them, nor did they present any scholarly writings arguing the opposite. Therefore, if the Tribunal accepts that the term ‘seat’ should be interpreted under international law, it should be understood as the place of effective management and not as the place of registered office.

1.2.2. Renvoi to Cypriot law would be an incorrect approach in this case

965. As opposed to Claimants’ assertions,¹⁴⁶¹ Respondent points out that applying the principle of *renvoi* would represent incorrect approach in this case.

966. What should be noted first is that *renvoi* is always provided by an explicit legal rule. In this particular case, as previously elaborated,¹⁴⁶² Article 1(3)(b) of the BIT refers to national law only in respect to incorporation, and does not refer to national law for determination of what “seat” is (while Article 9(4) BIT stipulates application of international law in case of disputes under the BIT). The *Tenaris Talta* tribunal, as well as the *Orascom* tribunal, to which Claimants themselves refer,¹⁴⁶³ both agreed

¹⁴⁵⁶ Reply, paras. 843 and 844.

¹⁴⁵⁷ Counter-Memorial, paras. 429-460

¹⁴⁵⁸ *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011, paras. 215, 216 and 217, **RLA-71**; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, para. 154 **RLA-45**.

¹⁴⁵⁹ Pierre Sauve, *Trade and Investment Rules: Latin American Perspectives*, UN Economic Commission for Latin America and the Caribbean, 2006, p. 22; **RLA-47**; E. Schlemmer, Investment, Investor, Nationality, and Shareholders, in Muchlinsky/Ortino/Schreuer (EDS), *International Investment Law* (2008), at 79, as cited in *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, para. 127, **CLA-21**.

¹⁴⁶⁰ Counter-Memorial, para. 839.

¹⁴⁶¹ Reply, para. 840.

¹⁴⁶² Counter-Memorial, paras. 438 and 439.

¹⁴⁶³ Reply, paras. 860-869.

that, when there is no explicit *renvoi* to national law in order to determine the criteria used in the definition of the investor, international law must be applied.¹⁴⁶⁴ Claimants have not disputed this.

967. Nevertheless, as explained in this Section below, even if Claimants' argument that *renvoi* to Cyprus law were to be accepted, the term "seat" could not be given the meaning of "registered office".

1.2.3. Findings of other tribunals

968. Given that we have established that the interpretation of the term "seat" depends on the stance of international law, findings of other tribunals in investment arbitration cases cannot be disregarded.

969. Claimants' however assert that cases cited by Respondent cannot be taken into account because investment treaties applicable in those cases are "differently worded".¹⁴⁶⁵ However, Claimants' themselves heavily rely on *Orascom v. Algeria* case which was decided based on a differently worded BIT. This reliance makes Claimants argument inapposite.

970. Claimants have not disputed Respondent's reference to findings of the tribunal in *AFT v. Slovakia*. As a reminder, in this case, the tribunal found "seat" to be a "*distinct element in addition to "constitution and organization under Swiss law"*" and characterized it as "*effective center of administration of the business operations*".¹⁴⁶⁶ Now, pursuant to Slovak – Swiss BIT, applicable in said case, investors are defined as "*legal entities ... which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party*".¹⁴⁶⁷ As can be concluded by mere reading of this definition, this BIT adds another criteria to the definition of investor in addition to the BIT applicable in the present case (which contains two criteria,

¹⁴⁶⁴ *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, dated 31 May 2017, paras. 278-281, **CLA-111**, and *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, para 165, **RLA-45**.

¹⁴⁶⁵ Reply, para. 846.

¹⁴⁶⁶ *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011, paras. 216 and 217, **RLA-71**.

¹⁴⁶⁷ *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011, para. 86, [emphasis added] **RLA-71**.

incorporation and seat) - the real economic activities of the investor. Apart from that, the definition of investor is almost the same as the one provided in Cyprus – Serbia BIT. However, the tribunal expressly defined seat as “*effective center of administration of the business operations*” regardless of this additional criteria of real economic activities of the investor, which was considered in another section of the award separately from the criterion of “seat”.¹⁴⁶⁸ Thus, different wording of the treaty in *AFT v. Slovakia* case does not influence tribunal’s conclusions on the meaning of the term “seat”.

971. Award reached in case of *Tenaris and Talta v. Venezuela* is also relevant for the present case. Particularly, both Belgium-Luxembourg Economic Union – Venezuela and Portugal – Venezuela BITs provided for two distinct criteria for investors, as is the case in this arbitration - the first being the constitution of legal person in accordance with the laws of contracting party, and the second one having “*siège social*” and “*sede*” in one of the contracting parties.¹⁴⁶⁹ When definitions of “investor” from the Belgium-Luxembourg Economic Union – Venezuela and Portugal – Venezuela BITs, are compared to the definition of investor in the BIT applicable in the present case, it is evident that the criteria in all three BITs are the same, *i.e.* that Belgium-Luxembourg Economic Union – Venezuela and Portugal – Venezuela BITs do not add supplementary criteria apart from incorporation and seat.

972. Therefore, findings of *Tenaris and Talta v. Venezuela* tribunal are fully applicable in this case and Claimants cannot escape the conclusion that “*neither “siège social” nor “sede” can mean simply “registered office” or “statutory seat” in a purely narrow and formal sense, since neither term would then have any effective meaning*”, as well as that “*both “siège social” and “sede” in the Treaties in issue in this case mean the place of actual or effective management*”.¹⁴⁷⁰

¹⁴⁶⁸ *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011, paras. 219-228, **RLA-71**.

¹⁴⁶⁹ *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, para. 115, **RLA-45**.

¹⁴⁷⁰ *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, paras. 148 and 154, **RLA-45**.

1.2.4. Treaty practice of Serbia and Cyprus confirms that “seat” is a distinct criterion from incorporation

973. Claimants argue that all foreign-controlled companies would be excluded from the protection of Cypriot investment treaties if the interpretation of the notion “seat” as place of effective management is accepted.¹⁴⁷¹ This argument does not help Claimants’ case. In the present BIT, as well as in many other BITs, Cyprus agreed to a higher threshold and included “seat” as an additional criteria to incorporation.¹⁴⁷² On the other hand, in a number of other BITs, Cyprus excluded seat as criterion that the investor must fulfill. There is no viable explanation why the definition of the investor from this BIT (and other BITs having seat as the criterion as well) would be equated with the definition of the BITs lacking the criterion of seat.¹⁴⁷³ Had the Contracting Parties wanted to limit themselves solely to incorporation test, they could have done so, but they did not; instead, they introduced the criterion of “seat”.
974. In addition, Claimants did not provide any reasons that would warrant effectively substituting the term “seat” with “registered office”. For example, unlike in the *Orascom* case,¹⁴⁷⁴ there are no *travaux préparatoires* that would show that parties to the BIT objected to a criterion that would require something more than incorporation/registered office. On the other hand, Montenegro, as the successor state

¹⁴⁷¹ Reply, paras. 837 and 872.

¹⁴⁷² Agreement on reciprocal promotion and protection of investments between the Government of the Republic of Cyprus and the Government of the Islamic Republic of Iran, Article 1(2)(b), **RLA-53**; Agreement on the Reciprocal Promotion and Protection of Investments between the Lebanese Republic and the Republic of Cyprus, Article 1(1)(b), **RLA-54**; Agreement on the promotion and the reciprocal protection of investments between the Government of the Republic of Cyprus and the Great Socialist People's Libyan Arab Jamahiriya, Article 1(2), **RLA-55**; Agreement on the reciprocal promotion and protection of investments between the Government of the Republic of Cyprus and the Government of the Republic of San Marino, Article 1(1)(b), **RLA-56**; Agreement between the Government of the Republic of Cyprus and the Government of the Syrian Arab Republic on the promotion and reciprocal protection of investments, Article 1(2)(b), **RLA-57**; The Agreement between the Republic of Cyprus and Serbia and Montenegro on Reciprocal Promotion and Protection of Investments, Article 1(3)(b), **RLA-130**.

¹⁴⁷³ Agreement on the Promotion and the Reciprocal Protection of Investments between the Council of Ministers of the Republic of Albania and the Government of the Republic of Cyprus, Article 2(b), **RLA-50**; Agreement between the Government of the Republic Of Cyprus and the Government of the Hungarian People's Republic on Mutual Promotion and Protection of Investments, Article 1(3)(b), **RLA-51**; Agreement Between the Republic of Cyprus and the Republic of Poland for the Promotion and Reciprocal Protection of Investments, Article 1(3)(b), **RLA-52**.

¹⁴⁷⁴ *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, dated 31 May 2017, paras. 310-313, **CLA-111**.

to the BIT, confirmed in a separate case that its understanding is also that “seat” cannot mean “registered office”.¹⁴⁷⁵

1.2.5. Requirement of “seat” in the sense of effective management is incorporated in the definition of investor

975. Claimants contend that Respondent, by claiming that “seat” means place of effective management, attempts to impermissibly write a new requirement into Article 1(3)(b) of the BIT, contrary to Article 31(1) VCLT, as well as that Respondent offers no authorities for such interpretation.¹⁴⁷⁶ In order to support their stance, Claimants place much reliance on *Orascom v. Algeria* case and commit as much as three pages in their Reply to it.¹⁴⁷⁷ To Claimants’ misfortune, findings from *Orascom v. Algeria* case cannot be applied to this specific case for several reasons.

976. The applicable BIT in *Orascom v. Algeria* does not even use the term seat - it is not written in English but in French, Dutch and Arab, and in French, utilizes the phrase “siège social”.¹⁴⁷⁸ In that sense the tribunal in *Orascom* case noted:

*“The ordinary meaning of the term siège social is not univocal. In and of themselves, these terms merely refer to the seat of a corporation, as opposed to anything else, for instance an arbitral tribunal. Beyond that, a corporate seat or siège social can either be statutaire, referring to the seat appearing in the company’s bylaws or statutes, or réel, referring to the effective seat where the company is actually managed.”*¹⁴⁷⁹

977. In other words, the tribunal concluded that *siège social* can mean either registered office (seat appearing in the company’s bylaws or statutes) **or** effective seat (being the place where the company is actually managed). Therefore, tribunal in *Orascom* case differentiated between registered office and effective seat.

¹⁴⁷⁵ *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, Sections VI.B.2-3 (emphasis added), **CLA-023**.

¹⁴⁷⁶ Reply, paras. 858 and 859.

¹⁴⁷⁷ Reply, paras. 860-870.

¹⁴⁷⁸ *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, dated 31 May 2017, paras. 180 and 182, **CLA-111**.

¹⁴⁷⁹ *Ibidem*, para. 273.

978. After it made a difference between these two possible interpretations of the term *siège social*, the tribunal decided to assign to this term the meaning of *siège social statutaire* i.e. **registered** office.¹⁴⁸⁰ However, it did so for reasons which were only relevant for that particular BIT, and which do not figure in the case at hand:

- During its analysis, arbitral tribunal turned to French, Dutch and Arab dictionaries, and noted that these dictionaries ordinarily translate the respective terms *siege social* and *maatschappelijke zetel* as registered office;¹⁴⁸¹
- Unofficial English translation of the BLEU-Algeria BIT deposited by Belgium with the United Nations Treaty Series translates *siège social* as registered office;¹⁴⁸²
- BLEU Model BIT, which is in English, likewise refers to registered office. Also, majority of BLEU BITs also use *siège social* in French and registered office in English and in many of those BITs, English is the prevailing text;¹⁴⁸³
- During negotiations of BLEU – Algeria BIT, Belgium explicitly rejected introduction of any criterion conditioning protection upon the existence of a “genuine connection” to the home State, such as the presence of a management body. Tribunal took this as reason not to interpret *siege social* as “place of effective management” or *siège reel*.¹⁴⁸⁴

979. In the case at hand, the situation is completely different. English, which is the official text of the BIT, uses the term “seat”, and not the term registered office. Also, unlike with BLEU – Algeria BIT, neither of the parties rejected conditioning protection upon the existence of a “genuine connection”.

980. However, while accepted by the majority of the tribunal, the term *siège social*, apparently can be also assigned a different meaning even in the BIT applicable in that case - one of the arbitrators, Ms. Brigitte Stern, argued that *siège social* as referred to

¹⁴⁸⁰ *Ibidem*, para. 303.

¹⁴⁸¹ *Ibidem*, paras. 282-286.

¹⁴⁸² *Ibidem*, para. 301.

¹⁴⁸³ *Ibidem*, para. 303.

¹⁴⁸⁴ *Ibidem*, para. 313.

in the BIT can only mean *siège reel* (that is, the real seat). Ms. Stern further concluded that real seat does not coincide with the registered office.¹⁴⁸⁵ The same view is also adopted by the legal theory:

*”Siège social, or the seat of a corporation, is more commonly used to define nationality in treaties concluded by civil law countries. It connotes the place of effective management, and therefore reflects a more genuine link between the entity and the home country than the place of incorporation.”*¹⁴⁸⁶

981. But, more importantly, tribunal in *Orascom v. Algeria* clashed over the meaning of the term *siege social* because of the absence of cumulatively listed criteria which might have struck out one of the two possible meanings. In the present case, however, terms “registered office” (incorporation) and “seat” are listed cumulatively, which clearly excludes possibility that those terms have the same meaning. Consequently, we are not facing a similar dilemma of whether “seat” means seat or “registered office”.

982. Therefore, the meaning ascribed to the term *siège social* in *Orascom* case can be of no help for analysis of the term seat in the Cyprus-Serbia BIT, other than to prove that Respondent’s argument is correct, and that registered office is an element of incorporation while (real) seat represents the effective seat where the company is actually managed.

983. In addition, as Claimants stated,¹⁴⁸⁷ in the *Orascom* case, the law of the contracting parties did not recognize the concept “*siege social*”. As opposed to this, this is not an issue in the present case, since Cyprus law does recognize the concept of “seat” as a distinct term from the “registered office”, as explained previously¹⁴⁸⁸ and in this Section below. The reference to international law is needed not because the term “seat” is unknown to Cyprus law, but, as explained in this Section above, because the

¹⁴⁸⁵ *Ibidem*, para. 356.

¹⁴⁸⁶ Rachel Thorn and Jennifer Doucleff, 'Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of “Investor”', in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration*, Kluwer Law International 2010), pp. 7 an 8, **RLA-158**.

¹⁴⁸⁷ Reply, para. 868.

¹⁴⁸⁸ Counter-Memorial, paras. 464-470.

BIT does not refer to municipal law when designating the “seat” criterion in Article 1(3)(b) of the BIT. Hence, this is yet another reason why the reasoning of *Orascom* tribunal cannot be applied in the present case.

984. Consequently, interpreting the term “seat” as registered office would not only render the term agreed upon in the BIT as superfluous, contrary to *effet utile* principle, but it would also be contrary to the understanding of the term under municipal law of investor’s home state.

1.2.6. Conclusions of Mera tribunal are erroneous

985. At the outset, it should be noted that conclusions reached by the *Mera* tribunal are wrong. To begin with, *Mera* tribunal firstly opted for *renvoi* to a Cypriot law (instead of applying international law) although that was contrary to the provisions of the BIT, and then it wrongly applied the provisions of Cypriot law.
986. The reason why *Mera* tribunal decided not to apply international law was the lack of uniformly accepted definition of seat.¹⁴⁸⁹ This is however obviously wrong as lack of uniform definition does not justify disregarding international law altogether and recourse to interpretation by way of *renvoi* to municipal law, but requires additional effort of the tribunal to determine what definition, according to that tribunal, would be correct one, and of course to offer a plausible argument for that. It is precisely the task of the arbitrators to give the term seat, as stipulated in the Article 1(3)(b) of the BIT, the meaning it could have in the sense of international law application of which is clearly envisaged in Article 9(4) of the BIT. By applying the Cypriot law when looking for definition of the term seat, *Mera* tribunal disregarded the fact that Article 1(3)(b) of the BIT clearly stipulated that Cypriot law could have been applied *only* to the issue of incorporation of the company, not while defining the seat.
987. In addition, *Mera* tribunal made a mistake when applying Cypriot law. It disregarded the fact that Brussel I Regulative dated 2002 represents an integral part of the Cypriot law, and that according to that regulation the term “seat” is alternatively defined through three criteria, one of them being the place of central administration or

¹⁴⁸⁹ *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, para. 89 **CLA-022**.

principal place of business.¹⁴⁹⁰ This means that according to Cypriot law, seat has meaning which Respondent argues it has.

988. Further, as Respondent already stated in the Counter-Memorial,¹⁴⁹¹ conclusions that the tribunal in *Mera* reached disregarded that, under Cypriot law, company cannot be established without a registered office, *i.e.* designation and maintenance of a registered office is inevitable element of company's incorporation, which is why registered office cannot at the same time be deemed as a second condition for establishing nationality of an investor pursuant to Article 1(3)(b), and thus, cannot be equated with "seat", as well as the fact that terms "registered office" and "seat" are intentionally used in Cypriot Companies Law as distinct notions, as will be further elaborated in this Section below.

2. "Seat" as criterion according to the Cypriot law

989. Although Article 1(3)(b) of the BIT does not refer to municipal law when introducing the term "seat" as criterion for establishing the notion of "investor", and thus, the proper basis for interpreting that criterion is international law, Respondent will nevertheless explain that even from the standpoint of the Cyprus law, the term "seat" retains the same meaning – the one of effective management.

990. Respondent's Cyprus law expert, Professor Thomas Papadopoulos, explains that Cyprus incorporated in its mixed legal system notions of continental law, one of them being the notion of "seat", which was introduced "*by various amendments to Cyprus Companies Law (Chapter 113-Cap. 113) from 2000 to 2016 ... (Greek word: "έδρα") in Cyprus company law ... in many different articles ... rather than "registered office"*".¹⁴⁹² Instead of following its legislative tradition and using solely the term "registered office", it intentionally incorporated the concept of "seat". The introduction of the term "seat" started in 2000 during the process of the accession to the EU, and the term was not intended to simply re-label "registered office", but rather to exist as a separate term, while the notion of "registered office" continued to exist and was also regularly used in post-2000 amendments to the Cyprus Company

¹⁴⁹⁰ Article 63 of the Regulation (eu) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), **RLA-199**.

¹⁴⁹¹ Counter-Memorial, paras. 467-470.

¹⁴⁹² Second Expert Report of Dr. Thomas Papadopoulos, paras. 4-11.

Law.¹⁴⁹³ It should be recalled that it was during this time the Cyprus – Serbia BIT was concluded, in 2005.

991. Claimants attempt to defend the stance that the notion of “seat” from Cyprus Companies Law is a notion alternative to “registered office”, since “registered office” does not necessarily determine company’s place of incorporation.¹⁴⁹⁴ As thoroughly explained by Professor Papadopoulos, such reasoning is incorrect. Particularly, Professor Papadopoulos elaborates that:

“‘Registered office’ ... refers to place of incorporation as a reference to the law applicable to this company. ... In fact, ‘Registered office’ is ‘the place of incorporation’ for both companies incorporated for the first time in Cyprus and for companies having transferred their registered office to Cyprus under articles 354A-354R of Cyprus Companies Law (Chapter 113-Cap. 113). ... When it comes to companies previously incorporated abroad and which transferred their registered office in Cyprus (under articles 354A-354R of Cyprus Companies Law (Chapter 113-Cap. 113)), such a company is being reincorporated in Cyprus. Hence, the reincorporation determines the law applicable to such companies, which is Cyprus law. A reincorporation represents a ‘second’ incorporation in the new jurisdiction... Thus, ‘registered office’ and ‘place of incorporation’ substantially do not constitute different terms and they can only go hand in hand, i.e. the company’s registered office and place of initial incorporation or subsequent reincorporation could only be within the same jurisdiction.”¹⁴⁹⁵

992. Therefore, incorporation goes hand in hand with registered office which makes Claimants’ reasoning incorrect.

993. Further, the conclusion of Claimants’ legal expert, Mr. Georgiades, that the terms “seat” and “registered office” are used interchangeably due to the fact that articles

¹⁴⁹³ *Ibidem*, paras. 10 and 11.

¹⁴⁹⁴ Reply, paras. 879 and 880.

¹⁴⁹⁵ Second Expert Report of Dr. Thomas Papadopoulos, para. 17.

354K and 57B(1)(d) of Cyprus Companies Law (Chapter 113-Cap. 113) refer to the notion of seat, while the general title for Arts. 354A-354R is “Transfer of Registered Office of Companies to and from the Republic”,¹⁴⁹⁶ is refuted by Professor Papadopoulos. Particularly, he noted that it is far from clear that the lawmaker of Companies Law used this terms interchangeably in these provisions, on the contrary, “[i]f the terms *seat* and *registered office* had the same meaning, Cyprus legislature would not have used both terms within the same provision. It would be really confusing and against legal certainty for a legislature to use a term in the title of a part of Cyprus Companies Law (Chapter 113-Cap. 113), with an identical meaning as another term appearing in one of the provisions”.¹⁴⁹⁷

994. That the use of the term “seat” in the Cyprus Companies Law is far from “*a result of translation problems in connection with Cyprus’ accession to the EU*”, as unfoundedly claimed by Claimants,¹⁴⁹⁸ is supported by Article 391A of Cyprus Companies Law.¹⁴⁹⁹ This Article, for the purposes of providing certain exemptions to the companies with links to the North part of Cyprus, before its unlawful Turkish occupation since 1974, puts “*on an equal basis: ‘seat’/head office or ‘place of business’ or ‘whole property’ and which apply in addition, and cumulatively to the criterion of incorporation.*”¹⁵⁰⁰ In particular, Professor Papadopoulos explains:

“In case this company, on top of its registered office, has its seat or place of business or the whole of their property in occupied or inaccessible areas and is no longer trading and/or does not own any other property apart from the property that is in areas not controlled by the Republic, it is not obliged to pay the levy. However, in its articles of association, this company might

¹⁴⁹⁶ Second Expert Report of Agis Georgiades on Issues of Cyprus Law in ICSID Arbitration Case No. ARB/18/8, *Rand Investments Ltd, Sembi Investment Limited, William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand & Robert Harry Leander Rand v. Republic of Serbia*, para. 2.7.

¹⁴⁹⁷ Second Expert Report of Dr. Thomas Papadopoulos, para. 19.

¹⁴⁹⁸ Reply, para. 882.

¹⁴⁹⁹ “**Exception for companies which are based in areas not controlled by the Republic from the obligation to pay the levy and file annual returns.** Art. 391A Companies which were **incorporated** under the provisions of the basic law prior to 14 August 1974 **and have had their seat or place of business or the whole of their property in occupied or inaccessible areas** and are no longer trading and/or do not own any other property apart from the property that is in areas not controlled by the Republic, are not obliged to pay the levy provided for in s.391, nor any other levies or charges provided they give notification to the registrar in the prescribed manner”, Article 391A of the Cyprus Companies Law (as currently in force), [emphasis added] **RE-184**.

¹⁵⁰⁰ Second Expert Report of Dr. Thomas Papadopoulos, para. 34.

*continue to have its registered office in the above address at the occupied part, but it is managed from the unoccupied/free part, where its seat is found, and in that case, such company would not be exempted from payment of the subject levy. Therefore, Art. 391A of the Cyprus Companies Law (Chapter 113-Cap. 113), clearly expresses the position of Cyprus law that the terms “seat” and “registered office” have a different meaning.”*¹⁵⁰¹

995. Taking the above into account, there is no doubt that the Cyprus Companies Law makes clear distinction between the terms “seat” and “registered office”, and that it treats “seat” as something more than just a place “*to which all communications and notices may be addressed*”,¹⁵⁰² *i.e.* that it treats it as center of place of management. This entirely refutes Mr. Georgiades’ conclusion that there is nothing in the Companies Law to suggest that the term “seat” has a different meaning.¹⁵⁰³ Apparently, Claimants are well aware of that, so they try to attribute inconsistencies in their arguments to alleged translation problems in connection with Cyprus’ accession to the EU or to the lack of specific definition of the term in the law.¹⁵⁰⁴ Claimants have not provided any credible evidence that the introduction of the term “seat” in the Cyprus Companies Law is a consequence of translation problems. On the other hand, Claimants simply cannot seek to deprive of meaning any term which is not specifically defined, just because it does not suit their argument.¹⁵⁰⁵
996. Respondent agrees with Claimants that the term “seat” was introduced to Cypriot law as consequence of the EU accession and the implementation of EU law.¹⁵⁰⁶ However, it does not agree that it was introduced as alternative to the term “registered office”, but “*that the term “seat” has the meaning accepted in the EU law (head office), as implemented in the Cyprus law since Cyprus was an EU country when it concluded the BIT with Serbia (21-7-2005)*”, as well as that Cyprus legislature took into account

¹⁵⁰¹ *Ibidem.*

¹⁵⁰² Article 102 of Cyprus Companies Law 89(I)/2015, **RE-183**.

¹⁵⁰³ Second Expert Report of Agis Georgiades on Issues of Cyprus Law in ICSID Arbitration Case No. ARB/18/8, Rand Investments Ltd, Sembi Investment Limited, William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand & Robert Harry Leander Rand v. Republic of Serbia, para. 2.25.

¹⁵⁰⁴ Reply, para. 885.

¹⁵⁰⁵ Second Expert Report of Dr. Thomas Papadopoulos, para. 23: “*This argument of Mr. Georgiades that the terms, which are not expressly defined, should not be taken into account could not be accepted, because this would mean that all terms, which are not specifically defined cannot be applied.*”

¹⁵⁰⁶ Reply, para. 883; Second Expert Report of Dr. Thomas Papadopoulos, para. 29.

the real seat theory for the needs of European Companies based in Cyprus when applying European Company Statute to Cyprus.¹⁵⁰⁷

997. Finally, it should be noted that the case law to which Claimants refer does not show interchangeable use of the terms “seat” and “registered office” as misleadingly put forward by Claimants.¹⁵⁰⁸ In fact, none of the cases to which Mr. Georgiades referred in his report,¹⁵⁰⁹ even mention “registered office”, let alone use it interchangeably with the term “seat”.

3. Sembi does not have a seat in Cyprus

998. As explained in this Section above, the term “seat” in Article 1(3)(b) of the BIT represents separate criterion within the definition of “investor” which indicates effective management.¹⁵¹⁰ Sembi does not meet this criterion.

999. Before elaborating on Sembi’s lack of standing in these proceedings, it is necessary to define effective management.¹⁵¹¹ According to Black’s Law Dictionary, manager is “[o]ne who has charge of corporation and control of its business, or of its branch establishments, divisions, or departments, and who is vested with a certain amount of discretion and independent judgment... The designation of “manager” implies general power and permits reasonable inferences that the employee so designated is invested with the general conduct and control of his employer’s business”.¹⁵¹²

1000. In other words, managers are persons who have the *power to control* a company and its business, which entails making decisions which are of material importance for the company and for its business, and controlling the implementation of such decisions. They are people who have and exercise “a certain amount of discretion” and “independent judgment”.

¹⁵⁰⁷ Second Expert Report of Dr. Thomas Papadopoulos, para. 29.

¹⁵⁰⁸ Reply, para. 884.

¹⁵⁰⁹ Second Expert Report of Agis Georgiades on Issues of Cyprus Law in ICSID Arbitration Case No. ARB/18/8, Rand Investments Ltd, Sembi Investment Limited, William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand & Robert Harry Leander Rand v. Republic of Serbia, para. 2.23.

¹⁵¹⁰ *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, para 150, **RLA-45**.

¹⁵¹¹ Counter-Memorial, paras. 462 and 463.

¹⁵¹² Black’ Law Dictionary, definition of “manager“, **RLA-200**.

1001. It is unequivocally admitted by Claimants that Sembi was always under full control of Mr. Rand:

*“...Sembi is, and at all relevant times was, controlled by Mr. Rand. Mr. Rand is, and always was, a director of Sembi. Mr. Rand controlled the conduct of all other directors of Sembi. Mr. Markićević, who has been a director of Sembi since June 2013, and Mr. Obradović, who was a director of Sembi between December 2007 and June 2013, became directors based on Mr. Rand’s instructions and agreed to always follow Mr. Rand’s orders. The other two directors of Sembi have been supplied by HLB Axfentiou Limited (“HLB”)—a Cypriot company providing domiciliary and fiduciary services to Sembi, including providing remaining directors of Sembi. As is customary with offshore holding companies, Mr. Rand has an agreement with HLB that gives him full control over Sembi.”*¹⁵¹³

1002. On top of that, the trustee of Ahola Family Trust, which owns all of ordinary shares issued by Sembi, Mr. Jennings, seeks and follows instructions from Mr. Rand in respect of all matters involving the subject trust, as well as his ownership on behalf of the trust of the shares in Sembi.¹⁵¹⁴ Mr. Jennings also admitted that:

*“In line with this provision and the Control Agreement, I have left the management of and control over both Sembi and Coropi to Mr. Rand, who was, and remains to this day, a director of both companies.”*¹⁵¹⁵

1003. Therefore, it is clear that the effective management of Sembi is not performed in Cyprus, but in Canada, where Mr. Rand lives.¹⁵¹⁶

¹⁵¹³ Reply, para. 105.

¹⁵¹⁴ Jennings WS, paras. 7 and 10.

¹⁵¹⁵ Jennings WS, para. 14. *Emphases added.*

¹⁵¹⁶ Memorial, para. 39.

1004. In addition, Sembi does not meet the *Tenaris* tribunal requirements for holding companies.¹⁵¹⁷ First of all, it is not explained by Claimants how exactly is Sembi considered as a holding company. Even if it is, *Tenaris* tribunal criteria still requires holding companies to have “effective management” in the territory of a contracting state, which Sembi, as explained in this Section above, simply does not have.

1005. Claimants put a lot of weight on alleged “modern premises” at which Sembi is located, and due to which, according to Claimants, Sembi meets the requirement of “seat”.¹⁵¹⁸ It is unclear from where Claimants drew the conclusion that the seat is where the company has “modern premises”. Whether modern or not, Sembi’s alleged premises are not the place from which it is managed and thus these premises cannot be place of Sembi’s seat.¹⁵¹⁹

1006. Finally, Claimants try to justify the fact that Sembi has not submitted annual returns after 31 December 2011,¹⁵²⁰ by stating that the obligations to maintain books or registers do not constitute pre-conditions for a place to be designated as registered office.¹⁵²¹ Claimants’ unfortunate attempt to disregard the importance of submitting annual returns pursuant to Cyprus Companies Law does not hold water. Particularly, it is a requirement for every registered company to submit, at least once a year, an annual return with information about company and its structure.¹⁵²² The fact that these annual returns were not submitted for years brings into question Sembi’s activity in Cyprus.

1007. Taking everything mentioned above into account, it is clear that Sembi does not have effective management in Cyprus, and thus, it cannot be regarded as investor pursuant to Article 1(3)(b) of the BIT.

¹⁵¹⁷ *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, para 199, **RLA-45**.

¹⁵¹⁸ Reply, paras. 856 and 893.

¹⁵¹⁹ Counter-Memorial, para

¹⁵²⁰ Print-screens of the online search of Sembi’s corporate history, **RE-120**.

¹⁵²¹ Reply, para. 895.

¹⁵²² Article 118(1) of the Companies Law of Cyprus, **RE-184**.

F. NO JURISDICTION RATIONE MATERIAE UNDER THE ICSID CONVENTION

1. Claimants did not make an investment under the ICSID Convention

1008. Article 25(1) of the ICSID Convention does not contain a definition of “*an investment*” for the purpose of establishing the jurisdiction of the Centre. As explained by the tribunal in *KT Asia v. Kazakhstan*, this implies that the Contracting States intended to give this term its ordinary meaning under Article 31(1) of the VCLT.¹⁵²³ The notion of an investment under the ICSID Convention must be given an objective meaning¹⁵²⁴ which does not depend solely on the instrument recording the disputing parties’ consent. This was explained in no uncertain terms by the tribunal in *Saba Fakes v. Turkey*:

*“First, the Tribunal considers that the notion of investment, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply through a reference to the parties’ consent, which is a distinct condition for the Centre’s jurisdiction. The Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning.”*¹⁵²⁵

1009. It seems that Claimants now argue that the term “investment” used in Article 25(1) of the ICSID Convention has no meaning at all, since (according to Claimants) “*ICSID jurisdiction is restricted only by the investment treaty applicable between the parties to a dispute.*”¹⁵²⁶ This is manifestly wrong. Respondent does not see the reason to engage into a needless debate about the issue that has long been settled by the arbitral jurisprudence and that is “*beyond argument*”¹⁵²⁷ – Article 25 of the ICSID Convention

¹⁵²³ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 165, **RLA-95**.

¹⁵²⁴ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 211, **RLA-24**.

¹⁵²⁵ *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 108, **CLA-90**.

¹⁵²⁶ Claimants’ Reply, para. 665.

¹⁵²⁷ *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 43, **RLA-172**.

*“fixes the “outer limits” of ICSID jurisdiction and that parties can consent to that jurisdiction only within those limits.”*¹⁵²⁸

1010. The objective definition of “an investment” under Article 25(1) of the ICSID Convention is based on four elements contained in the *Salini* test - the existence of a substantial contribution by the investor; certain duration; the assumption of risk and the contribution of the activity to the host State’s development.¹⁵²⁹

1011. The fourth criterion – contribution to the host State’s development – originates from the ICSID Convention’s Preamble¹⁵³⁰ and it is the only objective requirement that can be gleaned from the Convention itself.¹⁵³¹ The four-requirement test has been followed by many ICSID tribunals, most recently by the tribunals in *Karkey v. Pakistan*¹⁵³² and *Union Fenosa v. Egypt*.¹⁵³³

1012. While Claimants deny that the contribution to the host State’s development is an element of “an investment” under the ICSID Convention, they argue that “[C]laimants’ investment complied even with the broadest of tests put forth by any tribunal.”¹⁵³⁴ As it will be demonstrated below, this is incorrect.

1.1. Claimants did not make a substantial contribution

1013. Claimants submit that their contributions comprise of:

- the EUR 5,549,000 purchase price for the Privatized Shares;
- EUR 2 million additional investment in BD Agro;
- the EUR 0.2 million purchase price for Mr. Rand’s Indirect Shareholding;

¹⁵²⁸ *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 156, **RLA-193**.

¹⁵²⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para. 52, **CLA-20**.

¹⁵³⁰ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para. 52, **CLA-20**.

¹⁵³¹ Christoph Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary*, 2nd ed., Cambridge University Press, 2009, pp. 116, 117, para.121, **RLA-97**

¹⁵³² *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 633, **RLA-178**.

¹⁵³³ *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award of the Tribunal, 31 August 2018, para. 6.66, **RLA-180**.

¹⁵³⁴ Claimants’ Reply, para. 672.

- Mr. Rand's EUR 2.2 million financing of the replacement of BD Agro's herd and other payments and loans made for the benefit of BD Agro.¹⁵³⁵

1014. **Payment of the purchase price** - As for the purported payment of the purchase price for the BD Agro's shares and the money supposedly advanced for the additional investments in the company, there is absolutely no evidence that the commitment of capital was made by Claimants. In order to overcome this obstacle, Claimants misconstrue the argument put forward by Respondent in its Counter – Memorial and engage into misrepresentation of facts.¹⁵³⁶

1015. First, Respondent does not contend, as Claimants would like to see it, that Claimants' contributions should be disregarded because the money was wired to the PA by Mr. Obradović.¹⁵³⁷ Rather, the problem is that the money used by Mr. Obradović to pay the purchase price and to invest in BD Agro *was not provided* by any of the Claimants. There are no documents such as wire transfer records or bank account statements that would suggest that the capital used to purchase BD Agro in the privatization originated from Mr. Rand, MDH or Sembi. It was Mr. Obradović who obtained the necessary funds through the loan taken from the Lundin Family.¹⁵³⁸ It was Mr. Obradović who paid all of the installments of the purchase price for the BD Agro's capital.¹⁵³⁹ As a matter of fact, documents revealed in this arbitration demonstrate that the price for the BD Agro's shares was not covered even with the funds advanced by the Lundin Family. The initial installment under the Privatization Agreement of EUR 2,124,451.01 was paid in October 2005, almost three months before Mr. Obradović received the first payment of 399 500 EUR on 2 January 2006,¹⁵⁴⁰ presumably based on the loan agreement with the Lundin Family. In addition, Mr. Obradović used the funds of BD Agro to effectuate the payment of at least four out of five remaining installments.¹⁵⁴¹

¹⁵³⁵ Claimants' Reply, para. 673.

¹⁵³⁶ Respondent's Counter – Memorial, paras. 498, 499.

¹⁵³⁷ Claimants' Reply, para. 675.

¹⁵³⁸ Witness Statement of Mr. Aksel Azrac dated 16 January 2019, para. 13; Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, **CE-28**.

¹⁵³⁹ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

¹⁵⁴⁰ Confirmation of transfer EUR 399,950 from Oil Company to Mr. Obradović, 2 January 2006, **CE-385**;

¹⁵⁴¹ See above, paras. 374-384.

1016. **Alleged additional investment in BD Agro** - The same can be said about Claimants' alleged additional investment in BD Agro – there is simply no documentary evidence to support the assertion advanced by Claimants. The amount of EUR 2 million purportedly invested in BD Agro is not an insignificant amount. Yet, Claimants are unable to point to the paper trail of payments and to prove that those payments were actually made and, more importantly, that the payments were made by any of the Claimants.

1017. Unable to prove that Mr. Rand actually paid for Mr. Obradović's acquisition of BD Agro, Claimants argue that "*Mr. Rand had also secured the financing from his longtime business partners, the Lundin Family.*"¹⁵⁴² Again, Claimants fail to explain the exact meaning of such contention. There is no document on the record that would contain the terms of the financial arrangement between Mr. Rand, the Lundin Family and Mr. Obradović. When prompted by Respondent to submit the agreement concluded with the purpose of financing BD Agro's privatization, Claimants were unable to locate and produce any document.¹⁵⁴³ Thus, the precise role of Mr. Rand in this transaction remains uncertain. The only thing certain is that Mr. Rand did not secure the financing for the purchase of BD Agro.

1018. Second, it is unclear from the Claimants' submission whether Claimants contend that Mr. Rand's repayment of Mr. Obradović's debt to the Lundin Family in 2008 and 2010 should be treated as the Claimants' payment of the purchase price for BD Agro on behalf of Mr. Obradović.¹⁵⁴⁴ In any event, funds which Mr. Obradović obtained through the loan from the Lundin Family were not used to pay the price for the acquisition of BD Agro and Mr. Rand's settlement of Mr. Obradović's debt cannot be treated as payment of the purchase price. Additionally, transfer of money from Mr. Rand to the Lundin Family and their companies is irrelevant since it did not lead to the acquisition of Mr. Obradović's shares in BD Agro by Sembi and the funds were not used for the purpose of furthering the BD Agro's business.

1019. Claimants also seem to argue that the same monetary contributions of one of them (Mr. Rand) should count as a contribution of each and every Claimant. The absurdity

¹⁵⁴² Claimants' Reply, para. 675.

¹⁵⁴³ Respondent's Redfern Schedule, point 4(a).

¹⁵⁴⁴ Claimants' Reply, paras. 673-675.

of the argument is most noticeable when it comes to the relationship between Mr. Rand and Sembi with regards Mr. Rand's repayment of Mr. Obradović's loans.

1020. Claimants themselves admit that the Sembi's bank account were used to transfer to the Lundins funds that were "ultimately committed" by Mr. Rand.¹⁵⁴⁵ Yet, Claimants essentially argue that the same contribution should give Mr. Rand the right of standing under the Canada – Serbia BIT and, simultaneously, provide Sembi with the status of the investor under the Cyprus – Serbia BIT. Unfortunately for Claimants this kind of double-dipping is impermissible. Sembi cannot rely on the contribution made by its ultimate owner as basis of its separate claim under the Cyprus – Serbia BIT,¹⁵⁴⁶ especially when its owner uses the same contribution to advance his own claim in the same proceeding. In order to hold "an investment" under the ICSID Convention both Mr. Rand and Sembi must prove that they made separate monetary contributions.

1021. This was the reasoning behind the decision to reject jurisdiction, for example, in *Doutremepuich v. Mauritius*. There, the tribunal found that the payment of EUR 300,000 into the account of a holding company owned jointly by two claimants were made solely by the first claimant (*Christian Doutremepuich*).¹⁵⁴⁷ This was enough for the tribunal to conclude that the second claimant (*Antoine Doutremepuich*) did not make an investment under the France – Mauritius BIT.¹⁵⁴⁸

1022. Third, Sembi has never made any contribution of capital to the BD Agro project. As explained previously, the repayment of Mr. Obradović's loan was effectuated with funds committed by Mr. Rand. There is no evidence that Sembi has ever paid the remaining installments of the purchase price under the terms of the Sembi Agreement. Even if it would be accepted, for the sake of the argument, that Sembi owned the shares in BD Agro, the mere ownership cannot replace the requirement of contribution.¹⁵⁴⁹

¹⁵⁴⁵ Claimants' Reply, para. 625.

¹⁵⁴⁶ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 192, 205, **RLA-95**.

¹⁵⁴⁷ *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, paras. 13, 128-130, **RLA-171**.

¹⁵⁴⁸ *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 131, **RLA-171**.

¹⁵⁴⁹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 233, **RLA-24**.

1023. Consequently, the other Canadian Claimants (Rand Investments, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand), as Sembi's shareholders, cannot benefit from its inexistent contribution.

1024. In what appears to be an alternative proposition, Claimants argue that Mr. Rand's children can rely on his contribution for the purpose of the Tribunal's *ratione materiae* jurisdiction under the ICSID Convention.¹⁵⁵⁰ Claimants rely on the award by the tribunal in *Renée Rose Levy de Levi v. Peru* to support their argument.¹⁵⁵¹ The Claimants' argument is misplaced.

1025. The circumstances in *Levy v. Peru* were considerably different from the facts in the case at hand. Jurisdiction of the tribunal in *Levy* was premised on the claimant's ownership of shares in a Peruvian bank. The acquisition of shares was a result of a gratuitous assignment from the claimant's father. Essentially, the initial investment was made by the claimant's relatives and later on transferred to Ms. *Levy de Levi* free of charge.¹⁵⁵² Neither her father nor any other relative were involved in the proceeding. Here, Claimants argue that both Mr. Rand and his children made the initial investment based on *the same monetary contributions* and they all pursue the claim based on the payments apparently made by only one of the Claimants (Mr. Rand). To put it plainly – the analogy with *Levy v. Peru* could arguably work in Claimants' favor only if Mr. Rand would not be a party in the present proceeding and if his claim was effectively assigned to his children.

1026. Fourth, Rand Investments' expenditures for consulting fees in 2013 were made in the preparation for Mr. Rand's acquisition of BD Agro's capital from Mr. Obradović. This follows from Mr. Rand's letter to the Serbian Prime Minister and Minister of Economy of 18 September 2014.¹⁵⁵³ The letter was sent more than a year after Mr. Obradović had agreed to assign the Privatization Agreement to Coropi, a company owned by Mr. Rand.¹⁵⁵⁴ In the letter, Mr. Rand stated that he had supported BD Agro

¹⁵⁵⁰ Claimants' Reply, para. 679.

¹⁵⁵¹ *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, **CLA-91**.

¹⁵⁵² *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 146, **CLA-91**.

¹⁵⁵³ Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, **CE-38**.

¹⁵⁵⁴ Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited; **CE-274**.

since the summer 2013 and noted that he was reluctant to continue doing so without the transfer of ownership from Mr. Obradović to himself.¹⁵⁵⁵

1027. As pre-investment expenditures, Rand Investments' payment of consulting fees cannot be treated as the investment under the Canada – Serbia BIT or the ICSID Convention.¹⁵⁵⁶ Furthermore, the amount of approximately 162,000 EUR was the only monetary contribution ever made by Rand Investments.¹⁵⁵⁷ The amount itself suggests the lack of *substantial* contribution as an element necessary for an investment to qualify for the protection under the ICSID Convention. The issue was discussed by the tribunal in *Casinos Austria v. Argentina* where it was held that the application of the Salini test may exclude from the protection “*wholly insignificant activities and assets that, while having a commercial value, do not amount to a significant contribution to the host State's economic life.*”¹⁵⁵⁸

1028. **Purchase price for Mr. Rand's Indirect Shareholding** - As for the purchase price for Mr. Rand's 3.9 % indirect shareholding in BD Agro,¹⁵⁵⁹ it is unclear exactly how did Claimants come up with the price of 200,000 EUR allegedly paid for the shares. No evidence of such payment has ever been submitted. Since the owner of shares was Mr. Rand's Serbian company (MDH Serbia), it can be inferred that it was MDH Serbia that paid for the acquisition of those shares.

1029. Claimants should not be allowed to argue the piercing of the corporate veil only when it suits them. This has been a reoccurring feature of the Claimants' case on jurisdiction. For example, payments made by Mr. Rand as a shareholder of Sembi are his own when Claimants need to establish the existence of Mr. Rand's monetary contribution. However, the same payments are attributed to Sembi because they were made using the company's bank account.¹⁵⁶⁰

¹⁵⁵⁵ Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, pp. 1-2, **CE-38**.

¹⁵⁵⁶ *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, paras. 50, 51, 60, 61, **RLA-78**.

¹⁵⁵⁷ Overview of Payments to Mr. David Wood, **CE-62**; Overview of Payments to Mr. Gligor Calin, **CE-68**; Rand First WS, paras. 40-44.

¹⁵⁵⁸ *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 189, **RLA-168**.

¹⁵⁵⁹ Claimants' Reply, para. 673.

¹⁵⁶⁰ Claimants' Reply, para. 675, fn. 745.

1030. In any event, the purported payment of 200,000 EUR for the 3.9% of BD Agro's shares cannot be considered as a significant contribution to the Respondent's economic life.

1031. **Payment for the purchase and transport of heifers** - Finally, Mr. Rand's partial payment for the purchase and transport of heifers is irrelevant since it did not lead to the acquisition of BD Agro's assets. Furthermore, the origin of funds used for the payment is uncertain. This is so because the flow of money between Mr. Obradović and Mr. Rand and his companies remain obscure. For example, the Sembi Agreement records that Mr. Obradović borrowed some EUR 13,8 million from the Lundins for the acquisition and further investments in BD Agro.¹⁵⁶¹ A significant part of that money never found its way to Mr. Obradović or BD Agro. Out of that sum, EUR 3,327,740 was transferred to MDH and not to Mr. Obradović.¹⁵⁶² It should not be too burdensome for Claimants to explain how exactly those funds were spent. If Claimants are unable or unwilling to do so, the only possible conclusion would be that the payments for the benefit of BD Agro were made using the money borrowed by Mr. Obradović.

1032. In conclusion – the expenditures that Claimants rely on are either inexistent or irrelevant for the purpose of jurisdiction under Article 25(1) of the ICSID Convention.

1.2. The Claimants' purported investment involved no significant duration

1033. Claimants have never obtained any asset that could be deemed as investment under the two BITs and the ICSID Convention. This by definition eliminates the possibility of a significant duration of the investment from the analysis. The Claimants' argument presupposes that BD Agro was acquired and operated by Claimants.¹⁵⁶³ Since Claimants never owned BD Agro, certain expenditures that were made by some of the Claimants did not result in long-term commitments. For instance, the one-time

¹⁵⁶¹ Agreement between Dj. Obradović and Sembi dated 22 February 2008, para. C; **CE-29**.

¹⁵⁶² Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, 15 September 2005, **CE-384**; Confirmation of transfer of EUR 5,000 from Mr. Lundin to Marine Drive Holding, 3 March 2006, **CE-391**; Confirmation of transfer from Longdale Assets Ltd of EUR 10,000 to Marine Drive Holding, 5 July 2006, **CE-398**.

¹⁵⁶³ Claimants' Reply, para. 683.

payment of consulting fees by Rand Investments certainly does not represent the involvement of significant duration.

1.3. Claimants bore no risk associated with the purported investment

1034. BD Agro was acquired and managed by Mr. Obradović and not by any of the Claimants. The funds required for the acquisition of BD Agro were obtained by Mr. Obradović. For some of the Claimants it is even *prima facie* clear that they made no commitment of any capital or other resources in the BD Agro project. This is in particular the case with Sembi and those of the Canadian Claimants relaying on Sembi's supposed contribution (Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand). In absence of any contribution, the risk that would follow from the investment does not exist.¹⁵⁶⁴ It seems that even Claimants do not contend otherwise.

1.4. Claimants' "investment" did not contribute to the development of the Republic of Serbia

1035. In their Reply, Claimants insist that their investment transformed BD Agro from a socialist-style farm to the most modern cow farm in Europe.¹⁵⁶⁵ Once again, that assertion is made based on the opinion of a journalist espoused in the newspaper article published in 2010.¹⁵⁶⁶

1036. The fact remains, however, that BD Agro was *de facto* bankrupt since March 2013 when the company's bank account was blocked by its creditors.¹⁵⁶⁷ This was not a result of any actions or omissions of Respondent, but a consequence of Mr. Obradović's management. BD Agro generated loss in almost every year it was managed by Mr. Obradović.¹⁵⁶⁸ For instance, 2010 was the first year in which BD Agro's revenue was lower than interest on the company's loans alone. With the exception of 2011, the pattern continued in 2012 and 2013.¹⁵⁶⁹ Therefore, the assertion

¹⁵⁶⁴ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 218, 219, **RLA-95**.

¹⁵⁶⁵ Claimants' Reply, para. 686.

¹⁵⁶⁶ News Article "*Where cows listen to Beethoven*" published on 27 November 2010, **CE-26**.

¹⁵⁶⁷ The Company's business account was blocked under the enforce collection procedure on 8 March 2013 and remained blocked ever since. See Pre-pack Reorganization Plan dated November 2014, p. 8, **CE-321**.

¹⁵⁶⁸ First Expert Report of Sandy Cowan, para. 2.6.

¹⁵⁶⁹ First Expert Report of Sandy Cowan, para. 4.32.

that “*the Privatization Agency managed BD Agro into bankruptcy*” is disingenuous, to say the least.¹⁵⁷⁰

1037. Finally, as already described above, certain activities of Mr. Obradović with regards BD Agro were illegal.¹⁵⁷¹ Some of those resulted in the criminal prosecution of Mr. Obradović.¹⁵⁷² To consider such business venture as an investment that contributes to the development of the host State would be absurd.

2. Claimants have no standing under the ICSID Convention

1038. All claims advanced in this arbitration are effectively based on the incorrect assumption that the Agency illegally terminated the Privatization Agreement it had concluded with Mr. Obradović, and not with any of the Claimants.

1039. Claimants do not have *jus standi* to advance those claims before the Tribunal, since the Tribunal “*cannot go into the substance of a claim if that claim is submitted to the Tribunal by a legal entity that is not bound by the Contract on which the claim is based.*”¹⁵⁷³

1040. Claimants’ attempt to draw a parallel between the case at hand and cases in which the investment contract was concluded by the investor’s subsidiary is clearly inapposite.¹⁵⁷⁴ Mr. Obradović entered into the agreement in his personal capacity, taking full advantage of his Serbian nationality in the process and obtaining the right to pay the purchase price for the BD Agro’s capital in six installments.¹⁵⁷⁵ To support their argument Claimants rely on authorities that contemplate circumstances profoundly different from those in the present dispute – a local company owned by a putative investor concludes a contract with the host State and the contract is later on affected by measures attributable to the State.¹⁵⁷⁶ The only way in which the analogy

¹⁵⁷⁰ Claimants’ Reply, Section II.X.

¹⁵⁷¹ See, for instance, paras. 402-414 above.

¹⁵⁷² *Ibid.*

¹⁵⁷³ *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Sentence, 10 janvier 2005, part II, para. 41; (English Translation from ICSID website), part II, para. 37(iv), **RLA-98**.

¹⁵⁷⁴ Claimants’ Reply, paras. 691-693.

¹⁵⁷⁵ See above, para. 68.

¹⁵⁷⁶ See, for instance, *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, para. 50, **CLA-66** (cited in Claimants’ Reply, para. 693).

offered by Claimants would work is if Mr. Obradović would be deemed as Claimants' subsidiary, which is clearly impossible.

1041. Claimants' attempt to distinguish the case at hand from the circumstances in *Consortium v. Algeria* is equally unavailing. In *Consortium*, the tribunal dismissed the claim for lack of jurisdiction because the claimant was not a contracting party in the contract that represented a basis of the claimant's investment. The contract was concluded between two Italian companies (*LESI* and *DIPENTA*) and the Algerian National Dams Agency (*ANB*).¹⁵⁷⁷ In Claimants' interpretation, the lack of standing in that case was a consequence of the fact that Consortium did not own an interest in the two companies that actually concluded the contract. Claimants then argue that, unlike in *Consortium*, "[t]he Canadian Claimants all own (nominally or beneficially) shares in Sembi and thus have standing under the Canada-Serbia BIT and the ICSID Convention to bring the claims relating to Serbia's interference with the Privatization Agreement, despite the fact that they are not party thereto."¹⁵⁷⁸

1042. The argument is clearly misplaced since it presumes that Sembi was a contracting party in the Privatization Agreement. However, as explained earlier, Sembi was never a party in the Privatization Agreement and the Agency was never contractually bound to Sembi.

1043. As for the assertion that "[t]he primary basis of the Claimants' investment is their interest in BD Agro—and not only their interest in the Privatization Agreement",¹⁵⁷⁹ Claimants' inability to demonstrate that they actually owned Mr. Obradović's shareholding interest in BD Agro is equally fatal for their right of standing before the Tribunal under the ICSID Convention.¹⁵⁸⁰

G. CLAIMANTS' CLAIMS AMOUNT TO ABUSE OF PROCESS

1044. The dispute at hand arises out of a domestic investment and it boils down to the issue of whether the Privatization Agency of Serbia validly and justifiably terminated the

¹⁵⁷⁷ *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Sentence, 10 janvier 2005, part II, para. 41; (English Translation from ICSID website), part II, para. 37(iv), **RLA-98**.

¹⁵⁷⁸ Claimants' Reply, para. 695 (emphasis added).

¹⁵⁷⁹ Claimants' Reply, para. 696.

¹⁵⁸⁰ Sections II.A.1 i II.B.1. of Rejoinder

contract it had concluded with Mr. Obradović, a Serbian national and the buyer of BD Agro's capital in privatization.

1045. The initiation of the present proceeding is nothing more than an attempt of Claimants to internationalize the domestic dispute and to misuse the ICSID System for purposes it was not intended, in contravention with the principle of good faith.¹⁵⁸¹

1046. Claimants are obviously right to assert that the abuse of process exist when a purported investor attempts to initiate the arbitration based on forged documents or on *ex post* restructuring of the investment.¹⁵⁸² However, it does not follow from this that a failed attempt to restructure the investment in order to obtain a right to international arbitration releases the alleged investor from the obligation not to manipulate the system of protection, especially when the claimant is fully aware that he does not own the investment.

1047. Respondent does not assert that a *bona fide* claim of an investor that fails at the jurisdictional level should necessarily be considered an abuse of process. What matters here is that Claimants commenced the arbitration fully cognizant of the fact that they did not acquire a property right that was recognized and protected under the laws of the host State.

1048. Over a period of more than two years, between 2013 and 2015, Mr. Rand unsuccessfully attempted to obtain the Agency's approval for the transfer of Mr. Obradović's shares in BD Agro to one of Mr. Rand's Cypriot companies (Coropi).¹⁵⁸³ However, Claimants must have been aware that the legally valid assignment of the Privatization Agreement (and consequently, Mr. Obradović's equity in BD Agro) was possible only upon a prior authorization by the Agency. Yet, Claimants commenced the arbitration asserting that the assignment took place anyway, some five years earlier when Sembi and Mr. Obradović concluded the Sembi Agreement. This cannot be considered a claim made in good faith.

¹⁵⁸¹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 113, **RLA-5**; *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL), PCA Case No. 2011-06, Award on Jurisdiction, para. 423, **RLA-79**.

¹⁵⁸² Claimants' Reply, para. 899.

¹⁵⁸³ Letter from D. Obradović to the Privatization Agency of 1 August 2013, **CE-273**; Email from I. Markićević to the Privatization Agency attaching letter to Ms. Uzelac, **CE-309**; Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, **CE-38**.

1049.Claimants have never offered a convincing explanation for Mr. Rand’s effort to acquire the ownership of shares that he supposedly already owned. Instead, Claimants submit that “[S]erbia purposefully ignores the distinction between nominal and beneficial ownership.”¹⁵⁸⁴ The real problem with the Claimants’ case is the fact that Serbian law ignores the distinction.

1050.According to Claimants, the only motive for Mr. Rand’s attempt to acquire Mr. Obradović’s position as the contractual party in the Privatization Agreement and to unite Mr. Rand’s alleged beneficial with “nominal” ownership was the fact that Mr. Obradović’s services in overseeing BD Agro’s business were no longer needed.¹⁵⁸⁵ However, contemporaneous written evidence tell a different story.

1051.In February 2014, during the meeting with the officials of the Agency, Mr. Obradović explained that he had submitted the request for the assignment of the Privatization Agreement so he could exchange his ownership interest in BD Agro for shares held by his “partner” in another company - PIK Pester Sjenica.¹⁵⁸⁶ According to Mr. Obradović:

*“[h]e had submitted to the Agency a Request for the assignation of the Agreement precisely in order to make easier the division with the partner and avoid trading in securities through the Stock Exchange and that this was one of the variants for the division of ownership between them and not because the Agreement was not executed.”*¹⁵⁸⁷

1052.There are two important conclusions that follow from the cited document.

1053.First, not only that Mr. Obradović was the only person who the Agency could treat as a lawful owner of BD Agro’s shares under the Privatization Agreement and the relevant Serbian legislation, but he also consistently acted as one.¹⁵⁸⁸

1054.Second, and more importantly, the beneficial ownership theory was fabricated in order to circumvent jurisdictional obstacles and the arbitration is used as means of settling

¹⁵⁸⁴ Claimants’ Reply, para. 903.

¹⁵⁸⁵ Claimants’ Reply, para. 903.

¹⁵⁸⁶ Minutes of the meeting at the Privatization Agency held on 4 February 2014, p. 1, **RE-36**.

¹⁵⁸⁷ Minutes of the meeting at the Privatization Agency held on 4 February 2014, p. 1, **RE-36**.

¹⁵⁸⁸ Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, **CE-48**.

outstanding issues from the business relationship between Mr. Obradović and Mr. Rand. This cannot be in accordance with the purpose for which the ICSID mechanism was established.

1055. Conveniently enough, it seems that Mr. Obradović has lost the recollection of the February 2014 meeting.¹⁵⁸⁹ While Mr. Obradović does not go so far as to assert that the minutes of the meeting were forged, for the avoidance of doubt, Respondent strongly rejects any insinuation of the sort.

1056. Finally, had Mr. Rand been successful in obtaining legally valid ownership of Mr. Obradović stake in BD Agro in 2013-2015, this would still be too late for the establishment of the Tribunal's jurisdiction.

1057. Restructuring of an investment, by way of changing its owner, at the time the dispute with the host State is foreseeable and in order to obtain the right to arbitrate has been consistently considered by investment tribunals as the abuse of the arbitration mechanism. For instance, relying on previous arbitral awards, the tribunal in *Phillip Morris v. Australia* held:

*“On this basis, the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the Tidewater tribunal, that a measure which may give rise to a treaty claim will materialise.”*¹⁵⁹⁰

1058. In the case at hand, Claimants attempted to acquire the Privatization Agreement at the time when the dispute between the Agency and Mr. Obradović was ongoing. At this time, there was no only “*a reasonable prospect*” that the Privatization Agreement would be terminated. The termination was immanent since Mr. Obradović has never genuinely intended to remedy the contractual breach, even though he was warned by

¹⁵⁸⁹ Second WS Obradović, para. 90.

¹⁵⁹⁰ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 554 (emphasis added), **RLA-188**.

the Agency about the possible consequences of the breach already in February 2011¹⁵⁹¹ and given plenty of opportunities to do so.

1059. Based on the foregoing, Respondent respectfully requests the Tribunal to dismiss the claims for lack of jurisdiction, as a result of the Claimants' abuse of process.

III. ATTRIBUTION

A. GENERAL

1060. The Parties disagree on attribution of conduct of the Agency to Respondent. In the Reply, Claimants continue to insist on its theory that public purpose of the Agency's activities is crucial for attribution of its acts to Respondent, while its separate legal personality is a mere form, and in this way completely ignores international authorities and arbitral practice pointing just the opposite, which was invoked in Respondent's Counter-Memorial. Claimants also repeat its conclusions about the Agency's lack of financial and managerial autonomy, although evidence clearly indicates otherwise.

1061. Claimants' Reply starts their discussion of the attribution by relying on a short excerpt from a single 2008 judgment of the Higher Commercial Court, which it elevates to a conclusive statement about attribution of all conduct of the Agency to Respondent. The excerpt reads as follows:

*"The notice of the Agency regarding the termination (...) represents the state's will to terminate the contract due to the non-performance. The act of notification (...) is not an administrative act, but an act by which the Privatization Agency uses its legal power, obtained by the transfer of authority under public law from the state, to terminate the agreement that did not achieve the legal goal and the social purpose of privatization due to non-performance."*¹⁵⁹²

¹⁵⁹¹ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, **CE-31**.

¹⁵⁹² Judgment of the Higher Commercial Court, Pž. 6463/2007 from 8 December 2008, p. 4, **RE-164**, quoted in Reply, para. 908.

1062. Before addressing Claimants' specific conclusions based on this excerpt, it is necessary to provide its proper context. The case concerned damage claims of a privatized company against the buyer, the Agency and the Republic of Serbia, following termination of a privatization agreement. The company's claim against the Republic of Serbia sought to make the latter jointly and severally liable for damage allegedly caused by acts of the Agency during the company's privatization. The first instance court denied the claim against the Republic of Serbia by holding that it cannot be liable for acts of the Agency and was not a party to the privatization agreement.¹⁵⁹³ On appeal, a chamber of the Higher Commercial Court confirmed this ruling, but used a different reasoning to support its conclusion, the one that is invoked by Claimants in the present case. The chamber sought to explain that there was no responsibility of the Agency, so accordingly the question of responsibility of the Republic of Serbia did not even arise. It is in that context that the chamber made a remark that the notice of termination by the Agency was not an administrative act, and then noted that it manifested "state will" to terminate the privatization agreement, and that the Agency obtained a legal power to do so by the "transfer of authority under public law from the state". Clearly, the remark in question did not seek further to explain the nature of relationship between the Agency and the State, it rather served to support the argument that the former's notice of termination was not an administrative act.

1063. Another chamber of the Higher Commercial Court made it clear that a notice of termination was an act of the Agency itself as a party to a privatization agreement:

"In this specific case, this procedure does not involve an administrative act that is suitable for annulment in court proceedings, but it is a unilateral declaration of will of one contracting party to the other contracting party in the sense of Article 41 of the Law on Privatization in conjunction with Article 124 of the Law on Obligations..."¹⁵⁹⁴

¹⁵⁹³ "It also found that the third defendant, the Republic of Serbia, cannot be held liable for the Agency's obligations, that the Agency did not appear on behalf of the Republic of Serbia, nor the Republic of Serbia is a contracting party in the Contract on the sale of socially owned capital", Judgment of the Higher Commercial Court, Pž. 6463/2007 from 8 December 2008, p. 1, **RE-164**, quoted in Reply, para. 908.

¹⁵⁹⁴ Decision of the Higher Commercial Court, Pž. 9899/2008 from 21 January 2009, p. 1, **RE-157.1** (emphasis added).

1064. This reasoning was given in a decision that was issued after the one invoked by Claimants (in 2009) and, interestingly, it accords with the first instance decision in the latter case and other court practice, as confirmed by Professor Radovic.¹⁵⁹⁵

1065. With reference to the above quoted excerpt from the 2008 judgment, Claimants first conclude that since the notice of termination was "*an expression of the Serbian state's will*", it is "*attributable to Serbia under public international law*".¹⁵⁹⁶ However, the court's remark about expression of the state will, on which Claimants base their contention about attribution under international law, was made in domestic legal proceedings concerning joint and several civil liability. As such, it does not provide any elements to discuss the relationship between the Agency and Respondent from the point of international law, but is a remark made in a completely different context. Accordingly, it clearly does not warrant the conclusion that Claimants make out of it.

1066. The second conclusion Claimants make, again with reference to the above quoted excerpt, is that a notice of termination constitutes "*the use of delegated public law authority [which] is a sovereign activity*" and thus attributable to Respondent. Again, the statement used by Claimants is taken out of its context and, moreover, was not followed in subsequent practice of the Higher Commercial Court, which clearly stated that a notice of termination was "*a unilateral declaration of will of one contracting party to the other contracting party*", i.e. a commercial act of the Agency.¹⁵⁹⁷

1067. Claimants also insist on the statements that privatization serves a social purpose, that the Agency is specifically tasked to assess fulfillment of such social purpose and to enforce it, which constitutes sovereign activity.¹⁵⁹⁸ However, Claimants' general allegation is certainly not sufficient for establishing attribution of specific actions of the Agency to Respondent, rather, they need to show that each such action was an exercise of governmental powers. Moreover, the fact that the Agency's purpose was to advance certain public goals in the privatization process is not sufficient for attribution:

"What matters is not the 'service public' element, but the use of 'prérogatives

¹⁵⁹⁵ See Second Expert Report of Professor Mirjana Radovic, para. 12, footnote 13; Expert Report of Professor Mirjana Radovic, para. 44.

¹⁵⁹⁶ Reply, para. 910.

¹⁵⁹⁷ See, also, Second Expert Report of Professor Mirjana Radovic, para. 12.

¹⁵⁹⁸ See Reply, paras. 912-918.

de puissance publique' or governmental authority."¹⁵⁹⁹

1068. In this context, Claimants also argue that the Agency's separate legal personality was "merely an issue of form"¹⁶⁰⁰ because it exercised governmental powers and was akin to state regulatory authorities, which may have a separate legal personality but exercise governmental functions.¹⁶⁰¹ According to Claimants, "*the essential issue is that such authorities - just like the Privatization Agency - carry out governmental functions and are entitled with powers to decide on the rights of the private parties.*"¹⁶⁰²

1069. However, separate legal personality cannot be "merely an issue of form" because it is an important factor in establishing whether there is attribution of an entity's conduct to the state.¹⁶⁰³ In fact, it seems that Claimants here argue that the conduct of the Agency is attributable to Respondent on the basis of Article 5 of the ILC Articles on State Responsibility, but in doing so they seek to establish attribution for *all* conduct of the Agency on account of the fact that it may be tasked to exercise *some* governmental authority.¹⁶⁰⁴ This is plainly against applicable rules on state responsibility, according to which the impugned act *itself* must be performed in the exercise of governmental authority.¹⁶⁰⁵ But this Claimants fail to prove, as will be discussed below. Moreover, it is simply not accurate that the Agency "*is entitled to decide on the rights of the private parties*". This is based on an isolated view of Claimants' expert that the Agency's actions in the present case were administrative acts, which is not shared by anyone else.¹⁶⁰⁶

¹⁵⁹⁹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83**.

¹⁶⁰⁰ Reply, para. 916.

¹⁶⁰¹ Reply, paras. 916-918.

¹⁶⁰² Reply, para. 918.

¹⁶⁰³ See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, p. 48, para. 6, **CLA-24** ("*Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5.*").

¹⁶⁰⁴ For more on Agency's governmental authority, see Sec.III.C.2.

¹⁶⁰⁵ See Article 5 of ILC Articles, Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, **CLA-24**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 163 & 170, **RLA-83**.

¹⁶⁰⁶ For more, see Expert Report of Professor Mirjana Radovic, paras. 16-17; Second Expert Report of Professor Mirjana Radovic, paras. 8-11.

1070. In conclusion, Claimants fail to show that the Agency was an organ of Respondent, or that impugned conduct in their case was anything else but a commercial conduct of a contracting party, so they have to resort to generalizations and distortions as they do, once again, in their Reply.

1071. The following sections will discuss and refute (1) various Claimants' allegations concerning the relationship between the Agency and Respondent and (2) Claimants' interpretation of applicable rules of attribution.

B. THE AGENCY AND RESPONDENT

1. Financing

1072. The Parties do not disagree about statutory provisions regulating financing of the Agency.¹⁶⁰⁷ Claimants however posit that Respondent is "*incorrect when it argues that the Privatization Agency was a financially autonomous entity*", rather it "*had strictly no say on the use of the funds it acquired in the privatization process*" whose flow it channeled to the state budget.¹⁶⁰⁸ However, Claimants' statement that the Agency had no say on the use of funds acquired in the privatization process does not prove that it was not a financially autonomous entity. For this reason, Claimants' argument that the Agency did not have any ownership rights over the privatized assets and had to transfer all revenues from their sale to the state budget is clearly irrelevant.¹⁶⁰⁹ The same goes for the fact that the percentage of the commission collected by the Agency was determined by the minister in charge of economic affairs.¹⁶¹⁰ The real question however is who had the authority to dispense with the Agency's own funds.

1073. It has not been contested that the Agency's director disposed independently with its funds, in accordance with the financial plan adopted by the Agency's managing board. According to the testimony of its former director, the Agency

¹⁶⁰⁷ Reply, para. 921 & Counter-Memorial, paras. 548-549.

¹⁶⁰⁸ Reply, paras. 919 & 924.

¹⁶⁰⁹ See Reply, para. 922.

¹⁶¹⁰ See Reply, para. 923.

*"had its own bank account and budget; the budget was disposed of independently by the director in accordance with the financial plan adopted by the Managing Board. Financial resources for the PA's budget came from its own revenue, which the Agency, due to its independence, collected under the law, as a fee for the preformed privatization activities, expressed as a percentage of the achieved sales price of the companies."*¹⁶¹¹

1074.Claimants are conspicuously silent on the question of who decided on the use of the Agency's funds and financing of its operation. They only state, without offering any evidence whatsoever, that their funds *"were not subject to its autonomous decision-making"*.¹⁶¹² This should be contrasted with the above testimony of Mr. Cvetkovic, the Agency's former director.

1075.In conclusion, the Agency was not only a separate legal person from Respondent, but also had financial autonomy and disposed with its own budget.

2. Relationship with the Ministry of Economy and the Government

1076.Claimants argue that the Agency was subject to direction and supervision of the Ministry of Economy and that it did not have managerial autonomy, as can be seen from applicable law and reality.¹⁶¹³ However, Claimants' arguments are without merit.

1077.To start with, the fact that members of the Managing Board of Agency were appointed and dismissed by the Ministry of Economy, or that the director of the Agency was appointed and dismissed by the Government, does not mean that either the Managing Board or director were in any way controlled or instructed by the Government.

1078.As Claimants recognize, the Agency had certain reporting obligations, such as to send semi-annual reports to the Ministry of Economy, which is not an indication of control.¹⁶¹⁴

¹⁶¹¹ Witness statement of Mr. Vladislav Cvetkovic, para. 4.

¹⁶¹² Reply, para. 920.

¹⁶¹³ Reply, para. 925 *et seq.*

¹⁶¹⁴ 2001 Law on Privatization Agency, Articles 11 and 18, **CE-238**; see, also, Reply, para. 928.

1079.Claimants state that the Agency's conduct in the privatization process was subject to "review and instructions" of the Ministry of Economy.¹⁶¹⁵ This is a distortion. The Ministry acted as an appeal body against decisions of the Agency taken in the process of privatization,¹⁶¹⁶ from which it does not follow that the Agency did not have managerial autonomy. On the contrary, the idea of appeal presupposes separation between the body taking a decision, and the body reviewing it on appeal. In any case, this aspect is irrelevant for the case at hand, because the Agency's conduct complained of in the present case was not and could not due to its nature, be subject to an appeal, because it was not an administrative act.¹⁶¹⁷

1080.Claimants also point to the Ministry of Economy's supervision of the Agency's implementation of the Law on Privatization as evidence of lack of managerial autonomy.¹⁶¹⁸ This is also inaccurate, because this control was the control of legality of the Agency's implementation of the law, where the Ministry did not take place of, or influence, the Agency's managerial autonomy and discretion.¹⁶¹⁹

1081.The fact that the Agency cooperated with the Ministry of Economy in the course of the supervision of legality procedure, by providing documents and information, cannot possibly indicate its subordination or lack of managerial autonomy, as Claimants contend,¹⁶²⁰ but merely cooperation in accordance with law.

1082.Finally, the fact that the Agency refrained from issuing further decision in the case of BD Agro until the supervision procedure was completed is also not evidence of subordination, as Claimants contend.¹⁶²¹ Rather, it was a prudent course of action, and procedurally proper, to wait with a decision until the Ministry of Economy provides guidance on how the Law on Privatization should be implemented. When this guidance was issued, it did not contain specific instructions on what decision to take, but directed the Agency to ask Mr. Obradovic for further information, and "*[i]n case the Buyer failed to deliver evidence on fulfillment of the obligations within additionally granted term, the Agency shall undertake the measures within its legal*

¹⁶¹⁵ See Reply, para. 929.

¹⁶¹⁶ See 2001 Law on Privatization, Articles 32 and 39, **CE-220**.

¹⁶¹⁷ See Second Expert Report of Professor Mirjana Radovic, para. 14.

¹⁶¹⁸ See 2001 Law on Privatization, Article 62, **CE-220**.

¹⁶¹⁹ See Second Expert Report of Professor Mirjana Radovic, paras. 13-14.

¹⁶²⁰ See Reply, para. 931.

¹⁶²¹ See Reply, para. 932.

authorizations." ¹⁶²² This is, by itself, clear evidence that no specific instructions were given on which decision to take and that the Agency clearly had managerial autonomy.

1083. Finally, Claimants allege that Respondent's arguments about managerial autonomy of the Agency are "*in stark contrast with the reality*" but fails to provide any evidence for this "reality". The only contemporaneous evidence it offers is the Agency's communication to the Ombudsman stating that the Ministry of Economy's instructions in the supervision procedure are obligatory to the Agency. However, as has been seen, these instructions concern legality of implementation of the Law on Privatization and not managerial autonomy and taking decisions, in particular those that are commercial in nature.

1084. Rather, the reality of the relationship between the Agency and the Ministry of Economy is well-illustrated by the episode where the Agency did not follow the position of the Ministry of Economy that there was no economic justification to terminate the Privatization Agreement and continued to insist that BD Agro and Mr. Obradovic remedy their violations of the Privatization Agreement.¹⁶²³ Claimants cannot invoke this episode in order to argue that the Agency acted unreasonably, and then completely forget it when discussing attribution. It clearly shows that the Agency acted independently from the Ministry.

1085. Finally, and importantly when it comes to the reality of their relationship, Claimants are silent about the unequivocal statement of the former director of the Agency that

"In accordance with the Law, the PA was making decisions independently, without interference from the Ministry of Economy or other state authorities, which I know from my direct experience acquired during the time I worked at the PA. Indeed, this does not mean that certain communication between the Ministry of Economy, other state authorities and the PA did not exist, but the PA was making its own decisions. In big and complex privatization cases, which by their nature had to be coordinated with other authorities, institutions and local communities, the PA cooperated through inter-sectoral working

¹⁶²² Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 14, **CE-98**, also quoted in Reply, para. 934.

¹⁶²³ See Counter-Memorial, para. 556; see, also, Witness Statement of Vladislav Cvetkovic, para. 5; Law on Privatization Agency, Article 18, **CE-238**; The letter of the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**.

*groups and their participation in tender committees and other forms of joint meetings, with the participation of the Ministry of Economy and other relevant ministries. However, such working groups served for adequate coordination of participants in the process and did not affect the independence of the PA with regard to its competences. The Ministry of Economy had the possibility of administrative oversight which it could activate through its role as the second-instance authority in the PA's decision-making procedure, and which it exercised in several cases through the institute of oversight of the PA's work."*¹⁶²⁴

1086. Clearly, Claimants' contentions about complete subordination of the Agency to the Ministry of Economy are without merit and are based on distortion of the relevant statutory provisions. The Agency was a separate legal person, with managerial and financial autonomy, whose conduct was only supervised for its legality by the Ministry of Economy, which amounted to providing guidance on legal interpretation on application of certain provisions of the Law on Privatization.

C. NO ATTRIBUTION OF AGENCY'S CONDUCT UNDER INTERNATIONAL LAW

1. Article 4 of ILC Articles

1.1. Agency is not a de facto state organ

1087. Claimants do not challenge that internal law of a state is the starting point for characterizing a person or entity as a state organ.¹⁶²⁵ Further, Claimants seem to have implicitly abandoned their argument that the Agency is a *de jure* organ of Respondent, and instead only argue that it is an organ *de facto*.¹⁶²⁶

1088. In doing so, Claimants completely disregard the substance of the standard for *de facto* organs in international law, in particular, the unequivocal position of the ICJ that in

¹⁶²⁴ Witness statement of Mr. Vladislav Cvetkovic, para. 5.

¹⁶²⁵ Counter-Memorial, para. 542, with reference to Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, p. 42, para. 11, **CLA-24**; and, also, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 163, **RLA-83**.

¹⁶²⁶ Reply, para. 940 *et seq.*

such situation "*persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument*".¹⁶²⁷ Claimants' Reply fails to address this pronouncement, which was quoted and relied upon in the Counter-Memorial.¹⁶²⁸

1089. The standard of "complete dependence" is a demanding one. It is also incompatible with any sort of managerial autonomy or financial independence. As discussed in the previous section, the Agency had managerial autonomy, which was also confirmed by the testimony of its former director, Mr. Cvetkovic.¹⁶²⁹ This is further confirmed by the documents invoked by Claimants themselves, showing that the Agency did not follow opinion of the Ministry of Economy that there was no economic justification to terminate the Privatization Agreement, and instead kept issuing notices seeking Mr. Obradovic's compliance with it and insisting on its right to effectuate termination in the case of non-compliance.¹⁶³⁰ Further, the Agency not only had its own bank account but also its own independent means of financing (commission from sales), and was independent in disposing with its budget.¹⁶³¹ All this clearly shows that the Agency was not in relationship of "complete dependence" with the Ministry of Economy, or that Respondent exercised control over the Agency. It also shows that its structural independence was not "purely formal" or that Respondent's approach is "formalistic", as Claimants contend.¹⁶³²

1090. Claimants further contend that case law invoked by Respondent does not lend support to its position. First, Claimants state that the tribunal in *Jan de Nul* reached its conclusion about lack of attribution on the basis of Article 4 of the ILC Article "*on the basis that the SCA operated in a manner comparable to business corporations, its activities thus qualified as commercial in nature, and its budget was autonomous*".¹⁶³³ While the commercial nature of SCA activities and an autonomous budget were

¹⁶²⁷ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgement of 26 February 2007, I.C.J. Reports 2007, para. 392, **RLA-86**; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 52, para. 109, **RLA-9**.

¹⁶²⁸ Counter-Memorial, paras. 546-547.

¹⁶²⁹ See Witness statement of Mr. Vladislav Cvetkovic, para. 4; see, also, Counter-Memorial, para. 556.

¹⁶³⁰ See The letter of the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**.

¹⁶³¹ See Witness statement of Mr. Vladislav Cvetkovic, para. 4; see, also, Counter-Memorial, paras. 549-550.

¹⁶³² Reply, paras. 941-942.

¹⁶³³ Reply, para. 943.

factors that lead the *Jan de Nul* tribunal to conclude that it was "*not part of the Egyptian state*",¹⁶³⁴ they need not be necessarily replicated in the present case for the Tribunal to come to the same conclusion. But they are, in large part: the Agency had an autonomous budget¹⁶³⁵ and its activities were in large part commercial.¹⁶³⁶ Claimants disregard all that and argues that the Agency was set up to "*pursue governmental tasks*" and "*endowed with corresponding public powers*".¹⁶³⁷ But Claimants fail to note that the fact that an entity (also) exercises certain activities of public nature (like SCA or the Agency) does not mean that this entity should be automatically considered a state organ, which was precisely the point in *Jan de Nul*.¹⁶³⁸

1091. Respondent relied on *Almas v. Poland* in its analysis of *de facto* organs to conclude that the Agency was not one.¹⁶³⁹ Claimants disagree, and this disagreement is based on their inaccurate reading of the relationship between the Agency and Respondent, in particular the Ministry of Economy.

1092. First, as discussed above, Claimants are wrong that the Agency was not financially independent. Further, the *Almas* tribunal emphasized the fact the Polish Agricultural Property Agency had its own bank account and held property in its own name, and the same goes for the Agency.¹⁶⁴⁰

1093. Second, as far as the control is concerned, it has already been showed that the Agency had management autonomy. Claimants aver that Poland's supervisory powers in *Almas* were restricted to general regulations and approvals of specific categories of

¹⁶³⁴ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 161, **RLA-83**.

¹⁶³⁵ See above Sec.III.B.A; see Witness statement of Mr. Vladislav Cvetkovic, para. 4.

¹⁶³⁶ See Law on Privatization Agency, Article 6(2), **CE-238**.

¹⁶³⁷ Reply, para. 944.

¹⁶³⁸ "*There is no doubt that from a functional point of view, the SCA can be said to generally carry out public activities, as acknowledged by the Respondent itself. However, structurally, it is clear that the SCA is not part of the Egyptian State.*" *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 161, **RLA-83**; see Counter-Memorial, paras. 553-554 ("*The same goes for the Privatization Agency, which to an extent carried a public activity but was structurally separate from Respondent.*").

¹⁶³⁹ Counter-Memorial, paras. 545 & 548-552.

¹⁶⁴⁰ See, *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para. 213, **RLA-85**. The Privatization Agency had its own bank account, see Law on Privatization Agency, Article 2, **CE-238**; The Privatization Agency sold shares of BD Agro in its own name and after termination of privatization agreements held these shares in its own name, see Law on Privatization Agency, Article 6(2), **CE-238**; see, also, Expert Report of Professor Mirjana Radovic, para. 28 & Second Expert Report of Professor Mirjana Radovic, para. 10.

sales of shares.¹⁶⁴¹ However, Claimants' own evidence indicates that the relevant minister had a power of supervision over the Polish Agricultural Property Agency distinct from issuing regulations for its operation,¹⁶⁴² which is again similar to the Agency in the present case where the Ministry of Economy supervised legality of implementation of the Privatization Law, including by the Agency. However, the latter did not require approval for concluding privatization agreements for sale of socially-owned capital,¹⁶⁴³ while the Polish Agency had to seek approval of certain sales. In both cases, government appointed and removed respective managements. Significantly, the Polish Agency had been tasked with, *inter alia*, privatization of state land, which indicates that it also helped implement a state policy.¹⁶⁴⁴ It seems that, on balance, the extent of governmental control is roughly the same in both cases (of Polish Agency and the Agency). It certainly does not amount to "complete dependence".

1094. Respondent also relied on *Bayandir v. Pakistan* in support of its proposition that a separate legal personality "*creates a strong presumption*" that an entity is not a state organ within the meaning of Article 4 of the ILC Articles.¹⁶⁴⁵ Claimants (mis)represent Respondent's argument as if it stated "*that a separate legal personality is the decisive criterion for the issue of attribution under Article 4*".¹⁶⁴⁶ While this is certainly so in respect of *de jure* organs,¹⁶⁴⁷ a general conclusion regarding Article 4 must be more nuanced, hence, the Counter-Memorial used the words "*a strong presumption*". Further, Claimants state that the *Bayandir* tribunal never examined

¹⁶⁴¹ See Reply, para. 946.

¹⁶⁴² See USA International Business Publications (2007). *Lithuania Mineral & Mining Sector Investment and Business Guide: Vol. 1, Strategic Information and Regulation* (Washington D.C.: International Business Publications), p. 113, **CE-790** ("*Legal entity APA is a state legal person under the supervision of the Minister responsible for the matters of Rural Development. APA operates according to the legislation and to the statute, which are issued by the Minister responsible for Rural Development*").

¹⁶⁴³ With regard to selling of state-owned property, the Agency required consent of the government, but this is not relevant in the present case, which concerns the Privatization Agreement on selling of socially-owned capital of BD Agro to Mr. Obradovic. See Article 17 of the Law on Privatization, **CE-220**.

¹⁶⁴⁴ See USA International Business Publications (2007). *Lithuania Mineral & Mining Sector Investment and Business Guide: Vol. 1, Strategic Information and Regulation* (Washington D.C.: International Business Publications), p. 111, **CE-790** (indicating that one of APA's purposes was restructuring and privatization of the State Treasury property used for agricultural purposes).

¹⁶⁴⁵ See Counter-Memorial, paras. 542-544.

¹⁶⁴⁶ Reply, para. 947.

¹⁶⁴⁷ See *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para.208, **RLA-85**: "*As the Respondent notes in the Rejoinder, tribunals have determined that an entity is not a State organ according to the terms of a State's legal order when it has independent personality in that order. For example, in Bayindir v. Pakistan, the tribunal rejected the claim that Pakistan's National Highway Authority was a State organ, because of its separate domestic legal personality.*"

whether the Pakistani entity in question was a *de facto* organ, because it found attribution on the basis of Article 8 of the ILC Articles.¹⁶⁴⁸ However, this is only partially correct. First, Respondent relied on *Bayindir* to support its proposition that a separate legal personality creates a presumption that an entity is not a state organ, not that it completely rules out it being a *de facto* organ. Second, Respondent relied on *Bayindir* to show that the presence of governmental officials in the bodies of an otherwise autonomous entity does not lead to attribution under Article 4 of the ILC Articles.¹⁶⁴⁹ In this context, *Bayindir* addresses, at least indirectly, the question of *de facto* organs, when it states that

*"The Claimant also asserts, however, that NHA's conduct was in fact the mere execution of decisions taken by government officials. This argument would appear to suggest that the acts incriminated emanate from government officials, who are themselves organs of the State under Article 4 of the ILC Articles. Given that – as already indicated above – NHA is a separate legal entity and that the acts in question are those of NHA as a party to the Contract, the Tribunal considers that there are no grounds for attribution by virtue of Article 4."*¹⁶⁵⁰

1095. It is obvious that Claimants cannot escape *Bayindir* in the context of Article 4 of the ILC Articles, either in the context of *de jure* or *de facto* organs.

1.2. The functional "perspective" and *Awdi v. Romania* distinguished

1096. Claimants further contend that Respondent allegedly avoids to discuss the functional perspective and the governmental tasks of the Agency, which they consider equally relevant for the application of Article 4.¹⁶⁵¹ It should be noted that exercise of governmental powers, as such, need not lead to attribution under Articles 4, as Claimants seem to suggest. For as long as an entity exercising governmental powers also performs other, commercial activity, it is not, without more, an organ under Article 4. As noted by the tribunal in *Almas v. Poland*:

¹⁶⁴⁸ Reply, para. 947.

¹⁶⁴⁹ Counter-Memorial, para. 555.

¹⁶⁵⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 119, **RLA-84**.

¹⁶⁵¹ See Reply, para. 949.

*“The ILC’s commentary to Article 4 suggests that ‘the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government’. By contrast, where an entity engages on its own account in commercial transactions, even if these are important to the national economy, this inference will not be drawn.”*¹⁶⁵²

1097. As discussed in the Counter-Memorial, the Agency had exercised certain public functions delegated to it, but this does not make it a state organ within the meaning of Article 4 of the ILC Articles, because it also engaged in commercial activity, as in the present case. In fact, Claimants’ broad suggestion that exercise of certain governmental powers by the Agency automatically makes it a state organ in the sense of Article 4 of the ILC Articles would make Article 5 completely redundant.

1098. The Parties disagree about significance of *Awdi v. Romania* award in the context of attribution under Article 4. Claimants argue that there is a parallel between the Romanian Privatization Authority and the Agency in the present case by pointing to *Awdi* tribunal’s statement that the former acted as an organ of the Romanian State when signing the privatization agreement in pursuance of public policy and not merely in private capacity.¹⁶⁵³ However, as Respondent pointed out, the *Awdi* tribunal did not provide any information about the place of the Romanian Privatization Authority in the state structure, or its status or powers under Romanian law.¹⁶⁵⁴ Its discussion of attribution is compressed in two paragraphs and actually starts with the statement that the Romanian Privatization Authority is a state organ.¹⁶⁵⁵ Claimants are wrong when they state that the *Awdi* award provided “*ample information of AVAS’s status and functions*”,¹⁶⁵⁶ because they again point to what the award said about its powers in the privatization process, but cannot point to any information about its position in the state structure and other functions, in particular whether AVAS was a *de jure* organ of

¹⁶⁵² *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para. 210, **RLA-85** (footnote omitted).

¹⁶⁵³ See Reply, para. 950, with reference to *Awdi*, para. 323.

¹⁶⁵⁴ Counter-Memorial, para. 560.

¹⁶⁵⁵ See *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, paras. 322-323, **CLA-26** the pronouncement is in the second sentence of paragraph 322.

¹⁶⁵⁶ Reply, para. 952.

Romania. However, if one takes a look at the government ordinance by which AVAS was established, it is immediately clear that this entity *was* part of the state structure under full control of the Romania government:

*"The Authority for the Administration of State Assets, hereinafter referred to as A.A.A.S., is a specialized institution of central public administration, with legal personality, subordinated to the Government and coordinated by the Minister of Economy."*¹⁶⁵⁷

1099. Therefore AVAS was legally part of the state administration and subordinated to the government of Romania. This is in stark contrast to the position the Agency had with respect to Respondent.

1100. For this reason, *Awdi* is not of much use in the present context. Moreover, its interpretation put forward by Claimants - that "*pursuance of public interest*" makes an entity a state organ¹⁶⁵⁸ - is clearly not in line with cases such as *Jan de Nul* and *Almas*, which held that conduct of an entity pursuing a public interest or a policy is not, without more, attributable to the state.

1.3. The remark of the European Court of Human Rights should not be given weight

1101. Claimants make much of the fact that the European Court of Human Rights referred to the Agency as "a state body".¹⁶⁵⁹ It dismisses Respondent's argument that the court did so in a different and a very specific context,¹⁶⁶⁰ by stating that the regime of the European Convention for Human Rights is not isolated from general international law, while decisions of the European Court of Human Rights were referred to by both the ILC Articles on Responsibility and investment tribunals.¹⁶⁶¹ Claimants however completely neglect the point that specificities of each treaty regime must be taken into

¹⁶⁵⁷ Decree by urgent procedure No.23, Article 1(2), **RE-331**.

¹⁶⁵⁸ See *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 322, **CLA-26**.

¹⁶⁵⁹ Reply, paras. 955-956.

¹⁶⁶⁰ Counter-Memorial, para. 559.

¹⁶⁶¹ Reply, paras. 957-958.

consideration in its application and that international rights and obligations under different agreements have separate existence and dispute resolution procedures.¹⁶⁶²

1102. The pronouncements referred to by Claimants were indeed made in a specific context of discussion of admissibility of ECHR applications *ratione personae*, i.e., whether, under Article 34 of the European Convention for Human Rights, Serbia was responsible for conduct of socially-owned companies,¹⁶⁶³ or whether such companies could file applications against Serbia.¹⁶⁶⁴ The court concluded that Serbia was responsible for conduct of socially-owned companies and, conversely, that such companies could not file applications against it.¹⁶⁶⁵ In *Kacapor*, which *inter alia* concerned Serbia's responsibility for conduct of a socially-owned company, the European Court of Human Rights offered the following reasoning for its decision:

"The Court notes, in this respect, that the debtor is currently owned by a holding company predominantly comprised of social capital (see paragraph 56 above) and that, as such, it is closely controlled by the Privatisation Agency, itself a State body, as well as the Government (see paragraph 75 above), irrespective of whether any formal privatisation had been attempted in the past.

*The Court therefore considers that the debtor, despite the fact that it is a separate legal entity, does not enjoy "sufficient institutional and operational independence from the State" to absolve the latter from its responsibility under the Convention (see, mutatis mutandis, *Mykhaylenko and Others v. Ukraine*, nos.35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02, § 44, ECHR 2004-XII).*

¹⁶⁶² See International Tribunal for the Law of the Sea, *MOX Plant Case (Ireland v. United Kingdom)*, Order on Request for Provisional Measures, December 3, 2001, (*MOX Plant Case*), paras. 50-51 **Exhibit RLA-194**.

¹⁶⁶³ See *R. Kačapor and others v. Serbia*, App. nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ECtHR, Judgement of 15 January 2008, paras. 97-99, **CLA-25**.

¹⁶⁶⁴ See *Zastava It Turs v. Serbia*, No. 24922/12, ECtHR 2013, paras. 19-23, **CLA-69**.

¹⁶⁶⁵ See *R. Kačapor and others v. Serbia*, App. nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ECtHR, Judgement of 15 January 2008, para. 99, **CLA-25**; see, also, *Zastava It Turs v. Serbia*, No. 24922/12, ECtHR 2013, paras. 22-23, **CLA-69**.

*Accordingly, the Court finds that the applicants' complaints are compatible ratione personae with the provisions of the Convention, and dismisses the Government's objection in this respect."*¹⁶⁶⁶

1103. As can be seen, this decision concerns the question of responsibility of the state for conduct of socially-owned companies, not for conduct of the Agency. Further, the European Court did not really explain why it considered State responsible for conduct of socially-owned companies, i.e. whether this was so because the Agency, which had to approve transactions of socially-owned companies outside the scope of regular business operations, was "a State body", or because the Government itself approved their decisions on status and reorganization, or for both reasons. Therefore, apart from the remark that the Agency was "a State body", this case does not provide any useful information about the relationship between the Agency and Respondent, let alone about possible attribution of the former's conduct to Respondent. Finally, it should also be noted that the European Court of Human Rights has been subject to strong criticism for its interpretation of international law rules of state responsibility, which belies Claimants' reliance on its jurisprudence in the present context.¹⁶⁶⁷

2. Article 5 of ILC Articles

1104. Claimants agree that attribution under Article 5 presupposes that (1) an entity is empowered to exercise elements of governmental authority and (2) the act itself must be performed in the exercise of governmental authority.¹⁶⁶⁸

1105. However, Claimants argue that "*the design of the entire privatization process was governmental, not commercial in nature*" and on this basis conclude that the Agency fulfilled the first limb of the test.¹⁶⁶⁹ However, Claimants' generalizations are of no use in the context of Article 5. Rather, this provision always relates to particular situations and requires that an entity was *empowered* to exercise governmental powers

¹⁶⁶⁶ *R. Kačapor and others v. Serbia*, App. nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ECtHR, Judgement of 15 January 2008, paras. 97-99, **CLA-25** (emphasis added).

¹⁶⁶⁷ See, in particular, Marko Milanovic, Tatjana Papic, *As bad as it gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law*, International and Comparative Law Quarterly, Vol. 58, 2009, p. 1, **RLA-132** (dissecting Court's attribution analysis in the well-known Behrami and Saramati admissibility decision in order "*to demonstrate that the Court's analysis is entirely at odds with the established rules of responsibility in international law, and is equally dubious as a matter of policy.*").

¹⁶⁶⁸ Reply, para. 960.

¹⁶⁶⁹ Reply, paras. 961-964.

and that *the act* complained of was performed in the exercise of governmental powers. Therefore, the analysis must be specific not general, so it is irrelevant whether the Agency was empowered to exercise governmental powers generally or in some other phases of the privatization process. As noted by the ILC:

*"The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage."*¹⁶⁷⁰

1106. Therefore, what is relevant is whether specifically termination of the Privatization Agreement or refusal to release pledge over Mr. Obradovic's BD Agro shares were governmental powers for which the Agency was empowered, and whether this power was exercised in the particular instance.

1107. Therefore, the essential inquiry is whether the activity itself was commercial or exercise of governmental powers. As has been submitted in the Counter-Memorial, the test is whether "[a]ny private contract partner could have acted in a similar manner".¹⁶⁷¹ Therefore, the question in the present case is whether only the Agency or any other private entity could terminate an agreement or release pledge over shares - obviously a private entity could do so, as well.

1108. Claimants disagree and argue that these Agency's activities were not commercial because the Agency was pursuing "governmental objectives" and therefore using its governmental powers.¹⁶⁷² This is obviously a circular argument because Claimants consider that the termination and refusal to release the pledge are governmental powers because they constituted exercise of governmental powers. Instead, the inquiry should be concerned with substance of an act. To use the example given by the ILC, a railway company may be granted certain police powers and its conduct would be

¹⁶⁷⁰ Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 43, para. 5, **CLA-24**.

¹⁶⁷¹ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83**.

¹⁶⁷² Reply, paras. 965-966.

considered as an act of the State under international law "*if it concerns the exercise of those powers, but not if it concerns other activities*", such as sale of tickets.¹⁶⁷³ Therefore, one must start with the substance of acts when analyzing whether they involve exercise of governmental powers, while other factors may also be taken into account, such as the way they are conferred on an entity, the purpose of their exercise and accountability to government for their exercise.¹⁶⁷⁴ The substance of the termination and refusal to release pledge is obviously commercial and it is not a function "*of a public character normally exercised by State organs*", to use the ILC phrase describing governmental powers.¹⁶⁷⁵

1109.Claimants put into question the commercial substance of the impugned acts by alleging that their motivation was not commercial but political, because the Agency

*"simply gave in to the political pressure for the termination of the Privatization Agreement (and the subsequent seizure of the Beneficially Owned Shares) exercised by the Ombudsman upon the urging of the trade unions..."*¹⁶⁷⁶

1110.First, this allegation is not supported by evidence.¹⁶⁷⁷ In particular, it is not supported by the transcript of the session of the Commission for Control frequently (mis)used by Claimants to support their allegations. The complaints that the Agency was receiving from BD Agro's employees and trade unions are mentioned at the end of Ms. Vuckovic's presentation of the case, matter-of-factly and with a remark that some complaints were not accurate. The proposal was to simply transmit the complaints to the Labor Inspectorate.¹⁶⁷⁸ There is no indication whatsoever that the Agency felt any

¹⁶⁷³ Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 43, para. 5, **CLA-24**.

¹⁶⁷⁴ See Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 43, para. 6, **CLA-24**.

¹⁶⁷⁵ See Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 43, para. 2, **CLA-24**.

¹⁶⁷⁶ Reply, para. 983; see, similarly, *ibid.*, para. 970, with regard to the release of the pledge.

¹⁶⁷⁷ For more, see Sec.I.C.2.

¹⁶⁷⁸ This is best illustrated by the transcript itself: "*So this is it. These are the two topics regarding BD Agro Dobanovci. You also have the rest here in the materials. We have mentioned daily communications we are receiving from the employees and trade unions, wherein they are requesting urgent measures to be taken and stating that they generally have big problems concerning business operations, in particular maintaining production and keeping the cattle alive, which is the core business activity of the subject of privatization. We have stated this as well. One of those from BD Agro Dobanovci who have addressed us also states that salaries are not being paid for a long period, from November 2013, December and so on...even for the entirety of 2014. We have even held a meeting at the request of the director of BD Agro Dobanovci and the bankruptcy trustee. And in oral communication these allegations are false. Bearing in mind that we no longer monitor this, our proposal would be to forward these communications to the competent labor*"

kind of pressure. In addition, there is not a hint that the Agency or anyone present at the meeting was influenced in any way by Ombudsman, indeed, he is not even mentioned in discussion.

1111. Second, Claimants' insistence on motivation for termination and refusal to release pledge as a factor indicating governmental nature of an act is wrong as a matter of law. In particular, Claimants are wrong to state, with reference to *Jan de Nul* that "[t]he motivation for the Privatization Agency's acts is extremely important".¹⁶⁷⁹ The part of the award relied upon by Claimants does not provide support for their argument, on the contrary, the tribunal actually stated that what mattered was whether the governmental authority was used when performing certain act, "*irrespective of the reasons*" for the act itself.¹⁶⁸⁰ The ILC Commentary also does not seem to consider motivation behind the impugned act as a relevant consideration in this context.¹⁶⁸¹

1112. Further, following *Jan de Nul*, public goals and purposes of privatization or, in Claimants' words, "statutory motivation", should also not be relevant for characterizing an act as exercise of governmental powers, because "[w]hat matters is not the "service public" element, but the use of "prérogatives de puissance publique" or governmental authority."¹⁶⁸² The test here, as already mentioned, is whether any other private actor could do the same thing,¹⁶⁸³ which in case of contract termination and refusal to release the pledge is clear it could.

1113. In conclusion, an action will be outside the scope of Article 5 of the ILC Articles if it is commercial in substance and could be performed by any other private actor.

inspectorate and it should act within its competence and request from the subject of privatization to abide by the Labor Law." Transcript of the audio recording from meeting of the Commission for Control dated 23 April 2015, pp. 4-5, **CE-768**.

¹⁶⁷⁹ Reply, para. 984.

¹⁶⁸⁰ "*What matters is not the "service public" element, but the use of "prérogatives de puissance publique" or governmental authority. In this sense, the refusal to grant an extension of time at the time of the tender does not show either that governmental authority was used, irrespective of the reasons for such refusal.*" *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83** (emphasis added).

¹⁶⁸¹ See Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 43, para. 6, **CLA-24**.

¹⁶⁸² See *Jan de Nul*, para. 170. *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83**.

¹⁶⁸³ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83**.

Whether the act was motivated by narrow commercial reasons or considerations of general or public importance does not change this analysis.

1114. In this sense, Claimants' pointing to the Ministry of Economy's statement that there was no economic justification for termination of the Privatization Agreement is irrelevant in the context of Article 5.¹⁶⁸⁴ It should also be noted that "economic justification" mentioned by the Ministry of Economy referred to BD Agro company only, and did not relate to other commercial (or public) considerations of the Agency connected with ensuring general compliance with privatization agreements.

1115. Finally, Claimants make a number of specific points in this context, which would be addressed in turn.

1116. Claimants state that the only purpose of Agency's refusal to release the Pledge was to exercise governmental power to terminate the Privatization Agreement, which makes the refusal itself an exercise of governmental power.¹⁶⁸⁵ As already discussed in this section, termination is not a governmental power. Further, it should also be noted that the purpose of refusal to release the pledge was to enable the Agency to take all measures to make Mr. Obradovic comply with the Privatization Agreement, while termination would be the ultimate consequence of non-compliance under the Law on Privatization.¹⁶⁸⁶ Most importantly, the refusal to release the pledge was in accordance with the Privatization Agreement, as confirmed by Professor Radovic.¹⁶⁸⁷

1117. As regards the termination of the Privatization Agreement, Claimants rely on a single decision of a Serbian court stating that termination "*represents the state's will to*

¹⁶⁸⁴ Reply, para. 985. The fact that the Privatization Agency did not follow the Ministry of Economy's opinion is relevant in the context of Article 4 of ILC Articles, because it illustrates that the Ministry of Economy did not exercise control over the Privatization Agency.

¹⁶⁸⁵ Reply, para. 968.

¹⁶⁸⁶ As Ms. Vuckovic stated at the meeting of the Commission for Control: "... if the Agency was to render a decision on deletion of pledge against shares to the buyer registered to his benefit, it would be free to dispose of them, which would be certain bearing in mind the buyer's request for assignment of the agreement. If this disposal of shares is permitted, and the buyer is, I repeat, entitled to this in accordance with the agreement, generally the Agency would no longer be in a contractual relation with someone and you would no longer be able to take measures against the contracting party, when the legal ground had generally ceased with it, and the buyer would be free to dispose of its shares." This was echoed by another participant: "... in accordance with the agreement, the pledge should be deleted, practically, when it pays the purchase price which it did pay. On the other hand we have an uncertainty – what will it do with the entire property since it would then be free to dispose of its shares. In that case there is no necessity in providing this term or anything, because it will do as it wants." Transcript of the audio recording from meeting of the Commission for Control dated 23 April 2015, pp. 4 & 6, **CE-768** (emphasis added).

¹⁶⁸⁷ See Second Expert Report of Professor Mrijana Radovic, para. 48.

terminate the contract",¹⁶⁸⁸ which was already discussed at the beginning of the present attribution chapter. This decision was not followed,¹⁶⁸⁹ and does not reflect the practice of Serbian courts, which considered act of termination as an act of a contracting party.¹⁶⁹⁰ It is also irrelevant that the termination is an *ex lege* consequence of the breaches under the Law on Privatization.¹⁶⁹¹ The *ex lege* termination is also a category of general contract law, as can be seen from the Law on Obligations.¹⁶⁹²

1118. Finally, Claimants also discuss the transfer of BD Agro's shares to the Agency in this context and consider that it had "public law aspect", although they do not explicitly say that this was an exercise of governmental powers.¹⁶⁹³ In any case, Claimants discussion is inapposite, because the transfer of the shares was an automatic consequence of the termination mandated by Law on Privatization, as the law applicable to the Agreement. The transfer was also *accessory* to termination, the latter being an act of a contracting party.¹⁶⁹⁴ As the termination could be challenged by the buyer in a civil court, the latter could also seek interim measure to prevent the Agency from further disposing with shares.¹⁶⁹⁵ This also shows that Claimants are wrong to state that the notice of termination gave rise to "*an irrebuttable presumption*" that the buyer acted as a dishonest party.¹⁶⁹⁶ If the buyer is successful it would to restore its rights under the privatization contract and could also seek compensation of damages incurred.

3. Article 8 of ILC Articles

1119. Claimants also allege that the Agency's refusal to release the pledge, as well as the termination of the Privatization Agreement, should be attributed to Respondent on the basis of Article 8 of the ILC Articles, because the Agency acted both "on the instructions" and "under direction or control" of Respondent.¹⁶⁹⁷

¹⁶⁸⁸ See Reply, paras. 974-975.

¹⁶⁸⁹ See Decision of the Higher Commercial Court, Pž. 9899/2008 from 21 January 2009, *Judicial Practice of Commercial Courts* – Bulletin, No. 1/2009, **RE-157.1**.

¹⁶⁹⁰ See Second Expert Report of Professor Mrijana Radovic, para. 12, footnote 13; Expert Report of Professor Mrijana Radovic, para. 44.

¹⁶⁹¹ See Reply, para. 976.

¹⁶⁹² See, e.g., Article 125 of the Law on Obligations, **RE-32**.

¹⁶⁹³ See Reply, paras. 978-980.

¹⁶⁹⁴ See Expert Report of Professor Mirjana Radovic, para. 55.

¹⁶⁹⁵ See Expert Report of Professor Mirjana Radovic, para. 54.

¹⁶⁹⁶ See Second Expert Report of Professor Mirjana Radovic, para. 29.

¹⁶⁹⁷ Reply, para. 986.

1120. At the outset, it should be noted that Claimants continue to allege existence of "continuous general control" of the Serbian Ministry of Economy over the Agency,¹⁶⁹⁸ while ignoring that, in the context of Article 8, both the ILC and the ICJ underlined that instructions, direction and control must be demonstrated with respect to *specific conduct*.¹⁶⁹⁹ This requirement was also confirmed in the context of international investment law. For example, the *Jan de Nul* tribunal stated that attribution under Article 8 requires "*both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake*".¹⁷⁰⁰

1121. Claimants also allege that the Agency acted as "*a de facto subordinate*" of the Ministry of Economy,¹⁷⁰¹ but this is yet another allegation of general control, which is inadequate in the Article 8 context. The factual inaccuracy of this allegation has already been addressed in the subsection dealing with Article 4,¹⁷⁰² so here it is sufficient to recall that actually the Agency refused to release the pledge and ultimately terminated the Privatization Agreement despite the Ministry of Economy's opinion that there was no economic justification for the termination.¹⁷⁰³

1122. Further, Claimants allege that Respondent exercised "direct control" over the release of pledge, termination of the Privatization Agreement and the seizure of shares because these acts were decided by the Commission for Control which included representatives from different ministries, who formed majority of its members.¹⁷⁰⁴ Here, Claimants fail to take into account their own and their expert's statement that the Commission for Control was an entity within the Agency.¹⁷⁰⁵ Since the Commission for Control was a collegiate body, and also included members from the Agency itself, it follows that its actions cannot be regarded as actions of its individual members (including those coming from state administration) or of any combination

¹⁶⁹⁸ Reply, paras. 987-988.

¹⁶⁹⁹ See Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 47, para. 3, **CLA-24**; *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgement of 26 February 2007 p. 169, para. 400, **RLA-86**; see, also, Counter-Memorial, paras. 579-581.

¹⁷⁰⁰ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 173, **RLA-83**; see, also, *White Industries Australia Limited v. The Republic of India*, UNCITRAL Case, Award, 30 November 2011, para. 5.1.27, **RLA-133**.

¹⁷⁰¹ Reply, para. 992.

¹⁷⁰² See above Sec.III.C.1.

¹⁷⁰³ See The letter of the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**.

¹⁷⁰⁴ Reply, paras. 989-991.

¹⁷⁰⁵ Memorial, para. 355; Expert Report of Milos Milosevic, para. 45.

of these members. Rather, these were actions of the Commission as a collegiate body within the Agency, which had a will distinct from its individual members. In other words, what Claimants' argument fails to take into account is that the Commission for Control (as well as the Agency itself) had its distinct will (*volonté distincte*) which was the result of its working and deciding as a collegiate body. Its decision cannot be, without more, attributed to Respondent any more than decision of an organ of international organization could be attributed to member states.¹⁷⁰⁶

1123.Claimants point to the fact that the decision on termination was rendered by only three members of the Commission for Control, two of them from the state administration and one from the Agency, but this is irrelevant since what is important is that this was a decision of the Commission, not of its individual members. It was also possible that the decision could be rendered by the two members coming from the Agency and one member coming from the state administration (who could also be against). According to the scenario proposed by Claimants, that would make such decision not attributable to Respondent.

1124.Again, what is required under Article 8 is the existence of specific instructions, direction or control, which is the requirement that Claimants cannot avoid by its flawed thesis that Respondent exercised "direct control" because members of the state administration took part in the decision of the Commission for Control. For avoidance of doubt, there is no evidence whatsoever that any of the members of the Commission for Control from the state administration acted under, or provided, any instructions, direction or control to other members, when the Commission's decisions on BD Agro were taken.¹⁷⁰⁷

1125.Claimants persist in arguing that the Agency received specific instructions to terminate the Privatization Agreement both from the Ministry of Economy and the Ombudsman.¹⁷⁰⁸ As already discussed in the Counter-Memorial, this is completely inaccurate.¹⁷⁰⁹ These two allegations will be discussed in turn.

¹⁷⁰⁶ Institut de Droit international, *The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations Toward Third Parties*, Article 6(a), **RLA-134**; Draft Articles on Responsibility of International Organizations with commentaries, Article 62(2), **RLA-135**.

¹⁷⁰⁷ See Privatization Agency's Rulebook on Procedure for Control dated 20 May 2010, **CE-763**.

¹⁷⁰⁸ Reply, paras. 993-1003.

¹⁷⁰⁹ Counter-Memorial, paras. 584-589.

1126.First, the Ministry of Economy stated that the Agency should grant an additional time limit to Mr. Obradovic to provide evidence that he complied with the Privatization Agreement, and if he failed to do so "*to undertake the measures within its legal [powers]*".¹⁷¹⁰ Respondent considers that this statement did not indicate (instruct, direct, control) any specific conduct to be performed by the Agency. It is also significant that the Ministry of Economy did not specifically request termination of the Privatization Agreement or even use the word "termination". Claimants respond that it is clear that the termination was "the measures" referred to by the Ministry of Economy.¹⁷¹¹ However, they fail to consider that the Ministry's statement used the plural "the measures" instead of the singular "the measure" or even specific "termination". Claimants completely fail to address the possibility of other measures, which is crucial, because it shows that the Agency could as well decide not to terminate and provide the Buyer with yet another time-limit for compliance or with a certificate that it fulfilled all its obligations under the Privatization Agreement. This shows that the Agency had a choice to make, and that it did not perform the impugned act (termination, refusal to release the pledge) as the result of instructions, direction and control but on the basis of its own will.

1127.Claimants' only argument here is that the Agency itself had requested several times the Ministry of Economy's opinion regarding the termination of the Privatization Agreement.¹⁷¹² But this does not speak in favor of considering the Ministry's statement as a specific instruction to terminate the Privatization Agreement, especially in light of the fact that it previously opined that there was no economic justification for the termination.¹⁷¹³

1128.As far as the alleged instructions, direction or control from the Ombudsman are concerned, Respondent pointed out in the Counter-Memorial that the Ombudsman's recommendation was not binding on the Agency and the Ministry of Economy and that, in any case, its substance did not contain an instruction to terminate the Privatization Agreement but to "*take necessary measures to determine... whether all conditions stipulated by the Law on Privatization for termination... have been*

¹⁷¹⁰ Report of Ministry of Economy on the Control over the Privatization Agency, p. 13, **CE-98**.

¹⁷¹¹ Reply, para. 994.

¹⁷¹² Reply, para. 994.

¹⁷¹³ See The letter of the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**.

fulfilled", which left it to the Agency to decide what to do on the basis of its own judgment.¹⁷¹⁴ In the Reply, Claimants point to the Ombudsman's follow up letter in which he expressed his dissatisfaction with the measures taken. They argue that the Ombudsman "*would absolve the Privatization Agency only after it had terminated the Privatization Agreement*".¹⁷¹⁵ This, however, is not a fair reading of the letter. Rather, the Ombudsman did not consider that the provision information about the control on fulfillment of buyer's obligations was a sufficient response to his recommendation, so he asked the information on "*whether the issue of validity of disputable Agreement on sale of socially owned capital was solved or not*".¹⁷¹⁶ In other words, the Ombudsman merely reiterated what he stated in his opinion. So Claimant's argument actually does not bring anything new to the discussion.

1129. Finally, Claimants state that the events leading to the termination "*are strikingly similar*" to *Bayandir v. Pakistan*, where the tribunal established government's responsibility based on continuous governmental interference into a motorway project. In particular, Claimants point to the fact that the tribunal paid "*particular attention to a clearance from the Pakistani President to the chairman of the NHA to resort 'to the available contract remedies, including termination'*" in response to Bayandir failure to comply with the contract.¹⁷¹⁷ According to Claimants, the *Bayandir* tribunal did not attach relevance to the lack of absolute specificity in the instruction and considered NHA's subsequent conduct attributable to Pakistan under Article 8 of the ILC Articles, which is equally applicable in the present case.¹⁷¹⁸

1130. However, Claimants fail to consider several crucial elements the *Bayandir* tribunal took into account when establishing attribution, which do not exist in the present case. First, the tribunal noted that the termination in *Bayandir* received "express clearance" from the government, which is absent from the statements of either the Ministry of Economy or Ombudsman. Second, and equally important, the government's involvement in the present case cannot possibly be compared with direct, specific and

¹⁷¹⁴ Counter-Memorial, paras. 588-589, quoting Opinion of the Ombudsman of 19 June 2015, **CE-42**.

¹⁷¹⁵ Reply paras. 996-997.

¹⁷¹⁶ Letter from the Ombudsman to the Privatization Agency of 18 September 2015, p.1, **CE-88**.

¹⁷¹⁷ Reply, para. 999.

¹⁷¹⁸ Reply, paras. 1000-1001.

detailed involvement and interest of the highest levels of government in *Bayandir* and their guidance to terminate the contract.¹⁷¹⁹ As noted by the *Bayandir* tribunal:

*"During the hearing on the merits, it became in particular clear that at a meeting held on 12 April 2001, General Musharraf gave clearance to the Chairman of NHA, General Javed, to resort to the available contract remedies, including termination (Tr. M., 29 May 2008, 74-75). Similarly, General Qazi, Minister of Communications, confirmed that the decision to terminate the Contract could not have been taken without some guidance from higher levels of the Pakistani government"*¹⁷²⁰

1131. These circumstances clearly do not obtain in the present case. In particular, statements coming from the Ministry of Economy and Ombudsman do not reveal the specificity of government's intervention seen from the above passage, which led the *Bayandir* tribunal to establish attribution on the basis of Article 8 of the ILC Articles.

IV. THERE WERE NO VIOLATIONS OF SERBIA'S OBLIGATIONS UNDER THE TREATIES

A. THE CONDUCT COMPLAINED OF WAS NOT PERFORMED IN A SOVEREIGN CAPACITY

1. Claimants fail to show that there is "no firm requirement" in international law that a violation must be committed in the exercise of sovereign powers

1132. In the Counter-Memorial, Respondent demonstrated, with reference to abundant practice of arbitral tribunals,¹⁷²¹ that a treaty breach presupposes exercise of sovereign

¹⁷¹⁹ See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 126-128 & 236, **RLA-84**.

¹⁷²⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 128, **RLA-84** (emphasis added).

¹⁷²¹ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260, **RLA-33**; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 345, **CLA-37**; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, para. 79, **RLA-94**; *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 51, **RLA-92**; *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 115, **RLA-93**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 180, **RLA-84**;

powers. Claimants argue that this is "*no firm requirement*" but fail to provide any firm evidence in support of their argument.¹⁷²²

1133. Claimants first rely on a single article which they say supports their position that commercial and governmental acts are often intertwined and that any attempt to draw a line between commercial and sovereign acts "*may be artificial, if not outright impossible*."¹⁷²³ However, Claimants fail to mention that this text, from 2007, clearly confirms that the dominant position was to distinguish between sovereign and commercial acts.¹⁷²⁴ The author actually embraces the same position, while also trying to propose certain modifications in case of violations of fair and equal treatment, which is clear from the very part of the article relied upon by Claimants.¹⁷²⁵ They however fail to note that the trend continued, for example, *Duke*, *Bayindir*, and *Almas* were decided after this text was published in 2007, and they continued to uphold the principle that exercise of sovereign powers was necessary for a treaty breach.¹⁷²⁶

1134. Claimants also invoke *Eureko* and *Ampal* awards but these cases did not even deal with the issue. Claimants in fact admit this when they state that these two cases allegedly upheld their position "*implicitly*".¹⁷²⁷

1135. Further, Claimants continue to rely on *SGS v. Paraguay* and its statement that "*[l]ogically, one can characterize every act by a sovereign State as a 'sovereign act'*" so the state may also be internationally responsible for its acts in commercial

see, also, *Kristian Almås and Geir Almås v. The Republic of Poland* (UNCITRAL), PCA Case No. 2015-13, Award, 27 June 2016, paras. 274-284, **RLA-85**, and the extensive review of arbitral practice pointing to the same conclusion provided by the tribunal.

¹⁷²² Reply, paras. 1014-1019.

¹⁷²³ Reply, para. 1014, and footnote 1001 referring to Guido Santiago Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, In: Jan Van den Berg (ed.), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, Volume 13 (2007), **CLA-112**.

¹⁷²⁴ "*As noted by Happ and Rubins, these cases would show the growing support obtained by the idea that a sovereign act is needed as opposed to a commercial one in order to consider a contract breach as a treaty breach.*", Guido Santiago Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, In: Jan Van den Berg (ed.), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, Volume 13 (2007), p.525, **CLA-112**.

¹⁷²⁵ See Guido Santiago Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, In: Jan Van den Berg (ed.), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, Volume 13 (2007), p.525, **CLA-112**.

¹⁷²⁶ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 345, **CLA-37**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 180, **RLA-84**; *Kristian Almås and Geir Almås v. The Republic of Poland* (UNCITRAL), PCA Case No. 2015-13, Award, 27 June 2016, para. 274, **RLA-85**

¹⁷²⁷ Reply, para. 1015.

sphere.¹⁷²⁸ However, when one reads these remarks in their proper context, it is obvious that the tribunal made them as an illustration of how difficult it was sometimes to distinguish between commercial and sovereign acts and then reserved its decision for the merits, as this was indeed a jurisdictional analysis and a jurisdictional decision.¹⁷²⁹

1136. All this shows that Claimants have not been able to provide direct support for their position that there is no firm requirement that a treaty breach requires exercise of sovereign powers.

1137. Claimants also continue to insist that "sovereign objectives" behind the Privatization Agreement require that this well-accepted distinction be abandoned, for otherwise states would be able to conceal their abusive behavior towards investors by entering into contractual arrangements with them, unless there is "*a specific showing of the exercise of sovereign powers*". This, allegedly, would run against the purpose of international investment law.¹⁷³⁰ In fact, Claimants' example with a possibility of a state's abusive behavior is clearly inapposite because this would clearly be a situation in which the state does not behave like an ordinary contracting party. So Claimants' big words ring hollow. They should not obscure what is a well-established and workable principle of international investment law.

1138. Finally, it should be noted that while Claimants question whether the requirement that a treaty breach must be performed by an act undertaken in the exercise of sovereign power is a "firm" requirement, they do not question the standard for distinguishing

¹⁷²⁸ Reply, paras. 1015-1016.

¹⁷²⁹ This is clear if one considers the paragraphs in which the quote used by Claimants appear:

"135. The Tribunal notes here the challenge of drawing a line between an ordinary commercial breach of contract and acts of sovereign interference or jure imperii, particularly in the context of a contract entered into directly with a State organ (here, the Ministry of Finance). Logically, one can characterize every act by a sovereign State as a "sovereign act"—including the State's acts to breach or terminate contracts to which the State is a party. It is thus difficult to articulate a basis on which the State's actions, solely because they occur in the context of a contract or a commercial transaction, are somehow no longer acts of the State, for which the State may be held internationally responsible.

136. In any event the Tribunal need not, and cannot, at this stage decide whether Claimant has made a showing of Treaty breach. As we explained in Section III.B above, the threshold at the jurisdictional stage is whether the facts alleged by Claimant could, if proven, make out a claim under the Treaty. Claimant maintains it has alleged sufficiently "sovereign" acts in connection with contractual non-performance; Respondent maintains it has not. Resolution of that dispute is properly reserved to such time as both Parties have fully presented their evidence and arguments." *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, paras. 135-136, **CLA-41** (emphasis added).

¹⁷³⁰ Reply, paras. 1018-1019.

between commercial and sovereign acts suggested by arbitral practice - that there is no exercise of sovereign power if the conduct in question is "*conduct which any contract party could adopt*".¹⁷³¹

2. The alleged breaches do not stem from Respondent's exercise of sovereign powers

2.1. Claimant's general argument that the privatization process was "*inherently governmental*" is inapposite

1139. Claimants' contention that the Agency exercised governmental powers when it terminated the Privatization Agreement and refused to release the Pledge over buyer's shares in BD Agro is in most part based on their arguments made in the attribution context. These arguments have been refuted in detail in the preceding chapter. In particular, it should be recalled that Claimants are wrong to argue, repeatedly, that since these acts were performed as part of privatization, thereby pursuing "*broader social purposes*", this should supposedly make them an exercise of "*sovereign powers*".¹⁷³² As the tribunal in *Jan de Nul* emphatically stated, "[w]hat matters is not the 'service public' element, but the use of 'prérogatives de puissance publique' or governmental authority".¹⁷³³ Again, to establish whether the acts in question were an exercise of governmental authority one should look into their substance rather than to the fact that their ultimate purpose is to advance broader social goals of a public policy, because many private and commercial forms of conduct also advance certain public policy goals (for example, education and health). Therefore, as discussed, the applicable test is whether the conduct in question is "*conduct which any contract party could adopt*".¹⁷³⁴

1140. Claimants continue to rely on *Awdi* and *Bosca* awards in the present context but fail to consider one important distinguishing factor between these cases and the present one. Namely, the relevant conduct in those cases included exercise of sovereign

¹⁷³¹ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 348, **CLA-37**.

¹⁷³² Reply, paras. 1005 & 1021-1024.

¹⁷³³ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83**.

¹⁷³⁴ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 348, **CLA-37**.

powers - in *Awdi*, to make reasonable efforts to procure issuance of a governmental document;¹⁷³⁵ in *Bosca*, the relevant conduct concerned pre-contract negotiations with heavy government involvement ("*multi-step State-approval process*").¹⁷³⁶ This is in stark difference with the present case, which concerns an imminently commercial act - termination of a contract. Claimants' allegation that there was also governmental interference in the present case, through the Ministry of Economy's supervisory powers and instructions to the Agency,¹⁷³⁷ has been already discussed in the attribution context and it has been demonstrated that the Agency was not instructed or directed to terminate, but that it took the decision to terminate the Privatization Agreement independently.¹⁷³⁸

1141. The fact that the Agency's power to terminate a privatization agreement was ultimately based on the Law on Privatization and the Law on Privatization Agency does not change commercial nature of termination.¹⁷³⁹ Namely, all its acts had ultimately to have a legal basis in law, because the Agency itself was created by the Law on Privatization Agency. This fact, by itself, does not say anything about the nature of its conduct in a particular instance.

1142. Claimants are also wrong to argue in this context that there was a legal inequality between the Agency and the Buyer as the parties of the Privatization Agreement, because the buyer had minimal bargaining power in the negotiations, while the Agency had powers of supervision during its implementation. This is nothing out of ordinary in other commercial transactions, for example, banks frequently have formalized pre-prepared loan contracts¹⁷⁴⁰ and also may have sweeping powers of supervision of the borrowing party's obligations. Indeed, all this does not say anything about the nature of contract termination, which is relevant in the present case.

1143. Claimants also make an argument that since the Agency decided to terminate the Privatization Agreement on the basis of termination grounds set out in the Law on

¹⁷³⁵ See *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 321, **CLA-26**.

¹⁷³⁶ *Luigiterzo Bosca v. Lithuania* (UNCITRAL), PCA Case No. 2011-05, Award, 17 May 2013, para. 127, **CLA-42**.

¹⁷³⁷ Reply, paras. 1012, 1026 & 1030.

¹⁷³⁸ See above Sec.III.A&C.3.

¹⁷³⁹ Reply, para. 1007.

¹⁷⁴⁰ Expert Report of Professor Mirjana Radovic, para. 27; see, also, Second Expert Report of Professor Mirjana Radovic, para 19.

Privatization and not in Article 7 of the Privatization Agreement, this somehow indicates that the termination was exercise of governmental powers.¹⁷⁴¹ This is clearly wrong. As Professor Radovic explains, the grounds for termination in Article 7 of the Privatization Agreement supplemented the grounds in Article 41a of the Law on Privatization,¹⁷⁴² and all applied cumulatively. They were all part of the commercial relationship entered freely into by the Buyer and the Agency. Moreover, the reason for the termination in the present case was a violation of a *contractual* provision, which is clearly a commercial reason and has nothing to do with exercise of governmental powers.

1144. Claimants also make an argument that motivations for the termination were political and not commercial. As already explained, this is completely inaccurate and not supported by evidence. Further, it should be noted that the tribunal in *Jan de Nul* did not look into the reasons behind an act but into whether the act itself was an exercise of governmental authority "*irrespective of the reasons*" for which it was undertaken.¹⁷⁴³

2.2. Respondent's impugned conduct did not involve exercise of sovereign powers

1145. Claimants' discussion arguing that the specific acts complained of were an exercise of sovereign powers is mainly a restatement of their arguments from the attribution context, which have already been refuted.¹⁷⁴⁴

1146. As regards the Agency's *refusal to release the pledge* over Mr. Obradovic's shares, it should first be noted that this was in accordance with the Privatization Agreement and contract law, as confirmed by Professor Radovic.¹⁷⁴⁵ Claimants here insist on the Agency's alleged motive to do so, but as already discussed, motives for this were purely commercial. Evidence shows that the Agency wanted to retain ability to ensure Mr. Obradovic's compliance with his obligations under the Privatization

¹⁷⁴¹ Reply, paras. 1009-1010.

¹⁷⁴² Expert Report of Professor Mirjana Radovic, paras. 31-32; Second Expert Report of Professor Mirjana Radovic, para. 23.

¹⁷⁴³ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83** and above Sec.III.C.2.

¹⁷⁴⁴ See above Sec.III.C.2.

¹⁷⁴⁵ Second Expert Report of Professor Mirjana Radovic, para. 48.

Agreement.¹⁷⁴⁶ Further, while Claimants state that the refusal to release the shares was motivated by "*the desire to avoid public backlash*" and maintain control over the shares pending termination,¹⁷⁴⁷ the alleged political motivation of the Agency's action is also not borne by the record.

1147. Further, Claimants argue that the Ombudsman's investigation was a governmental act, and contend that it was only formally directed towards the Ministry of Economy and the Agency, while it influenced the Agency and prompted it to terminate the Privatization Agreement.¹⁷⁴⁸ However, the fact that Ombudsman's investigation and recommendations were not measures directly affecting Mr. Obradovic or BD Agro is not a formal matter, as Claimants present, but substantive one, because what is relevant is the nature and substance of the alleged act by which investor's treaty rights were violated.¹⁷⁴⁹ The alleged violations in the present case were obviously performed by the actions of the Agency.

1148. Further, Claimants continue to make a parallel with *Caratube*, but it was already showed in the Counter-Memorial that this case differs in several crucial elements from the present one. Most importantly, the ministry as a contractual party in *Caratube* changed its previously adopted position to extend the contract and terminated it after prosecutor's intervention. In the present case, the Agency had repeatedly and for a long time issued warnings that the Privatization Agreement would be terminated due to Mr. Obradovic's non-compliance, so its eventual termination cannot be regarded as its change of position following the Ombudsman's recommendation.¹⁷⁵⁰ Claimants conveniently ignore this argument in their Reply. Finally, and in any case, the substance of the Ombudsman's recommendation was such that it did not constitute an instruction to the Agency to terminate the Privatization Agreement.¹⁷⁵¹

¹⁷⁴⁶ See Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 4 & 6, **CE-768**.

¹⁷⁴⁷ Reply, para. 1032.

¹⁷⁴⁸ Reply, paras. 1034-1035.

¹⁷⁴⁹ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 345, **CLA-37** ("... in order to prove a treaty breach, the Claimants must establish a violation different in nature from a contractual breach...") (emphasis added); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260, **RLA-33** ("Only the state in the exercise of its sovereign authority... may breach the obligations assumed under the BIT") (emphasis added).

¹⁷⁵⁰ Counter-Memorial, paras. 618-620; Witness Statement of Julijana Vuckovic, paras. 10-11.

¹⁷⁵¹ See above Sec.III.C.3.

1149.As regards the very act of *termination* of the Privatization Agreement, Claimants argue that it was an administrative act and therefore exercise of governmental powers. This is obviously a position only Claimants' expert holds, contrary to consistent court practice and considered arguments of Professor Radovic.¹⁷⁵² Further, Claimants continue to rely on one decision of the Higher Commercial Court also stating that notice of termination is not an administrative act, but making a remark that by the notice of termination the Agency uses its legal power obtained by the transfer of authority under public law from the state.¹⁷⁵³ However, as already noted, the latter remark was not followed by court practice and cannot be decisive when considering the nature of termination from the point of view of international law.

1150.Other Claimants' arguments have also been dealt with in the context of attribution. They wrongly contend that the notice of termination established "*an irrebuttable presumption*" that the buyer was a dishonest party, although it is clear that this could be challenged in civil court proceedings.¹⁷⁵⁴ Claimants retort that administrative acts can also be challenged in court proceedings,¹⁷⁵⁵ but in this way they fail to appreciate the fundamental difference between the two types of court proceedings: civil proceedings, where the notice of termination would be considered, and administrative court proceedings, dealing with administrative acts. These differences are in detail outlined by Professor Radovic¹⁷⁵⁶ and are in any case well-known to any lawyer from a civil law country such as Serbia.

1151.Claimants also dramatize that the transcript of the discussion during the meeting of the Agency's Commission for Control held on 23 April 2015 reveal that it "*shockingly abused its powers*" because it was well aware that there were not valid grounds for termination under Article 7.1. of the Privatization Agreement.¹⁷⁵⁷ However, the termination was based Article 41a(1)(3) of the Law on Privatization, whose provisions cumulatively with Article 7 provided grounds for termination. Therefore, the termination was lawful and there was nothing "*shocking*" about it. In any case, all this

¹⁷⁵² Expert Report of Professor Mirjana Radovic, para. 50; Second Expert Report of Professor Mirjana Radovic, para. 12, footnote 13; Counter-Memorial, para. 621.

¹⁷⁵³ Reply, para. 1038, referring to Judgment of the Higher Commercial Court, Pž. 6463/2007 dated 8 December 2008, **RE-164**.

¹⁷⁵⁴ Second Expert Report of Professor Mirjana Radovic, para. 40; Expert Report of Professor Mirjana Radovic, paras. 53-54.

¹⁷⁵⁵ Reply, para. 1040.

¹⁷⁵⁶ See Second Expert Report of Professor Mirjana Radovic, paras. 39-40.

¹⁷⁵⁷ Reply, paras. 1041-1042.

does not say anything at all about whether the notice of termination was an exercise of governmental authority or a commercial act.

1152. Claimants continue to contend that the transfer of the shares to the Agency following the notice of termination was also an exercise of Serbia's sovereign powers, because no private party can do so.¹⁷⁵⁸ However, they fail to appreciate the fact that this was an automatic consequence of the termination under the law applicable to the Privatization Agreement, having nothing to do with the governmental or commercial nature of Agency's conduct. The transfer of shares was not an administrative act¹⁷⁵⁹ and, importantly, was open to court challenge and injunctions from further disposal in civil proceedings following contract termination.¹⁷⁶⁰ This clearly shows that neither the Agency's conduct, nor the ensuing situation, were an exercise of sovereign powers.

1153. Finally, Claimants also argue that the Agency terminated the Privatization Agreement pursuant to the instructions of the Ministry of Economy and the Ombudsman,¹⁷⁶¹ which is factually inaccurate as has been in detail discussed in the chapter dealing with attribution.¹⁷⁶² In any case, even assuming that there were instructions to the Agency to terminate the Privatization Agreement (*quod non*), this would still not make the termination an exercise of governmental powers. Involvement of state organs is simply not sufficient to transform a commercial act into an exercise of governmental powers.¹⁷⁶³

1154. In conclusion, Respondent reiterates that the nature of both the refusal to release the shares and the termination of the Privatization Agreement should be assessed on the basis of the test accepted in arbitral practice for distinguishing between acts of commercial (contractual) nature and exercise of sovereign power - whether "[t]hese acts constitute conduct which any contract party could adopt".¹⁷⁶⁴ As was discussed in the Counter-Memorial, these acts of the Agency were acts of contractual nature,

¹⁷⁵⁸ Reply, para. 1048.

¹⁷⁵⁹ See Expert Report of Professor Mirjana Radovic, para. 55.

¹⁷⁶⁰ Expert Report of Professor Mirjana Radovic, paras. 53-54.

¹⁷⁶¹ Reply, paras. 1043-1046.

¹⁷⁶² See above Sec.III.C.3.

¹⁷⁶³ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 153, **RLA-116**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 128-129, **RLA-84**.

¹⁷⁶⁴ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 348, **CLA-37**.

that any contract party could adopt, indeed, they correspond to what an ordinary private party would do in a similar situation and reflect general rules of contract law.¹⁷⁶⁵

B. GENERAL EXCEPTIONS

1155.Claimants argue that Respondent cannot invoke the general exception clause contained in Article 18 of the Canada-Serbia BIT because its conduct does not fulfill the requirements for the application of such exceptions.¹⁷⁶⁶ Namely, Claimants rely on the case-law of the World Trade Organization (hereinafter: “the WTO”) concerning Article XX of the 1994 General Agreement on Tariffs and Trade (hereinafter: “the GATT”), on which Article 18 is modeled, in order to claim that the measures undertaken by Respondent were neither necessary nor designed to secure compliance with the Law on Privatization and that they actually represent a disguised restriction on Claimants' investment.¹⁷⁶⁷

1156.It should be noted, from the outset, that Claimants do not question the compatibility of Article 41a(1)(3) of the Law on Privatization with the Canada-Serbia BIT, nor do they rely on arbitrary and unjustifiable discrimination as part of the *chapeau* of Article 18 of the treaty.

1157.Claimants briefly state that it is Respondent's burden of proof to show that the measures it undertook were both “*designed and necessary to ensure compliance with Article 41a(1)(3)*”.¹⁷⁶⁸ However, Claimants do not further discuss the substance of these requirements. As will be seen, these requirements, as interpreted by the WTO bodies, are much less onerous than what Claimants purport to present them.

1158.Namely, that a measure is *designed* to ensure compliance with a provision of the law compatible with the Canada-Serbia BIT simply means that the measure is capable of achieving such a goal. As noted by the WTO Appellate Body in *India – Solar Panels*:

¹⁷⁶⁵ Counter-Memorial, paras. 599-602; see, also, Expert Report of Professor Mirjana Radovic, para. 67.

¹⁷⁶⁶ See Reply, paras. 1051 & 1053.

¹⁷⁶⁷ See Reply, paras. 1052-1062.

¹⁷⁶⁸ See Reply, para. 1055.

“As noted previously, the legal standard as clarified by the Appellate Body requires a panel to apply ‘an initial examination of the relationship between the inconsistent measure and the relevant laws or regulations’. A panel, thus, must ‘scrutinize the design of the measures sought to be justified’. The Appellate Body further clarified that the standard for ascertaining whether such a relationship exists is whether the assessment of the design of the measure reveals that the measure is not incapable of securing compliance with the relevant laws and regulations in Indonesia. Finally, we note that the Appellate Body has described this test as ‘not... particularly demanding’...”¹⁷⁶⁹

1159. The requirement of necessity, on the other hand, is often assessed through the lens of a reasonably available alternative measure that would be less restrictive on the investment (or trade, in the case-law of the WTO bodies), and would make an equivalent contribution to the objective.¹⁷⁷⁰ In line with that, the panel in *United States – Section 337* established that:

“[i]t was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.”¹⁷⁷¹

¹⁷⁶⁹ Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769, para. 7.248, **RLA-143**. See also Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, p. 1827, para. 5.58, **RLA-144**; Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131, para. 5.68, **RLA-145**.

¹⁷⁷⁰ See Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3, para. 335, **RLA-146**.

¹⁷⁷¹ Panel Report, *United States – Section 337 of the Tariff Act of 1930*, L/6439 - 36S/345, adopted 7 November 1989, para. 5.26, **RLA-147**, also quoted in Appellate Body Report, *Korea – Various Measures on Beef*, 2001, para. 165, **CLA-113**.

1160. Such an alternative measure would still need to preserve Respondent's right to achieve its desired level of protection with respect to the objective pursued.¹⁷⁷²

1161. Claimants argue that the failure to release the Pledge was a violation of the Share Pledge Agreement and unlawful under Serbian law and thus cannot be a measure that is considered to be designed and necessary to comply with Article 41a(1)(3) of the Law on Privatization.¹⁷⁷³ The circumstances and lawfulness of the Agency's refusal to release the pledge have already been explained in detail.¹⁷⁷⁴ Claimants further assert that the refusal to release the Pledge was not necessary because the release of the pledge would have not prevented the Agency from terminating the Privatization Agreement and then seeking damages, which seems to be a reasonable available alternative measure in the eyes of Claimants.¹⁷⁷⁵ Such a proposition is wrong.

1162. Both the refusal to release the pledge and the termination of the Privatization Agreement were designed, i.e. "capable of", and necessary to ensure compliance with the Privatization Agreement and Article 41a(1)(3) of the Law on Privatization, which provides that a Privatization Agreement shall be terminated if the buyer of a privatized company disposes of the property of such company "*contrary to provisions of the [privatization] agreement*".¹⁷⁷⁶ Respondent has explained at length the conduct by which Claimants have violated Article 41a(1)(3).¹⁷⁷⁷ Nevertheless, it is important to note here that Article 41a(1)(3), same as Article 5.3.4 of the Privatization Agreement, serves the ultimate objective of ensuring continued well-being of the company and preserving its material base which is, in turn, meant to secure its continued operation. Bearing that in mind, Claimants' suggestion that seeking damages after the termination of the Privatization Agreement might have been a reasonably available alternative is inappropriate as such measure would not have been capable of securing the viability and continued operation of the company. The Agency's refusal to release the Pledge

¹⁷⁷² See Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131, para. 5.115, **RLA-145**. See also, Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, p. 1827, para. 5.59, note 214, **RLA-144**; Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3, para. 318, **RLA-146**.

¹⁷⁷³ See Reply, para. 1056.

¹⁷⁷⁴ See above Sec.I.D.

¹⁷⁷⁵ See Reply, para. 1056.

¹⁷⁷⁶ 2001 Law on Privatization, Article 41a, **CE-220**.

¹⁷⁷⁷ See above Sec.I.B.5.1.

serves the same goal because the buyer would be able to dispose of the privatized shares after which ensuring compliance with the Privatization Agreement would be impossible. As noted by Professor Radovic,

*"the purpose of pledge over shares in a privatized company was to secure the rights of the Privatization Agency in case the buyer breached the contract in such a way that justified its termination. In particular, in case of privatization, the pledge secured the Privatization Agency's (future and conditional) right to claim shares back from the buyer in case his potential breach of contract eventually led to termination of the privatization agreement."*¹⁷⁷⁸

1163. Therefore, the refusal to release the pledge over the buyer's shares in BD Agro was a necessary measure.

1164. On the other hand, at the time when the Agreement was terminated, the termination was the only reasonable measure left that could be undertaken in order to ensure compliance with the law. Namely, the Agency gave Mr. Obradovic seven extensions of the deadline for remedying the breach of Article 5.3.4. over a period of five years.¹⁷⁷⁹ Mr. Obradovic's clear unwillingness to act accordingly,¹⁷⁸⁰ ultimately left no other reasonable recourse to the Agency then to terminate the Agreement in order to ensure compliance with Article 41a of the Law on Privatization.

1165. Claimants further argue that the conduct of the Agency falls outside of the ambit of Article 18 of the Canada-Serbia BIT as it represents a "disguised restriction on the Claimants' investment".¹⁷⁸¹ However, Respondent has already explained that Mr. Obradovic's breach of Article 5.3.4 of the Privatization Agreement provided legitimate grounds for termination.¹⁷⁸² Moreover, the breach was acknowledged by Mr. Obradovic himself.¹⁷⁸³ The Agency has also consistently held the attitude that Mr. Obradovic was in breach of his contractual obligations, at least since January 2011,¹⁷⁸⁴

¹⁷⁷⁸ Second Expert Report of Professor Mirjana Radovic, para. 47.

¹⁷⁷⁹ See Appendix I.

¹⁷⁸⁰ See above Sec.I.B.3.

¹⁷⁸¹ See Reply, paras. 1060-1062.

¹⁷⁸² See above Sec.I.B.2&3.

¹⁷⁸³ See e.g., Letter from Mr. Obradovic and BD Agro to the Agency, 23 July 2012, **RE-21**.

¹⁷⁸⁴ See Notice of the Agency on Additional Time Period dated 24 February 2011, **CE-31**.

and that the failure to remedy the breach of Article 5.3.4 of the Privatization Agreement would be grounds for termination of the agreement under Article 41a of the Law on Privatization.¹⁷⁸⁵ Therefore, the Agency clearly had a genuine reason for the termination of the Privatization Agreement and for its refusal to release the Pledge.

1166. In conclusion, the conduct Claimants complain of falls under the exception of Article 18 of the Canada-Serbia BIT and all claims under this treaty should be dismissed.

C. RESPONDENT DID NOT EXPROPRIATE CLAIMANTS' INVESTMENT

1167. As demonstrated in Respondent's Counter-Memorial and explained further above, termination of the Privatization Agreement and subsequent transfer of shares held by Mr. Obradović were consequences of a genuine breach of contractual duties by Mr. Obradović. The Agency terminated the Privatization Agreement using its right envisaged by the contractual framework after several years of urging the buyer of BD Agro to remedy the breach. In such circumstances there cannot be unlawful expropriation under the relevant BITs. Nothing that Claimants submit in their Reply can affect this conclusion.

1168. The Claimants' case on purported expropriation is based on misinterpretation of facts and law. In certain instances, Claimants' presentation of relevant facts amounts to outright manipulation. On other occasions, Claimants choose to deal with Respondent's arguments by resorting to straw man fallacy or by simply ignoring them.

1169. The crux of Claimants' argument on the alleged expropriation is an assertion that the Agency fabricated the pretext for the termination of the Privatization Agreement, with the idea of depriving Claimants of the shares in BD Agro held by Mr. Obradović and referred to by Claimants as "*Beneficially Owned Shares*."¹⁷⁸⁶

1170. However, Respondent will once again show below that Claimants' assertions are without any merit.

¹⁷⁸⁵ See Counter Memorial, Section II.A.2.

¹⁷⁸⁶ Claimants' Reply, para. 1064.

1. Claimants did not acquire property rights recognized by Serbian law

1171.As Respondent previously submitted,¹⁷⁸⁷ any analysis with regard to the alleged expropriation of Claimants’ property rights is obsolete if Claimants are incapable to demonstrate that they were holding those rights in accordance with Serbian law at the relevant moment (i.e. at the time of the purported breach).

1172.International law (relevant BITs in this case) offers protection to property rights, but the existence and content of those rights is subject to national law.¹⁷⁸⁸ Thus, before turning to the issue of whether Respondent’s acts or omissions represented expropriation of shares in BD Agro or Claimants’ purported contractual rights, the Tribunal should resolve a preliminary question – did Claimants acquire the right of ownership in shares or any contractual rights through the conclusion of the Privatization Agreement. This question must be answered by the application of Serbian law.¹⁷⁸⁹

1173.Therefore, Claimants’ assertion that their “*beneficial ownership is not based on the acquisition of any right in rem to the Beneficially Owned Shares under Serbian law*”¹⁷⁹⁰ or that “*the protection of the Claimants’ beneficial ownership does not rest upon the recognition of such proprietary aspects of the Claimants’ beneficial ownership under Serbian law*”¹⁷⁹¹ is clearly misplaced.

1174.In their brief response to the argument raised by Respondent, Claimants argue that “*all of their investments are capable of being expropriated.*”¹⁷⁹² The argument misses the point entirely.

¹⁷⁸⁷ Respondent’s Counter-Memorial, Section C.2.

¹⁷⁸⁸ Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award of the Tribunal, 13 November 2019, para. 341, **RLA-184**.

¹⁷⁸⁹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 135, **RLA-108**; *EnCana Corporation v. Republic of Ecuador (UNCITRAL)*, LCIA Case No. UN3481, Award, 3 February 2006, para. 184, **RLA-109**; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 162, **RLA-110**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, para. 257, **CLA-32**; *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018, para. 432, **RLA-111**.

¹⁷⁹⁰ Claimants’ Reply, para. 561.

¹⁷⁹¹ Claimants’ Reply, para. 563.

¹⁷⁹² Claimants’ Reply, para. 1067.

1175. Respondent has never disputed that rights *in rem* or contractual rights are capable of being expropriated under international law. What Respondent *does* contest is the assertion that Claimants acquired ownership of Mr. Obradović's shares according to Serbian law or any of his contractual rights stemming from the Privatization Agreement.

1176. As previously demonstrated by Respondent, Claimants have never been considered the owners of shares acquired by Mr. Obradović under the pertinent rules of Serbian law. Claimants argue that it does not matter whether their alleged ownership of Mr. Obradović's shares "*is qualified as a right in rem or a purely contractual right.*"¹⁷⁹³ They also imply that the termination of the Privatization Agreement could amount to expropriation even if Claimants did not possess the right *in rem* over the shares, since the wrongful termination of a contract, according to Claimants, can give rise to expropriatory taking even if the State does not interfere with the investor's rights *in rem*.¹⁷⁹⁴ Bearing in mind the circumstances of the case at hand and the way in which the Claimants plead their case in this arbitration, both arguments are illogical and untenable.

1177. First, ownership is by definition a property right (right *in rem*).¹⁷⁹⁵ The ownership as *purely contractual right* cannot exist. If Claimants' were not the owners of Mr. Obradović's shares under Serbian law at the time of the Privatization Agreement's termination (which they were not), they could not have been deprived of their ownership.

1178. Second, it is impossible to identify how exactly the Claimants' purported right of ownership of Mr. Obradović's shares could be affected without the transfer of shares to the Share Fund. The only sanction for the breach of the Privatization Agreement by the buyer (Mr. Obradović) that was available to the Agency was the transfer of shares back to the Agency. It would make no sense for the Agency to terminate the Privatization Agreement based on the Mr. Obradović's breach and to leave the buyer in the possession of shares. However, the only person whose ownership was affected

¹⁷⁹³ Claimants' Reply, para. 1073.

¹⁷⁹⁴ Claimants' Reply, para. 1071.

¹⁷⁹⁵ Second Expert Report of Professor Mirjana Radovic, para. 54.

by the termination and subsequent transfer was the person that owned the shares in accordance with Serbian law – Mr. Obradović.

1179. Likewise, Sembi's rights under the Sembi Agreement were not expropriated by Respondent for the same reason that applies to the alleged beneficial ownership of shares in BD Agro – Sembi has never validly acquired any contractual rights capable of being expropriated. Sembi's purported rights hinge upon the validity of the assignment of Mr. Obradović's "*right, title and interest*" from the Privatization Agreement to Sembi. As it was already explained, the Sembi Agreement never created any effect under Serbian law since it was concluded in breach of the mandatory provision contained in the 2001 Law on Privatization.

1180. Finally, Claimants refer to Mr. Rand's loans to BD Agro as another (separate) investment that was allegedly expropriated by Respondent.¹⁷⁹⁶

1181. Respondent has already explained why these loans do not represent "covered investment" under Article 1 of the Canada – Serbia BIT.

1182. In any event, in their argument on merits, Claimants do not dedicate a single paragraph in which they would explain how precisely the loss of those loans would be attributable to any act or omission of Respondent. A casual reference that Mr. Rand's loans to BD Agro were capable of being expropriated is not substitute for analysis and cannot lead to the Respondent's liability under the BIT.

2. The Agency did not act in exercise of sovereign authority

2.1. The PA did not terminate the Privatization Agreement in exercise of sovereign authority

1183. Respondent submits that for an expropriation to happen the State must perform its sovereign powers in relation the contract in order to attract the responsibility under the BITs. The performance of public powers is, therefore, indispensable for the existence of expropriation.

¹⁷⁹⁶ Claimants' Reply, para. 1068.

1184.The Claimants’ assertion that there is no firm requirement that a Treaty breach requires exercise of sovereign powers¹⁷⁹⁷ clearly cannot stand.

1185.As already shown by Respondent in its Counter-Memorial,¹⁷⁹⁸ all cases dealing with expropriation as a consequence of the State’s termination of a contract speak in one voice – expropriation can occur only if the other party to the contract uses public powers in relation to the termination of that contract.¹⁷⁹⁹ A list of cases confirming that “[o]nly the State in the exercise of its sovereign authority (*‘puissance publique’*), and not as a contracting party, may breach the obligations assumed under the BIT”¹⁸⁰⁰ is endless.

1186.Only a decree or legislative act or some other form of a clear *puissance publique* may turn the breach or termination of a contract into the BIT claim and potentially trigger international responsibility of a State. As famously stated by the *Waste Management* Tribunal:

*“Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts. (...) The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation.”*¹⁸⁰¹

1187.The cases in which investment tribunals upheld claims of expropriation based on the State’s termination of a contract are the cases in which tribunals searched for and found the manifestation of sovereign power in the acts that deprived claimants of their investment. For example, in *Siemens v. Argentina* the contract entered into by

¹⁷⁹⁷ Claimants’ Reply, Section V.A.1.

¹⁷⁹⁸ Respondent’s Counter-Memorial, paras. 660, 661.

¹⁷⁹⁹ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260; footnotes omitted; emphasis added, **RLA-33**. See, also, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 444, **RLA-84**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 248, **RLA-48**; *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 Jun 2010, para. 330, **RLA-115**; *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Final Award, 18 January 2017, para. 279, **RLA-25**.

¹⁸⁰⁰ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260, **RLA-33**.

¹⁸⁰¹ *Waste Management, Inc. v. United Mexican States (“Number 2”)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 115, **RLA-93**.

Siemens's subsidiary (SITS) and Argentinean Government was terminated by a government decree.¹⁸⁰² That was the case as well in *Occidental v. Ecuador*, *Caratube v. Kazakhstan* and *Urbaser v. Argentina*.¹⁸⁰³

1188. In the case at hand, the Agency terminated the Privatization Agreement as a result of a persistent breach of contractual duties by Mr. Obradović and using its prerogatives as a contracting party under the Privatization Agreement and the applicable law.

1189. Claimants attempt to label the Agency's use of contractual prerogatives as exercise of sovereign powers is inapposite.

1190. First, Claimants argue that "*privatization in Serbia was inherently governmental process.*"¹⁸⁰⁴ The argument is purportedly based on the purpose of the privatization process. The general purpose of privatization is, however, irrelevant for the expropriation analysis.¹⁸⁰⁵ Respondent reiterates that it does not matter whether the Agency was entrusted with some elements of public authority *in general terms*. The crucial issue here is whether the termination of the Privatization Agreement itself was done in exercise of sovereign powers. This was explained in no uncertain terms by the tribunal in *Suez v. Argentina*. There, the tribunal dismissed the claim that the termination of the concession/privatization contract by the host State represented an expropriation and offered several observations relevant for the dispute at hand:

"In investor-State arbitrations which involve breaches of contracts concluded between a claimant and a host government, tribunals have made a distinction between acta iure imperii and acta iure gestionis, that is to say, actions by a State in exercise of its sovereign powers and actions of a State as a contracting party. It is the use by a State of its sovereign powers that gives rise to treaty breaches, while actions as a contracting

¹⁸⁰² *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 97, **RLA-48**.

¹⁸⁰³ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para 199, **RLA-119**; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, para 76, **CLA-28**; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergo v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para 856, **RLA-121**.

¹⁸⁰⁴ Claimants' Reply, Section V.A.2.a.

¹⁸⁰⁵ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 169, 170, **RLA-83**.

party merely give rise to contract claims not ordinarily covered by an investment treaty.

[...]

In the present case, did the Province act in the exercise of its sovereign powers (acta iure imperii) or as an ordinary contracting party (acta iure gestionis) when it terminated the Concession Contract with APSF? (...) While Argentina exercised its public authority on various occasions during the crisis, the Tribunal does not consider that the Province's termination of the Concession Contract was an exercise of such authority. Rather, its actions were taken according to the rights it claimed under the Concession Contract and the legal framework.”¹⁸⁰⁶

1191. Second, Claimants assert that the termination of the Privatization Agreement was a sovereign act primarily relying on Mr. Milošević’s interpretation with regard to the nature of notice on termination under Serbian law.¹⁸⁰⁷ As explained by Respondent above and by Respondent’s legal expert, Professor Radovic, this is simply wrong – notice of termination is not an administrative act but rather a notice of intent (expression of will) of a contracting party to terminate the contract, which is the conclusion unequivocally adopted by Serbian courts.¹⁸⁰⁸

1192. Third, Claimants attempt to insinuate that the alleged involvement of Ombudsman and the Ministry of Economy in the control of BD Agro’s privatization somehow transforms the termination of the Privatization Agreement from contractual act to the exercise of sovereign powers by the Agency.¹⁸⁰⁹ However, as held by the tribunal in *Suez v. Argentina* – “the mere fact that there is some government involvement in the events that lead to the termination of a contract does not necessarily mean that such termination is the result of an exercise of sovereign powers...”¹⁸¹⁰ In other words,

¹⁸⁰⁶ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, paras. 153, 154 (emphasis added), **RLA-116**.

¹⁸⁰⁷ Claimants’ Reply, paras. 1037-1039.

¹⁸⁰⁸ First Expert Report of Professor Mirjana Radovic, paras. 44, 45.

¹⁸⁰⁹ Claimants’ Reply, paras. 1043-1046.

¹⁸¹⁰ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 153 (emphasis added), **RLA-116**.

contrary to what seems to be the Claimants' allegation, the mere fact that a certain act can be attributed to the State does not automatically entail that such act qualifies as sovereign.¹⁸¹¹

1193. Fourth, Claimants insist on the alleged irrelevance of the fact that Mr. Obradović was able to commence the court proceeding to quash the notice of termination. This fact is, however, crucial for determining the nature of the notice. The termination of the Privatization Agreement does not amount to an authoritative decision of the Agency, determining the rights of the Buyer (Mr. Obradović) in definitive manner.¹⁸¹² Disputes originating from privatization contracts in Serbia are treated as commercial disputes and settled by commercial courts.¹⁸¹³ While it is correct that the judicial review is possible also for administrative acts, the applicable law, procedure and scope of powers of commercial and administrative courts respectively are fundamentally different.¹⁸¹⁴

1194. Finally, Claimants' last attempt to prove that the termination of the Privatization Agreement was a sovereign act relies on the misrepresentation of facts. Claimants argue that the Agency abused its powers by terminating the Privatization Agreement, although it was aware that Article 7 of the Agreement does not expressly provide for the termination based on the breach of Article 5.3.4. According to Claimants, the audio recordings of the meeting held on 23 April 2015 by the Agency's Commission for Control allegedly demonstrate that the Agency "*shockingly abused its powers in a manner unheard of in private contractual relationships.*"¹⁸¹⁵ Leaving aside the obvious question of why would the act of a contracting party taken in disregard of the contractual terms necessarily and automatically qualify as sovereign, the Claimants' allegations are simply untrue. As already explained above, Claimants' presentation of facts purposely neglects the part of the recordings that reveal the position of the Agency that was consistently communicated to Mr. Obradović for several years - Article 41a of the Law on Privatization contains a valid ground for the termination triggered by Mr. Obradović's breach of Article 5.3.4.

¹⁸¹¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 129, **RLA-84**.

¹⁸¹² First Expert Report of Professor Mirjana Radovic, para. 49.

¹⁸¹³ Second Expert Report of Professor Mirjana radovic, para. 39.

¹⁸¹⁴ Second Expert Report of Professor Mirjana radovic, para. 39.

¹⁸¹⁵ Claimants' Reply, para. 1041.

1195. In their Reply, Claimants once again rely on the award in *Siag v. Egypt* in order to demonstrate that investor's contractual rights can be directly expropriated through the termination of a contract.¹⁸¹⁶ The repeated reliance on *Siag* is equally misplaced.

1196. In *Siag*, the termination of the contract for sale of a plot of land was executed based not on the prerogative of the contractual party envisaged in the contractual framework (as it was the case with the Privatization Agreement), but rather on series of decrees issued by the Egyptian Minister of Tourism, the President of Egypt and the Prime Minister.¹⁸¹⁷ Clearly, the *Siag* case falls into the line of cases in which termination of a contract was indeed an exercise of *puissance publique*, unlike the case at hand. Furthermore, in that case Egypt did not contest that the expropriation had actually taken place,¹⁸¹⁸ which prevented the *Siag* tribunal from espousing its position on the relationship between the termination of a contract and expropriation – the fact that necessarily limits usefulness of the tribunal's reasoning for any future discussions on the issue.

1197. In sum – termination of the Privatization Agreement by the PA did not represent the exercise of sovereign authority. Consequently, even if the termination could be attributed to Respondent, it cannot lead to its liability under the BITs.

2.2. Consequential transfer of shares was not an exercise of sovereign authority

1198. Termination of the Privatization Agreement due to the breach of Mr. Obradović unavoidably resulted in the transfer of previously sold shares to the seller (the Agency). The transfer did not occur in isolation. It was an automatic consequence of termination envisaged by the law governing the Privatization Agreement. As such, the transfer of shares represented the right of the Agency exercised under the contract and not an act *ex iure imperii*.

1199. Claimants disagree and argue that the Agency's right to effectuate the transfer is sovereign in nature and that it does not lose its sovereign nature simply because it is a

¹⁸¹⁶ Claimants' Reply, paras. 1074, 1075; Claimants' Memorial, paras. 396, 397.

¹⁸¹⁷ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 Jun 2009, paras. 36, 76, 77, **CLA-9**.

¹⁸¹⁸ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 Jun 2009, para. 427, **CLA-9**.

consequence of another act.¹⁸¹⁹ However, their submission, apart from the general contention about the nature of act in question, offers little in terms of analysis. This is in particular the case with the Claimants' argument on expropriation – the relevant part contains two short paragraphs dismissing *en bloc* Respondent's argument about the lack of manifestation of sovereign powers in acts of the Agency.¹⁸²⁰

1200. In any event, Respondent will here again demonstrate that the transfer of shares from Mr. Obradović to the Agency cannot serve as ground of its liability under international law.

1201. First, Respondent reiterates that the physical taking of assets that occurred as a regular consequence of the contract's termination cannot by itself represent an act of direct expropriation. This follows from the reasoning of the tribunal in *Vannessa v. Venezuela*.¹⁸²¹ The Tribunal in that case found that the physical taking of the mining site and related assets by a Venezuelan Government Agency (CVG) did not amount to expropriation, since that was the consequence of the concession contract's termination envisaged by the contract.¹⁸²²

1202. The Claimants' attempt to distinguish the findings of *Vannessa* tribunal is unpersuasive. Claimants assert that the reasoning of the *Vannessa* tribunal is not applicable to the case at hand, since there the contract provided specifically for the Canadian investor's consent for taking of property without entitlement to any damages, in case of the contract's termination for any reason. Claimants also add that the *Vannessa* tribunal found that the termination of the contract in that case was justified.¹⁸²³

1203. The reasoning of the tribunal in *Vannessa* fully applies here. By entering into the Privatization Agreement, the buyer (Mr. Obradović) accepted all of the consequences of possible breach and termination of the Agreement. The Agency did not simply invent the transfer of shares as a repercussion of the termination. This possibility was known to Mr. Obradović at the time he concluded the Privatization Agreement since

¹⁸¹⁹ Claimants' Reply, para. 1049.

¹⁸²⁰ Claimants' Reply, paras. 1116, 1117.

¹⁸²¹ Respondent's Counter-Memorial, para. 636.

¹⁸²² *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)04/6), Award, 16 January 2015, **RLA-107**.

¹⁸²³ Claimants' Reply, para. 1082.

it was envisaged in Article 41(5) of the 2001 Law on Privatization – the law that was applicable to the Privatization Agreement by virtue of its own provisions.¹⁸²⁴ Claimants cannot seriously assert that Mr. Obradović did not accept the obligation to return the shares that he bought in case of the contract’s termination. Likewise, the termination of the Privatization Agreement was a legitimate reaction to Mr. Obradović’s persistent refusal to honor his contractual obligation, just as the termination of the concession contract in *Vennessa* was deemed justified.

1204. Second, Claimants again distort the Respondent’s argument with regard to the applicability of the share transfer provision from the Law on Privatization. In Claimants’ interpretation, to assert that the Law on Privatization must be applied as part of the contractual framework defined by the parties to the Privatization Agreement is to invoke provisions of national law in order to escape liability under international law, in breach of the principle contained in Article 27 of the VCLT.¹⁸²⁵ This is plainly absurd. Mr. Obradović explicitly accepted application of the Law on Privatization with all of its provisions (including the provision on transfer of shares in case of termination) when he entered into the contractual relationship with the Agency. Therefore, provisions of the Law on Privatization were incorporated into the Privatization Agreement. What Claimants now attempt to argue is basically that the Agency could not use its contractual prerogatives since that was against Serbia’s international obligations. Claimants in effect propose that contractual provisions are subject to international constitutionality test. The argument is clearly misplaced.

1205. Finally, as a general rule of contract law, any party to a contract that was terminated is entitled to restitution of what has been given under the contract.¹⁸²⁶ What Claimants refer to as “*the Privatization Agency’s legal power to unilaterally appropriate ownership of the Privatized Shares*”¹⁸²⁷ is in reality an act by which the Agency simply withdrew what it had previously sold, as a result of the breach and termination of the Privatization Agreement, and not the exercise of sovereign powers.

¹⁸²⁴ Privatization Agreement, Recitals, **CE-17**. The Agreement stipulated that BD Agro’s capital was sold “[I]n accordance with the provisions on the Law on Privatization...and the provisions of the Regulation on Sale of Capital and Property in Public Auction...”

¹⁸²⁵ Claimants’ Reply, paras. 1077-1079.

¹⁸²⁶ Law on Obligations, Article 132 (2), **RE-32**.

¹⁸²⁷ Claimants’ Reply, para. 1049.

1206. The rule that each contractual party must return what it has received under the terminated contract can be modified by the terms of the contract. Such modification was made by virtue of Article 7(2) of the Privatization Agreement which established a rebuttable presumption that the buyer (Mr. Obradović), as a party acting in bad faith, loses his right to recovery of the purchase price in case of termination.¹⁸²⁸ However, Mr. Obradović was able to challenge the termination of the Privatization Agreement before the competent court and to refute the presumption of his liability.¹⁸²⁹

1207. In conclusion – no act of the Agency during the execution and termination of the Privatization Agreement was taken in exercise of sovereign authority. As a result, termination and ensuing transfer of shares from Mr. Obradović to the Agency did not amount to expropriation under the BITs.

2.3. Claimants failure to challenge purported breach of the Privatization Agreement before contractually chosen forum disqualifies their expropriation claim as a matter of substance

1208. The dispute at hand is purely contractual dispute. All of Claimants' allegations are essentially matter of contract law – whether the Agency had the right to refuse release of the pledge on shares and to terminate the Privatization Agreement based on the breach of Article 5.3.4. of the Agreement. Claimants' attempt to implicate Ombudsman and the Ministry of Economy into their contractual relationship with the Agency serves only the purpose of distorting the true character of the dispute.

1209. In such circumstances, a breach of an international treaty can arise due to the breach of the contract by the State only if the existence of breach was previously established by the competent contractual forum. As held by the *Parkerings* tribunal:

“Under certain limited circumstances, a substantial breach of a contract could constitute a violation of a treaty. So far, case law has offered very few illustrations of such a situation. In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary. This preliminary determination is even more necessary if the

¹⁸²⁸ Privatization Agreement, Article 7(2), **CE-17**. See, also, the 2001 Law on Privatization, Article 41a(3), **CE-220**.

¹⁸²⁹ Second Expert Report of Mirjana Radovic, para. 30.

parties to the contract have agreed on a specific forum for all disputes arising out of the contract.”¹⁸³⁰

1210.Claimants respond to this argument by asserting that Serbia seeks to import the substantive requirement of exhaustion of local remedies into the expropriation analysis.¹⁸³¹ Obviously, this is incorrect.

1211.The formal rule on exhaustion of local remedies, by its scope of application, requires applicants to exhaust all available remedies which exist in the internal legal system and which can effectively undo the wrong suffered, regardless of the particular legal framework within which the rights were acquired. This rule applies in relation to judicial and administrative branches of government and in relation to all remedies available. Clearly, to assert that a contractual party is under an obligation to seek redress for breach of a contract before contractually agreed forum is not the same as to invoke the local remedies rule.

1212.Thus, Respondent has never argued that Mr. Obradović (acting as a supposed *alter ego* of Claimants) was under an obligation to exhaust all available local remedies to challenge *any* administrative or judicial decision that was allegedly harmful to his (Claimants’) interest, as a substantive precondition for Respondent’s liability under international law. What Claimants cannot do, however, is to bypass the forum specifically designated in the Privatization Agreement as competent for disputes arising out of the contract, and still argue that the alleged breach of the Agreement by the Agency represented expropriation under the BITs.

1213.For this reason, the Claimants’ reliance on *obiter* of the *ad hoc* Committee in *Helnan v. Egypt* is misplaced.¹⁸³² In that case, the Committee discussed the tribunal’s reasoning with regards Helnan’s complaint about an administrative measure rendered by the Egyptian Minister of Tourism (downgrading category of the hotel managed by the claimant).¹⁸³³ The measure was obviously not of contractual nature or rendered under any contract. The Committee voiced its concerns that, in such circumstances, to

¹⁸³⁰ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para 316 (emphasis added), **RLA-114**.

¹⁸³¹ Claimants’ Reply, para. 1104.

¹⁸³² Claimants’ Reply, para. 1106.

¹⁸³³ *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, paras. 146-148, **CLA-115**.

insist that Helnan was required to challenge the measure before administrative courts would be akin to the imposition of the local remedies rule.¹⁸³⁴ The same reasoning is clearly not applicable in the case at hand. Here, Claimants are complaining about the allegedly wrongful termination of the contract by the Agency. The Notice of Termination (as a measure of contractual character) was issued under the Privatization Agreement and the applicable law, and the Buyer (allegedly acting as Claimants' alter ego) was required to address the issue before the competent Commercial Court, not because he was under an obligation to peruse local remedies but because a purely contractual breach can amount to expropriation only when the access to the contractual forum is "legally or practically foreclosed."¹⁸³⁵

1214. Claimants also rely on *Crystallex v. Venezuela* in support of the reasoning adopted by the Helnan Committee.¹⁸³⁶ However, in *Crystallex* the tribunal found that the termination of the contract between *Crystallex* and Venezuelan state-run corporation (CVG) was effectuated through the act representing the State's exercise of sovereign authority.¹⁸³⁷ In the tribunal's opinion, such character of the measure was evident, *inter alia*, based on the law of Venezuela as well.¹⁸³⁸ This is in evident contradiction with the dispute at hand where the Privatization Agreement was terminated using the act of contractual nature.

1215. Furthermore, Respondent's argument does not contradict the requirement of waiver of local proceedings under the Canada – Serbia BIT, as Claimants now argue.¹⁸³⁹ The requirement is aimed at preventing parallel proceedings before different forums. The sheer existence of the requirement did not prevent Claimants from submitting their contractual dispute to the competent forum *before* initiating arbitration.

1216. Finally, Claimants look to distinguish *Waste Management* and *Parkerings* (invoked by Respondent in its Counter-Memorial)¹⁸⁴⁰ from the present dispute by asserting that

¹⁸³⁴ *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010, paras. 46, 47, **CLA-116**.

¹⁸³⁵ *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 174., **RLA-93**.

¹⁸³⁶ Claimants' Reply, para. 1110.

¹⁸³⁷ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 700, **CLA-117**.

¹⁸³⁸ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 706, **CLA-117**.

¹⁸³⁹ Claimants' Reply, para. 111.

¹⁸⁴⁰ Respondent's Counter-Memorial, paras. 656, 657.

in those cases disputes were purely contractual and no severing act was involved in the breach.¹⁸⁴¹ The distinction is nonexistent – the dispute at hand is also contractual. It revolves around interpretation of certain provisions contained in a contract (the Privatization Agreement) and the issue of whether the Notice of Termination issued by the Agency was justified.

1217. In sum, the lack of exercise of governmental authority disqualifies the breach of contract as grounds for the expropriation claim. Further, the failure of Claimants (*i.e.* Mr. Obradović) to sue the Agency in the appropriate forum to remedy the breach is testament to the lack of evidence that any breach had occurred.

3. Termination of the Privatization Agreement was justified under the applicable law

1218. Without prejudice to what has been stated above, Respondent submits that the State's termination of a contract (even if executed through acts *ex iure imperii*) must represent a breach of the contract under the applicable law in order to amount to expropriation. In other words, if there was no breach of the contract by the act of its termination, there cannot be a breach of the State's international obligation.

1219. Thus, two prerequisites for the existence of expropriation are applied cumulatively – if there is no breach of the contract by the State there is no need to examine the nature of the act employed in order to terminate the contract and *vice versa*. This was the reasoning upheld by the tribunal in *Malicorp v. Egypt*:

*“The first question, therefore, is whether the Republic had the right to discharge itself from the Contract pursuant to the private law rules governing it (see above, no. 93). If that is the case, it is unnecessary to examine whether the Respondent also took a measure under its public powers (“measures de puissance publique”), not as a party to the Contract but as a State, the effectiveness and conformity with the Agreement of which would have to be examined.”*¹⁸⁴²

¹⁸⁴¹ Claimants' Reply, para. 1114.

¹⁸⁴² *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 126 (emphasis added), **RLA-77**.

1220. In the case at hand, not only that the Agency terminated the Privatization Agreement using the act available to any ordinary contractual party, but the termination was also legitimate and justified under the law applicable to the Privatization Agreement.

1221. Respondent has already explained in detail why the termination of the Privatization Agreement was fully in conformity with the governing law (Law on Privatization).¹⁸⁴³ In order to avoid unnecessary repetition, Respondent will here briefly deal with allegations raised by Claimants in their Reply.

3.1. The Agency did not act in bad faith in terminating the Privatization Agreement

1222. During the course of contractual relationship with Mr. Obradović which lasted for ten years in case of BD Agro only, the Agency gave 30 different notices to the buyer, warning him about various breaches of the Privatization Agreement. For the 221 Million Pledge alone, Mr. Obradović was given seven extensions of deadlines for remedying the breach and the Agency waited for almost five years before it finally terminated the Privatization Agreement due to Mr. Obradović's unwillingness to fulfill his contractual obligation.

1223. This is not a bad faith conduct on behalf of the Agency. This is exactly the opposite of bad faith.

1224. The Claimants' accusations about the Agency's alleged disingenuous conduct is built primarily on Claimants' presentation of facts which in itself is done in bad faith.

1225. First, Claimants rely on the audio recordings from the meeting of the Agency's Commission for Control that supposedly demonstrate that the Agency was aware of the fact that the Privatization Agreement could not be terminated for the breach of Article 5.3.4.¹⁸⁴⁴ Claimants conveniently leave out the part of the recordings showing the Agency's understanding that it was able to terminate the Agreement for the breach of said provision based on Article 41a of the Law on Privatization.¹⁸⁴⁵

¹⁸⁴³ See above, paras. 190-230.

¹⁸⁴⁴ Claimants' Reply, para. 1091.

¹⁸⁴⁵ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 2, CE-768.

1226. Second, Claimants once again attempt to manipulate the Tribunal by asserting that the loan that was the reason for the 221 Million Pledge was repaid.¹⁸⁴⁶ As shown previously, the truth of the matter is that the payment of the loan was simply postponed (through the conclusion of the Refinancing Loan with Nova Agrobanka) and guaranteed with the same pledge on BD Agro's assets, which remains in place even today.¹⁸⁴⁷

1227. Finally, Claimants dispute that Mr. Obradović was well aware of his breaches and duly warned about the risk of termination, by arguing that “[M]r. Obradović never accepted his responsibility for alleged breaches of the Privatization Agreement because he correctly considered the transactions in dispute to be fully compliant with the contractual terms.”¹⁸⁴⁸ The assertion is not only inapposite but it is also untrue. Whether or not Mr. Obradović accepted that he was in breach of the contract has nothing to do with the fact that he was aware of the consistent position of the Agency – breach of Article 5.3.4. is a valid reason for the termination. Long history of contractual relationship between the Agency and Mr. Obradović clearly shows that this fact was communicated to him also in the context of other privatizations that he was involved in and that Mr. Obradović has never challenged the Agency's position.¹⁸⁴⁹ In any event, Mr. Obradović *did* accept that he was in breach of Article 5.3.4. when it comes to the Privatization Agreement and even asked for an extension of the deadline to fulfill his obligation.¹⁸⁵⁰

3.2. Irrelevance of proportionality

1228. In their Reply, Claimants reiterate that the termination of the Privatization Agreement was unlawful under Serbian law because it was allegedly disproportionate. The argument advanced by Claimants relies on the analysis offered by their legal expert, Mr. Milošević,¹⁸⁵¹ on the effects that Article 20(3) of Serbian Constitution (the Constitution) supposedly should have on contractual relationships.

¹⁸⁴⁶ Claimants' reply, para. 1099.

¹⁸⁴⁷ See above, paras. 126-132.

¹⁸⁴⁸ Claimants' Reply, para. 1092.

¹⁸⁴⁹ See above, paras. 186, 187.

¹⁸⁵⁰ Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

¹⁸⁵¹ Claimant' Reply, para. 1097.

1229. Article 20 of the Constitution reads:

Restriction of human and minority rights

Article 20

Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right.

Attained level of human and minority rights may not be lowered.

*When restricting human and minority rights, all state organs, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means.*¹⁸⁵²

1230. First obvious problem with the Claimants' argument is the fact that the provision at stake clearly refers to obligations of "*all state organs*" and the Agency is not an organ of Serbia. That aside, the provision of Article 20(3) obviously contemplates restrictions of *human and minority rights*.

1231. The absurdity of the Claimants' argument hardly warrants any explanation. If what Claimants now argue would be true, no state organ would ever be able to breach a contract without restricting *human or minority rights* of the other contractual party. In any case, Respondent's legal expert, Professor Radovic, explained why the proportionality analysis has no place in a contractual relationship.¹⁸⁵³ In sum, if the termination of the contract was justified under the rules governing the contract, the analysis of proportionality is obsolete.

¹⁸⁵² Constitution of the Republic of Serbia (2006), Article 20, **RE-333**.

¹⁸⁵³ First Expert Report of Professor Mirjana Radovic, para. 34; Second Expert Report of Professor Mirjana Radovic, para. 29.

1232.Claimants once again rely on the findings of the tribunal in *Ampal v. Egypt*. They submit that “[S]erbia attempts to do away with the proportionality analysis on the basis of a pure misinterpretation of the findings of the tribunal in *Ampal v. Egypt*.”¹⁸⁵⁴ This is incorrect. In fact, Claimants misinterpret the findings of the tribunal.

1233.The *Ampal* tribunal first established that Egypt had unjustifiably terminated the contact with the claimant’s Egyptian subsidiary.¹⁸⁵⁵ Only then it turned to the proportionality analysis in order to determine whether the breach of the contract represented the breach of the US – Egypt BIT as well.¹⁸⁵⁶ Thus, contrary to the Claimants’ interpretation, the proportionality criterion was not applied when the tribunal was examining whether Egypt had breached the contract under the contractual framework.

1234.Based on the forgoing, it is clear that the termination of the Privatization Agreement by the Agency was of contractual nature and justified under the contractual framework. The only way in which liability of Respondent under the BITs could arise is to somehow qualify acts of the Agency as “*disguised abuse of public authority*.”¹⁸⁵⁷ However, no such abuse was present, despite the obvious efforts of Claimants to fabricate the existence of bad faith on Agency’s side.

1235.Respondent respectfully reiterates that the appropriate test to be applied by the Tribunal was the one developed in *Vigotop v. Hungary*:

“*The issues for determining an expropriation in the context of a contract termination are (i) whether the contract is terminated by the contractual procedure rather than a legislative act or executive decree, and (ii) whether there exists a legitimate contractual basis for termination, i.e., (a) the contract or the governing law provides the ground for termination, (b) the evidence substantiates a factual basis for invoking the contractual ground, and (c) the*

¹⁸⁵⁴ Claimants’ Reply, para. 1102.

¹⁸⁵⁵ *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Award, 21 February 2017, paras. 329, 331-333, **CLA-31**.

¹⁸⁵⁶ *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Award, 21 February 2017, paras. 334, 335, **CLA-31**.

¹⁸⁵⁷ *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland* (UNCITRAL), PCA Case No 2015-13, Award, 27 Jun 2016, para. 282, **RLA-85**.

*State acts in good faith, not abusing its right by a fictitious or malicious exercise of it.*¹⁸⁵⁸

1236. As explained in Respondent's Counter-Memorial,¹⁸⁵⁹ applied to the circumstances of the present dispute, the test evidently indicates that the termination of the Privatization Agreement did not amount to expropriation under the BITs.

4. There was no expropriation of Mr. Rand's indirect shareholding

1237. Claimants do not dispute the fact that MDH Serbia's 3.9% shareholding in BD Agro was not affected by the Privatization Agreement's termination. Instead, they develop a theory that the termination of the Agreement and subsequent actions of the Agency resulted in BD Agro's bankruptcy and to loss of value of shares indirectly owned by Mr. Rand. The claim is advanced under the label of indirect expropriation and based on the Claimants' interpretation of Annex B.10 contained in the Canada – Serbia BIT.¹⁸⁶⁰ Claimants' assertions are wrong both as a matter of fact and law.

1238. Annex B.10 contains a list of factors that should be considered during the inquiry about purported indirect expropriation:

(b) the determination of whether a measure or a series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

- i. the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,*
- ii. the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations, and*
- iii. the character of the measure or the series of measures,¹⁸⁶¹*

¹⁸⁵⁸ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014, para. 331 (emphasis added), **RLA-113**.

¹⁸⁵⁹ Respondent's Counter-Memorial, paras. 669-672.

¹⁸⁶⁰ Claimants' Reply, Section V.C.5.

¹⁸⁶¹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Annex B.10(b), **CLA-001**.

1239.The Claimants’ argument with regard to the alleged indirect expropriation is based mainly on misinterpretation of relevant facts.

1240.First, the loss of value of Mr. Rand’s shares was not caused by termination of the Privatization Agreement. Rather, “*the economic impact*” suffered by Mr. Rand was result of BD Agro’s bankruptcy. Contrary to what Claimants have been unsuccessfully attempting to prove, it was Mr. Obradović (the alleged *alter ego* of Mr. Rand) that managed BD Agro into bankruptcy and not the Agency. As it was explained previously by Respondent, the pre-pack reorganization plan for BD Agro was quashed by the decision of the Commercial Court of Appeals on 30 September 2015, before the termination of the Privatization Agreement. It failed simply because BD Agro was unsuccessful in securing and maintaining support of its biggest commercial creditor (Banca Intesa).¹⁸⁶² The adoption of the Amended plan was not thwarted by the Agency.¹⁸⁶³

1241.Furthermore, the bankruptcy proceeding was conducted in lawful way and fully in accordance with relevant Serbian laws. Mr. Rand has never used an opportunity to object to any act taken during the course of BD Agro’s bankruptcy. As explained by Respondent in its previous submission, if loss of an investment was a result of bankruptcy, liability of the State for expropriation can arise only if the proceeding itself was conducted in arbitrary manner and in breach of the host State’s law.¹⁸⁶⁴ Claimants do not even try to argue otherwise.

1242.Second, Claimants submit that Respondent frustrated their legitimate expectations that the pledge over BD Agro’s shares would be released after 8 April 2011 and that the Privatization Agreement would not be terminated for reasons not expressly listed in the Agreement.¹⁸⁶⁵ The argument advanced here is in reality an attempt to read into the Canada – Serbia BIT the existence of an umbrella clause. What Claimants basically ask the Tribunal to do is to protect Mr. Obradović supposed contractual expectations as Claimants’ legitimate expectation under international law. This is not possible.

¹⁸⁶² See above, paras. 438-471.

¹⁸⁶³ See above, paras. 472-489.

¹⁸⁶⁴ Respondent’s Counter-Memorial, paras. 648, 649.

¹⁸⁶⁵ Claimants’ Reply, para. 1144.

1243. Several investment tribunals have found that contractual expectations (expectations that the contractual counter-party will live up to its obligations) cannot be equated with legitimate expectations protected by international treaties.¹⁸⁶⁶ Moreover, legitimate expectations arise out of specific representations made by the State towards the investor.¹⁸⁶⁷ Simply put – Respondent could not have made any commitments directed to Claimants based on the contract concluded between the Agency and Mr. Obradović. In addition, expectations need to be reasonable (objective) in order to be legitimate.¹⁸⁶⁸ Claimants were not objectively able to form expectations that the Agency would not declare termination based on breach of Article 5.3.4. in circumstances where the Agency has been warning Mr. Obradović for several years that it considered such breach as a legitimate reason for termination and where Law on Privatization expressly stipulated this.

1244. Finally, both measures complained of (refusal to release pledge on shares and termination of the Privatization Agreement) are typical contractual measures. It should be noted that Claimants attempt to analyze the character of Agency's measures by employing the method of mind reading, i.e. by submitting that those measures were "*fueled by improper motives.*"¹⁸⁶⁹ This is again both inapposite and untrue.

1245. To conclude, Claimants' assertion that Mr. Rand's indirect shareholding in BD Agro was indirectly expropriated is manifestly unfounded.

5. Destruction of Claimants' purported investment was not caused by Serbia

1246. As already explained in Respondent's Counter-Memorial¹⁸⁷⁰ and further elaborated above,¹⁸⁷¹ demise of BD Agro's business was inevitable consequence of Mr. Obradović's managerial techniques. BD agro was *de facto* bankrupt as early as March

¹⁸⁶⁶ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para 561, **RLA-114**; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 Jun 2010, para. 335, **RLA-115**; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 jun 2011, para. 292, **RLA-142**; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1378, **RLA-176**.

¹⁸⁶⁷ *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, paras. 185, 186, **RLA-186**.

¹⁸⁶⁸ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 261.

¹⁸⁶⁹ Claimants' Reply, para. 1145.

¹⁸⁷⁰ Respondent's Counter-Memorial, Section V.C.4.

¹⁸⁷¹ See above, paras. 494-500.

2013.¹⁸⁷² Formal bankruptcy finally ensued in August 2016, on the initiative of Banca Intesa, one of BD Agro’s biggest commercial creditor.¹⁸⁷³ As a result, the company was sold at the public auction in April 2019 for approximately EUR 13 million.¹⁸⁷⁴ Since liabilities of BD Agro that caused the bankruptcy in the first place were significantly larger in comparison with the price achieved at the auction, this clearly demonstrates that the value of BD Agro at the date which Claimants refer to as the date of expropriation was practically nonexistent.¹⁸⁷⁵

1247. Respondent respectfully reiterates that the existence of causal link between the State’s act or omission and harm suffered by the investor is precondition to the State’s liability for expropriation under international law.¹⁸⁷⁶ Apart from referring to the prerequisite of causal link as “*alleged requirement*”¹⁸⁷⁷ Claimants do not seriously dispute this contention. Instead, they attempt to refute the Respondent’s argument in two different ways.

1248. First, Claimants allege that BD Agro was not bankrupt at the time the Privatization Agreement was terminated and that bankruptcy would have been avoided if not for the termination.¹⁸⁷⁸ This is wrong. As explained earlier, the company has never obtained support for reorganization from one of its major creditors - Banca Intesa¹⁸⁷⁹ Without support of that creditor the adoption of the pre-pack reorganization plan was practically impossible. On the other hand, Mr. Cowan in his Expert Report explains that, considering the record of BD Agro’s past performance, it is unlikely that the pre-pack reorganization plan would be successful, even if adopted.¹⁸⁸⁰

1249. Second, Claimants imply that the allegedly low purchase price for BD Agro achieved as a result of the sale through public auction was somehow a result of non-transparent

¹⁸⁷² Pre-pack Reorganization Plan dated November 2014, p. 8, **CE-321** – stating that the Company’s business account was blocked under the enforce collection procedure on 8 March 2013 and has remained continuously blocked ever since.

¹⁸⁷³ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro of 30 August 2016, **CE-109**.

¹⁸⁷⁴ Evidence of the sale of BD Agro dated 9 April 2019, **RE-171**.

¹⁸⁷⁵ Second Expert Report of Sandy Cowan, para. 2.7.

¹⁸⁷⁶ *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award, para. 748, **RLA-123**; *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova* (UNCITRAL), Final Award, April 18, 2002, para. 87, **RLA-122**.

¹⁸⁷⁷ Claimants’ Reply, para. 1118.

¹⁸⁷⁸ Claimants’ Reply, para. 1121.

¹⁸⁷⁹ See above, paras. 490-493.

¹⁸⁸⁰ Second Expert Report of Sandy Cowan, paras. 7.15., 7.16.

and illegal character of the public auction.¹⁸⁸¹ Respondent reminds once again that such serious accusations are not supported by any evidence of wrongdoing.

1250. Therefore, the loss of Claimants' purported investment was unavoidable consequence of circumstances caused by Claimants themselves and not the result of expropriatory taking by the Republic of Serbia.

6. Legality of the alleged expropriation

1251. In their Reply Claimants once again reiterate the contention that Serbia's "expropriation" was unlawful under international law. Their submission, however, hardly adds anything new to the analysis since Claimants obviously struggle in effort to find any support for the assertion in facts of the case.

1252. First, Claimants maintain that the recommendation issued by Ombudsman in his control of the Agency's and the Ministry of Economy's conduct during the privatization of BD Agro lacked public purpose.¹⁸⁸² It follows from here that Claimants consider Ombudsman's recommendation as a measure that terminated the Privatization Agreement, allegedly leaving them without their investment. Respondent has already explained why this is patently wrong.¹⁸⁸³ In sum, Ombudsman did not terminate the Privatization Agreement. Moreover, he did not even recommend its termination. Ombudsman merely recommended that the Agency and the Ministry *finally clarify the legal status of BD Agro*.¹⁸⁸⁴

1253. In any event, Ombudsman's recommendations are not binding, neither formally nor practically,¹⁸⁸⁵ and cannot be deemed as orders, as Claimants would like to label them. There is absolutely no evidence that the recommendation affected the Agency's decision to terminate the Privatization Agreement in any way. The recommendation was not even mentioned during the internal discussions at the Commission for Control's sessions about BD Agro.¹⁸⁸⁶

¹⁸⁸¹ Claimants' Reply, para. 1122.

¹⁸⁸² Claimant's Reply, para. 1124.

¹⁸⁸³ Respondent's Counter-Memorial, paras. 685-688.

¹⁸⁸⁴ Opinion of the Ombudsman of 19 June 2015, p. 2, **CE-42**.

¹⁸⁸⁵ Second Expert Report of Professor Mirjana Radovic, para. 45.

¹⁸⁸⁶ See above, para. 256.

1254. Furthermore, even if the recommendation could be perceived as a recommendation to terminate the Privatization Agreement, according to the reasoning adopted by the tribunal in *Tulip v. Turkey*, a recommendation to consider termination of a contract is not a misuse of sovereign powers.¹⁸⁸⁷

1255. Claimants try to prove that the findings of the Tulip tribunal cannot be applied here because, according to Claimants, the tribunal in that case found that the recommendation of a State organ (*Supreme Audit Board*) to the contractual party (*Emlak*) to consider terminating the contract with the investor did not affect the decision to terminate.¹⁸⁸⁸ The Claimants' reading of the award is peculiar. The observation relied on by Respondent was made by the tribunal separately and in addition to the fact that the recommendation had no real impact on the decision. The relevant paragraph of the award reads:

*“As regards the recommendation of the Supreme Audit Board, suggesting that Emlak consider termination of the project in light of the slow pace of construction, the record does not reveal that any such recommendation had any particular influence on Emlak. What is more, Claimant offers no basis on which the Tribunal could find a mere recommendation to consider taking an action as an improper exercise of sovereign power. Especially is that so in the absence of any evidence that the Board exerted pressure on Emlak to terminate the Contract or that its recommendation was motivated by an improper purpose.”*¹⁸⁸⁹

1256. Clearly, Claimants' interpretation of the award in *Tulip* is misplaced.

1257. By initiating control over the privatization process of BD Agro, the Ombudsman acted fully in accordance with his statutory mandate.¹⁸⁹⁰ Claimants again insist that the Ombudsman acted out of ulterior motives.¹⁸⁹¹ However, blank assertions are not substitute for evidence and labeling is not substitute for analysis. It is up to Claimants

¹⁸⁸⁷ *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, para. 418, **RLA-114**.

¹⁸⁸⁸ Claimants' Reply, para. 1127.

¹⁸⁸⁹ *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, para. 418 (emphasis added), **RLA-114**.

¹⁸⁹⁰ Second Expert Report of Professor Mirjana Radovic, para. 44.

¹⁸⁹¹ Claimants' Reply, para. 1126.

to prove the existence of such motives.¹⁸⁹² Since they are unable to do so, the argument lacks any merit.

1258. Second, Claimants submit that the alleged expropriation was done in breach of their due process rights. Just as it was the case with their Memorial, Claimants again omit to explain exactly how their right to be heard was breached by the Agency. This is unsurprising. Discussions between Mr. Obradović and the Agency about the breach of Article 5.3.4. lasted for several years. During that time Mr. Obradović had plenty of opportunities to voice his position. He was also able to challenge the Agency's decision before the competent court – a right that he decided to use only to withdraw his lawsuit in March 2016.¹⁸⁹³

1259. Instead, Claimants concentrate on the supposed lack of due process during the Ombudsman's control of BD Agro's privatization.¹⁸⁹⁴ Respondent has already indicated the fundamental flaw in Claimants' reasoning in this matter¹⁸⁹⁵ - due process guarantees apply in an administrative or judicial procedure when the competent organ determines rights and obligation of a party. The Ombudsman simply did not conduct the administrative or judicial proceeding that would result in final determination of Claimants' rights. That alone should be more than enough to put the Claimants' erroneous contention out of the way. The fact that Claimants chose not to respond to this argument in their Reply is equally telling.

1260. Thus, the procedure in which Ombudsman exercises control over activities of State organs and bodies entrusted with public authority cannot possibly lead, even in theory, to expropriation of anyone's rights.

1261. In any event, the existence of due process guarantees does not entail that an investor has the right to "*participation in the sovereign decision to expropriate.*"¹⁸⁹⁶ Article 10(4) of the Canada – Serbia BIT and Article 5(2) of the Cyprus – Serbia BIT respectively elaborate on the meaning of the due process guarantee in the context of

¹⁸⁹² See *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, paras. 565, 566, **RLA-124**.

¹⁸⁹³ Witness Statement of Mr. Djura Obradovic dated 20 September 2017, para. 30.

¹⁸⁹⁴ Claimants' Reply, para. 1135.

¹⁸⁹⁵ Respondent's Counter-Memorial, para. 689.

¹⁸⁹⁶ *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, para. 587, **RLA-124**.

expropriation by declaring that the affected investor has a right to prompt review of its case before an independent authority.¹⁸⁹⁷ Claimants argue that the relevant BITs require protection of an investor's due process rights both during the adoption of the expropriatory measure and the right to challenge the measure afterwards.¹⁸⁹⁸ Claimants also assert that the Respondent's reliance on *South American Silver v. Bolivia* award is inapposite, since the tribunal in that case applied the provision of the UK – Bolivia BIT that does not contain the requirement of due process during the course of expropriation.¹⁸⁹⁹ However, the South American Silver tribunal based its findings that the claimant was not entitled to participate in the process of rendering the decision on expropriation not only on text of Article 5 of the UK – Bolivia BIT, but on the purpose and object of the BIT as well. In dismissing the claimant's argument, the tribunal opined:

*“Such a result does not arise from the object and purpose of the Treaty, and the Claimant does not allege or substantiate that the effective protection of the investment under the Treaty requires participation to the investor in the sovereign decision to expropriate. Nothing in the Treaty mandates a Contracting Party, as the Claimant argues, to establish “legal recourse” to call into question the “legality” of a decision that has not yet been made.”*¹⁹⁰⁰

1262. More importantly, both cases on which Claimants rely in support of their argument (*Bear Creek v. Peru* and *AIG v. Kazakhstan*) involved decisions issued in administrative proceedings (Governmental decree in *Bear Creek*¹⁹⁰¹ and cancellation of the construction permits by local authorities in *AIG*¹⁹⁰²) that were addressed to the investors and directly affected their rights. This was not the case with the control

¹⁸⁹⁷ Article 10(4) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CLA-1**; Article 5(2) of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

¹⁸⁹⁸ Claimants' Reply, para. 1131.

¹⁸⁹⁹ Claimants' Reply, para. 1130.

¹⁹⁰⁰ *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, para. 587 (emphasis added), **RLA-124**.

¹⁹⁰¹ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 446, **CLA-119**.

¹⁹⁰² *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para. 10.3.2(o), **CLA-121**.

initiated by Ombudsman and finalized with the recommendation to competent bodies to *finally clarify the legal status of BD Agro*.¹⁹⁰³

1263. Finally, Respondent submits that it was under no obligation to compensate Claimants since no expropriation of their investment occurred. Furthermore, Respondent reiterates that the lack of compensation – in circumstances where all other conditions for lawful expropriation are met – does not of itself render expropriation unlawful under international law.

1264. This is the position espoused by the tribunal in *Tidewater v. Venezuela*, based on comprehensive analysis of decisions rendered by international tribunals and scholarly writings on the issue.¹⁹⁰⁴ The strongest argument relied on by the tribunal in that case refers to the relationship between the requirement of compensation and lawfulness of indirect expropriation. Simply put, if expropriation could be considered unlawful for the mere fact that no compensation was paid to the investor, no indirect expropriation could ever be in accordance with international law – the fact which would render the treaty-based standard of compensation effectively obsolete:

*“Most expropriation claims turn on the question whether a measure is expropriatory at all. In such cases, where the tribunal finds expropriation, compensation is almost always due. Cases where expropriation is acknowledged and the dispute revolves around the proper amount of compensation are rare; cases where no compensation has been paid because the label of expropriation itself is contested are the norm. That means that almost every decision finding expropriation would also find unlawful expropriation – and almost every tribunal would then set aside the ‘fair market value at the time of expropriation’ standard for compensation for expropriation. Such an approach thus would make a detailed and elaborate element of the expropriation provision in modern BITs, including the provisions of Article 5 of the Venezuela-Barbados BIT, effectively nugatory.”*¹⁹⁰⁵

¹⁹⁰³ Opinion of the Ombudsman of 19 June 2015, p. 2, **CE-42**.

¹⁹⁰⁴ *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, paras. 129-240, **RLA-125**.

¹⁹⁰⁵ *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 138 (emphasis added), **RLA-125**.

1265. Contrary to what Claimants argue,¹⁹⁰⁶ the fact that the dispute in *Tidewater* revolved around the issue of whether the level of compensation offered by Venezuelan Reserve Law was reasonable in the circumstances,¹⁹⁰⁷ detracts nothing from the persuasiveness of the tribunal’s reasoning.

D. THERE WAS NO IMPAIRMENT OF THE INVESTMENT BY ARBITRARY, UNREASONABLE AND DISCRIMINATORY MEASURES

1. Sembi is not entitled to rely on non-impairment clauses contained in investment treaties concluded between Serbia and third states

1266. Claimants invoke the most favored nation clause (the “**MFN clause**”) in order to avail themselves of the non-impairment standard contained in (i) Article 2(3) of the Germany-Serbia BIT; (ii) Article 2(2) of the BLEU-Serbia BIT; (iii) Article 2(3) of the Finland-Serbia BIT; (iv) Article 3(2) of the UAE-Serbia BIT; and (v) Article 2 of the Croatia-Serbia BIT.¹⁹⁰⁸

1267. Respondent recalls that Sembi has not made an investment in the sense of the Cyprus-Serbia BIT.¹⁹⁰⁹ Nevertheless, even if the tribunal were to find otherwise, Cyprus-Serbia BIT does not itself contain a non-impairment clause, and thus, Claimants are attempting to introduce a standard of treatment not afforded to it by the basic treaty, rather than just availing themselves of a more favorable standard already accorded to it. This would be wrong.

1268. Claimants challenge as inapposite Respondent’s reliance on *Hochtief v. Argentina* where the tribunal concluded that:

“it cannot be assumed that Argentina and German intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the

¹⁹⁰⁶ Claimants’ Reply, para. 1137.

¹⁹⁰⁷ *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 143, **RLA-125**.

¹⁹⁰⁸ See Reply, paras. 1147 & 1151.

¹⁹⁰⁹ See above Sec.II.B.3.

extent of the legal rights of third parties. ... The MFN clause is not a renvoi to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.”¹⁹¹⁰

1269. Claimants argue that the *Hochtief* decision does not support Respondent’s theory because the analysis, in this case, did not concern the use of the MFN clause to import substantive standards of treatment and instead related to the issue whether an investor may circumvent the requirement to litigate the dispute for 18 months before local courts, through an MFN clause.¹⁹¹¹ However, the cited language from the decision shows that the *Hochtief* tribunal did not, in any way, differentiate between the operation of the MFN clause with respect to the substantive standards of treatment and the procedural requirements for accessing jurisdiction. This is further confirmed by the following considerations of the tribunal:

“Indeed, the (‘procedural’) right to enforce another (‘substantive’) right is one component of the bundles of rights and duties that make up the legal concept of what property is.

This is clear if one considers the case of a claim to money or to performance having an economic value, both of which are stipulated by Article 1(c) of the Argentina-Germany BIT to be within the definition of an ‘investment, or of intellectual property rights, addressed in Article 1(d). The argument that although a State could not cancel such claims or intellectual property rights without violating the BIT, it could cancel the right to pursue the claims or enforce the intellectual property rights through litigation or arbitration without violating the BIT is nonsensical. It is nonsensical because the right to enforcement is an essential component of the property rights themselves, and not a wholly distinct right.”¹⁹¹²

¹⁹¹⁰ *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, para. 81, **RLA-88**.

¹⁹¹¹ See Reply, para. 1150.

¹⁹¹² *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, paras. 66-67, **RLA-88**

1270. Therefore, the tribunal's pronouncement should be equally applicable to both situations.

1271. A similar conclusion was also reached by the tribunal in *Access Mezzanine v. Hungary*:

*"The Tribunal is of the view that an investor may properly rely only on rights set forth in the basic treaty, meaning the BIT to which the investor's home state and the host state of the investment are directly parties, but not more than that."*¹⁹¹³

1272. Therefore, in case that the tribunal were to consider Sembi as an investor within the meaning of the Cyprus-Serbia BIT, it could still only avail itself of the rights it was afforded under the basic treaty, whose substance may be expanded by operation of the MFN clause. However, these rights may not be supplemented with new rights, not envisaged in the original treaty, such as protection against impairment of the investment through arbitrary or discriminatory conduct.

2. The legal standard for arbitrary conduct

1273. In arguing what should be taken as the standard for arbitrary conduct, rather than replying to the interpretation of the standard put forward by Respondent, Claimants mostly repeat their arguments from the Memorial. Claimants essentially take a somewhat convoluted journey in order to make a full circle and come to a supposed agreement between the parties on the expression given to the standard by Professor Schreuer, which Claimants initially proposed.¹⁹¹⁴ In doing this Claimants miss the point of Respondent's argument on the meaning of "arbitrary", namely, that this is a standard entailing a high threshold¹⁹¹⁵, and that impugned measures need to reach a certain level of excessiveness and gravity in order to breach the BIT, as clearly stated by the ICJ in the *ELSI* case.¹⁹¹⁶

¹⁹¹³ *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyongkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Objections under Arbitration Rule 41(5), 16 January 2013, para. 74, **RLA-148**.

¹⁹¹⁴ See Reply, paras. 1152-1159.

¹⁹¹⁵ See Counter Memorial, paras. 705-711.

¹⁹¹⁶ See *Case Concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, I.C.J. Reports 1989, para. 128, **RLA-89**.

1274.Claimants reiterate Professor Schreuer’s summary of certain types of arbitrary conduct as, it seems, their preferred interpretation¹⁹¹⁷ and criticize Respondent’s arguments against relying on this summary.¹⁹¹⁸ Nevertheless, Claimants themselves concede that such a summary is not a final statement of the law.¹⁹¹⁹ Moreover, in his treatise, Professor Schreuer himself refers to the summary as only one of the ways in which tribunals have approached the determination of the substance of arbitrary conduct.¹⁹²⁰ This only underlines his earlier conclusion that the “*conceptual contours [of the standard of protection against arbitrary or discriminatory measures] are still somewhat sketchy*”,¹⁹²¹ which is precisely why Respondent has suggested application of the standard pronounced in the *ELSI* case.¹⁹²² Namely that:

“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”¹⁹²³

1275.Furthermore, in defining arbitrariness and setting the standard for arbitrary conduct, arbitral tribunals regularly rely on the definition provided in *ELSI*.¹⁹²⁴ Even the tribunal in *Lemire v. Ukraine* which quotes Professor Schreuer’s categories does this by incorporating them together with the *ELSI* language:

¹⁹¹⁷ See Reply, paras. 1156 & 1159.

¹⁹¹⁸ See Reply, para. 1157.

¹⁹¹⁹ See Reply, para. 1157.

¹⁹²⁰ See Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, 2012, p. 193, **CLA-130** (“*Some tribunals have accepted the following categories of measures as arbitrary: (a) a measure that inflicts damage on the investor without serving any apparent legitimate purpose; (b) a measure that is not based on legal standards but on discretion, prejudice, or personal preference; (c) a measure taken for reasons that are different from those put forward by the decision maker; (d) a measure taken in wilful disregard of due process and proper procedure.*” (emphasis added)), See also, *ibid*, pp. 191-193.

¹⁹²¹ Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 198, **CLA-13**.

¹⁹²² See Counter Memorial, para. 707.

¹⁹²³ *Case Concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, I.C.J. Reports 1989, para. 128, **RLA-89**.

¹⁹²⁴ See, e.g., *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 392, **CLA-39**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 318, **RLA-48**; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 176-177, **CLA-40**; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 378, **CLA-37**; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, paras. 521-523, **RLA-149**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, Award, 4 April 2016, paras. 577-578 & 597, **CLA-117**.

“Arbitrariness has been described as “founded on prejudice or preference rather than on reason or fact”; “...contrary to the law because...[it] shocks, or at least surprises, a sense of juridical propriety”; or “wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety”; or conduct which “manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination. ... Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.” Professor Schreuer has defined (and the Tribunal in EDF v. Romania has accepted) as “arbitrary”:

“a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in wilful disregard of due process and proper procedure.”

*Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.”*¹⁹²⁵

1276. Claimants rely on the decisions in *LG&E v. Argentina*, *Siag v. Egypt* and *Lauder v. Czech Republic* in seemingly trying to relax the standard.¹⁹²⁶ However, the tribunal in *LG&E v. Argentina*, as already quoted by Respondent¹⁹²⁷, found that arbitrariness required the state to implement a measure “without engaging in rational decision-making process”¹⁹²⁸, which can hardly be interpreted as a low threshold. Both the tribunals in *Siag v. Egypt* and *Lauder v. Czech Republic* relied on the ordinary meaning of the term “arbitrary”, but this does not conflict with the *ELSI* standard as

¹⁹²⁵ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras. 262-263, **RLA-150** (emphasis added).

¹⁹²⁶ See Reply, paras. 1152, 1154-1155.

¹⁹²⁷ See Counter Memorial, para. 709.

¹⁹²⁸ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 158, **CLA-8**.

proposed by Respondent.¹⁹²⁹ Namely, the pronouncement of the ICJ in the *ELSI* case has been widely relied on by the tribunals as the authoritative interpretation of the standard precisely because it is close to the ordinary meaning of the term.¹⁹³⁰

1277. Claimants also quote the recent decision in *Glencore v. Colombia* in arguing that the term “unreasonable measures” is broader than arbitrary measures, including also “*measures that are irrational in themselves or result from irrational decision-making process*”.¹⁹³¹ This goes against the general wisdom that the terms “arbitrary”, “unreasonable” and “unjustifiable” are used interchangeably, without any apparent distinction.¹⁹³² Even more importantly, such definition of unreasonableness does not seem to actually add any substance to the standard than what is already encompassed by the definition of arbitrariness.¹⁹³³ Nonetheless, it should be noted that the tribunal in *Glencore v. Colombia* explicitly observed that the threshold for finding unreasonableness is a high one.¹⁹³⁴

1278. As already noted by Respondent the high threshold suggests that an ordinary failure to comply with the law would not be sufficient for the finding of arbitrariness. This was noted by the Tribunal in *Cargill v. Mexico* when it stated that:

“[...] [A]rbitrariness may lead to a violation of a State’s duties [...] but only when the State’s actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking

¹⁹²⁹ See Counter Memorial, para. 707.

¹⁹³⁰ See e.g. *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 318, **RLA-48** (“the definition in *ELSI* is the most authoritative interpretation of international law and it is close to the ordinary meaning of the terms emphasizing the wilful disregard of the law.”); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 392, **CLA-39** (“the definition in *ELSI* is close to the ordinary meaning of arbitrary since it emphasizes the element of wilful disregard of the law.”).

¹⁹³¹ *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1452, **CLA-128**, cited in Reply, para. 1153.

¹⁹³² See Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 183, **CLA-13**; Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, 2012, p. 191, **CLA-130**; *National Grid plc v The Argentine Republic*, Award, UNCITRAL, 3 November 2008, para. 197, **CLA-6**.

¹⁹³³ See e.g. *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 158, **CLA-8**.

¹⁹³⁴ See *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, paras. 1455-1456, **CLA-128**.

repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive."¹⁹³⁵

1279. Even more to the point, as the tribunal in *Duke Energy v. Ecuador* concluded, “contractual breaches do not amount, in themselves, to arbitrary conduct”¹⁹³⁶ and Claimants must show something beyond a normal contractual dispute, which would shock (or surprise) the judicial propriety, in order to establish arbitrary or unreasonable conduct.¹⁹³⁷

1280. Finally, Claimants allege that Respondent is taking the stance that bad faith is a necessary component of arbitrary conduct.¹⁹³⁸ However, Claimants are taking Respondent’s argument out of context. Namely, Respondent does not allege that bad faith is an element of arbitrariness in general. Rather, the point is in the following. When claiming specifically that certain conduct is arbitrary because it is “a measure taken for the reasons that are different from those put forward by the decision-maker”, as Claimants do with respect to the termination of the Privatization Agreement,¹⁹³⁹ they ought to also show an element of bad faith.¹⁹⁴⁰ The reason is that bad faith is clearly present when false reasons are provided for one’s action. It may even be augmented with a desire to harm the investor, mentioned in Professor Schreuer’s specification that this applies “in particular, where a public interest is put forward as a pretext to take measures that are designed to harm the investor” .¹⁹⁴¹ .

1281. In any event, while there may be some overlap in the standards proposed, Claimants need to show that the conduct complained of reaches a certain threshold to breach the non-impairment standard, or in other words, the conduct must “shock[], or at least surprise[], a sense of juridical propriety”, and breaches the rule of law, rather than just a rule of law.¹⁹⁴²

¹⁹³⁵ *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 293, **CLA-129**.

¹⁹³⁶ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 381, **CLA-37**.

¹⁹³⁷ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 381, **CLA-37**.

¹⁹³⁸ See Reply, paras. 1157 & 1158.

¹⁹³⁹ See Memorial, para. 428 & Reply, paras. 1181-1202.

¹⁹⁴⁰ See Counter Memorial, para. 729.

¹⁹⁴¹ Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 188, **CLA-13**.

¹⁹⁴² *Elettronica Sicala SpA (ELSI) (United States v. Italy)*, ICJ Reports 1989, Judgment of 20 July 1989, para. 128, **RLA-89**.

3. The conduct of the Agency was not arbitrary nor unreasonable

1282.Claimants argue that the following conduct of the Agency was arbitrary and unreasonable: (i) refusal to release the pledge over BD Agro shares; (ii) refusal to allow the assignment of the Privatization Agreement to Coropi; and (iii) the termination of the Privatization Agreement. Respondent will in turn show that nothing in the conduct of the Agency in these instances could be understood as either arbitrary or unreasonable.

3.1. Agency's refusal to release the pledge was not arbitrary nor unreasonable

3.1.1. The refusal was in accordance with the Serbian Law

1283.Claimants first argue that the Agency's refusal to release the pledge was contrary to Serbian Law. They claim that the Share Pledge Agreement only allowed the Agency to "*maintain the pledge 'for a period of 5 years as of the day of conclusion of the sale and purchase agreement, that is, until the final payment of the sale and purchase price'.*"¹⁹⁴³ According to Claimants this means that the Agency had to release the Pledge immediately upon the payment of the Purchase Price.¹⁹⁴⁴

1284.Respondent, relying on the expert report of Professor Radovic, already explained that the purpose of the Pledge was to prevent the disposal of the shares by Mr. Obradovic while he still had obligations to comply with under the Privatization Agreement.¹⁹⁴⁵ Claimants attempt to refute this by arguing that the Pledge could only secure monetary receivables, and thus, could not possibly secure Mr. Obradovic's compliance with all obligations assumed under the Privatization Agreement.¹⁹⁴⁶ However, this rule is not expressly provided by Serbian law and is only derived from the manner in which the pledge is generally enforced, namely, by selling the pledged object and satisfying the

¹⁹⁴³ See Reply, para. 1163, citing Privatization Agreement, 4 October 2005, Schedule 1: Share Pledge Agreement, Article 2, **CE-17**. As noted by Respondent's expert, Professor Radovic, this translation of the Article 2 of the Share Pledge Agreement is incorrect and the provision states the pledge is established for a period of five years *or* until the final payment of the purchase price. Second Expert Report of Professor Mirjana Radovic, para. 50.

¹⁹⁴⁴ See Reply, para. 1163.

¹⁹⁴⁵ See Counter-Memorial, para. 716; see also First Expert Report of Professor Mirjana Radovic, paras. 65-67.

¹⁹⁴⁶ See Reply, para. 1644.

secured claim from the purchase price. Contrary to this, as Professor Radovic concludes,

“in case of privatization, the pledge secured the Privatization Agency’s (future and conditional) right to claim shares back from the buyer in case his potential breach of contract eventually led to termination of the privatization agreement”.¹⁹⁴⁷

1285. This clearly encompassed any breach of the Privatization Agreement, irrespective of whether it arose from a monetary or non-monetary obligation.

1286. Furthermore, the Agency had clear legal grounds for its refusal to release the pledge for as long as Mr. Obradovic did not fulfill his obligation and remedied the breach of Article 5.3.4 of the Privatization Agreement. Namely, under Article 122 of the Law on Obligations, a contracting party in a bilateral contract is not obliged to fulfill its obligation unless the other party fulfills or is ready to simultaneously fulfil its own obligation.¹⁹⁴⁸ Mr. Obradovic was first notified of the breach and the obligation to remedy it in early 2011,¹⁹⁴⁹ and from that moment on until the termination of the Privatization Agreement he has failed to fulfill his obligation. Therefore, the refusal to release the Pledge was not an arbitrary act, but a legitimate exercise of the Agency’s legal rights.

1287. Claimants argue that it is evident from the report of the Ministry of Economy which states that the limitations imposed by Article 5.3.4 of the Privatization Agreement should be considered concluding with 8 April 2011 – the day Mr. Obradovic paid the last installment of the purchase price – and even from Respondent’s own submission stating that disposal of assets in contradiction with Article 5.3.4 occurring after 8 April 2011 should not be considered as a breach of the Privatization Agreement, that the term of the Agreement expired upon the payment of the Purchase Price.¹⁹⁵⁰ According to Claimants, because Article 5.3.4 provides that it will apply during the term of the Agreement, the statements referred to above prove that that term expired on 8 April 2011. This is a misrepresentation of these arguments. Namely, the only thing that was

¹⁹⁴⁷ Second Expert report of Professor Mirjana Radovic, para. 47.

¹⁹⁴⁸ See Law on Obligations, Article 122, **RE-32**. See also above Sec.I.D.3.

¹⁹⁴⁹ Notice of the Privatization Agency on Additional Time Period dated 24 February 2011, **CE-32**.

¹⁹⁵⁰ See Reply, para. 1167.

stated by the Ministry and Respondent is that disposal of assets which are subsequent to the payment of the Purchase Price cannot be grounds for a breach of Article 5.3.4. This however has no effect on the consequences of a breach that occurred and was established *prior* to the payment of the purchase price, as in the present case, nor does it affect the Buyer's obligation to remedy the existing breach.¹⁹⁵¹

3.1.2. The Commission for Control did not act in an arbitrary nor unreasonable manner

1288.Claimants also contend that the Commission for Control acted in bad faith and rely on the audio recordings of two separate sessions of the Commission as their evidence.¹⁹⁵² Claimants argue that the Agency purposefully ignored Mr. Obradovic's request for release of the Pledge, and avoided the issue as it knew that the Pledge had to be released.¹⁹⁵³

1289.Mr. Obradovic submitted his first request for the release of the Pledge in 2012. Claimant's argue that the fact that the Agency did not act on or reply to Mr. Obradovic was arbitrary and unreasonable because it was required under the Share Pledge Agreement to immediately do so.¹⁹⁵⁴ Respondent has explained already in the preceding paragraphs that the Agency was under no such obligation and that there were valid reasons for the Agency to refuse the release of the Pledge. It was precisely these reasons that the Agency took into account when deciding upon this course of action:

"We did not act upon this request. We did not reply to this request because of the same reasons we are giving now in our, so to say, letter to the Commission. Therein we say that if the Commission was to render a decision on deletion of pledge against shares, excuse me, if the Agency was to render a decision on deletion of pledge against shares to the buyer registered to his benefit, [he] would be free to dispose of them, which [is]

¹⁹⁵¹ Second Expert Report of Professor Mirjana Radovic, para. 34.

¹⁹⁵² See Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, **CE-768**; Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, **CE-770**.

¹⁹⁵³ See Reply, paras. 1168-1175.

¹⁹⁵⁴ See Reply, para. 1169.

*certain bearing in mind the buyer's request for assignment of the agreement.*¹⁹⁵⁵

1290. Moreover, Mr. Obradovic was subsequently informed that the Agency would not release the Pledge on shares before he demonstrates the performance of the Privatization Agreement in line with the Agency's Notices. At a meeting held on 4 February 2014, Mr. Obradovic was expressly informed that the Agency could not issue the decision on the release of the pledge since he had not complied with the Notices instructing him to remedy the breaches of the Privatization Agreement noted in January 2011.¹⁹⁵⁶ Likewise, in the 27 April 2015 Notice, issued after the above-mentioned session of the Commission for Control, Mr. Obradovic was informed that his request for the release of the Pledge would be considered *only after expiration of the additional term for compliance granted by the said Notice.*¹⁹⁵⁷

1291. Claimants also refer to Mr. Obradovic's additional request submitted in June 2015 through his lawyer and quote one of the members of the Commission commenting on this request and stating:

*"Fortunately, the attorney did not submit a valid power of attorney, so we will reply that we do not know who authorized him, and so forth."*¹⁹⁵⁸

1292. For Claimants, this is a clear show of bad faith. Respondent, on the other hand, submits that this was just one of the comments put forth as part of the discussion at the session. The actual letter sent to Mr. Obradovic's attorney on 26 June 2015, in response to his request of 16 June 2015 followed the clear stance of the Agency and explicitly stated that the request would be considered only after the expiration of the period granted to Mr. Obradovic to comply with his obligations.¹⁹⁵⁹

1293. As the second and to them "even more shocking" showing of the Agency's bad faith, Claimants invoke its supposed conscious violation of the Share Pledge Agreement, as

¹⁹⁵⁵ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 4, **CE-768**;

¹⁹⁵⁶ Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

¹⁹⁵⁷ Letter from the Privatization Agency to D. Obradović of 27 April 2015, p. 3, **CE-348**.

¹⁹⁵⁸ See Reply, para. 1170, quoting Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 4, **CE-770**.

¹⁹⁵⁹ Letter from Mr. Vasiljevic to the Privatization Agency of 16 June 2015, p. 1, **RE-65**. Letter from the Privatization Agency to Mr. Vasiljevic of 26 June 2015, p. 1, **RE-66**.

the Agency knew that Mr. Obradovic was entitled to the release of the Pledge.¹⁹⁶⁰ They rely on a quote from Ms. Vuckovic that is nevertheless, as already shown above, in line with the Agency's consistent approach towards the matter of the release of the Pledge exhibited throughout this privatization process whereas the Pledge could only be removed once Mr. Obradovic remedied the breach of the Privatization Agreement.¹⁹⁶¹

1294. The Agency's conduct was fully in accordance with the Privatization Agreement and general contract law. It also had a legitimate motivation and purpose, and as such it cannot be said not to have engaged "*rational decision-making process*" as Claimants attempt to portray it.¹⁹⁶²

1295. Claimants also rehash their argument that the audio recordings of the sessions of the Commission for Control show that the refusal to release the Pledge was not a commercial conduct and that it was a measure adopted to ease the supposed public pressure. Respondent has already refuted this argument above and respectfully directs the Tribunal to that discussion.¹⁹⁶³

3.2. Agency's refusal to allow the assignment of the Privatization Agreement to Coropi was not arbitrary nor unreasonable

1296. Claimants also assert that the Agency's refusal to allow for the assignment of the Privatization Agreement from Mr. Obradovic to Coropi "*significantly contributed to BD Agro's insolvency*", "*constituted an arbitrary and unreasonable measure*" and inflicted damage on the investor "*without serving any legitimate purpose*".¹⁹⁶⁴

1297. Namely, Claimants argue that the Agency "*clearly did not regard a bank guarantee as the sole method of securing its rights, but expressly communicated to the Claimants that it would be satisfied with 'other means of security'*".¹⁹⁶⁵ They then go on to say that Mr. Obradovic offered such security by agreeing in the assignment agreement with Coropi to guarantee the performance of Coropi's obligations.¹⁹⁶⁶ Claimants draw

¹⁹⁶⁰ See Reply, para. 1171.

¹⁹⁶¹ See above Sec.I.D.2.

¹⁹⁶² See Reply, para. 1176.

¹⁹⁶³ See above Sec.III.C.2.

¹⁹⁶⁴ See Reply, paras. 1177 & 1180.

¹⁹⁶⁵ See Reply, para. 1178.

¹⁹⁶⁶ See, Reply, para. 1178.

their conclusions from the list of documents that Mr. Markicevic testifies was provided to them in 2013 by the Agency which lists the following:¹⁹⁶⁷

“(...) certified statement on pledge provided by the buyer as guarantee that the assignee will perform his/her obligations from the assigned sale agreement (the pledge can be provided in the form of a bank guarantee, solo promissory note, pledge or other means of security or by signing as the pledgor the Amendment to the Sale Agreement to be concluded by the Agency and the assignee)”

1298. However, Claimants presuppose that the Agency would necessarily have to accept the security of the buyer's choosing. This is difficult to accept, especially in cases where the buyer has a proven record of negligence in contract performance like Mr. Obradovic.¹⁹⁶⁸ In any event, as shown by Respondent, the conditions for the assignment were not fully met at any moment.¹⁹⁶⁹ Moreover, the Agency was clear that it cannot render any measures or take any decision with regard to BD Agro while the Supervision Proceedings were ongoing¹⁹⁷⁰ and the Rulebook which was in force at the time the Supervision Proceedings concluded in April 2015, had the bank guarantee as the only possible type of security.¹⁹⁷¹

1299. Claimants also argue that the Agency never got to the stage where it would actually review the documentation, and thus, it engaged in negotiations on this matter in bad faith.¹⁹⁷² They base this on the audio recording of one of the sessions of the Commission for Control, however, the relevant part actually states the following:

“In order for an agreement to be assigned certain conditions need to be met. They did, at one point, deliver this documentation which we did not review officially. The Centre, of course, reviewed it and it was not complete, but we

¹⁹⁶⁷ See Second Witness Statement of Mr. Igor Markicevic, paras. 26-29; List of documents requested by the Privatization Agency dated 11 June 2013, **CE-272**.

¹⁹⁶⁸ See above Sec.I.B.1.

¹⁹⁶⁹ See above Sec.I.E.5. See also Counter-Memorial, Sections II.D.2.-3.

¹⁹⁷⁰ See above Sec.I.E.3.

¹⁹⁷¹ “Commission [for Control] shall render decision on prior approval to the buyer for assignment of the [privatization] agreement if the buyer delivers the following documents:

(...) certified statement on pledge by which the buyer guarantees that the assignee will perform his/her obligations from the assigned agreement in the form of a bank guarantee in the value of 30% of the purchase and sale price [from the privatization agreement] ...” Rulebook on Undertaking of Measures of 7 April 2014, Article 34, **RE-93**.

¹⁹⁷² See Reply, para. 1179.

*had never... (Julijana Vuckovic adds: put it on the agenda) reached that phase where we would ask them to supplement the documentation.”*¹⁹⁷³

1300. This is in line with what was said at the same session just a few minutes earlier:

*“[...] in August 2013, the buyer submitted a request for assignment of the agreement to one Canadian company [...] the Centre for Control reviewed the documentation submitted by the assignee, and we determined at that point that the assignee did not submit the entire documentation, which was pointed out on several occasions in meetings held at the mere headquarters of the Agency”*¹⁹⁷⁴

1301. Contrary to Claimants’ assertion, this clearly shows that there was no bad faith on part of the Agency.

1302. At the outset, Respondent reiterates that in refusing to consent to assignment the Agency did not affect any contractual rights of the buyer under the Privatization Agreement. Claimants reply to this that the purpose of the Privatization Agreement was to transfer ownership of BD Agro shares to Mr. Obradovic, and disposal of property as Mr. Obradovic sees fit would be one of the most fundamental aspects of those ownership rights.¹⁹⁷⁵ However, an assignment of contract is not a simple disposal of property rights, and in such case the Agency would be fully entitled to refuse assignment under general contract law. It did so, as any party to a contract would in a situation where the other party is in breach of its obligations.

1303. In conclusion, the Agency’s refusal to consent to the proposed transfer does not fall within the scope of the impairment standard and in any event the Agency’s decision in the circumstances and insistence on proper documentation can hardly be viewed as arbitrary.

¹⁹⁷³ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 9, **CE-768**;

¹⁹⁷⁴ Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 3, **CE-768**.

¹⁹⁷⁵ Reply, para. 1180.

3.3. The termination of the Privatization Agreement was not arbitrary nor unreasonable

1304.Claimants allege that the termination of the Privatization Agreement constitutes unreasonable or arbitrary treatment. First, they argue that the Agency’s decision to terminate the Privatization Agreement could not have been a rational reaction to Mr. Obradovic’s breaches because the decision disregarded the “*instruction*” contained in the opinion of the Ministry of Economy of 30 May 2012 and the advice of the Agency’s legal counsel given in June 2013.¹⁹⁷⁶ Claimants further argue that for the issue at hand it is not important whether these opinions were binding, but whether the decision to disregard them was rational.¹⁹⁷⁷

1305.To begin with, the 2012 opinion of the Ministry of Economy simply states that there is “*no economic justification for the termination of the agreement*”.¹⁹⁷⁸ This is different from an assessment of potential legal grounds for the termination. The latter aspect of the issue was covered only by the report of the Ministry issued after its control of the legality of the Agency’s conduct in 2015. This report found that a breach of Article 5.3.4. did indeed exist.¹⁹⁷⁹

1306.Further, as regards 2013 Attorney’s Opinion, while the Agency was free to seek outside legal advice, it was certainly not bound to follow it, nor can the choice not to do so automatically be judged as unreasonable. Nevertheless, as Respondent explained above, the 2013 Attorney’s Opinion was superficial and ignored the existing court practice of the Supreme Court of Cassation.¹⁹⁸⁰ Bearing that in mind, the Agency’s disregard of the opinion is not surprising or unreasonable.

1307.Second, Claimants allege a “*series of inexplicable turnabouts*” continuing with the report from the Supervision Proceedings which, in opposition to the Ministry’s opinion from 2012, directed the Agency to grant Mr. Obradovic an additional period of time in order to rectify the breach of Article 5.3.4 of the Privatization Agreement. According to Claimants this deadline was “*fully discretionary*” and “*unrealistic*” and

¹⁹⁷⁶ See Reply, para. 1183.

¹⁹⁷⁷ See Reply, para. 1184.

¹⁹⁷⁸ Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012, **CE-33**.

¹⁹⁷⁹ Report of Ministry of Economy on the Control over the Privatization Agency 7 April 2015, p. 13, **CE-98**.

¹⁹⁸⁰ See above para. 217.

had a hidden agenda – to postpone the Commission’s decisions on the release of the pledge and the assignment of the Privatization Agreement.¹⁹⁸¹

1308. As explained, the stances taken by the Ministry do not contradict each other as they simply assess different aspects of the issue. Furthermore, Claimants’ insistence that the time left for Mr. Obradovic to remedy the breach was unrealistic is hard to understand. Namely, the deadline corresponds to previous additional time periods left for Mr. Obradovic to remedy breaches of the contract.¹⁹⁸² Mr. Obradovic was subsequently granted a second extension of the time to remedy the breach.¹⁹⁸³ It should be recalled however, that the breach occurred in late 2010 and was discovered in early 2011.¹⁹⁸⁴ By the time the deadline Claimants complain of was granted, more than four years have passed from the breach.

1309. Claimants also argue that it is evident from the audio recordings of the sessions of the Commission for Control that the Commission was aware that Claimants would not be able to remedy the breach in the given time.¹⁹⁸⁵ But as explained by Respondent, Claimants pick and choose among the statements of the members of the commission and omit relevant information as it suits their arguments. The recordings actually show that the Commission even engaged in a *bona fide* examination of different contractual options and even at one point considered a certain “loosening” of the conditions.¹⁹⁸⁶ Finally, in relation to Claimants’ argument that the aim was to find plausible excuse for postponement of the Commission’s decision on the release of the pledge and the assignment of the Privatization Agreement, a simple question needs to be asked – what would have been the purpose of this postponement? The only reasonable explanation is that, had the Agency been so set on the termination of the Agreement as Claimants purport to present it, it would have done it in 2011 when the Buyer failed

¹⁹⁸¹ See Reply, paras. 1185-1187.

¹⁹⁸² See e.g. Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-31**; Notice of the Privatization Agency on Additional Time Period 22 June 2011, **CE-96**; Notice of the Privatization Agency on Additional Time Period 6 October 2011, **CE-97**; Notice of the Privatization Agency on Additional Time Period 22 December 2011, **CE-32**; Notice on Additional Time Period of 22 June 2012, **RE-15**; Notice of the Privatization Agency on Additional Time Period 31 July 2012, **CE-78**; Notice of the Privatization Agency on Additional Time Period 8 November 2012, **CE-79**.

¹⁹⁸³ Letter from the Privatization Agency to Djura Obradovic and BD Agro, **CE-351**.

¹⁹⁸⁴ Notice of the Privatization Agency on Additional Time Period dated 24 February 2011, **CE-31**.

¹⁹⁸⁵ See Reply, para. 1186.

¹⁹⁸⁶ See above Sec.I.D.2; see also Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 10, **CE-768**; Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 5, **CE-770**.

comply with its Notice for an additional time period to remedy the breach of Article 5.3.4. and it would have not given Mr. Obradovic yet another opportunity to do so in April 2015.

1310. Third, much of Claimants argument in the context of impairment is still mainly based on the assumption that the Ombudsman's recommendation was the main cause and the main reason for the termination. Respondent has extensively discussed the absurdity of this theory. To begin with, Ombudsman's recommendations lack any binding force. Claimants, however, assert that this is irrelevant. They argue that the recommendations nevertheless carry significant authority and invoke an 86.3% compliance rate that the recommendation have.¹⁹⁸⁷ As Professor Radovic notes, this still leaves a significant number of recommendations that were not complied with.¹⁹⁸⁸ Moreover, Claimants do not provide any evidence of the supposed influence of the Ombudsman on the Agency apart from relying on the general role that the Ombudsman has within the state administration.¹⁹⁸⁹

1311. Claimants further argue that while the Ombudsman did not provide express orders to the Ministry of Economy and the Agency, he did not need to as his recommendation and subsequent letters were "*clear enough*".¹⁹⁹⁰ However, the substance of Ombudsman's recommendation in the present case is different from how Claimants present it. The Ombudsman never recommended to the Agency to terminate the Privatization Agreement. Rather, the recommendation was that the Privatization Agency and the Ministry of Economy should finally clarify the status of the Privatization Agreement, i.e. whether the conditions for the termination have or have not been met.¹⁹⁹¹ Clearly, the Privatization Agency's was not required in any way to terminate the Privatization Agreement by the Ombudsman's recommendation, as it could as well determine that the conditions for termination had not been met and

¹⁹⁸⁷ See Reply, paras. 1190-1191.

¹⁹⁸⁸ Second Expert Report of Professor Mirjana Radovic, para. 45.

¹⁹⁸⁹ See Reply, para. 1191.

¹⁹⁹⁰ See Reply, para. 1192.

¹⁹⁹¹ "*In cooperation with the Ministry of Economy, the Privatization Agency shall take all necessary measures to determine, within the shortest period of time, whether all conditions stipulated by the Law on Privatization of 2001 for termination of the Agreement on sale of socially owned capital through the method of public auction of the subject of privatization "Buducnost" Dobanovci have been fulfilled, in order to finally clarify legal status of the subject of privatization, that is, of company "BD Agro AD" Dobanovci and its employees who, for a long period of time, have lacked any certainty regarding manner of exercising of their labour rights.*" Opinion of the Ombudsman of 19 June 2015, p. 1, para. 1, **CE-42**.

decide to issue the Buyer with a certificate confirming that he fulfilled his duties under the Privatization Agreement and to formally end the privatization process of BD Agro.

1312. Claimants also invoke subsequent correspondence between the Agency and the Ombudsman.¹⁹⁹² They argue that the Privatization Agreement was terminated only ten days after the letter of the Ombudsman dated 18 September 2015.¹⁹⁹³ Claimants' also make much of the fact that on 21 October 2015, the Ombudsman sent a letter to the Agency, closing his investigation, where he stated that the Agency fully acted in accordance with the recommendation.¹⁹⁹⁴ However, as Respondent already explained, in all correspondence the Ombudsman simply maintained the same position – that the Agency ought to take necessary measures in order to decide whether or not to terminate the Privatization Agreement.

1313. Finally, Claimants argue that the Ombudsman's interference was “*a patent example of an abuse of power without any legitimate function*”, because the exercise of Ombudsman's powers must pursue the goal of protecting citizens' rights.¹⁹⁹⁵ According to Claimants the control over the legality of the conduct of the Agency would not satisfy this requirement because the Agency's and the Ministry's control of Mr. Obradovic's compliance with Articles 5.3.3 and 5.3.4 of the Privatization Agreement concerned only financial aspects of the transaction and were unrelated to the rights of employees.¹⁹⁹⁶ Nevertheless, as Professor Radovic states:

“pursuant to Article 1 of the Law on Ombudsman, the Ombudsman is defined as ‘an independent state body that protects the rights of citizens and controls the work of [...] organizations [...] entrusted with public authority’ (emphasis added). As I explained in my First Expert Report, the Ombudsman was expressly authorized to control the legality and proper work of authorities (Art. 17(2)), including holders of public authority (such as the Privatization Agency) Since the Privatization Agency was entrusted to control the privatization process and to follow up on contract

¹⁹⁹² See Reply, para. 1193.

¹⁹⁹³ See Reply, para. 1192.

¹⁹⁹⁴ See Letter from the Ombudsman to the Privatization Agency, **CE-727**.

¹⁹⁹⁵ See Reply, para. 1194.

¹⁹⁹⁶ See Reply, para. 1195.

*performance, in my view the Ombudsman had the authority to look into the case of BD Agro.*¹⁹⁹⁷

1314. Finally, Claimants comment that if the Ombudsman were truly concerned with rights of employees he would have, for example intervened in the failed privatization of Minel Transformatori which ended in much controversy.¹⁹⁹⁸ However, this argument is completely irrelevant. Claimants submit only one newspaper article¹⁹⁹⁹ which provides very little context, and never mentions the Ombudsman, clearly making it impossible to determine anything on the role he had or did not have in the case.

1315. Fourth, Claimants argue that the Privatization Agreement was terminated due to the pressure from the Ombudsman and the trade unions, and not for reasons put forward by Respondent. However, Claimants fail to produce any actual evidence of the pressure they claim, let alone evidence of its supposed effect on the decision of the Commission for Control. Claimants further claim that the decision was unclear on the grounds for termination,²⁰⁰⁰ referring to both Article 5.3.3. and 5.3.4. Respondent has already addressed this issue. Namely, the Notice on Termination states that the Commission for Control took into account the conduct of the buyer with respect to the alienation of the fixed assets (Article 5.3.3), but does not state that this was a reason for termination.²⁰⁰¹ Claimants assert that this is highly inappropriate due to the impact of the Notice on Claimants' rights.²⁰⁰² However, the only relevant matter is that it is undoubtedly clear what was the ground for the termination, as only this had legal effect on the legal relationship of the parties, and there is absolutely no confusion about that.

1316. Essentially, the entirety of Claimants' case about alleged arbitrary treatment in the termination of the Privatization Agreement hinges upon the erroneous notion that the Ombudsman ordered the Agency to terminate the agreement. It looks as if Claimants argue that the repeated Notices of the Agency requesting Mr. Obradovic to remedy

¹⁹⁹⁷ Second Expert Report of Professor Mirjana Radovic, para. 44. (footnotes omitted)

¹⁹⁹⁸ See Reply, paras. 1198-1199.

¹⁹⁹⁹ See *Disastrous Privatization by Influential Serbian Minister Goes Uninvestigated*, Organized Crime and Corruption Reporting Project, 11 February 2019, **CE-796**.

²⁰⁰⁰ See Reply, paras. 1201-1202.

²⁰⁰¹ Notice on Termination of the Privatization Agreement of 28 September 2015, **CE-50**.

²⁰⁰² See Reply, para. 1202.

the breach of Article 5.3.4,²⁰⁰³ are irrelevant for the act of termination.²⁰⁰⁴ This is absurd. The Agency's notices show the consistent stance that the Agency took that the Privatization Agreement could be and would be terminated if Mr. Obradovic failed to remedy the breach. The same grounds for termination were clearly established by the Commission for Control, which is evident from the audio recordings of their sessions and numerous written reports.²⁰⁰⁵ The record shows that the Agency acting on the Ombudsman's recommendation was not, and could not be, "*the real reason for the termination*" of the Privatization Agreement. The real and only reason was the failure of Mr. Obradovic to remedy the violation of Article 5.3.4. of the Privatization Agreement in additional time given and after numerous extensions.

1317. Bearing in mind the reasons above, there has been no violation of the impairment standard by arbitrary treatment in the present case.

E. THERE WAS NO VIOLATION OF THE FET STANDARD

1. The only source of obligations under Article 6(2) of the Canada-Serbia BIT is the customary international law minimum standard of treatment

1318. Article 6(2) of the Canada-Serbia BIT makes it clear that the only source of obligation for Respondent is the customary international law minimum standard of treatment. Namely, the provision clearly states that

*"The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."*²⁰⁰⁶

²⁰⁰³ Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-31**; Notice of the Privatization Agency on Additional Time Period 22 June 2011, **CE-96**; Notice of the Privatization Agency on Additional Time Period 6 October 2011, **CE-97**; Notice of the Privatization Agency on Additional Time Period 22 December 2011, **CE-32**; Notice on Additional Time Period of 22 June 2012, **RE-15**; Notice of the Privatization Agency on Additional Time Period 31 July 2012, **CE-78**; Notice of the Privatization Agency on Additional Time Period 8 November 2012, **CE-79**; Letter from the Privatization Agency to Djura Obradovic and BD Agro, **CE-351**.

²⁰⁰⁴ See Reply, para. 11

²⁰⁰⁵ See above Sec.IB.3.3.1.3.

²⁰⁰⁶ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 27 April 2015, **CLA-1**.

1319. Contrary to Claimants' assertion,²⁰⁰⁷ it is not in question whether the content of customary international law minimum standard of treatment can evolve over time. However, this does not mean that the standard as it exists in customary international law can be equated to the "autonomous" FET standard envisioned by some investment treaties.

1320. Claimants rely on the text of the norm providing the minimum standard of treatment in order to claim that it was the intention of the parties to incorporate the fair and equal treatment as "*defined by treaty practice*", into the standard.²⁰⁰⁸ They further rely on the pronouncement of the tribunals in *Mondev v. US* and *Pope & Talbot v. Canada*²⁰⁰⁹ in order to come to the conclusion that the minimum standard of treatment provided by Article 6 of the Canada-Serbia BIT "*springs from that of autonomous FET standards contained in other treaties*" and furthermore, that "[s]uch FET standard does not 'go beyond what is required under customary international law' because it is a part of that very customary international law".²⁰¹⁰ Claimant's argument essentially comes to the conclusion that there is no difference between the international customary minimum standard of treatment as found in Article 6 of the Canada-Serbia BIT and an autonomous FET standard provided by some other BITs.

1321. The problem with such argument, however, is that it blatantly disregards the explicit language of Article 6 of the Canada Serbia BIT quoted above, and moreover, turns it on its head. While the language of Article 6 of the BIT includes fair and equal treatment into the minimum standard, the point is to say that such treatment is limited to what is required under customary international law and does not require "*treatment in addition or beyond*" this. This is clear from the conclusions of the tribunal in *Mesa Power Group v. Canada*:

"[t]he Tribunal disagrees with the Claimant's submissions that the 'autonomous' fair and equitable treatment provisions in other treaties impose additional requirements on Canada beyond those deriving from the

²⁰⁰⁷ See Reply, para. 1207.

²⁰⁰⁸ See Reply, paras. 1208 & 1210.

²⁰⁰⁹ See Reply, paras. 1209 & 1211. It should be noted here that the more correct interpretation of the pronouncement of the tribunal in *Mondev v. US* would be simply that the tribunal did not view the minimum standard of treatment as frozen in time and incapable of evolving, but that investments under NAFTA are still only entitled to fair and equal treatment as contained in customary international law.

²⁰¹⁰ Reply, para. 1212.

minimum standard. As was already discussed above, the FTC Note is clear that the Tribunal must apply the customary international law standard of the international minimum standard of treatment, and nothing else. There is thus no scope for autonomous standards to impose additional requirements on the NAFTA Parties.”²⁰¹¹

1322. Similarly, the tribunal in *Grand River v. US* found that:

“the content of the obligation imposed by Article 1105 must be determined by reference to customary international law, not to standards contained in other treaties ... Further, the concepts of ‘fair and equitable treatment’ and ‘full protection and security’ refer to existing elements of customary international law regarding the treatment of aliens and do not add to that standard.”²⁰¹²

1323. Simply put, Claimants’ contention that the minimum standard of treatment is practically derived from the autonomous FET standard (and because of that has the same content) is plainly wrong.

1324. Finally, while the customary international law minimum standard of treatment may in principle evolve, the burden is on Claimants to establish that the breaches they allege do fall within the content of such standard.²⁰¹³ In that sense, it should be noted that the autonomous FET clauses contained in some BITs cannot be understood as reflecting customary rules. This was confirmed by the tribunal in *Cargill v. Mexico*:

“significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom. It

²⁰¹¹ *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 24 March 2016, para. 503, **RLA-136**; see also, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 380, **RLA-137**. (“The parties accept that the minimum standard of treatment under the US–Oman FTA refers to the customary international law standard and not an autonomous treaty standard. That conclusion is compelled by Article 10.5.2, which expressly provides that the Treaty’s standards of fair and equitable treatment and full protection and security “do not require treatment in addition to or beyond that which is required by [the minimum standard of treatment]’.”).

²⁰¹² *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 176, **RLA-138**.

²⁰¹³ See *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, paras. 271-273, **CLA-126**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 601, **RLA-127**.

may be that widespread adoption of a strict autonomous meaning to "fair and equitable treatment" may in time raise international expectations as to what constitutes good governance, but such a consequence is different than such clauses evidencing directly an evolution of custom."²⁰¹⁴

2. The content and threshold of the customary international law minimum standard of treatment

1325. Claimants further argue that the minimum standard of treatment is “*by no means restricted to host State’s conduct that is ‘shocking or egregious’*”.²⁰¹⁵ Claimants proceed to make much ado about Respondent’s supposed reliance on the *Neer* standard which they assert is outdated and obsolete.²⁰¹⁶ The entire discussion is aimed at discrediting the standard as adopted by the tribunal in *Glamis Gold v. US*.²⁰¹⁷ It should be noted that when asserting that a “*myriad*” of tribunals criticized the *Glamis Gold* tribunal,²⁰¹⁸ Claimants predominantly rely on decisions that predate the *Glamis Gold* award,²⁰¹⁹ and are actually a criticism on *Neer*.

1326. In any case, Respondent never relied on the *Neer* standard; it rather invoked the content and threshold for the minimum standard of treatment as articulated in a recent award rendered by the tribunal in *Eli Lilly v. Canada*, which in turn relied on the *Glamis Gold* award.²⁰²⁰ A number of other arbitral tribunals, interpreting the provision of Article 1105 of the NAFTA, which is equivalent to Article 6 of the Canada-Serbia BIT, came to the equally stringent standard. The tribunal in *Cargill v. Mexico*, for example, concluded that:

“the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one

²⁰¹⁴ *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 276, **CLA-126**.

²⁰¹⁵ See Reply, para. 1213.

²⁰¹⁶ See Reply, paras. 1214-1219.

²⁰¹⁷ See Reply, paras. 1213, 1217 & 1219.

²⁰¹⁸ See Reply, para. 1216.

²⁰¹⁹ See Reply, note 1207, in particular, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Award on the Merits of Phase 2, 10 April 2001, **CLA-136**; *Waste Management, Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, **RLA-093**; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, **CLA-138**.

²⁰²⁰ See Counter-Memorial, para. 745, quoting *Eli Lilly and Company v. The Government of Canada* (UNCITRAL), ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, para. 222, **RLA-128**.

aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.”²⁰²¹

1327. Similarly, the tribunal in *Mobil & Murphy v. Canada* found that the standards are set “at a level which protects against egregious behavior” and went on to say that “[i]t is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law”.²⁰²²

1328. More recently the tribunal in *Al Tamimi v. Oman* concluded that:

*“In the Tribunal’s view, therefore, to establish a breach of the minimum standard of treatment under Article 10.5, the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman’s regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor’s basic rights and expectations. It will certainly not be the case that every minor misapplication of a State’s laws or regulations will meet that high standard.”*²⁰²³

²⁰²¹ *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 296, **CLA-126**.

²⁰²² *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012, para. 153, **RLA-139**.

²⁰²³ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 390, **RLA-137**. The tribunal was discussing Article 10.5 of Chapter 10 of the United States – Oman Free Trade Agreement, **RLA-157**. The provision contains language limiting the obligation to provide “fair and equitable treatment” to covered investments in a way similar to Article 6(2) of the Canada Serbia BIT.

1329. It is important to note that even tribunals which have accepted that the minimum standard of treatment may evolve over time, still consider that there is a high threshold for a breach of the minimum standard of treatment, which is relevant for the tribunal's analysis.²⁰²⁴ In their Reply, Claimants rely on the standard as set out in the *Waste Management v. Mexico* award.²⁰²⁵ However, it would be wrong to consider that the pronouncement of the tribunal in *Waste Management v. Mexico* is in any way a lowering of the high threshold generally required for a breach of the minimum standard of treatment. As the tribunal in *Al Tamimi v. Oman* concluded with reference to the *Waste Management* award:

*“In that case, the minimum standard was said to require “arbitrary, grossly unfair, unjust or idiosyncratic” conduct by a State party, or a “complete lack of transparency and candour”, or “a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings”. As other tribunals have noted, adjectives such as “gross” and “manifest” indicate the acknowledged stringency of the standard.”*²⁰²⁶

3. A violation of another provision of the agreement does not automatically constitute a violation of the minimum standard of treatment

1330. Claimants argue that it was never their contention that “a finding of expropriation necessarily resulted in a finding of a violation of the FET standard”.²⁰²⁷ If this is indeed correct, Respondent agrees with such a statement. In any event, the provision of Article 6(3) of the Canada-Serbia BIT is very clear on the matter: “[a] breach of another provision of this Agreement, or of a separate international agreement, does

²⁰²⁴ *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 24 March 2016, para. 504, **RLA-136**; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, para. 441, **CLA-139**. *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award 26 January 2006, para 194, **CLA-95** (“Notwithstanding the evolution of customary law [...] the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence [...] For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment [...] as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable standards.”).

²⁰²⁵ See Reply, paras. 1220-1221.

²⁰²⁶ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 384, **RLA-137**.

²⁰²⁷ Reply, para. 1223.

not establish that there has been a breach of this Article.”²⁰²⁸ Plainly no breach of a different provision of the Canada-Serbia BIT, or of a provision of a different treaty, including a standard imported through an MFN clause, can be taken to automatically constitute a breach of the minimum standard of treatment. This is not to say that Claimants cannot demonstrate that the same conduct breached various standards of protection, but Claimants’ arguments go well beyond that.

1331. Namely, Claimants do argue that a finding of the violation of the non-impairment standard set forth, *inter alia*, in Article 2(3) of the Germany-Serbia BIT and imported by virtue of the MFN clause contained in the Cyprus-Serbia BIT, would automatically result in the violation of the minimum standard of treatment provided by Article 6 of the Canada-Serbia BIT.²⁰²⁹ They equally seem to argue that a finding of lack of due process with regard to the Ombudsman’s conduct in the context of expropriation would automatically lead to a breach of the minimum standard of treatment.²⁰³⁰

1332. First, arbitral decisions on which Claimants rely in support of their argument concern the interpretation and application of a FET provision which contains the autonomous standard, rather than the minimum standard of treatment provided by the Canada-Serbia BIT, and as such are not relevant for the analysis of its Article 6.²⁰³¹ Second, as quoted above, the very text of Article 6 of the Canada-Serbia BIT prevents such an automatic finding of a breach.

1333. In addition, as shown by Respondent, the threshold for the breach of Article 6 of the Canada-Serbia BIT is exceptionally high,²⁰³² and any finding of arbitrary conduct or lack of due process would need to reach this threshold in order to constitute a violation of Respondent’s obligation. This is not to say that a finding of arbitrariness, in general,

²⁰²⁸ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 27 April 2015, **CLA-1**.

²⁰²⁹ See Reply, paras. 1226-1227 & 1230.

²⁰³⁰ See Reply, para. 1231.

²⁰³¹ See *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, paras. 608 & 610-611, **RLA-127**; *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, paras. 278 & 280, **CLA-126**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 176, **RLA-138**; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 386, **RLA-137**. The FET clause contained in the Argentina-US BIT relevant to the dispute in *El Paso v. Argentina*, provides that “[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law”, and evidently does not set the same limitations as Article 6 Canada-Serbia BIT.

²⁰³² See above Sec.IV.E.2.

would not require a high threshold, indeed Respondent has shown quite the opposite,²⁰³³ but nevertheless, one needs to be mindful of the specific requirements of FET standard qualified by the link to customary international law when trying to over impose findings made under different standards. In any event, Respondent has already shown that the conduct of the Agency was not arbitrary in any of the instances Claimants' allege and respectfully directs the tribunal to that discussion.²⁰³⁴

1334. Respondent here simply wishes to stress that a threshold for finding of arbitrariness under the international customary law minimum standard of treatment requires “*wholly arbitrary*” conduct,²⁰³⁵ “*manifest arbitrariness falling below international standards*”,²⁰³⁶ or “*something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning*”.²⁰³⁷ Moreover, mere contractual breach certainly does not amount to an arbitrary act in violation of the FET standard, unless it can be shown that the government committed an “*outright and unjustified repudiation of the transaction*” and prevented the creditor from having any remedy to address the problem, or unless it can be shown that the breach of contract was “*motivated by sectoral or local prejudice*”.²⁰³⁸

1335. Finally, Respondent has already explained above the reasons for which Claimants' assertion that due process rights apply in respect to the Ombudsman's control of BD Agro's privatization is erroneous and respectfully directs the tribunal to that section of its submission.²⁰³⁹

4. There was no violation of the FET standard

1336. Claimants argue that the Agency breached the FET standard contained in Article 6 of the Canada-Serbia BIT and Article 2(2) of the Cyprus-Serbia BIT by (i) acting in bad faith; (ii) engaging in a pattern of wrongful conduct with the aim of destroying

²⁰³³ See above Sec.IV.D.2.

²⁰³⁴ See Sec.IV.D.1&3.

²⁰³⁵ *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 115, **RLA-93**.

²⁰³⁶ *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award 26 January 2006, para 194, **CLA-95**.

²⁰³⁷ *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, paras. 608 & 610-617, **RLA-127**.

²⁰³⁸ *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 115, **RLA-93**.

²⁰³⁹ See above Sec.IV.C; see also, Counter-Memorial, para. 689.

Claimants' investment; and (iii) frustrating Claimants' legitimate expectations. Respondent will in turn address and refute each of these allegations.

4.1. The Agency did not act in bad faith

1337. At the outset, it should be noted that good faith in itself is not a source of substantive obligations. This was confirmed by the ICJ in the *Case Concerning Border and Transborder Armed Actions*:

*"The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" [...]; it is not in itself a source of obligation where none would otherwise exist."*²⁰⁴⁰

1338. Therefore, rather than being a separate substantive obligation under the minimum standard of treatment or the autonomous FET standard, good faith determines the manner in which an existing obligation should be fulfilled.

1339. In any case, Claimants absolutely fail to show bad faith on part of the Agency. At the outset, it should be noted that the standard of proof of bad faith is very high under both standards:

*"Although Claimant has avoided formulating this allegation in such terms, the underlying idea is that the PMRA acted in bad faith and launched a review process for reasons unrelated to its mandate and to the international obligations of Canada. The burden of proving these facts rests on the Claimant, in accordance with well established principles on the allocation of the burden of proof, and the standard of proof for allegations of bad faith or disingenuous behavior is a demanding one."*²⁰⁴¹

1340. Claimants argue that there are clear elements of bad faith in the conduct of the Agency, which used *"the provisions of the Privatization Agreement and the Share Pledge*

²⁰⁴⁰ *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment of 20 December 1988, para. 94, **RLA-140**.

²⁰⁴¹ *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, para 137, **RLA-141** (emphasis added); see also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 143, **RLA-84**.

*Agreement 'for purposes other than those for which they were created'".*²⁰⁴² Claimants' argument is based on two alleged instances of bad faith conduct of the Agency – the refusal to release the Pledge with the sole aim of retaining the option to expropriate Claimants' investment²⁰⁴³ and the termination of the Privatization Agreement with the full knowledge that Article 5.3.4. cannot constitute a legitimate ground for termination.

1341. First, with regard to the refusal to release the Pledge, Claimants draw their evidence of bad faith from the recordings of the meetings of the Commission for Control held on 23 April 2015 and 19 June 2015.²⁰⁴⁴ However, Claimants grossly misrepresent what was said in those meetings and the position taken by the Commission.

1342. Namely, Claimants argue that the Commission was fully aware that the pledge should have been released upon the full payment of the purchase price and yet, it deliberately chose not to do so in order to prevent Mr. Obradovic from transferring the Privatized shares.²⁰⁴⁵ Claimants' assertions are based on a purposeful misrepresentation of much of the discussion happening during the two meetings of the Commission.²⁰⁴⁶

1343. To begin with, the purpose of the Pledge, as already explained by Respondent was not simply to secure the full payment of the Purchase Price, rather it allowed the Agency to continue to effectively seek compliance from Mr. Obradovic, i.e. to remedy the breach of the Privatization Agreement, and in the event of his failure to do so and termination - reclaim the shares.²⁰⁴⁷ This had a broader purpose in ensuring the compliance of the buyer with the sum of its contractual obligations, and as shown by Respondent, precisely this concern served as Commission's motivation for refusing the release of the Pledge.²⁰⁴⁸ Namely, Mr. Obradovic, a buyer with an established record of negligence, had already breached the Privatization Agreement, and made it clear that as soon as he was able he would transfer the rights on the shares to a third

²⁰⁴² Reply, para. 1243, quoting *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 300, **CLA-131**.

²⁰⁴³ See Reply, para. 1237.

²⁰⁴⁴ See Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, **CLA-768**; Transcript of the audio recording from meeting of the Commission for Control, 19 April 2015, **CLA-770**.

²⁰⁴⁵ See Reply, paras. 1238-1239.

²⁰⁴⁶ See above Sec.I.D.2.

²⁰⁴⁷ See above Sec.I.D.1.

²⁰⁴⁸ See above Sec.I.D.2.

party, making it effectively impossible for the Agency to ensure compliance with the Privatization Agreement.

1344.Claimants attempt to paint this in quite dramatic terms, however, the reasoning and actions of the Agency were fully justified, especially when taking into account that the Agency had sufficient legal grounds for its refusal to release the Pledge under Article 122 of the Law on Obligations.²⁰⁴⁹ Moreover, Mr. Obradovic was familiar with the Agency's reasons for refusing to release the Pledge,²⁰⁵⁰ and the Agency was in general completely consistent and transparent in its dealings with Mr. Obradovic.

1345.Claimants also contend that the Agency deliberately imposed on Mr. Obradovic non-existent contractual obligations, knowing he would not be able to comply with them, in order to enable the termination of the Privatization Agreement.²⁰⁵¹ However, Claimants again base this statement on a selective (mis)presentation of the statements of the members of the Commission, ignoring the discussion as a whole and omitting relevant information in order to have it conform to their arguments. As shown by Respondent the recordings of the discussions of the Commission show that the Commission engaged in a *bona fide* examination of different contractual options and even at one point considered a certain "loosening" of the conditions.²⁰⁵² Nevertheless, the Commission could not have simply ignored the fact that Mr. Obradovic was in a long-lasting continuous breach of the Privatization Agreement.

1346.Second, Claimants argue that it is evident from the audio recordings of the meeting of the Commission for Control that the Agency decided to terminate the Privatization Agreement despite knowing that a breach of Article 5.3.4. could not constitute grounds for termination under Article 7.1. of the Agreement. This is again, a misrepresentation. The Agency had always understood that it could terminate the Agreement for the breach of said provision on the basis of Article 41(a) of the Law on Privatization. This is even clearly stated in the audio recording Claimants rely

²⁰⁴⁹ See above Sec.I.D.3.

²⁰⁵⁰ See above Sec.I.D.3; see also Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

²⁰⁵¹ See Reply, para. 1240.

²⁰⁵² See above Sec.I.D.2; see also Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 10, **CE-768**; Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 5, **CE-770**.

on,²⁰⁵³ and yet they have conveniently chosen to ignore this part. The Agency's reliance on Article 41(a) of the Law on Privatization is also evident from the Notices the Agency sent to Mr. Obradovic granting him additional time periods to comply with his contractual obligations, which repeatedly state that

*"[i]n the event of failure to comply with the above stated contractual obligations within the additionally granted term as per this Notice, the Privatization Agency will undertake the measures under Article 41a of the Law on Privatization".*²⁰⁵⁴

1347. Finally, Claimants argue that the conduct of the Agency was politically motivated and a result of external pressure from labor unions.²⁰⁵⁵ However, Claimants fail to show any evidence of the supposed "*pressure from labor unions*" having effect on the Agency's actions.²⁰⁵⁶ Quite the contrary, the Agency tended to treat these complaints as a matter of fact and simply forward them to institutions and authorities competent to deal with them.²⁰⁵⁷

1348. In conclusion, the Agency has exhibited a clear and consistent approach towards Mr. Obradovic's breach of the Privatization Agreement which was based on the Agency's understanding and interpretation of the Privatization Agreement and the Law on Privatization and there is no evidence whatsoever that the provisions of the

²⁰⁵³ See above Sec.I.B.3.1.3. Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 2, **CE-768**.

²⁰⁵⁴ Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-31**; Notice of the Privatization Agency on Additional Time Period 22 June 2011, **CE-96**; Notice of the Privatization Agency on Additional Time Period 6 October 2011, **CE-97**; Notice of the Privatization Agency on Additional Time Period 22 December 2011, **CE-32**; Notice on Additional Time Period of 22 June 2012, **RE-15**; Notice of the Privatization Agency on Additional Time Period 31 July 2012, **CE-78**; Notice of the Privatization Agency on Additional Time Period 8 November 2012, **CE-79**.

²⁰⁵⁵ See Reply, para. 1240.

²⁰⁵⁶ See above, Sec.I.B.5.6.

²⁰⁵⁷ See e.g. Transcript of the audio recording from meeting of the Commission for Control dated 23 April 2015, pp. 4-5, **CE-768**. (Ms. Vuckovic: "*So this is it. These are the two topics regarding BD Agro Dobanovci. You also have the rest here in the materials. We have mentioned daily communications we are receiving from the employees and trade unions, wherein they are requesting urgent measures to be taken and stating that they generally have big problems concerning business operations, in particular maintaining production and keeping the cattle alive, which is the core business activity of the subject of privatization. We have stated this as well. One of those from BD Agro Dobanovci who have addressed us also states that salaries are not being paid for a long period, from November 2013, December and so on...even for the entirety of 2014. We have even held a meeting at the request of the director of BD Agro Dobanovci and the bankruptcy trustee. And in oral communication these allegations are false. Bearing in mind that we no longer monitor this, our proposal would be to forward these communications to the competent labor inspectorate and it should act within its competence and request from the subject of privatization to abide by the Labor Law.*") (emphasis added)

Privatization Agreement, including the Share Pledge Agreement, were used for any other purpose than what they were intended for. Simply put, Claimants completely fail to show any bad faith on part of the Agency, let alone satisfy the demanding standard of proof for bad faith.

4.2. There was no pattern of orchestrated conduct aimed at destroying Claimants investment

1349.Claimants’ assertion that “*Serbia engaged in a pattern of wrongful conduct which effectively destroyed Claimants’ investment and thus breached the FET standard*”²⁰⁵⁸ is simply another iteration of their bad faith argument. Respondent reiterates that there is a high standard of proof for bad faith, which is only emphasized by the arbitral awards on which Claimants rely.

1350.Namely, Claimants quote the tribunal in *RosInvest v. Russia*, which was one of the Yukos related cases. The facts of Yukos were quite exceptional and this must be taken into account. These facts included a staggering VAT assessment against Yukos together with an inconsistent approach of the tax authorities in application of tax law to Yukos.²⁰⁵⁹

1351.A particularly significant aspect of the case, underlined by the tribunal in the paragraph quoted by Claimants is that “*despite having used nearly identical structures, no other Russian oil company was subjected to the same relentless and inflexible attacks as Yukos*”. This is in clear contradiction to the case of BD Agro, considering that, as already explained above, the Agency took the same approach as the one in the present case in numerous other privatizations, including with respect to the refusal to release the Pledge until all contractual obligations had been complied with,²⁰⁶⁰ and with respect to the termination of the Privatization Agreement for breach

²⁰⁵⁸ See Reply, para. 1254.

²⁰⁵⁹ This included the inconsistencies between VAT assessments and profit tax assessments by applying tax rules only to the detriment of Yukos, and not when that would have benefited the company; essentially assessing a punitive tax against Yukos for exploiting ambiguous legislation in rather the same manner as many other companies operating on the market, without applying the same treatment to those companies; a 3.8 billion USD repeat offender fine issued to Yukos for conduct pre-dating the tax audit, in departure from previous practice and treatment accorded to other companies; auction sale of the company where the bidders were under Russian control and the winning bidder was a completely unknown company with no real offices and the purchase price was paid with the assistance of the Russian state-owned oil company, all indicating a scheme to bring Yukos’ assets under state control. See *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award, 12 September 2010, para. 620, **CLA-147**.

²⁰⁶⁰ See Sec.I.D.2.2.

of Article 5.3.4. (or provisions equivalent to this provision),²⁰⁶¹ and even with respect to termination after the payment of the last installment of the purchase price.²⁰⁶²

1352. Claimants further rely on *Rompetrol v. Romania* but the circumstances of that case were equally different from the present one as the Yukos case. Namely the *Rompetrol* case concerned state conduct against company directors of the claimant which included arrest, detention, criminal investigations and wiretapping. The tribunal found that

*“[t]here is however no evidence that steps were taken either to assess or to avoid, minimise, or mitigate that possibility of harm, nor has the Respondent so pleaded in its written arguments. On the basis of the procedural irregularities during the criminal investigation of Mr. Patriciu and others ... the Tribunal accordingly holds that to that limited extent the Respondent is in breach of the guarantees accorded to the Claimant by Article 3(1) of the BIT, notably the guarantee of ‘fair and equitable treatment’”.*²⁰⁶³

1353. These irregularities included “*animus and hostility*” towards Mr Patriciu on behalf of the prosecutorial officials which may have affected the authorities’ tactical approach²⁰⁶⁴ and the arrest and attempted imprisonment of claimant’s directors on patently thin grounds put forward in attempt to justify pre-trial detention, with equally baseless repeated applications and what generally seemed to be wilfulness of the prosecutor.²⁰⁶⁵

1354. The *Rompetrol* tribunal nevertheless stressed that

“the Tribunal wishes to make it plain that it would not regard any breach, or indeed any series of breaches, of procedural safeguards provided by national or international law in the context of a criminal investigation or prosecution as giving rise to the breach of an obligation of fair and

²⁰⁶¹ See Sec.I.B.5.2.

²⁰⁶² See Sec.I.B.5.3.

²⁰⁶³ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 278, Award, 6 May 2013, para. 679, **CLA-148**.

²⁰⁶⁴ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 278, Award, 6 May 2013, paras. 645 & 648, **CLA-148**.

²⁰⁶⁵ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 278, Award, 6 May 2013, para. 651, **CLA-148**.

equitable treatment. All will depend on the nature and strength of the evidence in the particular case, on the impact of the events complained about on the protected investor or investment, and on the severity and persistence of any breaches that can be duly proved, as well as on whatever justification the respondent State may offer for the course of events. The Tribunal's finding is based entirely on the facts of the present case."²⁰⁶⁶

1355.As is obvious, both *RosInvest* and *Rompetrol* cases only reinforce the stringent standard of proof necessary for a finding of bad faith. Nothing of the conduct that Claimants invoke can possibly reach that threshold.

1356.Claimants allege that the Agency continuously refused to release the Pledge and approve the assignment of the Privatization Agreement in order to prevent Mr. Obradovic from disposing of BD Agro shares and in order to maintain control over BD Agro.²⁰⁶⁷ Claimants' argument simply makes no sense. The Agency's reasoning in refusing to release the Pledge has already been extensively discussed by Respondent.²⁰⁶⁸

1357.On the other hand, Claimants' argument with regard to the Agency's intention to "*maintain its control over BD Agro*" is novel. However, what Claimants intend by this is unclear, as BD Agro was not within the Agency's control. The Agency was simply controlling Mr. Obradovic's compliance with certain contractual obligations, which he had accepted by entering into the Privatization Agreement. The control over the company itself was always fully in the hands of Mr. Obradovic, and as Respondent explained, Mr. Obradovic was free to manage BD Agro as he deemed fit with the sole exception of not being able to dispose of the shares until he remedied the breach of the Privatization Agreement.²⁰⁶⁹ In any event, subsequent to the termination of the Privatization Agreement, BD Agro was sold in bankruptcy proceedings to a private owner, further undermining the contention that the Agency ever acted with intent to "*maintain its control over BD Agro*".

²⁰⁶⁶ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 278, Award, 6 May 2013, para. 679, **CLA-148**.

²⁰⁶⁷ See Reply, para. 1249.

²⁰⁶⁸ See above Sec.I.D.2; see also Counter-Memorial, paras. 55-57 & 719-720.

²⁰⁶⁹ See above Sec.I.D.4.

1358. With regard to the recommendation of the Ombudsman supposedly having the purpose of realizing the termination of the Privatization Agreement, as explained by Respondent's expert, professor Radovic, the Ombudsman's recommendations had no binding effect at all.²⁰⁷⁰ Moreover, the Ombudsman never actually recommended that the Agency terminate the Privatization Agreement, but rather to finally clarify the status of BD Agro.²⁰⁷¹ Finally, Claimants provide no evidence of influence of the Ombudsman's recommendation on the decision-making process of the Agency when terminating the Privatization Agreement, apart from a mere speculation based on concurrence of events. For a finding of bad faith and conspiracy this cannot possibly be sufficient.

1359. Claimants also argue that the Ministry of Economy was part of this supposed conspiracy against them. Namely, according to Claimants, the report of the Ministry, issued on 7 April 2015, effectively instructed the Agency to terminate the Privatization Agreement.²⁰⁷² As already explained by Respondent, at that time there had already been a long-standing and clear breach of Article 5.3.4. by Mr. Obradovic.²⁰⁷³ Nevertheless, the Ministry of Economy did not request from the Agency to terminate the Privatization Agreement, but rather, to give Mr. Obradovic an additional period of time to remedy the breach. In case that Mr. Obradovic failed to do so, the report simply stated that the Agency "*should undertake the measures within its legal authorization*".²⁰⁷⁴

1360. For Claimants, however, this was deliberate because it was obvious that Mr. Obradovic could not fulfil his obligation.²⁰⁷⁵ However, it is evident from the audio recordings of the sessions of the Commission for Control that the Commission had no such impression. Namely, while the members of the Commission acknowledged the possibility of termination, they never considered it to be *fait accompli*.²⁰⁷⁶ In any case, as already stated, the Agency could not have simply disregarded the fact that Mr. Obradovic was in long and continuous breach the Privatization Agreement. Moreover,

²⁰⁷⁰ Second Expert report of Professor Mirjana Radovic, section II.3.

²⁰⁷¹ Opinion of the Ombudsman of 19 June 2015, **CE-42**.

²⁰⁷² See Reply, para. 1251.

²⁰⁷³ See above, Sec.I.B.4.

²⁰⁷⁴ Report of the Ministry of Economy on the Control over Privatization Agency, 7 April 2015, p. 13, **CE-98**.

²⁰⁷⁵ See Reply, para. 1251.

²⁰⁷⁶ See above, Sec.I.B.3.1.3.

Mr. Obradovic never truly contested the existence of the breach,²⁰⁷⁷ and was given ample opportunity to remedy it.²⁰⁷⁸ It is Mr. Obradovic's utter unwillingness to actually remedy the breach that ultimately led to the termination of the Privatization Agreement.

1361. In conclusion, Claimants construct a flimsy theory of conspiracy between the Agency, the Ombudsman and the Ministry of Economy that finds no support in the record of this case and, as such, does not even come close to satisfying the high standard of proof necessary for a finding of bad faith.

4.3. No legitimate expectations

4.3.1. Legitimate expectations as part of the minimum standard of treatment

1362. Respondent recalls that the fair and equal treatment provided to investors under the Canada-Serbia BIT is limited to the international customary law minimum standard of treatment. For that reason, Claimants' reliance on protection of legitimate expectations as provided under autonomous FET standard is inapposite.

1363. Protection of Claimants' legitimate expectations under the minimum standard of treatment is quite narrow. First, the tribunals applying the minimum standard of treatment generally concur that legitimate expectations do not represent a stand-alone element of the FET. As concluded by the tribunal in *Mesa Power Group v. Canada*:

²⁰⁷⁷ See above, Sec.I.B.3.2. Furthermore, Mr. Obradovic was also involved in a number of other privatizations where the issue of a breach of equivalent provisions to Article 5.3.4. was raised and Mr. Obradovic never protested and actually acted upon the Agency's requests to remedy the breaches. See also Letter from the Agency to Mr. Obradovic, 27 December 2010, **RE-389**; Letter from Mr. Vladimir Kovac to the Agency, 28 January 2011, **RE-391**; Letter from the Agency, 25 February 2011, **RE-288**; Letter from Mr. Obradovic to the Privatization Agency, 4 March 2011, **RE-390**; Letter from the Agency to Mr. Obradovic, 28 January 2011, **RE-409**; Letter from the Agency to Mr. Obradovic, 18 March 2011, **RE-473**; Report from the 9th control of Beotrans (with supplementations), 21 April 2011, **RE-404**. This pattern was also repeated with a previous breach of Article 5.3.4. in the course of the privatization of BD Agro. See also Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 24 February 2009, **RE-99**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 31 March 2009, **RE-100**;

²⁰⁷⁷ Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 13 April 2009, **RE-101**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 1 June 2009, **RE-102**; Letter from BD Agro to the Privatization Agency, 8 July 2009, **RE-405**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 30 July 2009, **RE-** Notice from the Privatization Agency to Mr. Obradovic, 16 October 2009, **RE-384**; Notice from the Privatization Agency to Mr. Obradovic, 8 December 2009, **RE-475**; Email from BD Agro to the Privatization Agency, 18 January 2010, **RE-406**.

²⁰⁷⁸ See Annex I, detailing nine separate notices granting extension of time to Mr. Obradovic, including the notices issued subsequent to the report of the Ministry of Economy.

*“the Tribunal shares the view held by a majority of NAFTA tribunals that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached.”*²⁰⁷⁹

4.3.2. Stable environment

1364. In order to be taken into account, investors' legitimate expectations must meet certain requirements that significantly narrow their scope. This is true both in the context of the minimum standard of treatment and the autonomous FET standard. For example, the tribunal in *Mobil & Murphy v. Canada* found that any legitimate expectations that an investor could have must be:

(i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and

(ii) were, by reference to an objective standard, reasonably relied on by the investor, and

*(iii) were subsequently repudiated by the NAFTA host State.”*²⁰⁸⁰

1365. The *Glamis Gold* tribunal also found that the expectations must be objective and based on specific assurances and commitments.²⁰⁸¹

1366. Similarly, in the context of the autonomous FET standard, the tribunal in *Duke Energy v. Ecuador* stated the relevant rules and factors as follows:

“The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such

²⁰⁷⁹ *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 24 March 2016, para. 502, **RLA-136**. See also, *Waste Management, Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, para. 96, **RLA-093**; *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, para. 296, 18 September 2009, **CLA-126**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012, para. 152, **RLA-139**.

²⁰⁸⁰ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012, para. 152, **RLA-139**.

²⁰⁸¹ *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, paras. 615, 627 & 766, **RLA-127**; see also *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 127, **RLA-138**.

*expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.”*²⁰⁸²

1367. Therefore, only legitimate and reasonable expectations are protected, which is assessed on the basis of all circumstances – both the circumstances generally prevailing in the state and the circumstances directly related to the investment in question. Further, expectations must be content-specific and objective, and as such may arise from the conditions that the State offered, which were, in turn, relied upon by the investor when deciding to invest.

1368. The minimum standard of treatment does not encompass expectations based on general legislation,²⁰⁸³ nor expectations of stable and predictable environment.²⁰⁸⁴ This means that Claimants' reliance on expectations that “*that their business would be conducted in a stable regulatory framework and would be shielded from undue government influence*”²⁰⁸⁵ must fail. Moreover, upon a closer look at the way Claimants formulate this expectation it becomes evident that Claimants misunderstand what is meant by a stable framework.

1369. Claimants rely on the award in *Merrill and Ring v. Canada*,²⁰⁸⁶ where the tribunal stated:

²⁰⁸² *Duke Energy Partners and Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340, **CLA-37**; also quoted by *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 179, **RLA-84**; see also *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 334, **RLA-114**.

²⁰⁸³ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 127, **RLA-138**

²⁰⁸⁴ *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 296, **CLA-126**

²⁰⁸⁵ See Reply, para. 1268.

²⁰⁸⁶ This is a sole decision with a similar finding among tribunals applying the minimum standard of treatment and was not followed by other tribunals.

*“While it is clear that no representations have been made by Canada to induce the Investor to make a particular decision or to engage in conduct that is later frustrated, any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives. Emergency measures or regulations addressed to social well-being are evidently within the normal functions of a government and it is not legitimate for an investor to expect to be exempt from them. Yet, regulations which end-up creating benefits for a certain industry, to the detriment of an investor, might be incompatible with what that investor might reasonably expect from a government.”*²⁰⁸⁷

1370. From the above quote it is clear that the tribunal speaks of the *stability of the regulatory framework* and *interference by change in regulations*. Claimants, however, argue that such expectations were frustrated by the “*unwarranted and unlawful investigation conducted by the Ombudsman*” who had no authority to intervene in the manner he had.²⁰⁸⁸ Essentially, Claimants argue that their expectations have been frustrated by the conduct of the Ombudsman in contravention of the legal rules governing his competence.²⁰⁸⁹ State’s conduct in contravention to legal rules does not amount to breaches of legitimate expectations even under the pronouncement relied upon by Claimants, but may be relevant in the context of other elements of investment protection, such as prohibition of arbitrary conduct, discrimination, or denial of justice.

1371. Claimants attempt to circumvent this by relying on the award in *TECO v. Guatemala* where the tribunal purportedly found that “*the essential expectation in regulatory context is that ‘legal framework will not be applied arbitrarily’*”.²⁰⁹⁰

1372. However, Claimants misrepresent the findings of the tribunal, which cannot assist their legitimate expectations claim. The tribunal actually said the following:

²⁰⁸⁷ *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 233, **CLA-137**.

²⁰⁸⁸ See Reply, para. 1270.

²⁰⁸⁹ See Reply, paras. 1270-1271

²⁰⁹⁰ See Reply, para. 1269, quoting *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, para. 617, **CLA-150**.

*“In the Arbitral Tribunal’s view, in a regulatory context, a distinction needs to be made between the expectations arising from a specific representation that the legal framework will not change in all or in part, and the general expectation that the legal framework will not be applied arbitrarily.”*²⁰⁹¹

1373. The tribunal concluded that “[w]hat matters is whether the State’s conduct has objectively been arbitrary, not what the investor expected years before the facts. A willful disregard of the law or an arbitrary application of the same by the regulator constitutes a breach of the minimum standard, with no need to resort to the doctrine of legitimate expectations. There is therefore no need to dwell any further on the Parties’ arguments on representations and legitimate expectations.”²⁰⁹²

1374. In essence, Claimants’ reliance on *TECO v. Guatemala* is inapposite as the decision does not support a legitimate expectations claim and rather states the obvious - that arbitrary behavior is part of the minimum standard of treatment.

1375. Moreover, as Respondent explained above, BD Agro was not the only privatization where the Ombudsman intervened.²⁰⁹³ There was actually another privatization where Mr. Obradovic was the buyer of PIK Pester, and where the Ombudsman conducted control over the work of the Agency based on the complaints of the employees that the Agency failed to react appropriately to the breaches of that privatization agreement.²⁰⁹⁴ In such circumstances, Claimants’ expectations related to the Ombudsman cannot be deemed reasonable or objective.

1376. In any event, it has been clearly shown by Respondent that the Ombudsman in all instances acted within his powers. Namely, as Respondent’s expert, prof. Radovic explains, Article 1 of the Law on Ombudsman, defines the Ombudsman as “*an independent state body that protects the rights of citizens and controls the work of [...]*

²⁰⁹¹ *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, para. 617-618, **CLA-150**.

²⁰⁹² *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, para. 621-622, **CLA-150** (emphasis added).

²⁰⁹³ See above Sec.I.C.3.

²⁰⁹⁴ *Ibid.*

organizations [...] entrusted with public authority”.²⁰⁹⁵ Professor Radovic goes on to explain:

*“the Ombudsman was expressly authorized to control the legality and proper work of the authorities (Art. 17(2)), including the holders of public authority (such as the Privatization Agency). In case of holders of public authority, naturally, the Ombudsman’s authority was limited to controlling the performance of administrative tasks conferred to a particular organization. Since the Privatization Agency was entrusted to control the privatization process and to follow up on contract performance, in my view the Ombudsman had the authority to look into the case of BD Agro.”*²⁰⁹⁶

1377. There was simply nothing arbitrary about the Ombudsman’s control of the conduct of the Agency in order to ascertain its legality in light of the Law on Privatization.

4.3.3. Contractual obligations cannot serve as legitimate expectations

1378. Claimants also argue that their legitimate expectations were breached by the Agency’s failure to observe the Privatization Agreement, including the Share Pledge Agreement.²⁰⁹⁷ According to Claimants, the Agency frustrated the Claimants legitimate expectations that (i) the Pledge would be released upon the full payment of the Purchase Price; (ii) the Privatization Agreement would not be terminated for reasons other than those stipulated by the Privatization Agreement itself.²⁰⁹⁸

1379. However, tribunals have also come to the conclusion that the legitimate expectations of one party to a contract are not violated by the mere fact that the other party has breached the terms of the contract. In the words of the tribunal in *Glamis Gold*:

“mere contract breach, without something further such as denial of justice or discrimination, normally will not suffice to establish a breach of Article

²⁰⁹⁵ Second Expert report of Professor Mirjana Radovic, para. 44; see also Law on Ombudsman, Article 1, **CE-112**.

²⁰⁹⁶ Second Expert report of Professor Mirjana Radovic, para. 44; see also Second Expert report of Professor Mirjana Radovic, paras. 57-59.

²⁰⁹⁷ See Reply, paras. 1256-1266.

²⁰⁹⁸ See Reply, para. 1261.

1105. Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. ”²⁰⁹⁹

1380. Numerous other tribunals have come to the same conclusion, whether applying the minimum standard of treatment or the autonomous FET standard.²¹⁰⁰ The finding has also been upheld by the award in *Glencore v. Colombia*, which Claimants rely on. Namely, subsequent to the paragraph relied on by Claimants the tribunal goes on to say:

“The question is not so much whether representations and assurances formalized in contracts generate legitimate expectations (they do), but rather whether the subsequent breach by the State of obligations undertaken by contract results in a violation of the FET standard.

[...]

Summing up, different kinds of acts and measures, including contracts between the investor and the State, can give rise to an investor’s legitimate expectations. But a mere contractual breach by the State will not per se result in a violation of the international law FET standard. An additional element (be it the special significance of the breach, an act of puissance publique, loss of a secure and stable legal framework, and so on) is required to trigger international responsibility. ”²¹⁰¹

1381. At the outset, Respondent recalls that the actions of the Agency in refusing to release the Pledge and in terminating the Privatization Agreement were not performed in sovereign capacity.²¹⁰² Respondent also submits that there was no breach of contract and that the Agency acted in all in accordance with the Law on Privatization, and the Privatization Agreement (including the Share Pledge Agreement).

²⁰⁹⁹ *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 615, **RLA-127**.

²¹⁰⁰ See e.g. *Parkerings-Compagniet A.S. v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 344, **RLA-114**; *Gustav F.W. Hamester GmbH & Co. K.G. v. Ghana*, ICSID No. ARB/07/24, Award, 18 June 2010, para. 337, **RLA-115**; *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Final Award, 21 June 2011, para. 292, **RLA-142**.

²¹⁰¹ *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, paras. 1375 & 1378, **CLA-128**.

²¹⁰² See above Sec.IV.A.

1382.As for Claimant’s expectation that the Pledge would be released upon the payment of the Purchase Price, Respondent has already explained that the purpose of the Pledge was much broader than to secure the payment of the Purchase Price. As Professor Radovic explains, the purpose of a pledge on the shares of a privatized company differs from the purpose of pledge in general. Namely, rather than securing collection of receivables, the pledge in the context of privatization “*secured the Privatization Agency’s (future and conditional) right to claim shares back from the buyer in case his potential breach of contract eventually led to termination of the privatization agreement.*”²¹⁰³ This is clearly derived from the fact that Article 41a(2) of the Law on Privatization prescribes that subsequent to the termination of a privatization agreement privatized shares are to be returned to the Share Fund,²¹⁰⁴ and the fact that there was no possibility of selling the shares by activation of a pledge in order for the purchase price to be collected, which would be in line with the general purpose of pledge as means of security. Ultimately, this means that, as long as there existed reasons and possibility for termination, the pledge had a purpose to serve.

1383.Claimants argue that the Agency retained the Pledge with the sole purpose of preventing Mr. Obradovic from transferring the shares, blatantly disregarding the purpose of the Pledge.²¹⁰⁵ However, as explained above, the Agency was precisely following the purpose of the Pledge. Namely, the Agency was responsible for controlling Mr. Obradovic’s compliance with the terms of the contract. Once a breach of the contract was established,²¹⁰⁶ the Agency could not have, in good faith, released the Pledge, as there was still the request for the breach of the Agreement to be remedied. Releasing the Pledge would make that request meaningless as it was evident that Mr. Obradovic intended to transfer the shares to third party. Also, due to the breach, there was the possibility for termination of the Privatization Agreement remained, regardless of the payment of the purchase price, and the Agency had to retain the ability to comply with Article 41a(2) of the Law on Privatization. Moreover, the Agency entitled to refuse to release the Pledge under Article 122 of the Law on Obligations.²¹⁰⁷

²¹⁰³ Second Expert report of Professor Mirjana Radovic, para. 47.

²¹⁰⁴ 2001 Law on Privatization, Article 41a(2), **CE-220**.

²¹⁰⁵ See Reply, para. 2163.

²¹⁰⁶ See Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-31**.

²¹⁰⁷ See above Sec.I.D.3.

1384.Claimants also argue that by not releasing the Pledge the Agency essentially re-imposed on Mr. Obradovic the obligation not to transfer the shares of BD Agro prescribed by Article 5.3.1. of the Privatization Agreement which expired two years after the conclusion of the contract.²¹⁰⁸ However, this argument is inapposite. Simply because, due to its effect, the refusal to release the Pledge may seem as re-imposing an obligation that has been fulfilled does not mean that it really is so. Moreover, there is no substantial difference in the effect of having the Pledge shares in the period between 2007, when this obligation lapsed, and 8 April 2011, when the Purchase Price was paid, which is considered as legitimate by Claimants, and on the other hand, the effect of having the Pledge in the subsequent period.

1385.Finally, as already explained, the retention of the Pledge had no effect on Mr. Obradovic's ability to manage BD Agro and actually had no adverse effect on the operation of the company.

1386.Claimants' second expectation was that the Privatization Agreement would not be terminated for reasons other than those provided by Article 7.1 of the Privatization Agreement. However, Mr. Obradovic was always aware that the Agency applied the Law on Privatization, as the law governing the contract, in the course of its work. This law was a part of the contractual framework accepted by Mr. Obradovic when he entered into the Privatization Agreement. The plain reading of Article 41(a) of the Law on Privatization clearly shows that a privatization contract can be terminated both on the grounds explicitly listed in the contract,²¹⁰⁹ and because the buyer "*disposes of the property of the subject of privatization contrary to provisions of the agreement*"²¹¹⁰. Moreover, Mr. Obradovic was dully warned of the consequences of the failure to remedy the breach of Article 5.3.4 of the Privatization Agreement from the moment the breach was established, and directed to Article 41(a) of the Law on Privatization as the legal grounds for imposing those consequences.²¹¹¹ Therefore, the grounds for termination could not have come as surprise to him.

²¹⁰⁸ See Reply, para. 2164.

²¹⁰⁹ 2001 Law on Privatization, Article 41a(1)(7), **CE-220**.

²¹¹⁰ 2001 Law on Privatization, Article 41a(1)(3), **CE-220**.

²¹¹¹ Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-31**; Notice of the Privatization Agency on Additional Time Period 22 June 2011, **CE-96**; Notice of the Privatization Agency on Additional Time Period 6 October 2011, **CE-97**; Notice of the Privatization Agency on Additional Time Period 22 December 2011, **CE-32**; Notice on Additional Time Period of 22 June 2012, **RE-15**; Notice of

1387. Claimants also argue that the Agency terminated the Privatization Agreement for a breach that it knew did not exist.²¹¹² This is entirely untrue. First, Claimants state that this was evident from the audio recordings of the sessions of the Commission for Control, but it is unclear what they are referencing as the Agency not for a second wavered from its position that there was a breach of Article 5.3.4. Moreover, Mr. Obradovic himself accepted that there was a breach.²¹¹³ Further, Mr. Obradovic was well aware of the consequences because this was not the first time he was involved in this type of situation. Namely, he was involved in a number of other privatizations as the buyer where the Agency determined a breach of equivalent provisions to Article 5.3.4. in a similar manner as in the present case. Mr. Obradovic never protested these breaches and actually acted upon the Agency's requests to remedy them.²¹¹⁴ The same applies to a previous breach of Article 5.3.4 in the course of privatization of BD Agro which happened in 2009.²¹¹⁵

1388. Even if the Tribunal accepts that contractual breaches can frustrate legitimate expectations, these expectations must still be reasonable to enjoy protection.²¹¹⁶ Considering the sheer number of times Mr. Obradovic was forewarned that the contract can be terminated on the basis of Article 41a of the Law on Privatization due to violation of Article 5.3.4 it is confounding that he would come to expect precisely the opposite.

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

²¹¹² See Reply, para. 1265.

²¹¹³ See above, Sec.I.B.3.2.

²¹¹⁴ See Letter from the Agency to Mr. Obradovic, 27 December 2010, **RE-389**; Letter from Mr. Vladimir Kovac to the Agency, 28 January 2011, **RE-391**; Letter from the Agency, 25 February 2011, **RE-288**; Letter from Mr. Obradovic to the Privatization Agency, 4 March 2011, **RE-390**; Letter from the Agency to Mr. Obradovic, 28 January 2011, **RE-409**; Letter from the Agency to Mr. Obradovic, 18 March 2011, **RE-473**; Report from the 9th control of Beotrans (with supplementations), 21 April 2011, **RE-404**.

²¹¹⁵ See above Sec.I.B.3.3.3; see also Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 24 February 2009, **RE-99**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 31 March 2009, **RE-100**;

²¹¹⁵ Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 13 April 2009, **RE-101**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 1 June 2009, **RE-102**; Letter from BD Agro to the Privatization Agency, 8 July 2009, **RE-405**; Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 30 July 2009, **RE-** Notice from the Privatization Agency to Mr. Obradovic, 16 October 2009, **RE-384**; Notice from the Privatization Agency to Mr. Obradovic, 8 December 2009, **RE-475**; Email from BD Agro to the Privatization Agency, 18 January 2010, **RE-406**.

²¹¹⁶ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012, para. 152, **RLA-139**; *Duke Energy Partners and Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340, **CLA-37**.

1389. In conclusion, what Claimants invoke as their legitimate expectations is not actually protected as such in arbitral practice, neither under the minimum standard of treatment, nor the autonomous FET standard. Even if the tribunal were to find differently, none of Claimants' alleged expectations are reasonable. Namely, in the circumstances where Claimants are aware that the Ombudsman has the competence to control the conduct of the Agency when it controls compliance with the privatization contracts, and where they have been forewarned of the possibility of the termination of the Privatization Agreement, their expectations that this could not have happened cannot be deemed reasonable.

F. NO VIOLATION OF THE UMBRELLA CLAUSE

1390. Sembi relies on the MFN clause contained in the Cyprus-Serbia BIT in order to avail itself of the umbrella clause in Article 2(2) of the UK-Serbia BIT which provides that “*each Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*”.²¹¹⁷ On this basis, Sembi alleges that the Agency's refusal to release the Pledge of BD Agro shares after the payment of the Purchase Price in full and the termination of the Privatization Agreement violated the umbrella clause.

1391. *First*, Respondent recalls its position elaborated above in the context of the non-impairment clause that the MFN clause does not allow for importation of rights that are not already contained in the basic treaty.²¹¹⁸ In the context of the umbrella clause, Respondent further submits that the *ejusdem generis* principle requires that both the basic treaty and the treaty invoked by Claimant contain a provision dealing with the same subject-matter.²¹¹⁹ Even if the substantive protection of the MFN clause were to be set wide, contractual breaches cannot be seen as a matter regulated by an investment treaty which does not already contain an umbrella clause, and thus importing it would go against the *ejusdem generis* principle.²¹²⁰ Consequently, considering that the Cyprus-Serbia BIT does not contain an umbrella clause, none can

²¹¹⁷ See Reply, para. 1274.

²¹¹⁸ See above Sec.IV.D.1.

²¹¹⁹ *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award, 6 March 1956, UNRIAA Volume XII, pp. 83-153, p. 107, **RLA-156**.

²¹²⁰ See *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Final Award, 21 June 2011, para. 184, **RLA-142**.

imported through the operation of the MFN clause contained in Article 3(1) of this BIT.

1392. *Second*, even if Sembi could rely on the umbrella clause from Article 2(2) of the UK-Serbia BIT, the conditions for its application have not been met in the present case. Claimants attempt to disprove Respondent's previous objections²¹²¹ by arguing that (i) Sembi can avail itself of the protection of the umbrella clause even though it is not a party to the Privatization Agreement;²¹²² (ii) Serbia can be held liable for the violation of the umbrella clause even though itself is not party to the contract, because the conduct of the Agency is attributable to it;²¹²³ (iii) an umbrella clause can be violated by actions that do not constitute exercise of sovereign powers.²¹²⁴ Each of these arguments shall be refuted in turn.

1393. Claimants argue that the UK-Serbia BIT requires only that the State has entered into an obligation ("any obligation") "with regard to the investments of the investors" and there is no requirement that the state had entered into this obligation *directly* with the investor.²¹²⁵ However, Claimants ignore the generally upheld requirement of privity of contract, namely, that the contract needs to be concluded between the protected investor and the host state.²¹²⁶ The requirement has recently been upheld by the Tribunal in *WNC v. Czech Republic*:

"To summarise, the Claimant's contention that there is no requirement of privity in relation to umbrella clauses finds no authoritative support in the case law of international investment tribunals. To the contrary, tribunals have rather consistently resolved that they have no jurisdiction under

²¹²¹ See Counter-Memorial, paras. 752-760.

²¹²² See Reply, paras. 1276-1279.

²¹²³ See Reply, paras. 1280-1282.

²¹²⁴ See Reply, paras. 1283-1284.

²¹²⁵ See Reply, para. 1276.

²¹²⁶ See e.g. *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case no. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 223, **RLA-151**; *Azurix Corp. v. Argentine Republic*, ICSID Case no. ARB/01/12, Award, 14 July 2006, para. 52, **CLA-39**; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Application for Annulment, 25 September 2007, para. 95(b), **RLA-152**; *Limited Liability Company Amto v. Ukraine*, SCC Case no. 080/2005, Final Award 26 March 2008, para. 110, **RLA-90**; *EDF (Services) Limited v. Romania*, ICSID Case no. ARB/05/13, Award 8 October 2009, para. 318, **RLA-87**, *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Final Award, 21 June 2011, para. 185, **RLA-142**.

umbrella clauses to consider contractual obligations between host states and investors' locally incorporated subsidiaries.

*If it were necessary to do so, the Tribunal would uphold the requirement of privity even for generally worded umbrella clauses, which are intended to give effect to legal commitments entered into by the host state with regard to investments, not to change their scope or content.*²¹²⁷

1394. Clearly the requirement has not been met in the present case as the parties to the Privatization Agreement are Mr. Obradovic and the Agency.²¹²⁸

1395. Claimants attempt to support their claim with regard to Sembi by referring to the awards in *Continental Casualty v. Argentina* and *Amto v. Ukraine* in order to assert that the underlying contract can be signed by an entity other than the investor.²¹²⁹ However, these awards refer to a *subsidiary company of the investor* as the original party to the contract.²¹³⁰ This is significantly different from Sembi, which, as Respondent has already explained,²¹³¹ did not even exist at the time when Mr. Obradovic concluded the Privatization Agreement with the Agency,²¹³² and thus the Agency could not have possibly entered into an obligation “*with regard to [Sembi’s] investment*”.

1396. Moreover, it is not entirely clear that these awards support Claimants position. As noted by the WNC tribunal in relation to the statement in *Continental Casualty v. Argentina* award quoted by Claimant:

“This statement is seemingly in conflict with the cases considered above. However, there are a number of reasons why Continental Casualty should not upset the otherwise consistent jurisprudence on the privity objection. First, in making this statement, the tribunal was referring to obligations of

²¹²⁷ *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, paras. 334-335, **RLA-153**.

²¹²⁸ Privatization Agreement with Annexes, **CE-17**.

²¹²⁹ See Reply, paras. 1277-1278.

²¹³⁰ See *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 297, **CLA-151**; *Limited Liability Company Amto v. Ukraine*, SCC Case no. 080/2005, Final Award 26 March 2008, para. 110, **RLA-90**.

²¹³¹ See Counter-Memorial, para. 753.

²¹³² See Extract from the Department of Register of Companies and Official Receiver concerning Sembi, **RE-142**, showing that the company was incorporated on 31 December 2007, more than two years after the conclusion of the Privatization Agreement.

the host state in general and not contractual promises in particular. Second, the tribunal did not ultimately pursue its investigation of whether contractual obligations of Argentina were justiciable under the umbrella clause because it had already decided Argentina could rely on the defence of necessity with respect to those obligations. As such, it did not need to conduct a full analysis of the issue or engage with cases that had resolved similar questions. Finally, it commented that the contracts in question "could ... be considered as guaranteed by the umbrella clause, subject to the caveat that they were not directed to foreign investors nor specifically addressed to their investments". Accordingly, it is not apparent that the contracts would have fallen under the umbrella clause even if the tribunal had taken this question to its conclusion."²¹³³

1397. On the other hand, the award in *Amto v. Ukraine* clearly upheld that where contractual obligations have been undertaken by a separate legal entity from the state, the umbrella clause has no direct application.²¹³⁴ Claimants attempt to circumvent this by arguing that it is sufficient that the conduct of such entity be attributable to the state for its liability under international law standards. This, however, does not correspond to the prevailing arbitral practice on the issue.

1398. As expressly clarified by the tribunal in *EDF v. Romania*:

*"the attribution to Respondent of AIBO's and TAROM's acts and conduct does not render the State directly bound by the ASRO Contract or the SKY Contract for purposes of the umbrella clause."*²¹³⁵

1399. The question of attribution under international law simply does not arise in the umbrella clause context but liability is resolved in accordance with national law:

"In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach

²¹³³ *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, para. 333, **RLA-153**.

²¹³⁴ *Limited Liability Company Amto v. Ukraine*, SCC Case no. 080/2005, Final Award 26 March 2008, para. 110, **RLA-90**.

²¹³⁵ *EDF (Services) Limited v. Romania*, ICSID Case no. ARB/05/13, Award 8 October 2009, para. 318, **RLA-87**.

of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.”²¹³⁶

1400. In any event, Respondent has already explained in detail that the actions of the Agency are not attributable to Serbia.²¹³⁷

1401. Finally, contrary to Claimant’s assertions,²¹³⁸ there is substantial arbitral practice showing that the umbrella clause can only be violated through acts that constitute exercise of sovereign powers.²¹³⁹ In that sense, Respondent reiterates that the conduct complained of by Claimant was not performed in sovereign capacity. This has been explained in detail above, and Respondent respectfully directs the tribunal to that discussion.²¹⁴⁰

1402. *Third*, even if the umbrella clause were applicable, the conduct complained of does not constitute a violation. Claimant in this regard refers to the Agency’s refusal to

²¹³⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 96, **RLA-155**. See also, *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 346, **RLA-115** (“a contractual obligation between a public entity distinct from the State and a foreign investor cannot be transformed by the magic of the so-called ‘umbrella clause’ into a treaty obligation of the State towards a protected investor”).

²¹³⁷ See above Sec.III.

²¹³⁸ See Reply, paras. 1283-1284.

²¹³⁹ See e.g. *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case no. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260, **RLA-151**; *El Paso Energy International Company v. Argentine Republic*, ICSID Case no. ARB/03/15, Decision on Jurisdiction of 27 April 2006, para. 79, **CLA-19**; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, paras. 108-109, **RLA-91**; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 310, **CLA-52**; *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 126, **RLA-77**.

²¹⁴⁰ See above Sec.IV.C.

release the pledge and the termination of the Privatization Agreement.²¹⁴¹ As already explained, the Agency was fully within its legal rights when it refused to release the pledge. Namely, under Article 122(1) of the Law on Obligations, the Agency did not have to release the pledge for as long as the Buyer did not comply with his obligations under Article 5.3.4 of the Privatization Agreement.²¹⁴²

1403. With regard to the termination of the Privatization Agreement, Claimants again allege that this was done in violation of its plain language and is thus, also a violation of the umbrella clause.²¹⁴³ However, the Privatization Agreement was terminated on the grounds of Article 41a of the Law on Privatization, as extensively discussed by Respondent.²¹⁴⁴ Claimants also argue that the termination after the full payment of the purchase price was unlawful. This is contradicted by the existing court practice of Serbian Courts.²¹⁴⁵ Moreover, that such practice is not unlawful has been recognized by Claimants themselves,²¹⁴⁶ and thus, they are now contradicting their own statements.

1404. In conclusion, Sembi cannot rely on the umbrella clause from the UK-Serbia BIT, and even if there is no violation.

V. QUANTUM

A. INTRODUCTION

1405. In this chapter, Respondent will discuss Claimants' compensation claim, specifically:

(A) erroneous and unproved factual assumptions concerning BD Agro's ownership over land (B); causality (C); various land valuations invoked by Claimants to show that they should not be relied upon when determining the value of BD Agro's land

²¹⁴¹ See Reply, paras. 1285-1286.

²¹⁴² See above Sec.I.D.3.

²¹⁴³ See Reply, para. 1286.

²¹⁴⁴ See above Sec.I.B.5.

²¹⁴⁵ See Counter-Memorial, paras. 100-104.

²¹⁴⁶ See Reply, para. 410. (“*To be clear: the Claimants are not arguing that a privatization agreement cannot be terminated after the payment of the purchase price for violation of the buyer’s other essential obligations relating, for example, to compliance with the agreed social program for the employees of the privatized company. They argue—and show—that the Privatization Agreement could not be terminated for the alleged violation of Article 5.3.4. alone after payment of the full purchase price and the fulfilment of all (other) contractual obligations*”).

(D); summarize its own expert's valuation of all BD Agro's land valued by Claimants' experts (E); discuss whether BD Agro's business should be valued as a going concern (F); summarize findings of Mr. Cowan's second report and his valuation of BD Agro (G); discuss calculation of interest (H); and discuss the value of Claimants' interest in BD Agro's equity (I).

1406. The present Rejoinder is accompanied by the second report of Mr. Sandy Cowan, Respondent's financial expert, but also by a report of Ms. Danijela Ilic, an experienced real estate expert.²¹⁴⁷

1407. Finally, Respondent would also like to address Claimants' allegation that they could not verify the amount of applicable taxes in the BD Agro's valuation due to Serbia's failure to produce relevant documents.²¹⁴⁸ This is a completely inappropriate allegation, especially considering that Claimants themselves state that they "*trust that Serbia diligently searched its archives and that the documents are missing simply because they are unavailable.*"²¹⁴⁹ Indeed, Respondent diligently searched for these documents but they could not be located.

B. THE REASONS FOR BD AGRO'S OVERVALUATION, IN PARTICULAR THE LAND THAT DOES NOT BELONG TO IT

1408. Claimants seek compensation for alleged breaches in the amount of at least EUR 81 million.²¹⁵⁰ This immediately raises the question how could a company, which was bought for about EUR 5.5 million in 2005²¹⁵¹ see its value skyrocket over the course of ten years until 21 October 2015. Obviously, BD Agro was not Amazon or Apple, it was a struggling agricultural company and it did not suddenly discover an oil reserve or gold on its land. There are several answers to the above question:

- i. One part of the answer lies in the fact that Claimants and their experts have valued BD Agro pretending that it was a company without problems, while in

²¹⁴⁷ Second Expert Report of Sandy Cowen & Expert Report of Ms. Danijela Ilic.

²¹⁴⁸ See Reply, Chapter VI(D)(2)(d) ("*The Claimants are unable to verify the amount of applicable taxes due to Serbia's failure to produce relevant documents*").

²¹⁴⁹ Reply, para. 1378.

²¹⁵⁰ See Reply, para. 1450, and Second Expert Report of Richard Hern, para. 202.

²¹⁵¹ See Privatization Agreement, Article 1.2, **CE-17**.

reality it was on the verge of bankruptcy, not only at the valuation date but years before.²¹⁵² This is immediately obvious from the fact that its bank accounts were permanently blocked from 8 March 2013 (for EUR 7 million) and remained so until the valuation date.²¹⁵³ The company's financial sickness has been thoroughly demonstrated by Mr. Cowan, who stated that it could not be considered a going concern.²¹⁵⁴

- ii. Another part of the answer can be found in the fact that Claimants grossly overvalue BD Agro's land.
- iii. Finally, a significant part (over 40%) of the land that Claimants present as being in BD Agro's ownership cannot be taken into account as a basis for compensation. Specifically, out of approximately 936ha of the land claimed to be BD Agro's, approximately 394ha is either not in the company's ownership or its ownership is disputed. This has been noted in a valuation prepared for the purpose of BD Agro's sale in the bankruptcy proceedings, which did not take into account such land.²¹⁵⁵

1409. In light of all these facts, the value of BD Agro diminishes to nil, as demonstrated by Mr. Cowan, Respondent's financial expert.

1410. Moreover, there is another consideration that could not be seen by analysis of financial reports and therefore was not mentioned by previous valuers - only an analysis of years of BD Agro's transactions has revealed the extent of mismanagement of BD Agro by Mr. Obradovic, Mr. Rand and their associates, who were ruining the company by their financial machinations and were draining its value and cash for years. They have gone that far that the company actually paid for its own privatization.²¹⁵⁶

1411. As already mentioned, BD Agro's accounts were blocked for about two and a half years before the termination of the Privatization Agreement. Since the end of 2014,

²¹⁵² Second Expert Report of Sandy Cowan, paras. 3.15 & 3.16.

²¹⁵³ Second Expert Report of Sandy Cowan, para. 3.16.

²¹⁵⁴ Second Expert Report of Sandy Cowan, paras. 3.10-3.21.

²¹⁵⁵ See Report on evaluation of market value of bankruptcy debtor's property and evaluation of debtor as legal entity "BD AGRO" ad Dobanovci in bankruptcy on 30 June 2018 (Mr Bodolo valuation), **CE-511**, as well as his list of valued property submitted as **RE- 553**; See, also, list of BD Agro's property that was not sold, dated 30 June 2018, **RE-451**.

²¹⁵⁶ See above Sec.IF.

the company was on the verge of bankruptcy. On 21 October 2015, its total liabilities were between EUR 43.8 million and EUR 61.2 million on any count.²¹⁵⁷ This could not be possibly offset by its business value, as the company was practically not operating. Claimants well know that, as they were part of the whole operation for years, together with Mr. Obradovic. While the company had surplus land, whose sale was liberally used to offset losses by Mr. Obradovic, it also had a problem that a large part of the land was actually not BD Agro's property (although recorded in the cadastre) or was subject to disputes. In such situation, it does not come as a surprise that BD Agro's value at the valuation date was nil, as demonstrated in more detail by Mr. Cowan.

1412. Claimants blatantly ignore the land issue in their compensation claim. According to a valuation report by Mr. Bodolo, prepared in the bankruptcy proceedings, BD Agro's total claimed land is approximately 936ha, out of which 542 may be valued as BD Agro's property, while the rest of 394ha had to be excluded from the valuation, for the following reasons:

*"The difference between the surface in ownership which has been recorded as the ownership of the bankruptcy debtor in the land registry extracts of 936ha 20ar 45m² and surface which is the subject of valuation (and sale) of 542 ha 05ar20 originates from the plots and parts of the plots which were allocated to the employees and Municipality of Zemun in the previous period for the construction of family housing facilities, and which change was not implemented in the Republic Geodetic Authority, as well as the plots which are the subject of court disputes which have not been finally solved, land which may be the subject to restitution, as well as the land which should have been subject of expropriation, and the real consequence of which may be the deletion of the ownership right."*²¹⁵⁸

1413. Therefore, Claimants factor into their valuation BD Agro's ownership over the land that is *not* in its ownership because it was given away (to employees to build family houses or to the local municipality of Zemun) or was subject to expropriation or

²¹⁵⁷ See Second Expert Report of Sandy Cowan, para. 2.4.

²¹⁵⁸ Report on evaluation of market value of bankruptcy debtor's property and evaluation of debtor as legal entity "BD AGRO" ad Dobanovci in bankruptcy on 30 June 2018 (Mr Bodolo valuation), p. 11, **CE-511**. See also p. 13 of Mr. Bodolo valuation.

restitution (denationalization). Mr. Bodolo notes that the changes of ownership were not implemented through the cadaster, so BD Agro remains inscribed as owner but in reality it is not. Further, there is the land whose legal status is controversial and is subject to court disputes, "*the real consequence of which may be the deletion of the ownership right*". Therefore, BD Agro either does not have ownership over significant parts of "its" land, or such ownership is subject to controversy, as also confirmed by its bankruptcy administrator in the sales documentation.²¹⁵⁹ All this means that this land should not be taken into account in valuation of the company.

1414. Claimants must be very well aware of this fact. Mr. Obradovic and Mr. Rand, as well as their associates, were for years involved in BD Agro's operations. It would be astonishing if they did not know anything about the fact that almost one half of its land was not in company's ownership or was subject to controversy. Further, Mr. Rand had this information at its disposal from the bankruptcy proceedings, both as a creditor, and through the fact that Mr. Broshko bought the sales documentation, which clearly flagged this information.²¹⁶⁰ Nevertheless, Mr. Rand chose to ignore that fact.

1415. Obviously, an accurate determination of BD Agro's ownership over the land is an essential prerequisite for the part of claim for compensation made on the basis of the value of this land. Claimants have failed to carry their burden in proving that the land in question really belongs to BD Agro and should be included in the valuation. In contrast to that, Respondent has showed, including by the evidence known to and submitted by Claimants themselves, that over 40% of the land evaluated by Claimants experts is not in ownership of BD Agro or its ownership is in dispute, so it should not be taken into account in valuation. On this basis, Mr. Cowan has been asked to provide also an alternative valuation of the company, taking this into account.

1416. Mr. Cowan was instructed to use Ms. Ilic's valuation, but also findings in Mr. Bodolo's report, in particular his determination that substantial part of BD Agro's land is subject to ownership controversy. Accordingly, Mr. Cowan has provided alternative calculations, both under bankruptcy scenario and a going concern scenario. In addition, under both scenarios Mr. Cowan provides calculations of BD Agro's value

²¹⁵⁹ See Documentation required for sale of bankruptcy debtor - BD Agro ad Dobanovci, dated March 2019, p. 2, **RE-559**.

²¹⁶⁰ See Third Witness Statement of Erinn Broshko, para. 32; see, also, Sales documentation for BD Agro, p. 2, **RE-559**.

on the basis of all its land (assuming that there is no ownership controversy) and of only part of its land taking into account the ownership controversy, as will be explained below. Here, Respondent would like to clarify that although these alternative calculations have been prepared for the benefit of the Tribunal, its position is that only a bankruptcy scenario taking into account the valuation of undisputed part of BD Agro's land is the proper basis for establishing the fair market value of the company. The valuation based on this scenario yields the result that is fully in accordance with the dark reality that has been exposed in Respondent's submissions: after years of mismanagement, a company that had been initially bought for approximately EUR 5.5 million became worthless by October 2015.

C. ON CAUSALITY

1417. The Parties agree that payment of compensation presupposes a causal link between a treaty breach and the injury suffered for which compensation is sought.²¹⁶¹

1418. According to Claimants, the termination of the Privatization Agreement and the transfer of the Buyer's shares to the Agency were expropriatory and caused them injury that needs to be compensated. Interestingly, Claimants' discussion of causality does not state, at least not expressly, that they suffered damage due to alleged violations of other Respondent's obligations under the BITs by the termination. Also, they do not state expressly that other measures complained of (refusal to release the Pledge and refusal to consent to assignment of the shares) caused them damage that requires compensation.

1419. The arbitral tribunal *Bilcon v. Canada* has provided a useful summary of international standards relating to causality:

"Authorities in public international law require a high standard of factual certainty to prove a causal link between breach and injury: the alleged injury must "in all probability" have been caused by the breach (as in Chorzów), or a conclusion with a "sufficient degree of certainty" is required that, absent a breach, the injury would have been avoided (as in Genocide). While the facts of the Genocide case were of course markedly

²¹⁶¹ See Reply, para. 1288; Counter-Memorial, para. 765.

different from those underlying the present arbitration, there is an important similarity: the ICJ, as the Tribunal in the present case, was confronted with a situation of factual uncertainty, where in the view of one of the parties, the same injury would have occurred even in the absence of unlawful conduct.

*An even stricter approach was established in Nordzucker, where the tribunal enquired whether the State's conduct "necessarily" led the investor to act in ways that harmed its profitability."*²¹⁶²

1420. On this basis, the *Bilcon* tribunal formulated the causality test as follows:

*"the test is whether the Tribunal is "able to conclude from the case as a whole and with a sufficient degree of certainty" that the damage or losses of the Investors "would in fact have been averted if the Respondent had acted in compliance with its legal obligations" under NAFTA. Alternatively, the Tribunal must be convinced that the Investors' alleged injury would, "in all probability", not have occurred if the NAFTA violation had not been committed."*²¹⁶³

1421. Claimants seek to establish causality between the termination of the Privatization Agreement and the alleged loss of profits that would have been obtained by future activity of BD Agro in the following way:

*"Was it not for Serbia's unlawful actions, BD Agro would have implemented the prepack reorganization plan and continued its operations. The reorganization had been already agreed with and approved by BD Agro's creditors - who believed in BD Agro's potential."*²¹⁶⁴

1422. As has been discussed above, in the chapter about BD Agro's bankruptcy proceedings, the approval of the Amended plan by BD Agro's creditors, which is mentioned by Claimants, was actually revoked on appeal.²¹⁶⁵ Further, it is important to note that BD

²¹⁶² *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 110-111, **RLA-154**.

²¹⁶³ *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 114, **RLA-154**.

²¹⁶⁴ Reply, para. 1291.

²¹⁶⁵ See Sec.I.G.

Agro tried to avoid having Banca Intesa as the majority creditor in Class A of secured creditors by overvaluing its land property, and that Banca Intesa challenged the Amended plan *inter alia* on this basis.²¹⁶⁶ Given (i) Banca Intesa's opposition to the pre-pack reorganization plan, (ii) its continuous seeking that BD Agro be put into bankruptcy and (iii) opposition to company's reorganization, it is certain that any new pre-pack reorganization plan prepared by Claimants' controlled management would face considerable obstacles in its adoption, delays due to appeals and possible veto.²¹⁶⁷ Therefore, its adoption was not probable or certain at all, regardless of the termination of the Privatization Agreement. This conclusion is augmented by Mr. Cowan's detailed opinion that it was not likely that the proposed pre-pack reorganization plans would work, even if adopted.²¹⁶⁸ All this clearly indicates that the purported causality invoked by Claimants (had there been no termination, BD Agro would have become a profit-making company and there would be no bankruptcy) is simply not realistic, let alone that there was "a sufficient degree of certainty" or "all probability" that Claimant's rosy scenario would materialize. This is even more so, considering Mr. Obradovic's record of mismanagement in BD Agro and other companies that he privatized and then brought to destruction.²¹⁶⁹

1423. In conclusion, Claimants have failed to establish causality, which is the necessary step in proving damages.

D. LAND VALUATIONS INVOKED BY CLAIMANTS SHOULD NOT BE RELIED UPON

1424. Valuation of BD Agro's land is a major factor in valuation of the company as a whole. Claimants' expert Dr. Hern makes his own assessment of the value of BD Agro's land, but in that he also relies on previous valuations prepared by Mr. Mrgud and Confineks.²¹⁷⁰ The relevant part of Dr. Hern's report has been positively reviewed by

²¹⁶⁶ See Objections of Banca Intesa to Amended pre-pack reorganization plan dated 7 May 2015, pp. 2-7, **RE-460**; Appeal of Banca Intesa dated 30 July 2015, **CE-354**. See Section II Reasons related to the content of the reorganization plan, **CE-354**.

²¹⁶⁷ See above Sec.I.G..

²¹⁶⁸ See Second Expert Report of Sandy Cowan, paras. 3.20 & 3.21; Expert Report of Sandy Cowan, paras. 5.1-5.3.

²¹⁶⁹ See Sec.I.F.

²¹⁷⁰ Expert Report of Richard Hern, Sec. 3.2.3.

Mr. Grzesik, who also provides his own assessment of the value of BD Agro's land.²¹⁷¹ All these reports have been reviewed by Ms. Ilic and found to have serious flaws, which make them unreliable. They will be considered in turn.

1. Dr. Hern's land "valuation"

1425. Respondent's Counter-Memorial mentioned a number of deficiencies in Dr. Hern's valuation of BD Agro's land which were identified in Mr. Cowan's expert report.²¹⁷² Now Respondent also submits expert report of Ms. Ilic, which in detail discusses Dr. Hern's "valuation" and demonstrates that it is not in accordance with accepted international standards and should not be relied upon.²¹⁷³ In short, Ms. Ilic shows that:

- Dr. Hern's exercise is methodologically flawed because it is not clear which valuation standards he applies in his "valuation" and whether he performs an "valuation" or "assessment";
- Dr. Hern does not consider the specific factors affecting the price of particular land plots (size, location etc), but values the land according to its category and a total size within the category.
- when determining the price of the land, Dr. Hern predominantly uses the Tax Administration's assessments of property value for the purpose of property sale tax and third party valuations, instead of evidence of real market prices, which is available from the Republic Geodetic Authority - and does so particularly when it suits his higher valuation.
- he uses both outdated evidence and evidence which post-dates the valuation date.

1426. First, Dr. Hern does not clearly state whether he performs a valuation of the land, which is necessary for the purpose of valuation of BD Agro, or he performs an assessment, which is a different exercise used for mass appraisals of real property for taxation purposes, not appropriate for the present purpose.²¹⁷⁴ Moreover, he

²¹⁷¹ See Expert Report of Krzysztof Grzesik, paras. 1, 5.11 & 11.1.

²¹⁷² See Counter-Memorial, paras. 786-787; Expert Report of Sandy Cowan, paras. 7.8.2, 7.8.3, 7.8.5, 7.10 & 7.12.

²¹⁷³ Expert Report of Danijela Ilic paras 5.1.-5.24.

²¹⁷⁴ "While valuation process is strictly defined in all internationally recognized valuation standards, the term "assessment" is used only in IAAO Standard on mass appraisal of real property - 2013 in the context of assessment of value of real property for taxation purpose.", Expert Report of Danijela Ilic, para 4.4.

interchangeably and therefore inconsistently uses the terms "valuation" and "assessment" and in this way confuses the analysis.²¹⁷⁵

1427.Second, Dr. Hern's analysis relates to the total size of land by the categories of its use, without considering specific factors such as the number of parcels, their size, use and location.²¹⁷⁶ If Dr. Hern wished to value large tracks of land, he was supposed to form a representative sample of the tract and on this basis seek comparable sales and make all necessary adjustments to estimate the market value. Ms. Ilic notes that she has not detected anything of the sort in Dr. Hern's report.²¹⁷⁷ Further, Dr. Hern is not accurate about the size of developable BD Agro's land in Zones A, B and C, which he should have determined with reference to graphics of the General Regulation Plan.²¹⁷⁸ This is of crucial importance because the land in Zones A, B and C presents over 80% of the value of all BD Agro's land according to Dr. Hern's valuation.²¹⁷⁹

1428.Third, once one inspects underlying evidence provided by Dr. Hern in support of his "valuation", one realizes that it is mainly based on Tax Administration's assessments for the purpose of property sale tax, and not on market evidence, i.e. actual sales transactions.²¹⁸⁰

1429.Ms. Ilic also notes that Dr. Hern uses evidence of third parties "*whenever there is a need to support a higher estimate of value*".²¹⁸¹ Ms. Ilic states that valuations of third parties are not suitable to be used as market evidence.²¹⁸² On this basis, she concludes that Dr. Hern should have based his opinion on the value of BD Agro's land in Zones A, B and C on actual sale transactions from 2014-2015, which may be obtained from the database of the Republic Geodetic Authority of Serbia.²¹⁸³ Significantly, Dr. Hern based his opinion on the value of "other construction land" on the sales data from the Republic Geodetic Authority, but failed to do so in case of Zones A, B, and C land.²¹⁸⁴ This difference in approach reveals not only the inconsistency of Dr. Hern's method,

²¹⁷⁵ Expert Report of Danijela Ilic, para. 4.4.

²¹⁷⁶ Ibid.

²¹⁷⁷ Ibid.

²¹⁷⁸ Expert Report of Danijela Ilic, 4.11.

²¹⁷⁹ See Hern, 1, para. 110, Table 3.10.

²¹⁸⁰ Expert Report of Danijela Ilic, paras. 5.8-5.13, see Expert Report of Richard Hern, para. 64, Table 3.3.

²¹⁸¹ Expert Report of Danijela Ilic, para. 5.14.

²¹⁸² Expert Report of Danijela Ilic, paras. 4.9-4.10.

²¹⁸³ Expert Report of Danijela Ilic, paras. 5.14-5.15.

²¹⁸⁴ Expert Report of Danijela Ilic, para. 5.18.

but also undermines credibility of his report, to say the least, since the sales data would lead to much lower value of the land, as demonstrated by Ms. Ilic's valuation of Zones A, B and C land.²¹⁸⁵

1430. Fourth, Dr. Hern labels his sources as contemporaneous to the valuation date, but in reality this is not so. Even when he uses evidence from actual market transactions, Dr. Hern includes evidence that is outdated²¹⁸⁶ and/or inappropriate (conditional agreements).²¹⁸⁷ He also uses assessments of the Tax Administration that are either outdated (2012) or subsequent to 21 October 2015, the date of valuation.²¹⁸⁸

1431. Claimants dismiss Respondent's criticism of Dr. Hern's report concerning his failure to appreciate the fact that conversion and development of agricultural land for construction purposes could take years. Claimants respond to this by quoting Dr. Hern stating that there is "*no basis to take account of a size discount where land does not need to be sold in large chunks, as in the situation in this case*".²¹⁸⁹ This, however, is inapposite, because Dr. Hern's argument here concerns the question whether a size discount should be applied in the valuation, and it does not say anything about the argument that conversion and development of the agricultural land could take years. As noted by Ms. Ilic,

"...developer expects that seller completes Detailed regulation plan which on the other hand presumes availability of access from public roads and serviced land with appropriated communal infrastructure. Simply, buyer is not prepared to bear risk, both time wise and finance wise, of taking all

²¹⁸⁵ Mr. Hern values this land at 62.9-82.9 mil. EUR, see Expert Report of Richard Hern, para. 94, Table 3.5, while Ms. Ilic values it at 39 mil. EUR on the basis of market data, see Expert Report of Danijela Ilic, para. 10.2.

²¹⁸⁶ Purchase agreement between BD Agro and Hypo Park dated 11 June 2008, **CE-144**, Purchase agreement between BD Agro and Eko Elektrofrigo dated 27 October 2008, **CE 145**, Purchase agreement between BD Agro and Trajan dated 12 November 2009, **CE 146**, dating from 2008-2009.

²¹⁸⁷ See Purchase agreement between BD Agro and Eko Elektrofrigo dated 27 October 2008, **CE 145**, Purchase agreement between BD Agro and Trajan dated 12 November 2009, **CE 146**.

²¹⁸⁸ Expert Report of Danijela Ilic, para. 5.5; and Expert Report of Richard Hern, para. 62; see, also, Purchase agreement between BD Agro and Eko Elektrofrigo dated 27 October 2008, **CE 145**; Purchase agreement between BD Agro and Trajan dated 12 November 2009, **CE 146**; Tax Administration Branch B Stara Pazova, Number 235-464-08-00090/2016-J2B02, Delivery of Information dated 23 December 2016, **CE-158**; Tax Administration Zemun Branch, Number 021-464-08-00029/2016-I1A02, Delivery of Information dated 12 February 2016, **CE-159**, Tax Administration Zemun Branch, Number 021-464-08-00029-1/2016-I1A02, Delivery of Information dated 25 May 2016, **CE-160**, Tax Administration Zemun Branch, Number 021-464-08-00125/2016-I1A02, Delivery of information dated 28 July 2016, **CE-161**.

²¹⁸⁹ Reply, para. 1373, quoting Second Expert Report of Richard Hern, para. 124.

these actions in order to have construction land ready for development. Therefore, at the date of purchase he is willing to pay only part of the full development potential due to the uncertainty of achieving it."²¹⁹⁰

1432.Claimants quote the statement of Mr. Grzesik, their expert, that Dr. Hern's valuation can "*be classified as being in line with internationally recognized valuation standards*", with the reservation that he should have provided "*the single market value as postulated by the definition of market value*".²¹⁹¹ However, as has been seen above, Ms. Ilic's report demonstrates that Mr. Grzesik's review of Dr. Hern's report was superficial and failed to note numerous deficiencies that make Dr. Hern's "valuation" unreliable. Further, as will be seen in the next section, Mr. Grzesik's own valuation" of BD Agro's land is prone to similar deficiencies.

2. Mr. Grzesik's land "valuation"

1433.Ms. Ilic demonstrates that Mr. Grzesik's "valuation" of BD Agro's land is unreliable. In essence, it suffers from similar deficiencies as Dr. Hern's - inconsistency as to whether he performs a valuation or assessment; use of evidence and valuation standards that post-date the date of valuation; methodological and evidentiary flaws.

1434.The methodological inconsistency concerning the very nature of exercise he performs - whether it is a valuation or assessment - has already been discussed in the previous section. Further, Mr. Grzesik uses primarily third party valuations and tax assessments in his valuation, in the same way as Dr. Hern does, which is not in accordance with international valuation standards.²¹⁹² He also relies on valuation standards that were published after the date of valuation.²¹⁹³

1435.Ms. Ilic assess not only Mr. Grzesik's "review" of Dr. Hern's "valuation" of BD Agro's land, but also Mr. Grzesik's own "valuation" of this land and shows that it is unreliable.

1436.Mr. Grzesik has failed to directly analyze the *size* of land in Zones A, B and C and relies in this regard on Dr. Hern, who is not reliable about the size of developable BD

²¹⁹⁰ Expert Report of Danijela Ilic, para. 4.39.

²¹⁹¹ See Reply, para. 1356, quoting Expert Report of Krzysztof Grzesik, paras. 5.4 & 5.11.

²¹⁹² Expert Report of Danijela Ilic, para. 4.4.

²¹⁹³ Expert Report of Danijela Ilic, para. 4.3.

Agro's land in Zones A, B and C, because he failed to determine it precisely with reference to graphics of the General Regulation Plan.²¹⁹⁴

1437. Further, as regards the land in Zones A, B and C, Mr. Grzesik determines the lower bound of price by reference to BD Agro's own previous transactions.²¹⁹⁵ However, these transactions are outdated since they are from 2008-2009 and precede the valuation date by six years.²¹⁹⁶ As Ms. Ilic explains, international standards allow use of old transactions if they are combined with knowledge of market trends occurring between their own date and the date of valuation. There is no evidence that Mr. Grzesik has done so.²¹⁹⁷ On the other hand, Mr. Grzesik forms his opinion about the upper bound of price of land in Zones A, B and C by using price assessments prepared by the Tax Administration for the purpose of property transfer tax, which are not market valuations and evidence of market price. Mr. Grzesik considers that individual assessments of land plots in Batajnica by the Serbian tax authorities "*for the purpose of expropriation represent the best evidence in support of a valuation of Zones A, B and C at a price of € 30/m²*".²¹⁹⁸ However, while Mr. Grzesik refers to Dr. Hern's report, he fails to note that both Dr. Hern and the assessments state that they were made for tax purposes.²¹⁹⁹ Actually, Mr. Grzesik refers to a footnote in Mr. Markicevic's witness statements as the only source that these assessments were made for the purpose of expropriations, but this itself is not supported by the document referred to by Mr. Markicevic.

1438. On the basis of his flawed analysis, Mr. Grzesik sets the price for land in Zones A, B and C at 30 EUR/m² and values BD Agro's land in the zones at EUR 87 million.²²⁰⁰ However, Ms. Ilic concludes that, if Mr. Grzesik disregarded the price assessments

²¹⁹⁴ Expert Report of Danijela Ilic, para. 4.11.

²¹⁹⁵ Expert Report of Krzysztof Grzesik, para. 6.5.

²¹⁹⁶ Expert Report of Danijela Ilic, para. 4.16.

²¹⁹⁷ Expert Report of Danijela Ilic, para. 4.17; Mr. Grzesik also states that older transactions are not reliable, which raises the question why does he refer to these old BD Agro's transactions at all, see Expert Report of Krzysztof Grzesik, para. 6.8.

²¹⁹⁸ Expert Report of Krzysztof Grzesik, para. 6.14.

²¹⁹⁹ See Expert Report of Richard Hern, para. 71 & Tax Administration Zemun Branch (17 March 2016), Number 021-464-08-00029/2016-IIA02, Delivery of information on market value of immovable, your reference number 9268/6-5 **CE-159**, Tax Administration Zemun Branch (8 June 2016), Number 021-464-08-00029-1/2016-IIA02, Delivery of information on market value of immovable your reference number 32381/6-05, **CE-160**, Tax Administration Zemun Branch (24 August 2016), Number 021-464-08-00125/2016-IIA02, Delivery of information on market value of immovable your reference number 47336/6-05, **CE-161**.

²²⁰⁰ Expert Report of Krzysztof Grzesik, para. 6.19. After subtracting the conversion fee, Mr. Grzesik arrives at the value of EUR 85.3 million for BD Agro's land in Zones A, B and C, see *ibid.* para. 6.26.

which do not comply with international standards and relied on actual sale transactions recorded in Republic Geodetic Authority, he would have come to a much lower price than 30 EUR/m² for land in Zones A, B and C.²²⁰¹

1439. As regards "other construction land", Mr. Grzesik simply restates what Dr. Hern stated in his first report and adopts his upper bound price as it is based on market transactions, arriving at the value of EUR 3.8 million (EUR 3.5 million adjusted for the conversion tax).²²⁰² However, Mr. Grzesik fails to note that Dr. Hern's review of market transactions also includes one transaction of mere 50m² of land, which was sold for 30 EUR/m² and had strong impact on his calculation, since Dr. Hern used the average price from the market transactions in his valuation. Here, it should be noted that Ms. Ilic also criticizes the use of average price, because median price would be more appropriate when there is a wide range of prices reached in market transactions, as here. With these corrections, the price reached for "other construction land" would be 30% lower than the one reached by Dr. Hern and Mr. Grzesik.²²⁰³

1440. Finally, as regards BD Agro's agricultural land, Mr. Grzesik has also accepted Dr. Hern's evidence of market transactions and data on expropriations, and arrives at the value of EUR 10 million.²²⁰⁴ However, as regards the expropriations, Mr. Grzesik has failed to note that the location of the expropriated land in question was not comparable, and that the information about the price paid was ambiguous.²²⁰⁵ Had he disregarded such information about expropriation compensation his assessment would have been 50% lower.²²⁰⁶

3. Mr. Mrgud's land valuation

1441. Claimants contend that Mr. Mrgud's valuation of BD Agro's land which valued it at EUR 87 million is supported by the valuation of Mr. Grzesik, who comes at only slightly lower figures.²²⁰⁷ However, as already discussed, Mr. Grzesik's valuation has serious problems and is not reliable. As such, it cannot render any legitimacy to Mr.

²²⁰¹ See Expert Report of Danijela Ilic, para. 4.23.

²²⁰² Expert Report of Krzysztof Grzesik, paras. 8.1-8.3.

²²⁰³ Expert Report of Danijela Ilic, para. 4.30.

²²⁰⁴ Expert Report of Krzysztof Grzesik, para. 10.2.

²²⁰⁵ Expert Report of Danijela Ilic, para. 4.33.

²²⁰⁶ Expert Report of Danijela Ilic, para. 4.36.

²²⁰⁷ See Reply, para. 1305.

Mrgud's results. Furthermore, Ms. Ilic has also reviewed Mr. Mrgud's valuation and found it not to be in line with internationally recognized valuation standards. Among other things, he did not state under which valuation standards he performed his valuation and he did not research actual market transactions available from the Republic Geodetic Authority.²²⁰⁸ Mr. Mrgud's valuation was also strongly criticized by Banca Intesa in the bankruptcy proceedings and the Commercial Appeals Court apparently agreed that the report is flawed so it instructed the lower court to check its veracity in new proceedings.²²⁰⁹

4. Confineks land valuations

1442.Claimants follow Dr. Hern in reliance on land valuations in Confineks reports and also argue that Respondent supposedly accepted these valuations. However, the Confineks land valuations are not reliable, as demonstrated by Ms. Ilic, and, further, they were not accepted by Serbia. These two issues will be discussed in turn.

4.1. Confineks land valuations are not reliable

1443.Confineks made two valuations of BD Agro, both of which included the value of its land.²²¹⁰ According to Ms. Ilic, the valuations of BD Agro's land have a number of deficiencies. To start with, they were prepared based on inventory lists which were not cross-checked with information from cadaster. For this reason, they contain mistakes relating to the size of land that was valued. Further, while Confineks claims that it valued the land using comparative approach, Ms. Ilic notes that "*there is no evidence of comparable land, no evidence of analytical processes undertaken in carrying out the valuation of cadastral parcels*". On this basis, she concludes that Confineks land valuation was not in line with internationally recognized valuation standards.²²¹¹ Deficiencies of the Confineks land valuation are also noted by Mr. Grzesik.²²¹²

²²⁰⁸ Expert Report of Danijela Ilic, para. 8.9.

²²⁰⁹ Decision of the Appellate Court, dated 30 September 2015, **CE-358**.

²²¹⁰ See Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci of December 2015, Sec. 4.2, **CE-142**; Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci of January 2016, Sec. 4.2, **CE-172**.

²²¹¹ Expert Report of Danijela Ilic, paras. 8.1 & 8.3.

²²¹² Expert Report of Krzysztof Grzesik, para. 6.6.

1444. Claimants state that credibility of Confineks valuations is supported by the fact that they correspond to Dr. Hern's valuation.²²¹³ However, instead of confirming them, Dr. Hern's land valuation itself was, *inter alia*, based on Confineks land valuations. The flaws of Confineks land valuations must then taint Dr. Hern's valuation as well.

4.2. Serbia has not accepted Confineks valuations and, in any case, this would have no impact on the present case

1445. Claimants persist with their claim that Respondent somehow "accepted" the Confineks valuations, through the alleged actions of the Agency.²²¹⁴ The fact that the Agency's conduct cannot be attributed to Respondent disposes of this claim immediately. But in any case, it is unclear what Claimants seek to achieve with their argument that Serbia somehow approved of Confineks valuations. They do not and cannot claim any "estoppel" or even reliance on that fact, even if it were accurate. It seems that Claimants argument' is directed to support their claim that Confineks (and Mrgud) valuation are "more relevant" than other contemporaneous valuation of BD Agro, because they were "expressly accepted" by Serbia (in case of Mrgud valuation, by creditors).²²¹⁵ In any case, the methodological flaws of these reports clearly make them unreliable as far as land valuation is concerned, which obviously disqualifies them.²²¹⁶ Even Claimant's real estate expert distanced himself from Confineks land valuations.²²¹⁷

1446. Claimants make much of the fact that temporary administrator of socially owned capital appointed by the Agency directed Mr. Markicevic to engage Confineks and in fact approved all important decisions taken by BD Agro's management.²²¹⁸ However, it should be noted that temporary administrator, while at the relevant time appointed and removed by the Agency, was under law independent in her work.²²¹⁹ Virtually all

²²¹³ Reply, para. 1300.

²²¹⁴ Reply, paras. 1312-1317.

²²¹⁵ Reply, para. 1324.

²²¹⁶ Expert Report of Danijela Ilic, paras. 8.1-8.3 & 8.9.

²²¹⁷ As regards the Confineks land valuation, Mr. Grzesik states that it is only "secondary" evidence, which does not reveal evidence on which it is based. See Expert Report of Krzysztof Grzesik, para. 12.4.

²²¹⁸ Reply, paras. 1308-1309.

²²¹⁹ Law on Privatization, Article 42, paras. 3&4, **CE-223**.

conduct allegedly approving Confiks reports is the conduct of BD Agro's management,²²²⁰ and cannot be attributed to the Agency, let alone Respondent.

1447. Moreover, as already discussed in the Memorial, various "approvals" of Confineks reports were performed by the representative of socially-owned capital in BD Agro's shareholders assembly, not by the Agency as Claimant contend.²²²¹ Not only that she was independent in her work under the Law on Privatization, but also she acted as a member of the shareholders assembly, which is a collegial organ of the company. Actions of the shareholders assembly may only be held opposable as regards BD Agro itself, not anyone else. Further, as already mentioned in the Counter-Memorial, shareholder's acceptance of financial reports at the shareholders meeting cannot possibly be interpreted as an automatic acceptance of all documents on which the financial report was based or referred to, such as Confineks valuations. This would be absurd.

1448. In this regard, Claimants' response is clearly wanting, as they only state that Serbia cannot "*seriously contend*" that the Agency accepted BD Agro's financial statements "*while it believed that they seriously overrepresented the value of BD Agro's assets*".²²²² However, this is not what is in issue here, but whether anyone's acceptance of a valuation in one context (exercise of corporate rights) should be held as binding years afterwards in a completely different context. Simply put, the Confineks land valuations have been exposed as flawed and unreliable and as such should not be used in the present proceedings as evidence of fair market value of BD Agro.

E. MS. ILIC'S VALUATION OF BD AGRO'S LAND

1449. In response to valuation of BD Agro's land prepared by Claimant's experts, Ms. Ilic has prepared her own valuation. It should be noted that Ms. Ilic has valued all land of BD Agro that was valued by Claimants' experts but that, at the beginning of her report, she makes the following remark:

"I would like to clarify that I understand my task as being principally to review BD Agro's land valuations provided by the real estate experts. I provide such

²²²⁰ Reply, paras. 1312-1317.

²²²¹ See, e.g., Reply, para. 1321.

²²²² Reply, para. 1321.

*review and then I provide my own valuation in response. As such, my valuation concerns all land owned by BD Agro on 21 October 2015, because this was also subject of the land valuations prepared by experts. However, from the evidence and reports provided to me, I see that the ownership of BD Agro is controversial with respect to a substantial part of its land, which I understand was the reason why only undisputed land was sold in the bankruptcy proceedings. This has not been taken into account in the land valuations provided by the experts so far. Since I provide my valuation as a response to the land valuations provided by the real estate experts and in particular by Claimants' experts Mr. Hern and Mr. Grzesik, I also do not distinguish between disputed and undisputed land, but I want to make a general qualification that controversial legal status of the land would either be an impediment to its sale or at least would substantially affect the market price of such land. The undisputed land was however valued in the valuation of Mr. Tibor Bodolo and his team which was provided in the bankruptcy proceedings. As I would discuss later in my report, I consider Mr. Bodolo's valuation to be realistic and in line with international standards. Therefore, it may be used as an expert valuation of BD Agro's undisputed land."*²²²³

1450. Therefore, Ms. Ilic notes what Claimants and their experts ignore - that a substantial part of BD Agro's land has disputed ownership status. Not only they ignore this fact, but also provide an excessive overvaluation of this land, as Ms. Ilic demonstrates in her report.

1451. Ms. Ilic's valuation is in line with international valuation standards. In her report, she explains in detail her methodology.²²²⁴ For the present purposes, it is sufficient to state that she applied the market approach for valuation of BD Agro's agricultural and construction land and basis her analysis on actual sale transactions, and not on third party valuations or tax assessments, as Mr. Hern and Mr. Grzesik predominantly do. For the valuation of market value of land tracts owned by BD Agro in Dobanovci, Ugrinovic, Becmen, Asanja, Dec, and Novi Becej, she has prepared a representative sample for each location and selected comparable market transactions from the data

²²²³ Expert Report of Danijela Ilic, Introduction, para. 6 (footnotes omitted).

²²²⁴ Expert Report of Danijela Ilic, para. 9.1-9.4.

base of the Republic Geodetic Authority in the period 2014-2015, that is close to the valuation date.²²²⁵ Her findings are in detail explained in her report and the Tribunal is kindly referred to it.

1452.Ms. Ilic concludes her report by stating the following:

*"The valuation is prepared in line with International Valuation Standards IVS 2013, which were in effect at the date of valuation, 21 October 2015. I have applied the market evidence, which is of highest relevance, actual sale prices recorded in RGA and where necessary I have also applied adjusted asking prices. I have applied Market approach (IVS 2013) aligned for the characteristics of subject of valuation. Since subject of valuation is large land tracts in different locations, I have applied statistical tools (median; representative sample on the level of the land tract) which have allowed valuation of the whole group of cadastral parcels in an accurate and efficient manner."*²²²⁶

1453.On this basis, her opinion on market value of BD Agro's land, on 21 October 2015, is as follows:

²²²⁵ Expert Report of Danijela Ilic, para. 9.21. and Appendix 2 containing data on comparable transactions.

²²²⁶ Expert Report of Danijela Ilic, para. 10.1.

Agricultural land	Size (m2)	Market value (eur)
Ašanja	309,160	92,748
Deč	17,641	5,292
Bečmen	227,021	976,190
Ugrinovci	583,448	711,806
Dobanovci	4,511,189	4,510,781
Novi Bečej	5,756	2,878
Total agricultural land	5,654,215	6,299,695
Forest land		
Novi Bečej	80,385	72,346
Total forest land	80,385	72,346
Construction land		
Bečmen	150,280	833,519
Dobanovci	2,852,015	39,014,194
Novi Bečej	55,426	162,952
Ugrinovci	37,219	327,527
Total construction land	3,094,940	40,338,192
Total BD Agro land	8,829,539	46,710,233

1454. Therefore, Ms. Ilic values BD Agro's land at EUR 46,710,233, and specifically: EUR 6,299,695 for agricultural land; EUR 40,338,192 for construction land (including Zones A, B and C) and EUR 72,346 for forest land. Since her valuation follows reports of Claimants' experts, Ms. Ilic has made a general reservation that it does not take into account the fact that 349ha of BD Agro's land is either not in reality in its ownership or the ownership is under controversy.

1455. This valuation has been used in valuation report of Mr. Cowan, as well. In addition, in line with Ms. Ilic's warning, Mr. Cowan also uses findings of Mr. Bodolo's report on the size of BD Agro's land whose status is not in controversy. Having in mind Mr. Bodolo's findings, Mr. Cowan prepared a calculation considering the most valuable part of the uncontested land (Zone A, B, C land) but on the basis of Ms. Ilic's land prices at the valuation date relevant in the present case, 21 October 2015. On this basis his valuation of the not contested land is EUR 24.1 million.²²²⁷

²²²⁷ Second Expert Report of Sandy Cowan, para. 5.9.

F. WHETHER BD AGRO'S BUSINESS SHOULD BE VALUED AS A GOING CONCERN

1456. One of the main issues in dispute between the Parties and their financial experts is whether BD Agro was a going concern at the valuation time, i.e. on 21 October 2015.

1457. Respondent's expert, Mr. Cowan, states that BD Agro was not a going concern at the valuation date, considering its operational and financial difficulties, which were threatening its ability to continue operations.²²²⁸ In particular, the company was in a situation of illiquidity for many years, and from 2014 was in bankruptcy proceedings, trying to agree a restructuring plan with its creditors²²²⁹. Mr. Cowan also points to the fact that the company's auditor report for 2013 emphasized that the company would not be able to continue operating as a going concern unless it obtains additional operating capital, which had not been seen.²²³⁰ The company's bank accounts were under permanent blockade from 8 March 2013 and remained so until the valuation date.²²³¹ In contrast to that, expert authority notes that "*the business is a going concern if it has a record of several years profitability*".²²³² Mr. Cowan also considers that the pre-pack reorganization plan proposed by the company did not seem realistic, especially in light of previous failed attempts to revitalize the company made on the basis of a similar strategy.²²³³

1458. On the other hand, Dr. Hern, Claimants' financial expert, states that, as a matter of fact, BD Agro was not in bankruptcy at the time of valuation and that its pre-pack reorganization plan was adopted by majority of creditors.²²³⁴ However, as noted in the chapter dealing with bankruptcy proceedings above, one of BD Agro's creditors, Banca Intesa, itself initiated bankruptcy proceedings against the company in 2015 and was not willing to accept the pre-pack reorganization plan proposed by the company. It was listed as a minority creditor in its class (because BD Agro's management wanted to circumvent its opposition to the plan) and for this reason was unable to prevent

²²²⁸ Expert Report of Sandy Cowan, para. 2.21.

²²²⁹ Expert Report of Sandy Cowan, para. 7.5.

²²³⁰ Second Expert Report of Sandy Cowan, para. 3.13.

²²³¹ Second Expert Report of Sandy Cowan, para. 3.16.

²²³² See Kantor, M. (2008), *Valuation for arbitration*,— Compensation Standards, Valuation Methods, and Expert Evidence, Wolters Kluwer, page 95, , **RE-486**, quoted in Second Expert Report of Sandy Cowan, para. 3.12.

²²³³ Expert Report of Sandy Cowan, paras. 5.2. & 5.5.

²²³⁴ Second Expert Report of Richard Hern, para. 34; Reply, para. 1299.

adoption of the Amended plan. However, it objected to and subsequently appealed the Amended plan.²²³⁵ The plan was revoked by the higher court and sent back for amendments. It is highly likely that Banca Intesa would continue to vote against the adoption of the pre-pack reorganization plan and that it would appeal the plan. Notably, in the period of almost two years (November 2014 to August 2016)²²³⁶ BD Agro, managed by managers appointed by Mr. Obradovic and subsequently by the Agency, was unsuccessful in persuading its creditors to support the pre-pack reorganization plan. There is not a single document indicating that it would succeed with that in the following period. All this shows that BD Agro's bankruptcy was inevitable in September 2015. This further confirms Mr. Cowan's financial analysis indicating that the company was not a going concern.

1459. Further, Dr. Hern considers that a distress discount applied by Mr. Cowan, on the basis of its conclusion that BD Agro was not a going concern at the date of valuation, is not consistent with the fair market valuation principle, which by definition cannot reflect a distressed sale of assets.²²³⁷ However, as Mr. Cowan states in his second report, the definition of market value *inter alia* assumes a willing buyer, *i.e.* it reflects a value that a buyer would be willing to pay for an asset or business *in full knowledge of all the facts*.²²³⁸

*"Dr. Hern has not included any discount on his Market Value to reflect that a willing buyer would factor into the price negotiations that BD Agro was a loss-making business with significant operational and financial issues, and on the verge of bankruptcy (...) and that a willing seller would accept a discounted sales price rather than go into bankruptcy and potentially receive nothing for their shares."*²²³⁹

1460. Accordingly, Mr. Cowan applies a 30% discount on this basis.²²⁴⁰

²²³⁵ See Objections of Banca Intesa to Amended pre-pack reorganization plan dated 7 May 2015, pp. 2-7, **RE-460**; Appeal of Banca Intesa dated 30 July 2015, **CE-354**. For more, see Sec.I.G.

²²³⁶ Original pre-pack reorganization plan, November 2014, **CE-321**; Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, **CE-109**.

²²³⁷ Second Expert Report of Richard Hern, para. 33.

²²³⁸ Second Expert Report of Sandy Cowan, para. 3.7.

²²³⁹ Second Expert Report of Sandy Cowan, paras. 7.33; see, also, *ibid*, para. 6.23.

²²⁴⁰ Second Expert Report of Sandy Cowan, para. 6.32.

1461. Further, considering that BD Agro was not a going concern, Mr. Cowan also considers that it is inappropriate to value it on the basis of the DCF method. Instead, it should be valued on the basis an asset basis.²²⁴¹

1462. Mr. Cowan does not consider that the use of DCF method would be warranted because cash-flow projections are unrealistic when compared to the business's historic performance.²²⁴² Claimants and Dr. Hern consider otherwise, arguing that cash-flows projects in the Amended plan were in line with historical data and accepted by BD Agro's creditors.²²⁴³ Mr. Cowan provides a detailed analysis why this conclusion is unfounded.²²⁴⁴

1463. Mr. Cowan's approach that BD Agro's lack of past profitability makes DCF method unwarranted is also in line with international practice. As noted by the arbitral tribunal in *Vivendi*,

*"And, as Respondent points out, many international tribunals have stated that an award based on future profits is not appropriate unless the relevant enterprise is profitable and has operated for a sufficient period to establish its performance record."*²²⁴⁵

1464. It is a fact that BD Agro was not a profitable enterprise for years. The use of DCF is therefore clearly not warranted.²²⁴⁶

1465. Here, it should be noted that the *Vivendi* tribunal also allowed for a possibility that

"... in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of

²²⁴¹ Second Expert Report of Sandy Cowan, para. 7.10.

²²⁴² Second Expert Report of Sandy Cowan, paras. 7.8.1 & 7.10-7.20.

²²⁴³ Reply, para. 1347, referring to Second Expert Report of Richard Hern, para. 144.

²²⁴⁴ Second Expert Report of Sandy Cowan, paras. 7.10-7.20.

²²⁴⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 8.3.3, **CLA-49** (emphasis added).

²²⁴⁶ Expert Report of Sandy Cowan, para. 2.6.

profitability of concessions it (or indeed others) had operated in similar circumstances."²²⁴⁷

1466. This sets very stringent evidentiary requirements for application of DCF in the exceptional case where there is no genuine going concern - "*sufficient evidence of [claimant's] expertise*" and "*proved record of profitability of concessions... operated in similar circumstances*". As has been demonstrated, Mr. Obradovic (and by extension Claimants) has demonstrated criminal negligence (if not worse) in managing BD Agro into bankruptcy. He similarly behaved in other privatizations, where he ruined the companies he bought. This is his apparent "expertise". Further, as a matter of burden of proof, Claimants have not provided *any* evidence that similar companies have had a proved record of profitability in similar circumstances. Rather, their only argument is that BD Agro's creditors approved the Amended plan. Apart from all problems with these proceedings, and revocation of the plan on appeal, it is clear that this argument cannot possibly demonstrate "*proved record of profitability*" of similar companies in similar circumstances.

G. MR. COWAN'S SECOND REPORT

1467. Mr. Cowan's valuation of BD Agro provides two general scenarios: one assuming a bankruptcy scenario, which he considers realistic, and one assuming a going concern scenario. In both scenarios, his valuation has two parts, one values BD Agro's business, another values its surplus land. With regard to the valuation of land in both valuation scenarios, Mr. Cowan was instructed to use Ms. Ilic's land valuation of all BD Agro's land, but also to take into consideration report of Mr. Badolo, who indicates disputed ownership status of a substantial part of this land. Under both bankruptcy and a going concern scenarios, Mr. Cowan provides calculations of BD Agro's value on the basis of all its land (assuming that there is no ownership controversy), and on the basis of the value of the most valuable part of the land that is not disputed, as explained below.²²⁴⁸

²²⁴⁷ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 8.3.4, **CLA-49**.

²²⁴⁸ Second Expert Report of Sandy Cowan, para. 6.41.

1468. Starting with the valuation based on the value of all BD Agro's land, under the bankruptcy scenario, Mr. Cowan has applied a bankruptcy sales discount of 50%. He states that *"it is typical to apply a discount to represent the impact on value of undertaking a sales process of a distressed business."*²²⁴⁹ Further, he also includes bankruptcy costs in his valuation, which he estimates at 20% of BD Agro's discounted asset value, on the basis of a Doing Business report by the World Bank.²²⁵⁰ In this bankruptcy valuation, Mr. Cowan values BD Agro at - EUR nil.²²⁵¹

1469. In the going concern valuation, based on the value of all BD Agro's land, Mr. Cowan applies asset-based method. He makes a provision for EUR 9.2 million due to pending court proceedings, which were likely to be lost by the company's own admission in its financial reports.²²⁵² He also uses a 30% distress discount at entity level, as he considers that *"a willing buyer would factor the price negotiations that BD Agro was a loss-making business with significant operational and financial issues, and on the verge of bankruptcy. It is likely that a willing buyer would pay less for the shares in BD Agro than it would if the company was in a better financial situation ..."*²²⁵³ In the going concern valuation, Mr. Cowan values BD Agro at EUR 8.8 million in the variant based on the value of all land.²²⁵⁴ Under that scenario, the compensation for Sembi's ownership of 75.87% of BD Agro's shares, together with applicable interest would be EUR 6.6 million while compensation to Mr. Rand on the basis of 3.9% of MDH Serbia-held shares would be EUR 0.3 million, also with interest.²²⁵⁵ As will be discussed further below, the latter compensation is subject to applicable taxes, which is partly admitted by Claimants.²²⁵⁶

1470. Then, taking into account findings of Mr. Badolo's report concerning ownership over the land, Mr. Cowan has used reduced size of the Dobanovci development land for his valuation. The reason why Mr. Cowan taken into account only the reduction in the

²²⁴⁹ Second Expert Report of Sandy Cowan, para. 2.5.2.

²²⁵⁰ Second Expert Report of Sandy Cowan, para. 2.5.3.

²²⁵¹ Second Expert Report of Sandy Cowan, Table in para. 2.4.

²²⁵² Second Expert Report of Sandy Cowan, para. 2.6.2.

²²⁵³ Second Expert Report of Sandy Cowan, para. 2.6.3.

²²⁵⁴ Second Expert Report of Sandy Cowan, Table in para. 2.4.

²²⁵⁵ Second Expert Report of Sandy Cowan, para. 2.7

²²⁵⁶ See Memorial, paras. 567-568.

Dobanovci development land from 285-290ha to 164ha and not all land considered controversial by Mr. Badolo is as follows:

" There are several parcels of land that Mr Bodolo states are not owned by BD Agro and are therefore not available for sale. However, the most significant value of BD Agro's land arises from the Dobanovci Development Land.

(...)

*To take into consideration the potential reduction in the area of Dobanovci Development Land available for sale, I have prepared a separate calculation of BD Agro's land value using Mr Bodolo's Dobanovci Development Land area of 164ha and Ms Ilic's value of €14.7/ha ."*²²⁵⁷

1471. On this basis, he has prepared

*"two further valuations, again assuming a bankruptcy scenario and a going concern scenario, in which the Dobanovci Development Land has an area of 164ha"*²²⁵⁸, *with the accompanying interest calculations, which show a business valuation of BD Agro of between €nil and €0.1 million"*²²⁵⁹

1472. As already mentioned, Respondent submits that only the bankruptcy scenario based on the valuation of undisputed part of BD Agro's land is the proper basis for establishing the fair market value of the company, because it takes into account the real situation of BD Agro's property, as well as failing business as at 21 October 2015. As Mr. Cowan has established, this value is nil.²²⁶⁰

1473. Alternatively, in the going concern scenario and under the same input for the value of the land, the value of BD Agro is also nil.²²⁶¹

1474. Finally, and briefly, Claimants and Dr. Hern criticize Mr. Cowan's first report.²²⁶² Some of the substantial points raised by them have already been exposed as

²²⁵⁷ Second Expert Report of Sandy Cowan, paras. 5.6. – 5.8.

²²⁵⁸ Report on evaluation of market value of bankruptcy debtor's property and evaluation of debtor as legal entity "BD AGRO" ad Dobanovci in bankruptcy on the date of 30 June 2018 (Valuation team headed by Mr Tibor Bodolo), p. 15, **CE-511**.

²²⁵⁹ Second Expert Report of Sandy Cowan, , para. 2.8

²²⁶⁰ Second Expert Report of Sandy Cowan, para. 2.8

²²⁶¹ Second Expert Report of Sandy Cowan ,para. 2.8.

²²⁶² Reply, paras. 1380-1381.

unfounded, including distressed discount, going concern and the conduct of bankruptcy proceedings.²²⁶³ The rest is deal with in Mr. Cowan's second report, to which the Tribunal is kindly directed.²²⁶⁴

H. CALCULATION OF INTEREST

1475.Claimants argue that interest on the amount of their claim should be calculated according to the provisions of Serbian law, because it is more favorable for them, and not with reference to interest rate usually awarded in international tribunal awards.²²⁶⁵

1476.As has been already pointed out by Respondent, Claimants are wrong, because the relevant BITs, while being silent on the specific question of calculation of interest for treaty breaches, point to application of rules of international law, not to national law.²²⁶⁶

1477.The basis for possible awarding of interest on the principal amount of Claimants' damages claim lies in the international legal rule reflected in Article 38 of the ILC Articles, which establishes the full reparation principle.²²⁶⁷ The main purpose of said principle is to help Claimants restore the position they would have enjoyed if the alleged breach had not occurred. Thus, addressing the issue of applicable interest rate, the tribunal in *Siemens v. Argentina* stated that:

*“... in determining the applicable interest rate, the guiding principle is to ensure “full reparation for the injury suffered as a result of the internationally wrongful act.”*²²⁶⁸

1478.In accordance with full reparation principle, Claimants are entitled to an interest rate calculated in manner which “*best approximates the value lost by an investor*”²²⁶⁹. The applicable interest rate thus should not be chosen on the basis that it is more

²²⁶³ See previous section and, also, Sec.I.G.

²²⁶⁴ Second Expert Report of Sandy Cowan, paras. 7.35-7.60.

²²⁶⁵ Reply, para. 1391.

²²⁶⁶ Counter-Memorial, paras. 818-822.

²²⁶⁷ Article 38 of Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries dated 2001, **CLA-24** and Memorial, para. 495; Counter-Memorial 831.

²²⁶⁸ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 396 (footnote omitted), **RLA-48**. See, also, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, para. 55.,

²²⁶⁹ *Azurix Corp. v. The Argentine Republic*, Award, para. 440, **CLA-39**.

advantageous either for Claimants or for Respondent, but should be objective and should reflect economic reality, as much as possible. And that economic reality is that Claimants are international investors who are active on the world market. Therefore, a more generally applicable interest rate than the local Serbian one approximates their economic reality.

1479. In this regard, the choice of the average annual LIBOR rate has been supported by arbitral practice:

*“This being an international tribunal assessing damages under a bilateral investment treaty in an internationally traded currency related to an international transaction, it would seem in keeping with the nature of the dispute that the applicable rate of interest be the annual LIBOR on November 5 of each year since November 5, 1998 until payment of the awarded amount of damages.”*²²⁷⁰

1480. Further, interbank interest rate (LIBOR/EURIBOR) increased by 2 percentage points appears also to have been accepted. For example, the tribunal in *National Grid v. Argentina* referred to six-months LIBOR plus two percentage points as “average interest rate which Claimant would have paid to borrow from that date to present”.²²⁷¹ Similarly, the tribunal in *Khan Resources v. Mongolia* found the same interest rate as “commercially reasonable borrowing rate over the relevant period (...) consistent with recent practice amongst ICSID tribunals and the prevailing scholarly view”.²²⁷²

1481. As illustrated, reasons for opting for application of any interest rate are reflected in showing actual economic reality on the financial market and reaching “closer approximation to the actual value lost by an investor”.²²⁷³ None of these tribunals chose to apply some rate just because it was “more advantageous”, as Claimants would have it. In the circumstances of the present case, and in particular considering newly revealed revelations about BD Agro's mismanagement by Mr. Obradovic, it is

²²⁷⁰ MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, para. 250, **CLA-51**.

²²⁷¹ *National Grid v. Argentina*, Award, 3 November 2008, para. 294, **CLA-6**.

²²⁷² *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, Award, dated 2 March 2015, para. 425, **RLA-195**.

²²⁷³ MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, para. 251, **CLA-51**.

submitted that only interbank interest rate (LIBOR/EURIBOR), without increase of 2%, would be appropriate.

1482. On their part, Claimants interpret full reparation principle as a basis for establishing rights that they do not enjoy. In fact, Claimants are trying to apply interest rate that is “more advantageous” for them in order to put themselves in a better position, not the objective one. For that point, they find no support. Notably, they have failed to submit any case law showing that tribunals deciding cases under bilateral investment treaties have applied a “more advantageous” interest rate on the basis of MFN clause or preservation of right clause.

1483. Therefore, Claimants mistakenly rely on the preservation of right clauses in Article 10 of the Cyprus-Serbia BIT, as well as in Article 13(1) of the Qatar-Serbia BIT, which the Canadian Claimants invoke under the MFN clause in Article 5 of the Canada-Serbia BIT.²²⁷⁴ However, interest rate has nothing to do with the treatment that Serbia is obliged to provide to Claimants under the Cyprus-Serbia and the Canada-Serbia BITs.

1484. Claimants are trying to justify application of a higher interest rate relying on importation of additional substantive standards of treatment through MFN clause. In support of that, they rely on case law that allegedly allows them only to show the existence of more beneficial provisions from other BITs in order to import such provision by the use of MFN.²²⁷⁵

1485. Respondent's Counter-Memorial has already discussed why the MFN clause is inapplicable in calculation of interest.²²⁷⁶ In this regard, Claimants deny applicability of *Hochtief* in the sphere of substantive investment protection, arguing that its pronouncement was made with regard to procedural rights.²²⁷⁷ However, the *Hochtief* award does not confine to the "procedural" rights its position that a MFN clause cannot import new rights where none exist in the basic treaty.²²⁷⁸

²²⁷⁴ Reply, 1391.

²²⁷⁵ Reply, paras. 1395-1400.

²²⁷⁶ Counter-Memorial, paras. 821-826.

²²⁷⁷ See Reply, para. 1395.

²²⁷⁸ *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, paras. 66-67, **RLA-88**; see, also, above Sec.IV.D.

1486.Claimants criticize, as "highly restrictive", the approach taken by the tribunal in *Ickale v. Turkmenistan* which held that investors cannot be said to be in a "similar situation" merely because they invested in a particular state.²²⁷⁹ However, the *Ickale* tribunal provided a detailed and convincing analysis of the phrase, in line with the customary rules of interpretation codified in the VCLT.

1487.As already pointed out, arbitral practice invoked by Claimants in this context did not discuss calculation of interest in the context of MFN standard, but dealt with substantive investment protection. As such, it should not be determinative in the present context. Rather, as already mentioned, the present context requires that analysis starts from the rules of general international law. From that point, one immediately realizes that the use of MFN clause as an instrument for determination of appropriate interest rate would effectively amend full reparation principle from Article 38 of the ILC Articles, because it would base calculation of interest on the *best* treatment and not on *full reparation*, as the latter may obviously be achieved even without the best treatment.

1488.Finally, Claimants fail to explain how the wording of the MFN clause from Canada-Serbia BIT allows them to import provisions concerning interest rate. Namely, the MFN clause contained in Article 5 of the Canada-Serbia BIT is very narrow in its scope because it uses language that links the term "treatment" to specific aspects of the investment process - "*establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment*". Under no circumstances this provision can be understood to allow invocation of interest rate prescribed by Serbian law that has nothing to do either with establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment. Claimants have no response to this treaty language other than an empty phrase - that Respondent is "*fabricating purported limitations to the scope of [the BIT] limitation*".²²⁸⁰

²²⁷⁹ *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, para. 328, **RLA-129**.

²²⁸⁰ Reply, para. 1394.

I. THE VALUE OF CLAIMANTS' INTEREST IN BD AGRO'S EQUITY

1. Introduction

1489. Claimant's discussion of the value of each Claimant's interest in BD Agro's equity is largely based on their justification of their alleged investment structure, which has already been in detail discussed from the jurisdictional perspective.²²⁸¹ In this part, Claimants discuss now the allocation of the compensation they claim should be effected.²²⁸² That discussion repeats many of the misconceptions that have already been thoroughly refuted in Respondent's submissions. One such misconception is that the value of MDH Serbia's shares in BD Agro, which are still in its ownership, was indirectly expropriated due to the Agency's termination of the Privatization Agreement and the transfer of Buyer's shares.²²⁸³ This argument has already been refuted and the Tribunal is respectfully directed to the chapter dealing with the bankruptcy proceedings, which demonstrates that BD Agro was on the verge on bankruptcy long before the termination of the Privatization Agreement.²²⁸⁴

1490. In this part, Respondent will address (a) applicable Serbian tax on the value that would have been received on Claimants' alleged interest in BD Agro's equity; (b) the claim for a tax gross up if compensation is received by the Canadian Claimants beneficiaries of the Ahola Trust; (c) Mr. Rand's claim for damages for its receivables towards BD Agro.

2. Applicable Serbian tax

1491. With respect to the compensation for MDH Serbia's interest in BD Agro's equity, Claimants accept that MDH Serbia would have to pay capital gain tax of 15% in Serbia.²²⁸⁵ Therefore, Claimants accept the principle that tax could be paid on any amount received as a fair market value of BD Agro. However, what Claimants admit as MDH Serbia's tax obligation is in fact not all tax that would be payable on the fair value of BD Agro in case of a market sale.

²²⁸¹ See Sec.II.

²²⁸² See Reply, paras. 1407-1449.

²²⁸³ See Reply, para. 1413 *et seq.*

²²⁸⁴ See Sec.I.G.

²²⁸⁵ See Memorial, para. 567.

1492. First, according to Claimants, the shares in BD Agro that were registered in Mr. Obradovic's name (75.87% share in the company) were held for benefit of Sembi.²²⁸⁶ In case of a market sale, Mr. Obradovic would be considered as the seller of these shares and would be required to pay tax before transferring the proceeds of the sale to Sembi. Specifically, if Mr. Obradovic sold his shares in BD Agro, he would have an obligation to pay 15% capital gain tax.²²⁸⁷ Capital gain in this case would be the difference between the sale price of his share, i.e. his interest in equity of BD Agro and its purchase price.²²⁸⁸ The purchase price of Mr. Obradovic's share in BD Agro, for the purposes of determination of capital gain, shall be considered the price at which Mr. Obradovic purchased his share increased according to the annual retail price index as of the date of acquisition until the date of sale, according to the official statistics data.²²⁸⁹

1493. Second, as already mentioned, Claimants have accepted that MDH Serbia in case of sale of its share in BD Agro would have to pay 15% corporate income tax in Serbia on the difference between the selling price and the original purchase price and claim that this tax would amount to EUR 0.4 million.²²⁹⁰

1494. However, in case of transfer of the selling price to Mr. Rand in Canada, MDH Serbia would also have obligation to pay another 15% for dividend tax.²²⁹¹ The 15% dividend tax to be paid in Serbia in this case is allowed by Convention between Canada and the Republic of Serbia for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital.²²⁹² In addition, even in case Mr. Rand were to decide to liquidate MDH Serbia, the obligation of paying 15% dividend tax would still exist. Personal Income Tax Law provides that in case of liquidation of the company, the liquidation remainder, i.e. surplus above the value of invested capital is considered as dividend²²⁹³ and such amount is subject to dividend tax.

²²⁸⁶ See Reply, para. 1408.

²²⁸⁷ See Personal Income Tax Law, Article 72, para. 3 and 77, **RE-564**.

²²⁸⁸ See Personal Income Tax Law, Article 72 para 1(3), **RE-564**.

²²⁸⁹ See Personal Income Tax Law, Article, Article 74, paras. 1 and 8, **RE-564**

²²⁹⁰ See Memorial, para. 567.

²²⁹¹ See Personal Income Tax Law, Articles 61, para. 1(2) and 64, para 1, **RE-564**

²²⁹² Convention Between Canada and the Republic of Serbia for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, 27 April 2012, Article 10, **RE-565**

²²⁹³ See Personal Income Tax Law, Article 61, para. 2, **RE-564**

1495. Since Mr. Rand expressly claims the value of its indirect shareholding in MDH Serbia,²²⁹⁴ the amount of compensation related to this shareholding would need to be reduced by the amount of applicable taxes as if this amount was transferred to him as a dividend.

1496. Respondent's position is that the value of compensation that would be due in case the Tribunal find that it breached the applicable BIT is nil. Therefore, it makes the above argument for the sake of completeness. However, should the Tribunal find that the compensation is due (*quod non*), it should also reduce it on the basis of applicable tax, as discussed above. In such case, Respondent stands at its disposal to provide the relevant calculation.

3. The claimed tax gross-up for the Canadian Claimants beneficiaries of the Ahola Family Trust

1497. Claimants argue that in case the compensation is instead of Sembi paid to Canadian beneficiary of the Ahola Family Trust, the Canadian Claimants beneficiaries of the Ahola Trust (Ms. Kathleen Elizabeth Rand, Ms. Allision Ruth Rand and Robert Harry Leander Rand) should also receive a gross-up for any Canadian tax payable.²²⁹⁵ Claimants' arguments are flawed both from the point of international law and from the point of the Canadian tax law on which they rely.

3.1. No support for the tax gross up in international law

1498. At the outset, it should be noted that there is no reason why Respondent should pay a tax gross up just because Claimants employed a particular investment scheme for their own benefit. This argument is reinforced by the fact that the whole scheme, if not illegal under Canadian law (as it was against the Serbian privatization and company legislation) was obviously designed to circumvent applicable tax law and, as such, should not be legitimized.²²⁹⁶

²²⁹⁴ See Reply, para. 1422.

²²⁹⁵ See Memorial, paras. 581-591; Reply, paras. 1432-1442.

²²⁹⁶ See Counter-Memorial, para. 809.

1499. Second, Claimants claim for a tax gross up is speculative and fails to satisfy the basic requirements of causality between the alleged breach and the injury for which compensation is sought.²²⁹⁷

1500. According to an unequivocal pronouncement of the arbitral tribunal in *Venezuela Holdings v. Venezuela*,

*"Regarding foreign taxation, the Claimants contend that there is a risk that other jurisdictions will seek to impose taxes that would have been prevented in the absence of the expropriation. According to the Claimants, such taxation would constitute additional consequential damages. The Tribunal considers that this claim is speculative and uncertain. Accordingly, the claim is dismissed."*²²⁹⁸

1501. Similarly, in *Rusoro v. Venezuela*, the arbitral tribunal held the following:

*"In its Memorial and Reply, Rusoro sought indemnity in respect of any double taxation of the Award that may rise in Canada (or elsewhere), to the extent this liability would not have arisen had Venezuela observed its international commitments under the Treaty⁶. This claim seems to have been abandoned in Rusoro's Post Hearing Brief. In any case, the claim lacks merit. Any tax liability arising under Canadian tax laws (or from any other fiscal regime, other than the Venezuelan), does not qualify as consequential loss arising from Venezuela's breach of the Treaty and does not engage Venezuela's liability."*²²⁹⁹

1502. Therefore, as clearly stated by the tribunal, a tax gross up on the basis of tax liability arising (no less than) under Canadian law was simply not a consequential loss arising from a treaty breach in Venezuela. The same analysis is equally applicable in the present case.

²²⁹⁷ See, e.g., *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, para. 367, **RLA-198**; *Venezuela Holdings v. Venezuela*, award, para. 388, **RLA-197**; *Rusoro v. Venezuela*, para. 854, **RLA-196**.

²²⁹⁸ *Venezuela Holdings v. Venezuela*, award, para. 388, **RLA-197**.

²²⁹⁹ *Rusoro v. Venezuela*, para. 854, **RLA-196**.

3.2. No support for the tax gross up under Canadian law

1503. In addition, Claimants' claim for a tax gross up suffers from a number of flaws and inconsistencies relating to the tax residence of the Ahola Family Trust and the Canadian income tax consequences of Claimants that would receive compensation for damages directly, and not through the Ahola Family Trust's interest in Sembi. Accordingly, Serbia disputes Claimant's interpretation of Canadian tax law and their calculation of the gross tax gross up.

3.2.1. Tax Residence of the Ahola Family Trust

1504. The Claimants argument is premised on the Ahola Family Trust being a non-resident trust for purposes of the Federal Act. Their position fails to take into account the fact that the residence of a trust for Canadian tax purposes is determined by the location of central management and control of the trust, not the residence of the trustee and that the non-resident trust rules in subsection 94(3) of the Federal Act may apply in the circumstances to deem the Ahola Family Trust to be resident in Canada.²³⁰⁰

1505. In paragraph 583 of the Claimants' Memorial, the Claimants state that the Ahola Family Trust is not resident in Canada because (a) it was settled outside of Canada and (b) the trustee is not resident in Canada. However, in *Fundy Settlement v. R*, the Supreme Court of Canada established that the residence of a trust is determined by applying the principles traditionally applied to determine the residence of corporations – that is, the location of central management and control.²³⁰¹ Prior to *Fundy Settlement*, the leading Canadian court case to deal with trust residency had suggested that the residence of a trust would be the same as the residence of its trustee.²³⁰² This interpretation was considered in *Fundy Settlement* and explicitly rejected as a rule of general application in determining the residence of a trust for tax purposes.

²³⁰⁰ Subsection 94(3) of the Federal (Income Tax) Act (Canada), **RE-566**.

²³⁰¹ “The principal basis for imposing income tax in Canada is residency. As with corporations, the residence of a trust should be determined by the principle that a trust resides for the purposes of the Income Tax Act where its real business is carried on, which is where the central management and control of the trust actually takes place.”, p.3, *St. Michael Trust Corp., as Trustee of the Fundy Settlement and St. Michael Trust Corp., as Trustee of the Summersby Settlement v. Her Majesty The Queen*, 2012 SCC 14, aff’g 2010 FCA 309 and 2009 TCC 450 (“*Fundy Settlement*”), **RE-366**. See also, *ibid* para. 15. The name of the case changed from *Garron* at the Tax Court of Canada level to *Fundy Settlement* at the Supreme Court level.

²³⁰² *Dill v. Her Majesty The Queen* 78 DTC 6376 (FCTD) (commonly referred to as “*Thibodeau*”), **RE-367**.

1506. The phrase “central management and control” refers to effective decision-making relating to the overall strategic direction and governance of the trust and is a fact driven analysis. Factors such as the scope of the beneficiaries involvement in making decisions with respect to the Ahola Family Trust and the scope of the trustee’s ability to delegate its authority should be considered. In this regard:

- (a) Paragraph 40 of the Claimants’ Memorial, provides that Mr. Rand, a Canadian resident, had “full control over the Beneficially Owned Shares from the moment of their acquisition... until ... 21 October 2015.” Moreover, paragraph 42 of the Claimants’ Memorial provides that Mr. Rand “kept the Beneficially Owned Shares under his sole control.”
- (b) The Ahola Family Trust Indenture lists certain restricted powers which the trustee shall not exercise without giving 30 days-notice to the protector.²³⁰³
- (c) The protector has the power to remove the trustee at any time.²³⁰⁴
- (d) The Claimants’ Memorial suggests that Mr. Rand, and not the Trustee, actively managed the Ahola Family Trust’s affairs (and provides no evidence of any activities of the Trustee).²³⁰⁵

1507. Claimants have not established that the Ahola Family Trust is a non-resident trust from a Canadian tax perspective. In any event, even if the central management and control of the Ahola Family Trust was exercised outside Canada, subsection 94(3) of the Federal Act should deem the Ahola Family Trust to be resident in Canada. More particularly, subsection 94(3) of the Federal Act deems a non-resident trust to be resident in Canada where there is a “resident contributor”²³⁰⁶ or a “resident beneficiary”²³⁰⁷ of the trust as those terms are defined in subsection 94(1) of the Federal Act. Subject to certain exceptions, which do not apply here, these definitions operate to deem a trust formed outside of Canada with beneficiaries in Canada to be

²³⁰³ The Ahola Family Trust Indenture, subclause 5(4), **CE-8**.

²³⁰⁴ The Ahola Family Trust Indenture, subclause 5(3), **CE-8**.

²³⁰⁵ *Ibid* at para 67.

²³⁰⁶ A “contributor” is someone that, at or before that time, has made a contribution to the trust. “Contribution” is defined in subsection 94(1) to mean a transfer or loan of property (other than an arm’s length transfer) made to the trust by a particular entity. *See* Federal (Income Tax) Act (Canada), **RE-566**.

²³⁰⁷ A beneficiary of the trust will be a “resident beneficiary” if, at a particular time, the beneficiary is resident in Canada and the trust has a “connected contributor” as defined in subsection 94(1) of the Federal (Income Tax) Act (Canada), **RE-566**.

resident in Canada for specific purposes, including for purposes of determining liability for Canadian tax in section 2 of the Federal Act. Because the beneficiaries of the Ahola Family Trust are resident in Canada (see paragraph 42 of Claimants' Memorial and the structure chart at page 16 therein), the trust should be deemed to be resident in Canada. This renders the Claimants' claim for a tax gross-up untenable.

1508. As a resident of Canada for purposes of the Federal Act, either because its central management and control is located in Canada or because it is deemed to be resident in Canada under subsection 94(3) of the Federal Act, the Ahola Family Trust should have been filing Canadian tax returns on an annual basis as required under paragraph 150(1)(c) of the Federal Act, and was required to pay taxes in Canada on its world-wide income under section 2 of the Federal Act computed at the highest marginal rate in Canada.²³⁰⁸ Canada has a progressive tax rate system with tax brackets for personal income tax, so this would be more tax payable than the gradual rates afforded to Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand as individuals.

1509. Separately, paragraph 48 of the Claimants' Memorial provides that Mr. Rand was a director of Sembi, and that Mr. Rand had "*a control agreement with the remaining directors of Sembi*". As a result, Sembi was likely also a resident of Canada for purposes of the Federal Act. As a resident of Canada, Sembi should have been filing tax returns annually in Canada as required under paragraph 150(1)(a) of the Federal Act, and should have been paying tax in Canada on its world-wide income under section 2 of the Federal Act.

3.2.2. Canadian Tax Consequences and Computational Errors

1510. In determining the character of a damages payment in Canada, the *surrogatum* principle is generally applied. This principle considers whether the payment was a replacement of income or capital and provides for the same tax treatment as what the payment was intended to replace.²³⁰⁹

²³⁰⁸ Subsections 104(1) and para 122(1)(a) of the Federal (Income Tax) Act (Canada), **RE-566**.

²³⁰⁹ *Tsiaprailis v. Her Majesty the Queen*, 2005 SCC 8, dated 2005, p. 2, **RE-428**; *Transocean Offshore Ltd. v. Her Majesty the Queen*, 2005 DTC 5201 (FCA), dated 2005, para 50, **RE-429**.

1511.If the Ahola Family Trust is determined to be resident in Canada, even if Sembi was not a resident of Canada, Sembi and BD Agro would each have been a “controlled foreign affiliate” as defined in subsection 95(1) of the Federal Act for purposes of Canada’s controlled foreign corporation rules. If Sembi had sold the shares of BD Agro, that sale would have been a taxable event in Canada and tax would have been payable by the trust at the highest marginal rate and not at the graduated personal tax rates of the individual beneficiaries either at the time of the disposition or at the time the proceeds were distributed to the Ahola Family Trust.²³¹⁰

1512.The relief that Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand are requesting for direct payment by the Tribunal appears to be a result of jurisdictional issues relating who can bring a claim against the Republic of Serbia. Because they are requesting payment directly as beneficiaries of the trust, it is as if the beneficiaries had disposed of their interest in the Ahola Family Trust. If the beneficiaries had disposed of their interest in the Ahola Family Trust, that event would have been taxable in Canada regardless of whether the trust was resident in Canada or not.²³¹¹ Alternatively, it is possible that they are seeking to receive payments directly to avoid the Canadian taxes that would otherwise apply if any payments were to be received by the Ahola Family Trust.

1513.Directing compensation to be received by the beneficiaries of the Ahola Family Trust is analogous to a directed payment for purposes of subsection 56(2) of the Federal Act and any capital gain on the disposition for Canadian tax purposes should be reduced by the tax cost in the shares.²³¹² For example, if the BD Agro shares held indirectly through Sembi had a tax cost of \$100 and a damages payment is determined to be \$200, the resulting capital gain on the shares should be \$100 (not \$200). Moreover, only 50% of capital gains are taxable in Canada – such that in this example the actual income inclusion would only be \$50.²³¹³ The Claimants’ calculation of the gross-up is flawed because it assumes no tax cost in the underlying shares.

²³¹⁰ Subsections 104(1) and para 122(1)(a) of the Federal (Income Tax) Act (Canada), **RE-566**.

²³¹¹ See the definitions of “disposition”, “capital property” and “adjusted cost base” in section 248 of the Federal (Income Tax) Act (Canada), **RE-566**.

²³¹² Subsection 56(2) of the Federal (Income Tax) Act (Canada), **RE-566**.

²³¹³ Section 38 and subsection 248(1) of the Federal (Income Tax) Act (Canada), **RE-566**.

1514. Under the Canadian tax rules, the disposition of the BD Agro shares would be taxed at the highest marginal rate by the Ahola Family Trust so there should be no rate differential.²³¹⁴ In fact, there is an argument that any damages payment awarded by this Tribunal that is to be received by the beneficiaries directly should be discounted by any tax savings that results from the beneficiaries receiving the amount personally. The Claimants' requested relief does not take into account Canada's progressive tax rate system²³¹⁵ as it calculates the tax gross-up using the highest marginal rate on the entire amount of the damages payment. This does not take into account Canada's graduated personal tax rates or the potential availability of lifetime capital gains exemption.²³¹⁶

1515. In conclusion, Claimants' claim for a tax gross up for the Canadian Claimants beneficiaries of the Ahola Family Trust is without merit and should be dismissed.

4. Mr. Rand's claim for damages for its receivables towards BD Agro.

1516. Finally, Mr. William Rand personally claims compensation for his payments to BD Agro's Canadian suppliers for the purchase and transport of heifers in the amount of EUR 2,177,903, as well as a short-term loan he provided to BD Agro in the amount of EUR 219,000.²³¹⁷

1517. This claim has already been discussed in the Counter-Memorial.²³¹⁸ Initially, Claimants contended that the BD Agro's bankruptcy proceedings were stalled and that Mr. Rand could not satisfy his claim there. In the meantime, however, it is obvious that the bankruptcy proceedings have moved on at a reasonable pace and BD Agro was sold. Now, Claimants contend that it was sold below its real value and even allege, without any evidence, that this is the result of wrongdoing.²³¹⁹ Their objections concerning the bankruptcy proceedings were refuted in detail above.²³²⁰ For the rest of Claimants arguments, it is clear that they do not add anything new to the discussion. They merely repeat their allegations that the termination of the Privatization

²³¹⁴ Subsections 104(1) and paragraph 122(1)(a) of the Federal (Income Tax) Act (Canada), **RE-566**.

²³¹⁵ Section 117 of the Federal (Income Tax) Act (Canada), **RE-566**.

²³¹⁶ Subsection 110.6(1) and section 117 of the Federal (Income Tax) Act (Canada), **RE-566**.

²³¹⁷ See Reply, para. 1443.

²³¹⁸ Counter-Memorial, paras. 811-815.

²³¹⁹ See Reply, para. 1444.

²³²⁰ See Sec.I.G.

Agreement caused the bankruptcy. In this, they forget the extent of financial abyss BD Agro found itself in 2014-2015.

1518. Consequently, Mr. Rand's claim resulting from alleged loss from his receivables against BD Agro should be dismissed.

VI. PRAYER FOR RELIEF

Respondent requests the Arbitral Tribunal to

- (1) *dismiss* all Claimants' claims for the lack of jurisdiction,
in event, dismiss all Claimants' claims for the lack of merit,
- (2) *order* Claimants to reimburse Respondent all its costs of the proceedings, with interest.

Belgrade / Novi Sad, 24 January 2020

Respectfully submitted,

Senka Mihaj, attorney at law



Professor Petar Djundic



Dr. Vladimir Djerić, attorney at law



*Appendix 1. Overview of Correspondence between the Agency, Ministry of Economy and BD Agro/Mr. Obradovic
Concerning the Breach of Article 5.3.4 of Privatization Agreement*

Date	Meeting / Letter	Agency's / Ministry's / Buyer's stance concerning the breach of Article 5.3.4 PA
24 Feb 2011	Agency's Notice (CE-31, pp. 6 and 7)	"Buyer is given <u>additionally granted term</u> of 60 days from the day of the receipt of this Decision <u>for fulfillment of obligations</u> referred to in item(s 5.3.3 and) 5.3.4 of the Agreement and submission of [an audit] report... In the event of failure to comply... the Privatization Agency will undertake the measures under Article 41a of the Law on Privatization."
29 Apr 2011	Audit Report (RE-13, pp. 5-7)	This Report confirmed that: (i) funds received by BD Agro from the 221 Million Loan were used for the benefit of third parties, i.e. Crveni Signal and Inex; (ii) amount of RSD 18,170,690.00 was still owed to by Inex; (iii) amount of RSD 70,944,422.27 was still owed by Crveni Signal; (iv) 221 Million Pledge was still registered.
24 Jun 2011	Agency's Notice (CE-96, pp. 4 and 5)	Agency granted <u>another additional term</u> and made the same <u>request for fulfilment</u> of the article 5.3.4 and delivery of auditor's report, as in the first Notice from 24 February 2011 and again noted that in case of noncompliance the Agency will undertake the measures under Article 41a .
6 Oct 2011	Agency's Notice (CE-97, p. 7)	Agency granted <u>another additional term</u> and made the same <u>request for fulfilment</u> of the article 5.3.4 and delivery of auditor's report, as in the first Notice from 24 February 2011 and again noted that in case of noncompliance the Agency will undertake the measures under Article 41a .
9 Nov 2011	Letter of Mr. Obradovic to the Agency (RE-60, pp. 1)	<i>Letter:</i> " Fulfillment of the obligation referred to in articles 5.3.3. and 5.3.4. of the Agreement which relates to sale of fixed assets, their collection and fund spending shall be documented by the audit report ...
23 Nov 2011	Meeting in the Ministry of Economy (RE-71, p. 1)	"At the meeting the draft auditor's report prepared by "Auditor" Beograd was presented, on acting of the Buyer within the additional deadline according to the Agency's Decision of 6 October 2011."
16 Dec 2011	Meeting in the Agency (RE-71, p. 2)	"It was concluded on the above meetings that the Buyer shall deliver the auditor's report which has to include declaration of the auditor whether the buyer performed, did not perform or partially performed obligations under Art. 5.3.3 and 5.3.4 of the Agreement"
27 Dec 2011	Agency's Notice (CE-32, pp. 4 and 5)	Agency granted <u>another additional term</u> and made the same <u>request for fulfilment</u> of the article 5.3.4 and delivery of auditor's report, as in the first Notice from 24 February 2011 and again noted that in case of noncompliance the Agency will undertake the measures under Article 41a .

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2 Feb 2012	Audit Report (RE-17, pp. 4-6)	This Report confirmed that there had <u>been no changes since 2011</u> Audit Report concerning the debts of Inex and Crveni signal, i.e. the Report confirmed that: (i) Inex still owed RSD 18,170,690; (ii) Crveni Signal still owed RSD 70,944,422.27; (iii) 221 Million Pledge was still registered.
21 Mar 2012	Meeting in the Agency (RE-72.1, p. 21)	“... the Buyer stated that he will make additional effort in order for Crveni signal to settle its obligation towards the Subject of privatization....and that Inex would return the loan when the conditions are met, and regarding the obligation to invest into the Subject again, because the subject of execution of investment obligation was sold, the Buyer believes that the Agency’s request is not legitimate, and it will not act in accordance with the Agency’s request. At the meeting, the Agency’s representatives continued to repeat that the Buyer must act in accordance with the Agency’s Decision dated 22 December 2012.”
30 Mar 2012	Meeting in the Agency (evident from RE-72.1, p. 21)	“...the Buyer notified the Agency that he prepared an appeal for the Ministry against the Agency’s decisions...”
2 Apr 2012	Letter from Mr. Obradovic to the Ministry of Economy (also then forwarded to the Agency)(CE-77, pp. 4 and 5)	“Return of the loans BD AGRO gave to third parties from the loan assets has been partially implemented. The loans which have not been returned are the loans given to the company Crveni signal (70 million dinars) and Inex, N. Varos (18 million dinars). We think that these loans did not directly cause the damage to the company , for the following reasons... On April 8, 2011, I <u>made the payment of the sixth and last installment</u> of the sale and purchase ... I think that I have <u>thus</u> completely complied with all the obligations towards the Agency in the capacity of the Buyer of the capital.”
22 Jun 2012	Agency’s Notice (RE-15, p. 1)	Agency granted <u>another additional term</u> and made the same <u>request for fulfilment</u> of the article 5.3.4 and delivery of auditor’s report, as in the first Notice from 24 February 2011 and again noted that in case of noncompliance the Agency will undertake the measures under Article 41a.
23 Jul 2012	Letter of Mr. Obradovic and BD Agro to the Agency (RE-21, pp. 1 and 2)	“Regarding your other requests, there were no changes in the meantime, so <u>we submit the Request for an additional period during which the contractual obligations may be realized</u> pursuant to your Decision of 27 December 2011.”
3 Aug 2012	Agency’s Notice (CE-78, p. 3)	Agency granted <u>another additional term</u> and made the same <u>request for fulfilment</u> of the article 5.3.4 and delivery of auditor’s report, as in the first Notice from 24 February 2011 and again noted that in case of noncompliance the Agency will undertake the measures under Article 41a.

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2 Nov 2012	Meeting in the Agency (RE-75, p. 1)	“At the meeting representatives of the Ministry confirmed that the Buyer has the obligation to submit to the Agency the auditor’s report with auditor’s statement on acting of the Buyer within the additional deadline, as well as <u>to submit explanation of reasons for not being able to meet the obligations under the Agreement as a whole.</u> ”
9 Nov 2012	Agency’s Notice (CE-79, p. 3)	Agency granted <u>another additional term</u> and made the same <u>request for fulfilment</u> of the article 5.3.4 and delivery of auditor’s report, as in the first Notice from 24 February 2011 and again noted that in case of noncompliance the Agency will undertake the measures under Article 41a.
13 Dec 2012	Audit Report (RE-19, pp. 6 and 7)	This Report confirmed that: (i) although Crveni signal repaid part of its debt towards BD Agro, it still owed RSD 65,904,569.84; (ii) Inex still owed RSD 18,170,690.00 to BD Agro.
4 Feb 2014	Meeting held at the Agency (RE-36, pp. 1 and 2)	<p>“He [Djura Obradovic] does not understand why the Agency does not issue the said certificate [of execution of contractual obligations] <u>since he paid the price...</u></p> <p>The Executive Director [of the Agency], Dr. Albina Kecman Susnjar, stated that the payment of the purchase price is <u>only one of the contractual obligations</u> and that the execution of other contractual obligations is <u>independent</u> of the obligation to pay the purchase price. She also stated that the Agency in its work applies the Law on Privatization and controls the concrete sale contract, that all obligations are important and that what is signed must be completed to the end. This is a standard form contract of sale by public auction and the treatment during the control is the same, for any offense, irrespective of the gravity of the offense. She also pointed out that assignation is possible only while the contract is in force.</p> <p>By the representative of the Center for Control of Performance of Agreements the Buyer was informed that the violation of contractual obligations was established <u>before the Buyer paid the full purchase price</u>, and that before the payment of the price the measures were taken towards the Buyer, i.e., there was a remedial period given to him to submit proof that the violations have been cured and that the Buyer has still not acted accordingly...”</p>
15 Dec 2014	Meeting held at the Ministry of Economy (RE-38, p. 1)	“... The representative of the Entity of Privatization have committed to prepare for the next meeting, which is agreed in principle to be held on 17 December 2014 in the Ministry, the <u>materials on the state of the mortgages</u> registered on the property of the Entity undergoing privatization as a collateral warranty for the liability of third parties.”
16 Dec 2014	Letter from BD Agro to the	BD Agro submitted to the Agency several documents from 201 and 2012, including, Supplementary Auditor’s Report from December 2012 which confirmed that there were

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	Agency (CE-323, p. 1)	outstanding debts of Inex and Crveni signal towards BD Agro and that the 221 Million Pledge was still registered.
17 Dec 2014	Meeting held at the Ministry of Economy (RE-22, p. 2)	<p>“The representative of the Entity stated that the condition regarding the already stated audit finding had not been changed, and that, in their opinion, the biggest problems in execution of obligations of the Buyer from the respective Agreement... were claims which the Entity had towards the company Crveni Signal Beograd and Inex Nova Varos...</p> <p>Contractual obligations which the Buyer undertook under Articles 5.3.3 and 5.3.4 of the Agreement of Sale of Socially-owned capital were underlined [by the Agency], with special emphasis on duration of the respective contractual obligations, but it was stated at the meeting that the Buyer should meet the stated obligations according to the balance on the date of payment of purchase price.”</p>
15 Jan 2015	BD Agro delivered to the Agency Prva revizija’s audit report (RE-39, p. 1)	The preparation of this Report was commissioned by MDH instead of BD Agro, due to which fact the Agency refused it.
16 Jan 2015	Meeting held at the Ministry of Economy (RE-39, p.1)	<p>“At the meeting it was noted thatthe submitted report was prepared according to the order given by the company “MARINE DIVE HOLDING” doo Belgrade, and not by the Buyer... therefore it cannot be taken as a basis for making a decision, since it was not ordered and delivered by the Buyer. It was also stated that the said report does not include the auditor's statements on all obligations of the Buyer as instructed by the Privatization Agency by its last Decision from November 2012, but that it indisputably includes the statement of the <u>auditor confirming that the Buyer has disposed with the fixed assets of the Entity contrary to the Agreement...</u>”</p>
23 Mar 2015	Request for issuance of confirmation (RE-51, p. 1)	Igor Markicevic requested from the Agency to issue Certificate on Fulfillment of the Obligations Referred to in the Agreement.
3 Apr 2015	Agency’s response to request for issuance of confirmation (RE-52, p. 1)	The Agency notified Igor Markicevic that the conditions for issuing the requested Certificate have not been met .

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20 Apr 2015	Meeting held at the Agency (<i>RE-41, p. 1</i>)	“The representatives of the Agency informed the attendees that the Ministry of Economy concluded the procedure of supervision over the work of the Agency in the case “BD Agro” Dobanovci, and gave an order to the Agency to grant the Buyer an additional period of 90 days to comply with the previously granted remedial period. ”
27 Apr 2015	Meeting held at the Agency (<i>RE-23, p. 2</i>)	“... Director of the Entity summarized the line of actins after receiving the decision of the Agency, including: <u>supplying audit report which confirms execution of obligations within additionally approved deadline</u> , which should be submitted by the Buyer, Djura Obradovic...”
27 Apr 2015	Letter from the Agency to Djura Obradovic (<i>CE-348, p. 2</i>)	“In line with the Ministry’s report..., as per Article 88 of the Law on Privatization... in regards to Article 41a, paragraph 1, item 3 of the Law on Privatization... the Buyer is given a subsequently granted 90-day term as of the receipt of Notification for submission of evidence on activities taken as per the Agreement... that is, in line with the Notification... of 9 November 2012...”
30 Apr 2015	Letter from Mr. Obradovic to the Agency (<i>RE-42, p. 1</i>)	Acting upon the Agency’s Decision dated 27 April 2015, Mr. Obradovic resubmitted Audit Reports from April 2011, February 2012, December 2012 and January 2015, to the Agency. He also submitted for the first time November 2011 Audit Report. All these reports demonstrated that: (i) debts of Inex and Crveni signal towards BD Agro remained unpaid; (ii) the 221 Million Pledge remain registered.
23 Jun 2015	Letter from the Agency to Djura Obradovic and BD Agro (<i>CE-351, p. 2</i>)	“The Buyer is notified that until the end of the subsequent deadline, in line with the decision of the Privatization Agency of April 23, 2015, that is until July 27, 2015, he is under obligation to deliver auditor’s report where the auditor shall... provide a <u>statement on performance of the obligations of the Buyer referred to in Article 5.3.4 of the Agreement ...</u> ”
2 Jul 2015	Letter from BD Agro to Agency (<i>CE-46, p. 7</i>)	“On April 30, 2015, the buyer from the Agreement... submitted to the Agency the reports of auditor companies "Auditor" and "Prva revizija", in which it is clearly and unequivocally stated that the buyer fulfilled all contractual obligations as of the date of payment of the last instalment of the purchase price (April 8, 2011), except in relation to lending to third parties , namely Inex Nova Varos ad Nova Varos and Crveni signal a.d. Beograd...”
20 Jul 2015	Letter from the Agency to BD Agro (<i>CE-47, p. 8</i>)	The Agency noted that auditing company “Prva Revizija d.o.o.” Belgrade confirmed that there was a failure in fulfillment of the obligations referred to in Article 5.3.4 of the Agreement, by stating that on 8 April 2011, 221 Million Pledge was still registered while Inex and Crveni signal still owned to BD Agro RSD 18,170,690.00 and RSD 70,944,422.27 respectively.

*Appendix 1. Overview of Correspondence between the Agency, Ministry of Economy and BD Agro/Mr. Obradovic
Concerning the Breach of Article 5.3.4 of Privatization Agreement*

10 Sep 2015	Letter from Mr. Obradovic to the Agency (<i>CE-48, p. 3</i>)	In this letter Mr. Obradovic tried to deceive the Agency that conditions for deletion of 221 Million Pledge were met: "...please find attached the evidence that BD Agro is in possession of all the documents needed for deletion of pledges registered on its immovable property as security instruments for the loans BD Agro received from Nova Agrobanka a.d. Beograd, which were partially used to finance loans approved to related parties — Inex — Nova Varos a.d. Nova Varos and Crveni Signal a.d. Beograd. Since BD Agro repaid these loan obligations in timely manner, on September 4, 2015, Nova Agrobanka provided appropriate statement for deletion of these pledges... This is also confirmed by the Auditing Company Prva Revizija... This way, complete fulfillment of obligations referred to in Article 5.3.4 of the Agreement was ensured..."
28 Oct 2015	Notice of Termination of Privatization Agreement (<i>CE-50, pp. 6 and 7</i>)	"In respect of performance of the obligation referred to in item 5.3.4 of the Agreement within additionally granted term, and pursuant to auditor's reports of 2011, 2012 and 2015, as well as documentation delivered along with auditor's reports and subsequently, it was ascertained that the pledge was registered on the immovable property of the Subject as security instrument for the loan of the Subject in the amount of 221,000,000.00 dinars... which the Subject received from Agrobanka Belgrade. Part of that loan in the amount of 70,944,422.77 RSD was used on the basis of the Guarantee Agreement... for settling of the obligations of the company AD "Crveni signal" Belgrade towards Agrobanka... Subsequently, part of the stated loan in the amount of 221,000,000.00 was used for issuing a loan to the company AD "Ineks" Nova Varos, in the amount of 30,670,690.00 dinars.... Since the Buyer failed to provide evidence in the additionally granted term that he had complied with the obligation referred to in item 5.3.4 of the Agreement, and according to the auditor's reports of 2011, 2012 and 2015, as well as documentation submitted along with auditor's reports, the obligation has not been performed, we hereby inform you that, at its 22nd session held on September 28, 2015, the Commission... rendered the decision that the Agreement... is considered terminated due to non - fulfillment, and in accordance with Article 88, paragraph 3 of the Law on Privatization... and in regards to Article 41a, paragraph 1, item 3 of the Law on Privatization... in line in line with the Report of the Ministry of Economy... of April 7, 2015.

-  - Agency's / Ministry's letters
-  - BD Agro's / Mr. Obradovic's letters
-  - Meetings