IN THE MATTER OF INVESTMENT DISPUTE UNDER THE AGREEMENT BETWEEN CANADA AND THE REPUBLIC OF SERBIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS AND UNDER THE AGREEMENT BETWEEN SERBIA AND MONTENEGRO AND THE REPUBLIC OF CYPRUS ON RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

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

AND

SEMBI INVESTMENT LIMITED

(CYPRUS)

CLAIMANTS

– v –

THE REPUBLIC OF SERBIA

RESPONDENT

REJOINDER ON JURISDICTION

6 March 2020

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I. INTRODUCTION

A. Preliminary statement

1. Most of Serbia's numerous objections to jurisdiction fail for the simple reason that they are based on the same two mistaken legal premises.

2. Serbia's first mistaken premise is that the Canada-Serbia BIT and the Cyprus-Serbia BIT only protect "*property right[s] that [were] recognized and protected under the laws of the host state*."[1]

3. Serbia does not cite *any* legal authority for that premise—and for a reason, because there is *none*. In fact, Serbia's proposition could not be more wrong.

4. International investment law protects not only proprietary rights, but also rights *in personam* and rights of beneficial ownership. The two BITs are no exception to the rule. Numerous international tribunals[2] and scholars[3] have recognized and applied the principle. Contrary to Serbia's suggestions, the language of the two definitions of "investment" under the two BITs also supports this conclusion.

5. It is entirely irrelevant whether or not an investment defined in the applicable treaty is also recognized under the laws of the host state. This stems from the supremacy of international law and the basic principle that a state cannot invoke its municipal law as the reason for the non-fulfillment of its international obligations.

6. It is equally irrelevant whether the investment enjoys protection under the domestic law of the host state. The very purpose of bilateral investment treaties is to provide additional protections to those available under the municipal law of the host state.

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[1] Rejoinder, ¶ 1047.

[2] See, e.g., *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, ¶¶ 144-145, **CLA-153;** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 216, **CLA-075**.

[3] David J. Bederman, "*Beneficial Ownership of international Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 936 (emphasis added), **CLA-078**.

7. Serbia's second mistaken premise is that "*Serbian law ignores the distinction [between nominal and beneficial ownership]*."[4]

8. This is a serious misrepresentation of Serbian law.

9. Serbian law does not ignore the distinction between nominal and beneficial ownership. For example, the 2011 Law on Capital Markets recognizes the essence of beneficial ownership, *i.e.* the fact that person who "*does not nominally own*" a financial instrument such as the shares in a joint-stock company, may "*[have] the benefits of ownership [...], the power to direct the voting or disposition of the financial instrument [and] to receive the economic benefits of ownership*."[5] The 2011 Law on Capital Markets provides for certain duties of such a person—and thus shows that beneficial ownership of shares in joint-stock companies is not illegal in Serbia.

10. Furthermore, as early as in 2003, the Privatization Agency sent detailed inquiries about potential beneficial ownership of the bidders in the privatization of the tobacco processing company, Duvanska industrija "Vranje" a.d. The Privatization Agency *explicitly* required potential buyers to disclose their "*actual and beneficial (as the case may be) ownership and control structure [...]*":[6]

> 4. An interested legal entity (hereinafter "**interested party**") shall be entitled to purchase the Tender Documents if it fulfills the following criteria:
>
> (i) it is an entity with more than five (5) years' direct experience in cigarette manufacturing (in-house production);
>
> (ii) its net revenues from tobacco products sales in the most recently audited fiscal year exceed the equivalent of Euro 10,000,000; and
>
> (iii) it has the ability to evidence, with full transparency, its actual and beneficial (as the case may be) ownership and control structure, as well as that of its parent companies and related companies.

4 Rejoinder, ¶ 1049.

5 2011 Law on Capital Markets, Article 2(34), **CE-728**.

6 Public Invitation for participation in a public tender process for the sale of socially owned capital of Duvanska industrija "Vranje" a.d.,, pp. 1-2 (emphasis added), **CE-890**.

11. The Privatization Agency also *required* interested bidders to submit "*an outline of the ownership and control structure […] including a summary of any beneficial ownership interests*":[7]

> 5. An interested party's Tender Documents Request must include the following documents, submitted in the English language and certified as authentic by one of its duly authorized representatives:

[…]

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

12. The Privatization Agency required identical information regarding beneficial ownership in the 2003 privatization of another Serbian company, Beopetrol a.d. Beograd.[8]

13. Thus, Serbia was fully aware of the existence and potential importance of beneficial ownership. Yet, it chose not to inquire about potential beneficial ownership interests in the privatization of BD Agro in 2005. The Privatization Agency only asked questions about the entity that was bidding to become the registered owner of the privatized shares.

14. The same focus on the holder of legal title permeates both the Law on Privatization, the Privatization Agreement and the then nascent regulation of the Serbian capital market. Beneficial ownership became relevant for Serbian regulatory purposes only much later.

15. It is simply disingenuous for Serbia to argue in this arbitration that the Claimants' beneficial ownership structure somehow violated or circumvented Serbian law. Mr. Rand repeatedly disclosed his beneficial ownership to the most senior of Serbian ministers and representatives of the Serbian government, including the Privatization

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

8 Public Invitation for participation in a public tender process for the acquisition of a controlling interest in Beopetrol a.d. Beograd, pp. 1-2, **CE-891**.

Agency. However, beneficial ownership was largely irrelevant under Serbian law at the time.

16. The Claimants' beneficial ownership certainly was and still is relevant under international investment law—and justifies the Tribunal's jurisdiction *ratione materiae* under both Treaties and the ICSID Convention. It also does away with the absurd objections that the present claims amount to an abuse of process and that the Claimants have no standing under the ICSID Convention.

17. The Claimants have already shown in the Reply that their investments were in accordance with Serbian securities regulations, and Serbia did not present any new arguments to refute that showing.

18. Serbia's next two objections merit only a short shrift: Mr. Rand was not required to submit a waiver by MDH Serbia and his filing the waiver with the Reply mooted the issue. The Tribunal obviously has jurisdiction *ratione temporis* under the Canada-Cyprus BIT. It is simply absurd for Serbia to assert that the Canadian Claimants' claims had expired before February 2014, more than a year before the Canada-Cyprus BIT entered into force in April 2015 and Serbia expropriated the Beneficially Owned Shares in October 2015.

19. If Serbia respected the applicable procedural rules, the introduction would stop here. However, Serbia's constant attacks against the Claimants reached new heights in the Rejoinder when Serbia filed new objections to jurisdiction, claiming illegality of the Claimants' investment due to their alleged failure to disclose their beneficial ownership and their alleged asset-stripping of BD Agro.

20. Serbia's new objections are obviously inadmissible because belated. Article 41(1) of the ICSID Arbitration Rules clearly requires that objections to jurisdiction be filed as soon as possible and no later than in the Counter-Memorial. Serbia purposefully chose not to do so, and it does not even attempt to justify its belated filing. It is respectfully submitted that the Tribunal should uphold the procedural integrity of this arbitration and reject Serbia's new objections on that ground alone.

21. However, even a cursory review of the new objections shows that they are devoid of any merit. The Serbian Minister of Economy, Mr. Predrag Bubalo, and his Deputy

Minister, Mr. Ljubiša Jovanović, were both informed that Mr. Obradović participated in the public auction as a mere nominal owner while Mr. Rand was the beneficial owner. The information was not formally provided in the privatization process only because the Privatization Agency did not ask. As noted above, the Privatization Agency did ask for such information in prior privatizations, but was irrelevant to them in the case of BD Agro. Mr. Rand, however, never made a secret of his beneficial ownership structure, and he, Mr. Broshko and Mr. Markićević spoke about it with numerous senior Serbian officials, including those at the Privatization Agency and the Ministry of Economy.

22. Thus, the objection based on the alleged failure to disclose the beneficial ownership structure fails both on facts, because the beneficial ownership structure was disclosed, and on law, because the applicable Serbian law actually did not require any disclosure and, in any event, the Privatization Agency purposefully chose to not request such information.

23. The objection regarding alleged "land machinations" has no merit either. The Claimants explain below that the purportedly problematic transactions were perfectly legal and, even if true (which they are not), such allegations in any event cannot justify an objection to jurisdiction.

24. Finally, the accusation of asset-stripping is based on a grossly erroneous and methodologically flawed calculation of cash-flows between certain bank accounts of BD Agro and a subset of those belonging to Mr. Obradović, which purportedly justifies Serbia's conclusion that BD Agro had repaid more shareholder loans than it had received.

25. One of the fundamental flaws of Serbia's calculation is that it ignores shareholder loans provided without direct cash payments to BD Agro; for example, when the loan was disbursed to BD Agro's suppliers or subsidiaries, or when Inex, one of a number of companies beneficially owned by the Claimants, purchased BD Agro's pre-privatization debt.

26. The correct calculation of the net balance of the debt financing that the Claimants and their other Serbian companies provided to BD Agro and its subsidiaries shows it to be in BD Agro's favor in the amount of at least EUR 3.3 million.

27. Serbia also completely ignores that the Claimants' shareholder loans to BD Agro were extended interest-free, at a time when the market interest rate was around 15% p.a. The aggregate value of such interest to BD Agro was approximately EUR 840,000.

28. Thus, the accusation of asset stripping is simply absurd—and shameless.

29. The Tribunal has jurisdiction over all claims raised in this arbitration.

B. Organization and evidence

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

    a. Section I is this Introduction;

    b. Section II describes the Facts relevant for jurisdictional issues;

    c. Section III sets out the legal arguments on Jurisdiction;

    d. Section IV addresses Damages; and

    e. Section V sets out the Claimants' Request for Relief.

31. Sections I-III of this Rejoinder on Jurisdiction address solely questions related to the Jurisdiction of the Tribunal.

32. In compliance with the Tribunal's decision of 20 February 2020, Section IV of this Rejoinder addresses certain new arguments on quantum raised in: (*i*) Serbia's Rejoinder of 24 January 2020; (*ii*) Ms. Danijela Ilic's expert report of 23 January 2020; and (*iii*) Mr. Sandy Cowan's second expert report of 24 January 2020. These new arguments are also addressed in Section VI of Mr. Markićević Fourth Witness Statement and Sections 2, 3.2 and 3.4 of Dr. Richard Hern's Third Expert Report.

33. This Rejoinder on Jurisdiction is accompanied by the following witness statements:

    a. Third Witness Statement of Mr. William Archibald Rand, *which addresses solely issues relevant for the jurisdiction of the Tribunal*. Specifically, it describes Mr. Rand's acquisition of BD Agro, disclosure of his ownership to

Serbian officials and Serbia's allegation regarding the alleged mismanagement of BD Agro.

b. Third Witness Statement of Mr. Djura Obradović, *which addresses solely issues relevant for the jurisdiction of the Tribunal*. Specifically, it describes Mr. Rand's acquisition of BD Agro, disclosure of his ownership to Serbian officials and Serbia's allegation regarding the alleged mismanagement of BD Agro.

c. Fourth Witness Statement of Mr. Erinn Bernard Broshko, *which addresses solely issues relevant for the jurisdiction of the Tribunal*. Specifically, it describes meetings with Serbian officials in the period between 2013 and 2015, during which Mr. Rand's beneficial ownership of BD Agro was repeatedly discussed.

d. Fourth Witness Statement of Mr. Igor Markićević, *which addresses issues relevant to both jurisdiction and quantum*. Issues relevant to the jurisdiction of the Tribunal include a factual description of: (*i*) meetings with Serbian officials in the period between 2013 and 2015, during which Mr. Rand's beneficial ownership of BD Agro was repeatedly discussed (Section II); (*ii*) Mr. Rand's beneficial ownership of certain Serbian companies (Section III); and (*iii*) BD Agro's shareholder loans (Section IV). With respect to the quantum issues that the Claimants have been authorized to address in this submission, Mr. Markićević addresses Serbia's new allegations regarding the value of BD Agro's assets and liabilities (Section V).

34. This Rejoinder on Jurisdiction is accompanied by the following expert reports:

a. Second Expert Report of Ms. Bojana Tomić Brkušanin, *which addresses solely issues relevant for the jurisdiction of the Tribunal*. Specifically, it explains in which ways BD Agro shares could have been transferred under the Sembi Agreement and the MDH Agreement, Serbian regulation related to control over companies and Serbian takeover bid rules.

b. Second Expert Report of Uglješa Grušić, *which addresses solely issues relevant for the jurisdiction of the Tribunal*. Specifically, it provides an analysis of Serbian private international law with respect to the validity of the MDH

Agreement and the Sembi Agreement and addresses recognition of foreign trusts under Serbian law.

c. Third Expert Report of Mr. Miloš Milošević, *which addresses solely issues relevant for the jurisdiction of the Tribunal*. Specifically, it confirms that Serbian law recognizes beneficial ownerships and explains that Mr. Rand acquired ownership over BD Agro in compliance with Serbian law.

d. Third Expert Report of Mr. Agis Georgiades, *which addresses solely issues relevant for the jurisdiction of the Tribunal*. Specifically, it confirms that all equitable rights in the Privatization Agreement and the BD Agro Shares were transferred from Mr. Obradović to Sembi immediately after the Sembi Agreement was entered and confirms that the terms "seat" and "registered office" are used interchangeably under Cypriot law and have the same meaning.

e. Third Expert Report of Dr. Richard Hern, *which addresses issues relevant to both jurisdiction and quantum*. With respect to the quantum, Dr. Hern addresses certain allegations raised in the expert report of Ms. Ilić and Second Expert Report of Mr. Cowan (Sections 2, 3.2 and 3.4). With respect to the jurisdiction, Dr. Hern analyzes money transfers between BD Agro, Mr. Obradović and the Serbian companies beneficially owned by Mr. Rand (Section 3.3).

35. This Rejoinder on Jurisdiction annexes a number of exhibits (*e.g.*, **CE-[x]**) and legal authorities (*e.g.*, **CLA-[x]**) numbered consecutively following those submitted with the Claimants' previous submissions, Claimants' Notice of Dispute dated 4 August 2017 ("**Notice of Dispute**"), Claimants' Request for Arbitration dated 9 February 2018 ("**Request for Arbitration**"), Claimants' Memorial dated 16 January 2019 ("**Memorial**"), Claimants' letter of 22 February 2019, Claimants' Reply to Request for Bifurcation dated 17 May 2019, Claimants' letter of 11 July 2019, Claimants' Request for Production of Documents and Replies to Respondent's Objections dated 26 July 2019, Claimants' letter of 30 September 2019, Claimants' Reply dated 4 October 2019 ("**Reply**") and Claimants' letter of 3 November 2019.

36. Capitalized terms that are not defined in this submission have the same meaning as in the Claimants' Reply.

II. FACTUAL BACKGROUND

37. Serbia's objections to jurisdiction rest on a number of misrepresentations. The Claimants will address these misrepresentations, first, in respect of the facts, and then in respect of applicable domestic law, in chronological order. In so doing, the Claimants will limit themselves to commenting only on issues that are relevant for the Tribunal's jurisdiction.

A. Serbia was aware of Mr. Rand's beneficial ownership of BD Agro

38. In May 2005, Mr. Rand visited BD Agro and met with various Serbian Government officials to discuss his potential investment. These officials included Mr. Predrag Bubalo, the then Minister of Economy, Mr. Ljubiša Jovanović, the Assistant (Deputy) Minister of Economy, Mr. Mladjan Dinkić, the then Minister of Finance, and Mr. Danilo Golubović, the then Deputy Minister of Agriculture, Forestry and Water Management.[9] They warmly welcomed Mr. Rand's interest in his potential investment.

39. On 16 May 2005, Mr. Jovanović sent an email to Mr. Rand, in which he summarized the status and economic condition of the company, the improvements that could be made and the reasons "*WHY TO INVEST IN DOBANOVCI*"—including the fact that, as a result of its location, the value of BD Agro's land would be "*permanently increasing*."[10] Mr. Jovanović's email was a typical teaser promoting an investment opportunity to a foreign investor.

40. Relying on the information provided by Mr. Jovanović and the outcome of his visit to BD Agro, Mr. Rand decided to pursue the investment. On 4 June 2005, *i.e.* approximately three weeks after Mr. Jovanović sent him the information about BD Agro, Mr. Rand wrote to Minister Bubalo. Mr. Rand thanked Minister Bubalo for his hospitality during Mr. Rand's visit to Belgrade and informed him that he was interested in participating in the public auction of BD Agro.[11]

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9 *E.g.* Email from L. Jovanović to W. Rand, 16 May 2005, **CE-013**; Email from W. Rand to P. Bubalo, 4 June 2005, **CE-014**. *See also* William Archibald Rand Second Witness Statement dated 3 October 2019, ¶¶ 8-9; William Archibald Rand Third Witness Statement dated 5 March 2020, ¶ 17; Djura Obradović Third Witness Statement dates 5 March 2020, ¶ 12.

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

11 Email from W. Rand to P. Bubalo, 4 June 2005, **CE-014**. *See also* Rand Second WS, ¶ 11; Rand Third WS, ¶¶ 24-25.

41. The letter was sent by email to the official address of the Ministry of International Economic Relations.[12] Mr. Rand also had it forwarded to Mr. Jovanović. Mr. Jovanović advised Mr. Rand to resend the email to the address of Minister Bubalo's personal assistant at the Ministry of Economy, where Mr. Bubalo had moved from the Ministry of International Economic Relations.[13]

42. Serbia cannot seriously argue that, because Mr. Rand did not keep a copy of the transmittal email resending the letter to Mr. Bubalo's personal assistant, "*no evidence suggests that Minister Bubalo ever received [the email from Mr. Rand]*."[14]

43. As Mr. Rand explains in his witness statement, Minister Bubalo was fully aware of the letter and its content.[15] And not only that. Minister Bubalo personally lent support to Mr. Rand when the Privatization Agency wanted to postpone the auction for the Privatized Shares. When Mr. Rand complained about the potential postponement, Minister Bubalo ordered the Privatization Agency to hold the auction as originally planned. The Privatization Agency followed the Minister's instruction, and the auction took place as scheduled.[16]

44. Serbia also cannot seriously claim that Mr. Rand was somehow secretive about his plan.[17] Mr. Rand's expression of interest was sent to the official address of the Ministry of International Economic Relations. One can hardly imagine a more transparent manner of expressing interest. The entire Ministry was informed that Mr. Rand was planning to buy BD Agro.

45. Serbian officials were aware not only of Mr. Rand's decision to invest, but also of Mr. Rand's actual investment. When Mr. Obradović submitted the winning bid for the Privatized Shares at the public auction held on 29 September 2005, Mr. Jovanović immediately reported the outcome of the auction directly to Mr. Rand. He sent the email

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12 Email from W. Rand to P. Bubalo, 4 June 2005, **CE-014**; *Progress in Policy Reforms to Improve the Investment Climate in South East Europe* (2006), p. 197, **CE-817**. *See also* Rand Third WS, ¶ 25.

13 Email from W. Rand to P. Bubalo, 4 June 2005, **CE-014**. *See also* Rand Third WS, ¶ 25.

14 Rejoinder, ¶ 24.

15 Rand Third WS, ¶ 25.

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

17 *E.g.* Rejoinder, ¶¶ 3-4.

from his official email account at the Ministry of Economy, stating: "*presume[d] that [Mr. Obradović] ha[d] already informed that you all succeeded in farm acquisition!*"[18]

46. Mr. Jovanović's email makes it clear that he was aware of Mr. Rand's beneficial ownership. He obviously would not have had any other reason to write to Mr. Rand to congratulate him for his successful acquisition of BD Agro.

47. Neither Mr. Jovanović, nor any of the other officials who were aware of Mr. Rand's acquisition of beneficial investment in BD Agro expressed any concerns or reservations regarding the beneficial ownership arrangement between Mr. Rand and Mr. Obradović.[19]

B. Mr. Rand did not bribe Mr. Jovanović

48. Unable to deny the existence of documentary evidence of Mr. Jovanović's full knowledge of, and support for, Mr. Rand's investment in BD Agro, Serbia does not shy away from accusing Mr. Rand and Mr. Jovanović of corruption.

49. Even a cursory scrutiny of Serbia's alleged "evidence of corruption" clearly shows that the accusation was entirely concocted for the purposes of this arbitration.

50. Serbia's first piece of evidence is the email that Mr. Jovanović sent to Mr. Rand on 16 May 2005.[20] According to Serbia, this email disclosed "*significant business information*" and placed other participants of the auction in an "*unfair position*."[21] Serbia's characterization is nothing short of ridiculous.

51. Mr. Jovanović's email was a simple teaser sent from his official email address at the Ministry of Economy and with his official signature block of the Assistant Minister.[22] In fact, it was Mr. Jovanović's official task to send such teasers because he was in charge of foreign direct investment and specifically of the privatization of BD Agro.[23]

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

19 William Archibald Rand First Witness Statement dated 5 February 2018, ¶¶ 15, 20; Rand Second WS, ¶ 20; Rand Third WS, ¶ 41; Djura Obradović First Witness Statement dated 20 September 2017, ¶ 11; Djura Obradović Second Witness Statement dated 3 October 2019, ¶ 17.

20 Email from L. Jovanović to W. Rand, 16 May 2005, **CE-013**.

21 Rejoinder, ¶ 25.

22 Email from L. Jovanović to W. Rand, 16 May 2005, **CE-013**.

23 Rand Third WS, ¶ 20.

Mr. Jovanović expressly informed potential Canadian investors—including Mr. Rand—and representatives of the Canadian Embassy that this was his task in his email of 6 April 2005:[24]

From: ljubisa jovanovic [mailto:ljovanovic@mpriv.sr.gov.yu]
Sent: 06 April 2005 11:01
To: Biljana Jovanovic (Biljana.Jovanovic@metro-cc.co.yu) <Biljana.Jovanovic@metro-cc.co.yu>; Bill Rand <rand@randedgar.com>; Bojana Todorovic (mission.serbia-and-montenegro@bluemail.ch) <mission.serbia-and-montenegro@bluemail.ch>; Damir First (damir.first@msee.at) <damir.first@msee.at>; Branko Marjanac (politics@embscg.ca) <politics@embscg.ca>; Djurdjevka.Ceramilac@international.gc.ca; Donald Mc Lennan (donald.mclennan@international.gc.ca) <donald.mclennan@international.gc.ca>; Dragan Visnjic (visnjic@eph.point-group.com) <visnjic@eph.point-group.com>; Dusan Busen (dusan.busen@acs-giz.si) <dusan.busen@acs-giz.si>; Kruljevic / Zupanjevac (DAM@smip.sv.gov.yu) <DAM@smip.sv.gov.yu>; Milorad Petrovic (milorad.petrovic@pks.co.yu) <milorad.petrovic@pks.co.yu>; milos.markovic@mitsubishicorp.com; Mix - Representative Office Yugoslavia <mix.yu@eunet.yu>; Perko Vukotic (diplomat@embscg.ca) <diplomat@embscg.ca>; Radivoje Lazarevic (yu1rl@softhome.net) <yu1rl@softhome.net>; Sava Blagovic (info@almamilano.com) <info@almamilano.com>; Zoran Pavlovic (genkon@idirect.com) <genkon@idirect.com>
Subject: NEW POSITION

Dear all,

Wish to inform you that I have moved to the new position , which is ASSISTANT TO MINISTER in the Ministry of Economy, Government of Republic of Serbia.
I will be managing the new department , called **international relations and competetivness support** .
That means that we will: - monitor and participate in EU&WTO assessment , on behalf of the Ministry of Economy

- further relations upgrading with all relevant int.institutions i.e. Stability Pact ,OECD, EAR ,WB , IMF on behalf of the Ministry of Economy
- continue to manage Business Councill with the FR Germany
- continue to propose various models & options to the domestic industry when restructuring is in objectivei.e. clasters , long term cooperation as well as marketing and promotion support to national enetrpreneurs
- take care about FDI issues - leaving FDI POLICY with MIER , in this Ministry we will be giving all necessary support to the potential investors , especially focusing and connecting with Agency for Privatisation

Bearing in mind our previous relations , am confident that we will mutually achieve further upgrading !
Sincerelly yours ,

52. It is therefore entirely unsurprising that on 13 May 2005, when Mr. Jovanović learned that Mr. Rand would be coming to Serbia to inquire about BD Agro and other business opportunities, he wrote to Mr. Rand and offered to send him "*a draft of proposals study*.[25] Mr. Jovanović's email of 16 May 2005 was the teaser and the proposal study promised a few days earlier.

53. All these emails were sent by Mr. Jovanović from his official email at the Ministry, with his official signature block of a deputy minister.

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24 Email from L. Jovanović to W. Rand et al., 6 April 2005 (emphasis added), **CE-815**. *See also* Rand Third WS, ¶ 20.

25 Email from L. Jovanović to W. Rand, 13 May 2005, **CE-816**.

54. Direct communication between the Ministry of Economy, the Privatization Agency and interested bidders was never unusual in Serbia. On the contrary, Mr. Cvetković—former director of the Privatization Agency and Serbia's witness in this arbitration—praised the method of direct talks with potential investors in one of his interviews:

> Under the current difficult circumstances, any privatization is a success, said Director of the Privatization Agency Vladislav Cvetkovic, pointing out Serbia has justified its place as a regional leader in investments.
>
> This is the result of *team work of the Ministry of Economy, the Agency and the entire Serbian government*, he told Tanjug, adding his institution has considerably contributed to drawing investments this year and will continue its activities in 2012. Reminding that everyone is doing business under more difficult circumstances, he said the Agency will additionally adapt in 2012 "for the even harder tasks ahead."
>
> *Cvetkovic said that the method of direct talks with potential investors, although criticized, has brought results and an increase in investments. "Even though the model has come under criticism, under these circumstances you cannot be a slave to traditional solutions. You must find a way to explain to investors that it is good and desirable to invest in Serbia, and at the same time attract them through active and available means," explained the Privatization Agency director*.[26]

55. Yet, Serbia cavalierly ignores Mr. Jovanović's job description and shamelessly speculates that he sent the information about BD Agro to Mr. Rand because he was pursuing a position that he was allegedly "*promised*" in BD Agro.[27] Serbia's only purported evidence of such a promise is Mr. Jovanović's email from 29 September 2005 where he informs Mr. Rand of the success in the public auction and states that he would like to discuss his position at BD Agro.[28]

56. Messrs. Rand and Obradović expressly confirm in their witnesses statements that absolutely *no* promises of a future position at BD Agro were made to Mr. Jovanović during the privatization process. Mr. Rand and Mr. Jovanović discussed Mr. Jovanović's potential engagement at BD Agro only when Mr. Rand came to Serbia shortly after the public auction for BD Agro shares.[29]

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[26] *CVETKOVIC: SERBIA JUSTIFIES ITS LEADERSHIP ROLE*, Tanjug, 29 December 2011 (emphasis added), **CE-892**.

[27] Rejoinder, ¶ 25.

[28] Rejoinder, ¶ 24; E-mail from L. Jovanović to W. Rand, 29 September 2005, **CE-016**.

[29] Rand Third WS, ¶¶ 34-35; Obradović Third WS, ¶ 16.

57. Even though Mr. Rand originally envisaged hiring an international manager, he became convinced that Mr. Jovanović had gained good insight into BD Agro while he worked on its privatization and understood the specific business environment in the Serbian agriculture sector. Thus, Mr. Rand decided to hire Mr. Jovanović as the general manager of BD Agro.[30]

58. Mr. Jovanović resigned from his position at the Ministry and joined BD Agro in December 2005. Mr. Jovanović's move from the Ministry of Economy to BD Agro was entirely transparent and publicly known. After his resignation, Mr. Jovanović sent an email to several Serbian governmental officials, OECD officials and other businesspersons within his contacts informing them about this news.[31]

59. Nobody raised any accusations of corruption at the time or during the following more than *14 years* until Serbia filed its Rejoinder in January 2020.

60. This is because there was *no corruption*, and Serbia concocted the accusation only for the purposes of this arbitration to downplay the simple fact that Serbian high officials, Minister Bubalo, Deputy Minister Jovanović and others, were aware of and supported both Mr. Rand's decision to invest in BD Agro and his subsequent acquisition of beneficial ownership of the Privatized Shares.

C. Mr. Rand had no illicit motive for his beneficial ownership

61. Serbia's baseless accusations do not stop at the allegations of bribery. Serbia also accuses Mr. Rand, again without offering any evidence, that he chose to invest as a beneficial owner, with Mr. Obradović being the nominal owner, in order to obtain the possibility to pay the purchase price for the Privatized Shares in installments.[32]

62. Mr. Rand's motives for investing through Mr. Obradović as the nominal owner of his investments were completely different—and purely practical. Mr. Rand is a Canadian citizen who lives in Vancouver and does not speak any Serbian. As such, he would be unable to attend to all matters generated by his Serbian companies that required the owner's local attention—such as attending and voting at shareholder meetings and

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30 Rand Third WS, ¶¶ 34-35.

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

32 Rejoinder, ¶¶ 67-74.

communicating, both in person and in writing, with the Privatization Agency and other representatives of all levels of the Serbian government.[33]

63. Mr. Obradović becoming the nominal owner of Mr. Rand's investments was the most convenient option to address this issue. As the nominal owner, Mr. Obradović was able to act upon on Mr. Rand's informal instructions because he did not need to prove his authority to act in Mr. Rand's name vis-à-vis third parties. An additional benefit was that the nominal ownership gave Mr. Obradović more credibility in Serbia.[34]

64. As the Tribunal may be aware, Serbian practice is—and at all times was—very formalistic. If Mr. Rand had been the registered owner of his investments in Serbia, Mr. Obradović would have been a mere representative acting in Mr. Rand's name and would have needed a special power of attorney for each shareholder meeting and for each meeting or other communication with the organs of the Serbian Government. Such powers of attorney would often need to be notarized and in many cases also apostilled. The arrangement would have been extremely cumbersome if not outright unworkable.[35]

65. It is also necessary to stress that Messrs. Rand and Obradović did not use this arrangement only for BD Agro, but for all companies that Mr. Rand acquired in Serbia. While this means that Mr. Rand thus could have paid for all of those companies in installments, he did not always do so.[36]

66. For example, Mr. Rand acquired Crveni Signal through an assignment of the respective privatization agreement originally concluded with another investor.[37] While the original privatization agreement envisaged payment in installments, the assignment provided that the third, fourth and fifth installments would be paid within eight days.[38]

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33 Rand Third WS, ¶ 11.

34 Rand Third WS, ¶ 14; Obradović Third WS, ¶ 7.

35 Rand Third WS, ¶ 12.

36 Rand Third WS, ¶ 39.

37 Assignment agreement between V. Vukelić and D. Obradović, 2 March 2007, **CE-565**.

38 Annex to the Agreement on sale and purchase of socially owned capital through the method of public auction ii/2 cert. no. 454/03, 14 March 2007, Art. 2, **CE-818**. *See also* Rand Third WS, ¶ 39.

67. It is therefore entirely clear that the possibility to pay the purchase price in installments did not play any role in Mr. Rand's considerations of the ownership structure of his Serbian companies.

68. Furthermore, Mr. Rand clearly did not need to pay the purchase price in installments because the funds secured by Mr. Rand for his investment in BD Agro significantly exceeded the total purchase price. By the end of 2007, Mr. Rand had secured more than EUR 13.6 million.[39] This was far more than the total purchase price of EUR 5,549,000[40] and the obligatory investment of EUR 1,998,554.16.[41] If needed, Mr. Rand would have been able to secure even higher amount—either from his own funds or from the Lundins.[42]

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39 Agreement between Mr. Obradović and Sembi, 22 February 2008, Preamble C, **CE-029**; Agreement between Mr. Djura Obradović, The Lundin Family, Mr. William Rand and Sembi, 22 February 2008, **CE-028**; Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, 15 September 2005, **CE-384**; Confirmation of transfer EUR 399,950 from Oil Company to Mr. Obradović, 2 January 2006, **CE-385**; Bank confirmation of transfer of EUR 399,950 from Oil Company to Mr. Obradović, 2 January 2006, **CE-386**; Confirmation of transfer of EUR 100,000 from Oil Company to Mr. Obradović, 20 January 2006, **CE-387**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 1 February 2006, **CE-388**; Confirmation of transfer of EUR 500,000 from Mr. Lundin to Mr. Obradović, 20 February 2006, **CE-389**; Confirmation of transfer of EUR 400,000 from Mr. Lundin to Mr. Obradović, 23 February 2006, **CE-390**; Confirmation of transfer of EUR 5,000 from Mr. Lundin to Marine Drive Holding, 3 March 2006, **CE-391**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 6 March 2006, **CE-392**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 7 April 2006, **CE-393**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 20 April 2006, **CE-394**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 5 May 2006, **CE-395**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović,11 May 2006, **CE-396**; Confirmation of transfer from Longdale Assets Ltd of EUR 50,000 to Mr. Obradović,13 June 2006, **CE-397**; Confirmation of transfer from Longdale Assets Ltd of EUR 10,000 to Marine Drive Holding, 5 July 2006, **CE-398**; Confirmation of transfer from Longdale Assets Ltd of EUR 130,000 to Mr. Obradović, 11 July 2006, **CE-399**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović, 17 July 2006, **CE-400**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 7 August 2006, **CE-401**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović, 28 August 2006, **CE-402**; Confirmation of transfer from Longdale Assets Ltd of EUR 1,200,000 to Mr. Obradović, 2 November 2006, **CE-403**; Confirmation of transfer from Longdale Assets Ltd of EUR 200,000 to Mr. Obradović, 28 December 2006, **CE-404**; Confirmation of transfer of EUR 800,000 from Mr. Lundin to Mr. Obradović, 29 December 2006, **CE-405**; Confirmation of transfer of EUR 250,000 from Mr. Lundin to Mr. Obradović, 5 April 2007, **CE-406**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 4 May 2007, **CE-407**; Confirmation of transfer from Longdale Assets Ltd of EUR 230,000 to Mr. Obradović, 30 May 2007, **CE-408**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 7 June 2007, **CE-409**; Confirmation of transfer from Longdale Assets Ltd of EUR 350,000 to Mr. Obradović, 1 November 2007, **CE-410**. *See also* Rand Third WS, ¶ 40.

40 Privatization Agreement, Arts. 1.2-1.3, **CE-017**.

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

42 Rand Third WS, ¶ 40.

69. Simply put, the possibility to pay the purchase price in installments was not the reason why Mr. Rand chose Mr. Obradović to be the nominal owner of the Privatized Shares.

D. Mr. Rand validly acquired beneficial ownership of the Privatized Shares

1. Mr. Rand and Mr. Obradović formalized their arrangement in the MDH Agreement

70. Prior to the auction, Messrs. Rand and Obradović formalized their agreement regarding Mr. Rand's investment in BD Agro in a written contract dated 19 September 2005 (the "**MDH Agreement**") between Mr. Obradović and Marine Drive Holdings Inc. ("**MDH**"), a company incorporated in the British Virgin Islands. Mr. Rand was the president and majority owner of MDH.[43]

71. The Claimants described the MDH Agreement and its relevant provisions in detail in their Reply.[44] In sum, the MDH Agreement gave MDH a call option on Mr. Obradović's shares in BD Agro and a bundle of contractual rights, the effect of which was that MDH had full control over and became the beneficial owner of the Privatized Shares and any additional shares in BD Agro from the moment of their acquisition by Mr. Obradović.[45]

72. According to Serbia, the MDH Agreement could not establish MDH's control over BD Agro because the legal control over shares in a joint stock company can be exercised only by their registered owner.[46] This is a red herring. The Claimants have never argued that, by the virtue of their beneficial ownership, they could vote the Beneficially Owned Shares *instead of* Mr. Obradović. The point is that the Claimants had full control over how *Mr. Obradović* voted the Beneficially Owned Shares as their nominal owner.

2. The MDH Agreement was valid and consistent with Serbian law

73. The MDH Agreement was valid and consistent with Serbian law.[47] In their Reply, the Claimants demonstrated that:

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

44 Reply, ¶¶ 38-42.

45 Deane ER, ¶ 15.

46 Rejoinder, ¶¶ 20-23, 565-570.

47 Reply, ¶¶ 56-76.

a. The MDH Agreement complied with Serbian rules on trading of shares in listed privatized companies;[48]

b. The MDH Agreement was consistent with Article 5.3.1 of the Privatization Agreement;[49] and

c. The non-existence of BD Agro share certificates capable of endorsement does not render the MDH Agreement invalid or unenforceable.[50]

74. In its Rejoinder, Serbia no longer claims that the MDH Agreement was invalid because of the non-existence of BD Agro share certificates capable of endorsement. Serbia does, however, reiterate its position that the MDH Agreement was inconsistent with the Serbian rules on trading of shares in listed privatized companies and Article 5.3.1 of the Privatization Agreement. In addition to these arguments from the Counter-Memorial, Serbia now also claims that the MDH Agreement was inconsistent with Article 2.1 of the Privatization Agreement[51] and Article 295 of the 2004 Law on Companies.[52]

75. The Claimants address Serbia's allegations *seriatim* below:

a. The MDH Agreement complied with the Serbian rules on trading of shares in listed privatized companies

76. In their Reply, the Claimants demonstrated that the MDH Agreement was in compliance with the Serbian rules on trading of shares in listed privatized companies, such as BD Agro.[53] The Claimants explained that the transfer of shares envisaged upon MDH's exercise of the call option could have been realized in at least three different ways:[54]

a. as a block trade transaction on the Belgrade Stock Exchange ("**BSE**");

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48 Reply, ¶¶ 58-67.

49 Reply, ¶¶ 68-70.

50 Reply, ¶¶ 71-76.

51 Rejoinder, ¶ 614.

52 Rejoinder, ¶ 713.

53 Reply, ¶¶ 58-67.

54 Reply, ¶¶ 62-67.

b. through a contribution of the BD Agro shares to a limited liability company and a subsequent transfer of such limited liability company; and

c. through delisting of BD Agro's shares from the BSE and their subsequent sale outside the stock exchange.

77. In its Rejoinder, Serbia continues to erroneously argue that the MDH Agreement is inconsistent with Article 52 of the 2002 Law on Market in Securities and other Financial Instruments because it allegedly constitutes a sale of listed shares "*outside the organized market.*"[55] According to that interpretation, Serbian law would only allow the owners of listed stock to sell their shares by offering them for purchase by the public-at-large on the BSE. The Claimants and their Serbian law expert, Ms. Tomić Brkušanin, already refuted Serbia's erroneous interpretation of Article 52 in their Reply.[56]

78. In any event, Serbia's argument is belied by its own admission in the Rejoinder that Serbian law allows block trade transactions on the BSE.[57] Block trade transactions serve to effectuate transfers of shares where the shares sold, their number and price are agreed before the realization of the block trade transaction on the BSE. A block trade can obviously be used to effectuate the transfer of shares under an option agreement, as demonstrated by Serbia's own recent use of block trades to effectuate the transfer of shares in Komercijalna banka under a put option stipulated in Serbia's shareholders agreement with the German company DEG and Swedfund International.[58]

79. Thus, Serbia modified its argument in the Rejoinder and now submits that, while block trades are allowed, they would not be allowed with respect to the transfer of BD Agro's shares pursuant to the MDH Agreement.[59] According to Serbia, this is because block trades are only possible if the agreed price does not deviate for more than 20% from the average price of the transferred shares during the previous three days and the price agreed in the MDH agreement did not meet this requirement.[60]

55 Rejoinder, ¶¶ 586-589.

56 Reply, ¶¶ 59-67.

57 Rejoinder, ¶ 594.

58 Reply, ¶ 66.

59 Rejoinder, ¶ 594.

60 Rejoinder, ¶ 594.

80. Serbia's argument ignores that the BSE had the authority to grant an exception from this rule. Contrary to Serbia's incorrect allegations in its Rejoinder,[61] the BSE granted such exceptions on a case-by-case basis.[62] In her second expert report, Ms. Tomić Brkušanin identifies several block trades that deviated from the average price by more than 20%.[63]

81. Even if Serbia was right and the transfer of BD Agro shares could not be realized through a block trade (*quad non*), this would not be an issue. Mr. Obradović could have simply contributed the shares as an in-kind contribution into the capital of a special purpose limited liability company and then freely transferred the limited liability company to MDH.[64]

82. Once again, Serbia does not dispute that this option was available. It merely argues that, by using this option, MDH would not become a direct owner of BD Agro shares, because they would be directly held by a Serbian limited liability company to which they were contributed.[65] This, however, is a non-issue. Mr. Rand expressly confirms in his third witness statement that he would have been perfectly fine with such an outcome.[66]

83. Finally, after the requirement for executing transfers of shares in privatized companies solely on the BSE was repealed on 3 January 2008, the shares in privatized companies could also be delisted and freely transferred thereafter.[67] According to Serbia, this option was not available because the 2004 Law on Companies prohibited delisting of joint stock companies with more than 100 shareholders.[68] This is another non-issue.

84. First of all, nothing prevented Mr. Obradović from buying further shares from the minority shareholders, reducing the total number of shareholders to 100, and then delisting BD Agro. Furthermore, after 1 February 2012, delisting was not subject to any

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[61] Rejoinder, ¶ 594.

[62] Bojana Tomić Brkušanin Second Expert Report dated 5 March 2020, ¶ 53.

[63] Tomić Brkušanin Second ER, ¶ 53 and Annex A.

[64] Bojana Tomić Brkušanin First Expert Report dated 3 October 2019, ¶ 35.

[65] Rejoinder, ¶ 595.

[66] Rand Third WS, ¶ 56.

[67] Tomić Brkušanin First ER, ¶ 40.

[68] Rejoinder, ¶ 596.

limitation on the number of shareholders and BD Agro could, thus, have been delisted without the need for shareholder consolidation.[69]

85. Serbia's argument that the MDH Agreement "*could not have resulted in the valid acquisition of ownership*" because of certain notification obligations under the 2002 Law on Market Securities in Securities and other Financial Instruments is equally false.[70]

86. First of all, Serbia refers to Article 59 of the 2002 Securities Law and claims that it prescribed 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 to such shares.[71] However, Serbia omits to mention that such obligation applied only in case of *direct* acquisition of voting rights—*i.e.* it would apply only to additional purchases of shares by Mr. Obradović after the privatization.

87. Serbia's reference to the obligation to submit a takeover bid under the 2002 Securities Law is equally misplaced.[72] The takeover rules under the 2002 Securities Law applied only to transfer of *nominal* shareholding. Conclusion of the MDH Agreement did not cause transfer of the nominal ownership over the Beneficially Owned Share and thus could not trigger the takeover rules under the 2002 Securities Law.[73]

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

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69 Tomić Brkušanin Second ER, ¶¶ 58 *et seq*.

70 Rejoinder, ¶ 598.

71 Rejoinder, ¶ 598.

72 Rejoinder, ¶ 598.

73 Tomić Brkušanin First ER, ¶ 88.

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

89. Article 5.3.1 of the Privatization Agreement prohibited Mr. Obradović to "*sell, assign or otherwise alienate [the Privatized Shares] in the period of 2 years as of the day of conclusion of the [Privatization Agreement].*"[74]

90. As the Claimants explained in their Reply, under Serbian law, sale, assignment and alienation all require transfer of legal title. A call option agreement does not transfer legal title to the underlying shares until the call option is exercised. Therefore, the call option arrangement in Article 1 of the MDH Agreement did not come within the purview of the restrictions set out in Article 5.3.1 of the Privatization Agreement.[75]

91. Serbia disagrees and claims that a transfer of beneficial ownership "*would indisputably be regarded as a disposition of shares.*"[76] This is not true. Beneficial ownership over the Privatized Shares was created through Articles 4 and 5 of the MDH Agreement. Pursuant to these provisions, the Privatized Shares remained at the risk of MDH and Mr. Obradović was required to vote the Privatized Shares in accordance with instructions received from MDH, cause the board of directors to consist of MDH's nominees, follow MDH's instruction regarding the management of BD Agro and not to encumber, pledge sell or option or alienate the BD Agro shares.[77]

92. None of the obligations under Articles 4 and 5 constitute a disposition prohibited under Article 5.3.1 of the Privatization Agreement because they do not involve the transfer of legal title.[78] Accordingly, without MDH's exercise of the call option, neither the conclusion of the MDH Agreement, nor the performance of the other rights granted to MDH thereunder, could violate Article 5.3.1 of the Privatization.[79]

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

75 Reply, ¶ 69. *See also* Miloš Milošević Third Expert Report dated 5 March 2020, ¶¶ 33 *et seq*.

76 Rejoinder, ¶ 608.

77 MDH Agreement, Arts. 4 and 5, **CE-015**.

78 Milošević Third ER, ¶ 35.

79 Milošević Third ER, ¶ 34.

c. The MDH Agreement was consistent with Article 2.1 of the Privatization Agreement

93. Pursuant to Article 2.1 of the Privatization Agreement, 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.*"[80] According to Serbia, this means that Mr. Obradović was entitled to alienate the entire shareholding in BD Agro only after 8 April 2011.[81] That is again incorrect.

94. To begin with, Serbia does not explain how its interpretation of Article 2.1 of the Privatization Agreement relates to Article 5.3.1, which restricted sales, assignment and alienation of the Privatized Shares for a period of two years from the conclusion of the Privatization Agreement.

95. In any case, Article 2.1 only precluded Mr. Obradović from actually effectuating a transfer of the Privatized Shares—it did not limit his ownership rights nor his ability to agree on future transfer of the Privatized Shares. Mr. Obradović would therefore be in breach of Article 2.1 only if MDH actually exercised its call option—which never happened.[82]

96. As a practical matter, any purported limitations stemming from Article 2.1 of the Privatization Agreement could be easily addressed by Mr. Obradović paying the purchase price in full prior to transferring the shares to MDH.

97. Finally, the issue is of a purely academic interest here because, even according to Serbia, the purported limitation ceased to apply on 8 April 2011, four years and a half before Serbia's seizure and expropriation of the Beneficially Owned Shares.

d. The MDH Agreement was consistent with Article 295 of the 2004 Law on Companies

98. Serbia also presents a brand new argument that the MDH Agreement could not serve as a valid basis for Mr. Rand's control over BD Agro after 9 December 2005, when Mr.

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[80] Privatization Agreement, 4 October 2005, Art. 2.1, **CE-017**.

[81] Rejoinder, ¶ 615.

[82] Milošević Third ER, ¶ 63.

Rand became a member of BD Agro's board of directors.[83] Serbia bases its claim on Article 295 of the 2004 Law on Companies, which states the following:

> *(1) Agreement by which a shareholder or proxy undertakes obligation to vote according to instructions of* joint stock company *or* member of the board *of directors,* director *or* member of executive board *is null and void.*[84]

99. Mr. Rand was a member of BD Agro's board of directors from 9 December 2005 until 9 July 2012.[85] However, Serbia's argument clearly cannot stand.

100. First of all, the Article 295 could not apply to the MDH Agreement because the MDH Agreement was concluded between Mr. Obradović and MDH. Mr. Rand was not a party to the MDH Agreement—the fact that he became a member of the board of directors after the conclusion of the MDH Agreement is thus entirely irrelevant.[86]

101. Mr. Rand's ownership of MDH changes strictly nothing to the above conclusion. As explained by Mr. Milošević, the extension of Article 295 to Mr. Rand, as a non-signatory to the MDH Agreement, would run afoul the general principle of Serbian law that any restrictions of rights must be interpreted narrowly.[87]

102. Mr. Milošević also explains that the extension of Article 259 to Mr. Rand would be contrary to the aim of Article 259, which is to limit the management's influence on shareholders—and not to limit a beneficial owner's ability to direct the nominal owner's exercise of their voting rights.[88]

103. It is very common that directors of the company are also its shareholders. In such a case, the directors can obviously vote their shares at their discretion. There is no reason to distinguish between that situation and a situation when a board member is a beneficial owner directing the nominal owner's exercise of the voting rights.[89] Neither of these

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[83] Rejoinder, ¶ 713.

[84] 2004 Law on Companies, Art. 295 (emphasis added), **RE–320**.

[85] Mirjana Radović Second Expert Report dated 24 January 2020, ¶¶ 90-92.

[86] Milošević Third ER, ¶ 56.

[87] Milošević Third ER, ¶ 57.

[88] Milošević Third ER, ¶ 58.

[89] Milošević Third ER, ¶ 59.

examples can be interpreted as an undue influence of the company's management on its shareholders.

104. Indeed, Mr. Rand became a board member because he was the beneficial owner and had control over the shares, and not vice versa. Therefore, his parallel board membership and beneficial ownership, including the control over the shares in BD Agro stemming from the latter—and not the former—did not violate Article 295 of the 2004 Law on Companies.[90]

e. In any event, the validity of the MDH Agreement must be assessed under the law of British Columbia

105. Serbia's analysis of alleged contradictions between the MDH Agreement and Serbian law entirely ignores the fact that the MDH Agreement was governed by the law of British Columbia.[91] This means that consequences of any potential conflict between the MDH Agreement and provisions of Serbian law must be assessed under the law of British Columbia.[92]

106. Thus, even if some of the provisions in the MDH Agreement were contrary to Serbian mandatory norms (*quad non*), Serbian law would be only relevant for an assessment of their enforceability in Serbia. Whether such potential contradictions would in any way affect the validity of the MDH Agreement would need to be judged under the British Columbian law.[93]

107. The above makes Serbia's analysis of the MDH Agreement's validity—which analysis is based solely on Serbian law and *not* British Columbian law—virtually irrelevant.

E. Serbian law did not require Mr. Obradović to make a formal disclosure about Mr. Rand's beneficial ownership in the privatization procedure

108. From the very beginning of this case, the Claimants have argued that Mr. Obradović concluded the Privatization Agreement only as a nominal owner, with the beneficial owner being Mr. Rand. Serbia disputed this fact in its Counter-Memorial, claiming that

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[90] Milošević Third ER, ¶ 60.

[91] Reply, ¶¶ 72-73.

[92] Uglješa Grušić Second Expert Report dated 5 March 2020, ¶ 27.

[93] Grušić Second ER, ¶ 27.

Mr. Obradović acquired BD Agro's shares for himself and that he has always acted as the owner of BD Agro.[94]

109. In its Rejoinder, Serbia came up with a completely new narrative. Realizing that it is simply undeniable that Mr. Obradović acquired the Privatized Shares on behalf of Mr. Rand, Serbia now claims that this arrangement needed to be disclosed to the Privatization Agency in the privatization procedure.[95]

110. As the Claimants explain below, this new theory—introduced for the first time in Serbia's Rejoinder—does not hold water. Serbian law did *not* require a formal disclosure of Mr. Rand's agreement with Mr. Obradović in the privatization procedure and, more importantly, Serbia was in any case well aware that Mr. Rand was to become the beneficial owner of BD Agro.

111. Serbia claims that, according to "*relevant regulation*" applicable at the time of BD Agro's privatization, bidders in the privatization process were obliged to *formally* disclose to the Privatization Agency the identity of the persons who were to become beneficial owners of the privatized companies.[96] This is simply not true.

112. There was not a single legal provision that would require a bidder in the privatization process to formally disclose the identity of a potential beneficial owner,[97] and Serbia does *not* cite to *any* such provision either.

113. Instead, Serbia argues that the existence of a general obligation to disclose the identity of a beneficial owner can be somehow inferred from legal provisions requiring transparency of the privatization process and disclosure of certain information about the bidders participating in an auction.[98] This is not true. As explained by Mr. Milošević, the principle of transparency applies only to conduct of the *public entities* involved in the privatization process—not the buyers.[99]

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94 *E.g.* Counter-Memorial, ¶¶ 287-290.

95 Rejoinder, ¶¶ 12-19.

96 Rejoinder, ¶¶ 12-19.

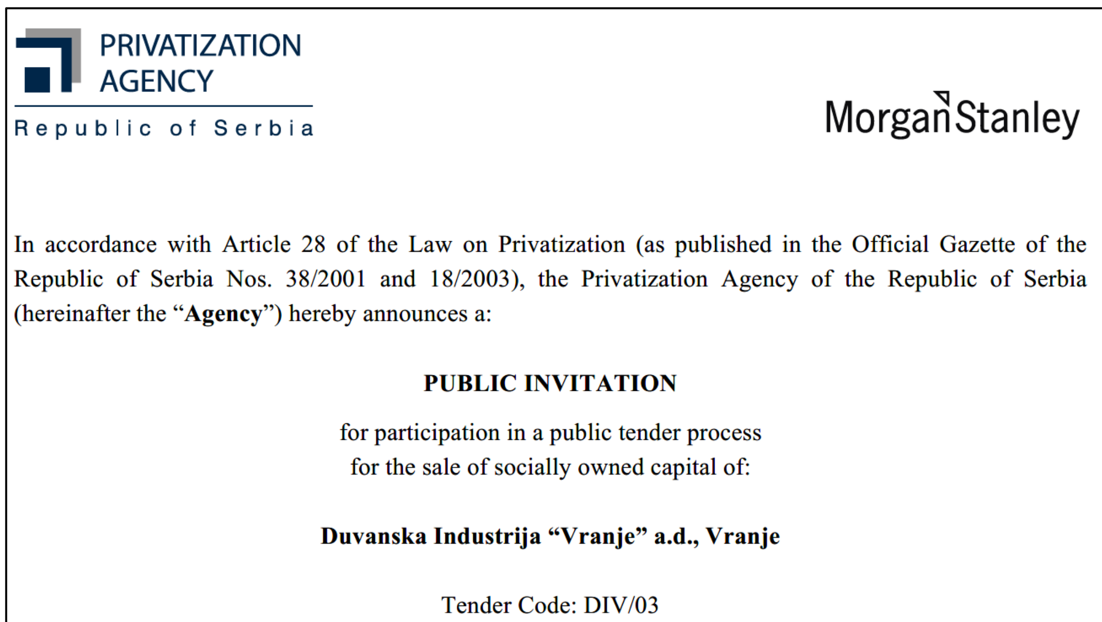
97 Milošević Third ER, ¶ 66.

98 Rejoinder, ¶¶ 2, 13-14, 17-18.

99 Milošević Third ER, ¶ 70.

114. Mr. Rand and Mr. Obradović both confirm that at no point during their numerous discussions with the Serbian officials did any of them inform them that Mr. Rand's beneficial ownership needed to be formally disclosed in the documents filed in connection with the public auction or with the Privatization Agreement.[100] The text of the documents themselves certainly did not ask for such disclosure either.[101]

115. In any case, Serbia's arguments are conclusively rebutted by the Privatization Agency's specific inquiries made in other privatization procedures. For example, when Serbia privatized the tobacco processing company, Duvanska industrija "Vranje" a.d., in 2003—two years before BD Agro's privatization—it expressly required potential buyers to disclose their "*actual and beneficial (as the case may be) ownership and control structure [...]*":[102]



PRIVATIZATION AGENCY
Republic of Serbia

Morgan Stanley

In accordance with Article 28 of the Law on Privatization (as published in the Official Gazette of the Republic of Serbia Nos. 38/2001 and 18/2003), the Privatization Agency of the Republic of Serbia (hereinafter the "**Agency**") hereby announces a:

PUBLIC INVITATION

for participation in a public tender process
for the sale of socially owned capital of:

Duvanska Industrija "Vranje" a.d., Vranje

Tender Code: DIV/03

[…]

[100] Rand Third WS, ¶ 43; Obradović Third WS, ¶ 19.

[101] Rand Third WS, ¶ 44; Obradović Third WS, ¶ 19.

[102] Public Invitation for participation in a public tender process for the sale of socially owned capital of Duvanska industrija "Vranje" a.d.,, pp. 1-2 (emphasis added), **CE-890**.

4. An interested legal entity (hereinafter "**interested party**") shall be entitled to purchase the Tender Documents if it fulfills the following criteria:

(i) it is an entity with more than five (5) years' direct experience in cigarette manufacturing (in-house production);

(ii) its net revenues from tobacco products sales in the most recently audited fiscal year exceed the equivalent of Euro 10,000,000; and

(iii) it has the ability to evidence, with full transparency, its actual and beneficial (as the case may be) ownership and control structure, as well as that of its parent companies and related companies.

116. The Privatization Agency also invited interested bidders to submit "*an outline of the ownership and control structure […] including a summary of any beneficial ownership interests*":[103]

5. An interested party's Tender Documents Request must include the following documents, submitted in the English language and certified as authentic by one of its duly authorized representatives:

[…]

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

117. The Privatization Agency made an identical request in the 2003 privatization of another Serbian company, Beopetrol a.d. Beograd.[104]

118. If Serbia had been right and there had been a general obligation to disclose identity of a beneficial owner, the Privatization Agency would have had no need to expressly require such disclosure in these two privatizations.

119. The fact that the Privatization Agency expressly required disclosure of beneficial ownership in these two privatizations also proves that the Privatization Agency was

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

104 Public Invitation for participation in a public tender process for the acquisition of a controlling interest in Beopetrol a.d. Beograd, pp. 1-2, **CE-891**.

fully aware of and recognized the existence of beneficial ownership and, when it found it relevant, did not hesitate to ask for its disclosure. Had the Privatization Agency made the same request during the privatization of BD Agro, Messrs. Rand and Obradović would have been more than happy to provide the requested information.[105] The Privatization Agency simply did not ask for it.

120. According to Serbia, the Privatization Agency allegedly needed to know the identity of the beneficial owner so that it could check whether the beneficial owner fulfilled certain statutory criteria.[106] According to Serbia, the Privatization Agency had to confirm that the buyer was not:

a. a domestic legal entity doing business by using the majority of socially owned capital;

b. an individual, a legal entity and the founder of a legal entity with due and outstanding obligations towards the subject of privatization;

c. 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;

d. a member of the auction commission or a person closely affiliated with a member of the auction commission; or

e. a member of the family of a person who had lost the capacity of the buyer.[107]

121. The Claimants understand that it is undisputed by Serbia that Mr. Rand fulfilled all these obligations—Serbia's Rejoinder even contains a section titled "*Mr. Rand could appear as the buyer.*"[108] Thus, even if Serbia had been right that Mr. Rand's beneficial ownership needed to be disclosed to the Privatization Agency in the privatization procedure (*quad non*), it is undisputed that such disclosure would have made no difference because Mr. Rand satisfied the conditions for being a buyer.

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105 Rand Third WS, ¶ 44.

106 Rejoinder, ¶¶ 13, 17.

107 Rejoinder, ¶ 17.

108 Rejoinder, § I.A.1.

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

122. Once the Privatization Agreement was concluded, Mr. Rand immediately replaced BD Agro's management. Mr. Rand, Mr. Obradović and Mr. Lukas Lundin became new members of the Board of Directors.

123. As the Claimants explained in their Reply, Mr. Rand's appointment to the Board of Directors was no symbolic gesture.[109] To the contrary, Mr. Rand immediately became involved in the management of BD Agro:

a. BD Agro management and employees reported to Mr. Rand about a great variety of issues, including items such as conclusion of agreements on sales of BD Agro's products such as milk, crops and eggs, sales of property, cooperation with consultants, preparation of seeding plans and investment into mechanization and machinery;[110]

b. Mr. Rand assisted with getting visas for the employees of BD Agro who were visiting Canada;[111]

c. Mr. Rand was regularly provided with financial reports and discussed BD Agro's financing needs with the senior management;[112] and

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[109] Reply, ¶¶ 79 *et seq.*

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

[111] Email communication between W. Rand and D. Ceramilać, 5 February 2007, **CE-621**.

[112] *E.g.* Email from Marine Drive Holdings Inc. to W. Rand, 23 March 2007, **CE-622**; Email from A. Jorga (BD Agro) to W. Rand et al., 2 November 2006, **CE-623**; Email from A. Jorga (BD Agro) to W. Rand et al., 26 July 2006, **CE-624**; Email from Marine Drive Holdings Inc. to W. Rand, 24 October 2007, **CE-625**; Email from A. Jorga (BD Agro) to W. Rand, 20 October 2006, **CE-626**; Email from Marine Drive Holdings Inc. to W. Rand, 6 July 2007, **CE-627**; Email from Marine Drive Holdings Inc. to W. Rand, 26 November 2007, **CE-628**; Email from Marine Drive Holdings Inc. to W. Rand and P. Bagnara, 29 December 2006, **CE-443**; Email communication between W. Rand and BD Agro, 26 July 2006, **CE-611**; Email from W. Rand to A. Jorga, 2 May 2006, **CE-629**; Email from W. Rand to A. Jorga, 7 July 2006, **CE-630**; Email from W. Rand to L. Jovanović, 13 April 2006, **CE-631**; Email from K. Lutz to D. Obradović, 16 November 2006, **CE-413**; Email communication between W. Rand and S. Marčetić, 5 July

d. Mr. Rand regularly visited BD Agro to personally control its operations and meet BD Agro employees.[113]

124. Due to Mr. Rand's extensive on-site involvement, BD Agro employees sometimes approached him with purely personal problems. One example, that speaks for it all, is that of Mr. Misailović. Mr. Misailović was BD Agro's employee and his son needed heart transplant surgery. Unfortunately, Mr. Misailović could not afford to pay for the operation. Mr. Rand did not hesitate and paid EUR 90,000 for the operation from his personal funds.[114]

125. Therefore, Serbia's allegation that the employees and minority shareholders of BD Agro did not know about Mr. Rand's beneficial ownership is nothing short of absurd.[115]

G. Mr. Rand's beneficial ownership of BD Agro was widely known and disclosed, including to Serbian officials

126. In their Reply,[116] the Claimants demonstrated that Mr. Rand communicated with a number of external consultants and business partners of BD Agro, including PricewaterhouseCoopers and the European Bank for Reconstruction and Development ("**EBRD**"),[117] all of whom were aware that Mr. Rand was the beneficial owner of BD Agro.[118] The Claimants further demonstrated that Mr. Jovanović regularly disclosed

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2006, **CE-632**; Email from W. Rand to BD Agro, 3 May 2006, **CE-633**; Email from W. Rand to L. Jovanović, 7 February 2006, **CE-634**; Email communication between W. Rand and Marine Drive Holdings Inc., 29 July 2006, **CE-635**; Email from K. Lutz to L. Jovanović, 4 December 2008, **CE-636**; Email from L. Jovanović to W. Rand, 17 August 2006, **CE-637**. *See also* Rand Second WS, ¶ 42.

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

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

115 Rejoinder, ¶ 62.

116 Reply, ¶¶ 83-86.

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

118 Rand Second WS, ¶ 45.

Mr. Rand's beneficial ownership to BD Agro's business partners[119] and that Mr. Rand's ownership of BD Agro was known to the Serbian media.[120]

127. Serbia's response is limited to *one single* paragraph, stating that such disclosures were "*immaterial to the case at hand*" and Serbia "*considers it unnecessary to comment on these assertions.*"[121] The brevity of Serbia's response is telling. Serbia simply cannot dispute the fact that BD Agro's business partners and consultants all over the world knew of Mr. Rand's ownership—and the general knowledge about Mr. Rand's beneficial ownership obviously *is* relevant, at the very least to show that the beneficial ownership actually existed.

128. BD Agro's modernized facilities also became a popular destination of official delegations. On 3 January 2007, Mr. Vojislav Koštunica, the then Prime Minister of Serbia, Mr. Predrag Bubalo, the then Minister of Economy, and Mr. Velimir Ilić, the then Minister of Capital Investments, visited BD Agro.[122]

129. The delegation was welcomed by the five flags installed at the entrance to BD Agro. The below picture shows the flags in the following order, from left to right: (*i*) BD Agro's flag; (*ii*) Swiss flag; (*iii*) Swedish flag; (*iv*) Canadian flag; and (*iv*) Serbian flag. The Canadian flag represented Mr. Rand and the Swiss and Swedish flags represented the Lundin family.[123]

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119 Reply, ¶ 84. *See also* Email from L. Jovanović to M. Marković, 3 December 2007, **CE-650**; Email communication between L. Jovanović and T. Smith, 23 October 2007, **CE-651**.

120 Reply, ¶ 85. *See also "BD AGRO" from Dobanovci is building a modern cow farm*, ekapija, 8 November 2007, **CE-757**.

121 Rejoinder, ¶ 51.

122 Obradović Second WS, ¶ 35.

123 Obradović Second WS, ¶ 36.

130. A similar picture was also published on BD Agro's website.[124] The website showed flags installed at BD Agro flying in the following order, from left to right: (*i*) BD Agro's flag; (*ii*) Canadian flag; (*iii*) Serbian flag; (*iv*) Swiss flag; and (*iv*) Swedish flag. The Canadian flag represented Mr. Rand and the Swiss and Swedish flags represented the Lundin family.

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

131. According to Serbia, the Canadian flag at the entrance of BD Agro could have represented Mr. Obradović because he is a Canadian and Serbian dual national.[125] This is not the case. The Canadian flag had always represented Mr. Rand, same as the Swedish and Swiss flags had always represented the Lundin family.[126]

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132. The above clearly shows that after the acquisition of BD Agro, Messrs. Rand and Obradović remained entirely transparent about the split beneficial and nominal ownership of BD Agro. The fact that Mr. Rand was the beneficial owner and had control over the company was known to BD Agro's employees, repeatedly disclosed to BD Agro's business partners and also known to Serbian officials visiting BD Agro—including the Prime Minister.

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

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

133. As the Claimants explained in their previous submissions, most of the funding that Mr. Rand had arranged for the purchase and subsequent investments in BD Agro came from the Lundin family and their investment bank, 1875 Finance S.A.[127] At the end of 2007, the Lundin family decided to exit the project and requested repayment of the funds loaned to Mr. Obradović.[128] Mr. Rand agreed to replace the Lundins' funds with his own.

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

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125 Rejoinder, ¶¶ 49, 690.

126 Obradović Third WS, ¶¶ 28-29.

127 *E.g.* Memorial, ¶¶ 88-95; Reply, ¶ 99; Rand First WS, ¶¶ 16, 23; Obradović First WS, ¶ 15; Aksel Azrac Witness Statement dated 16 January 2019, ¶¶ 12-13; Rand Second WS, ¶¶ 27; Obradović Second WS, ¶ 19.

128 Azrac WS, ¶ 15.

135. Mr. Rand thus purchased a Cypriot shelf company called Sembi Investment Limited ("**Sembi**") to serve as the new holding company for his beneficial ownership of the Beneficially Owned Shares. Sembi is a limited liability company organized under the laws of Cyprus.[129]

136. All of the preferred shares issued by Sembi are owned by Rand Investments Ltd.[130] All of the ordinary shares issued by Sembi are owned by The Ahola Family Trust,[131] a trust domiciled in Guernsey whose beneficiaries are, and have always been, Mr. Rand's three children.[132] Sembi is, and at all relevant times was, controlled by Mr. Rand.[133]

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

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

137. On 22 February 2008, Mr. Obradović, the Lundin Family, Mr. Rand and Sembi entered into an agreement on the repayment of the Lundins' funds by Sembi, whereby Sembi agreed to repay EUR 9 million to the Lundin Family (the "**Lundins Agreement**").[134] The Lundin Family in turn extinguished any claims it had to the Privatization Agreement and BD Agro. Mr. Rand personally guaranteed all of Sembi's and Mr. Obradović's obligations to the Lundins.[135]

138. The Lundins Agreement was negotiated between Mr. Rand and the Lundins, without any involvement of Mr. Obradović, who just signed the agreement pursuant to Mr. Rand's instructions.[136]

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129 Memorial, ¶¶ 46-50.

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

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

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

133 Reply, ¶¶ 102-105.

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

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

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

139. As explained in the Claimants' previous submissions, by October 2010, Sembi had repaid to the Lundins EUR 5.6 million.[137] The Lundins then agreed to waive the outstanding balance of the debt as a token of appreciation of their long-standing successful business relationship and friendship with Mr. Rand.[138]

b. The Sembi Agreement between Mr. Obradović and Sembi

140. On the same date, *i.e.* 22 February 2008, Mr. Obradović entered into a second agreement with Sembi (the "**Sembi Agreement**", together with the Lundins Agreement, the "**2008 Agreements**").[139]

141. Under the Sembi Agreement, Sembi assumed all of Mr. Obradović's obligations, including any payments owing to the Privatization Agency and the repayment of loans provided by the Lundins.[140] In consideration thereof, Mr. Obradović agreed to transfer to Sembi "*all of his right, title and interest in and to [the Privatization Agreement]*" and to "*sign any such documents and do all such things as may be necessary to effect the transfer to [Sembi] of the [Privatization Agreement] together with any other assets whatsoever held by Mr. Obradović which are related to BD Agro*."[141]

142. In their Reply, the Claimants explained that the Sembi Agreement transferred to Sembi the legal title of the rights and assets held by Mr. Obradović that could be transferred to Sembi on the date of the said agreement. In respect of the rights and assets for which additional documents had to be signed or other things had to be done, or a third-party consent had to be obtained to effect the transfer of legal title, the Sembi Agreement transferred to Sembi Mr. Obradović's equitable rights therein and Sembi thus became their beneficial owner.[142]

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137 Memorial, ¶ 93; Reply, ¶ 108; Confirmation of wire transfer from Sembi to I. Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-057**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-058**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-059**; Rand First WS, ¶ 33; Azrac WS, ¶ 16.

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

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

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

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

142 Reply, ¶ 113; Agis Georgiades Second Expert Report dated 3 October 2019, ¶¶ 3.12-3.13.

143. Based on the Sembi Agreement, Sembi registered its beneficial ownership of BD Agro in its books. Sembi's beneficial ownership of the Beneficially Owned Shares remained registered in Sembi's books ever since, of course with a note that the shareholding was expropriated on 21 October 2015.[143]

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

144. In their Reply, the Claimants explained that the Sembi Agreement is valid and consistent with the Privatization Agreement. Specifically, the Claimants demonstrated that:

a. the Sembi Agreement is consistent with Article 41ž of the Law on Privatization;[144]

b. the Sembi Agreement is consistent with Article 52(2) of the 2006 Law on Capital Markets;[145] and

c. the Sembi Agreement is consistent with the Privatization Agreement.[146]

145. In its Rejoinder, Serbia continues to argue that the Sembi Agreement was concluded in breach of the prohibition of assignment from the Law on Privatization[147] and inconsistent with the Privatization Agreement.[148] Serbia also claims—for the first time—that the Sembi Agreement could not have any effect even under Cypriot law[149]

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

144 Reply, ¶¶ 116-122.

145 Reply, ¶¶ 123-125.

146 Reply, ¶ 126.

147 Rejoinder, ¶¶ 643-659.

148 Rejoinder, ¶ 611.

149 Rejoinder, ¶¶ 660-674.

and is inconsistent with Article 295 of the 2004 Law on Companies and Article 359 of the 2011 Law on Companies.[150]

146. Each of these erroneous assertions will be refuted *seriatim* below, after a short recapitulation of the provisions of the Sembi Agreement and their effect.

1. The Sembi Agreement made Sembi the beneficial owner of the Beneficially Owned Shares and Mr. Obradović's receivables against BD Agro with immediate effect

147. The Sembi Agreement transferred to Sembi the legal title of the rights and assets held by Mr. Obradović that could be transferred to Sembi on the date of the said agreement. In respect of the rights and assets for which additional documents had to be signed or other things had to be done, or a third-party consent had to be obtained to effect the transfer of legal title, the Sembi Agreement transferred to Sembi Mr. Obradović's equitable rights therein and Sembi thus became their beneficial owner.[151]

148. As the beneficial owner of the Beneficially Owned Shares under the Sembi Agreement, Sembi also had the legal right to direct Mr. Obradović's exercise of his shareholder rights in BD Agro and, as a result, to control BD Agro.[152]

149. Rights and assets to which legal title should have been transferred after the conclusion of the Sembi Agrement included also the rights under the Privatization Agreement and the nominal ownership to the Beneficially Owned Shares. Messrs. Rand and Obradović did not intend to effectuate the transfer of these rights on the basis of the Sembi Agreement alone, but under a subsequent assignment agreement that would be subject to the Privatization Agency's approval.

150. Serbia's law expert, Ms. Radović, interprets the Sembi Agreement differently and asserts that Sembi and Mr. Obradović intended all of the above to take place only upon the assignment of the Privatization Agreement to Sembi.[153] This is simply not what the Sembi Agreement provides.

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150 Rejoinder, ¶ 713.

151 Reply, ¶ 113.

152 Reply, ¶ 127.

153 Radović Second ER, ¶ 115.

151. The plain text of the Sembi Agreement makes clear that the various transfers contemplated under the Sembi Agreement were to take place independently of each other. Mr. Georgiades, the Claimants' Cypriot law expert, confirms that this conclusion is clear from the plain text of Article 4 of the Sembi Agreement pursuant to which Mr. Obradović agreed to "*sign any such documents and do all such things as may be necessary to effect the transfer to [Sembi] of the [Privatisation Agreement.]*"[154]

152. Furthermore, Mr. Rand and Mr. Obradović both make clear in their witness statements that they intended to provide for such independent transfers,[155] and this is confirmed by Sembi's contemporaneous decision to record the beneficial ownership of BD Agro on its balance sheet filed with the financial statements for 2008. Sembi's decision to record its beneficial ownership is contemporaneous evidence of the understanding of both Sembi and Mr. Obradović because Mr. Obradović was one of the directors of Sembi at the time.[156]

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

153. The Claimants explained in the Reply that the Sembi Agreement does not violate Article 41ž of the Law on Privatization, which requires the Privatization Agency's written consent to assignment of the Privatization Agreement, because the Sembi Agreement is not an assignment agreement as defined in Serbian law and does not purport to assign the Privatization Agreement to Sembi.[157]

154. As the Claimants explained, under Serbian law, assignment is defined essentially as a transfer to the assignee of a contractual relationship that the assignor has with a third party. The effect of the assignment is that the assignee replaces the assignor in contractual relationship with the third party.[158]

155. The Sembi Agreement, on the other hand, is a complex agreement. Dr. Grušić, the Claimants' expert on Serbian private international law, explained in his first expert

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154 Agreement between Mr. Obradović and Sembi, 22 February 2008, Art. 4, **CE-029**. *See also* Agis Georgiades Third Expert Report dated 5 March 2020, ¶ 2.15.

155 Rand Second WS, ¶ 55; Obradović Second WS, ¶ 44.

156 Obradović Third WS, ¶ 37.

157 Reply, ¶¶ 116-122.

158 Reply, ¶ 117.

report, that from all the transfers contemplated under the Sembi Agreement, only the contemplated transfers of *legal* title to the Privatization Agreement and to Mr. Obradović's receivables against BD Agro could be qualified as an assignment within the meaning of Serbian law.[159]

156. The transfer of legal title to shares, including the Beneficially Owned Shares, does not constitute an assignment within the meaning of Serbian law. Similarly, the transfer of beneficial ownership to any rights and/or assets does not constitute an assignment under Serbian law.[160]

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

158. The contemplated assignment of legal title to the Privatization Agreement is consistent with Article 41ž because the parties to the Sembi Agreement did not intend to effectuate it on the basis of the Sembi Agreement alone, but under a subsequent assignment agreement that would be subject to the Privatization Agency's approval. This is why they agreed to "*sign any such documents and do all such things as may be necessary to effect the transfer to [Sembi] of the [Privatisation Agreement.]*"[161]

159. Dr. Grušić confirmed in his first expert report that the conclusion of a contract that contemplates the conclusion of a subsequent assignment agreement does not fall within the scope of Article 41ž.[162]

160. Serbia disagrees and claims that Article 41ž of the Privatization Agreement prohibits assignment of both "*nominal and beneficial interest in the Privatization Agreement.*"[163] Serbia is wrong.

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[159] Uglješa Grušić First Expert Report dated 3 October 2019, ¶ 107.

[160] Miloš Milošević Second Expert Report dated 3 October 2019, ¶¶ 188, 203.

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

[162] Grušić First ER, ¶ 109.

[163] Rejoinder, ¶ 654.

161. As explained by Dr. Grušić, it is the definition of "assignment" under the Serbian Law on Obligations that matters for the purposes of application of Article 41ž of the 2001 Law on Privatization. The Serbian Law on Obligations defines "assignment" as a transfer of a contractual relationship from one party to the contractual relationship (*i.e.* the assignor; the other party to the relationship being the non-assigning party) to a third party, which transfer occurs from the moment of acceptance of thereof by the non-assigning party or, if that non-assigning party has agreed to the transfer in advance, then from the moment of notification to the non-assigning party of the transfer.[164]

162. It is, therefore, clear that under the Serbian Law on Obligations, an assignment is a tripartite agreement whose parties are the assignor, the other party to the assigned contract and the assignee. Since the parties to the Sembi Agreement were only Sembi and Mr. Obradović (and the Privatization Agency had not consented to any assignment at the moment of conclusion of the Sembi Agreement), the Sembi Agreement cannot be regarded as an attempt to assign the Privatization Agreement within the meaning of "assignment" under Serbian law.[165]

3. Even if, *arguendo*, the Sembi Agreement would have been inconsistent with Article 41ž, it would remain valid under Cypriot law

163. In its Rejoinder, Serbia claims—for the first time—that the Sembi Agreement could not create any rights even under Cypriot law.[166] Serbia argues that the prohibition of assignment under Serbian law makes the Sembi Agreement invalid and excludes even a potential assignment under the rules of equity. According to Serbia, this is because Mr. Obradović's identity, as the buyer under the Privatization Agreement, was "*of importance*" to the Privatization Agency.[167] Serbia's arguments are wrong in several aspects.

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164 Law on Obligations, Art. 145(2), **CE-462**. *See also* Grušić Second ER, ¶ 78.

165 Law on Obligations, Art. 145(2), **CE-462**. *See also* Grušić Second ER, ¶ 78.

166 Rejoinder, ¶¶ 660-674.

167 Rejoinder, ¶¶ 663-665.

164. First of all, the validity of the Sembi Agreement and the assignment of rights and its effects as between Mr. Obradović and Sembi, are governed by Cypriot law while the assignability of the Privatization Agreement is governed by Serbian law.[168]

165. As explained by Mr. Georgiades, Cypriot law distinguishes between a contract which is void because the public interest requires strict adherence to the law, and a contract that requires the taking of a step or meeting of a precondition before it can be performed. Contracts in the latter category are not void *ab initio* if the step is not taken or the precondition is not met.[169]

166. A prohibition or restriction may render the assignment ineffective as against the debtor, but it does not necessarily invalidate the assignment as between the assignor and the assignee. If the assignment is not void for reasons of illegality or public policy, it remains valid as between the assignor and the assignee.[170] In such a case, the assignee may rely on the provisions of the assigned contract, and on the assignment contract, to sue the assignor. However, the assignee may not sue the debtor for breach of contract as the ineffectiveness of the assignment vis-à-vis the debtor means there is no contract that can be invoked by the assignee against the debtor.[171]

167. Mr. Georgiades also explains that Article 41ž merely imposed the requirement of the Privatization Agency's consent that had to be met for an assignment of the Privatization Agreement to be performed.[172] The Sembi Agreement clearly did not intend to circumvent these requirements. On the contrary, Article 4 of the Sembi Agreement required Mr. Obradovič to "*do all such things as may be necessary to effect the transfer [of the Privatization Agreement].*"[173]

168. Therefore, the Sembi Agreement was not forbidden by law, nor was it intended to defeat the provision of any law. As a result, the Sembi Agreement remains valid under Cypriot

168 Georgiades Third ER, ¶ 2.5.

169 Georgiades Third ER, ¶ 2.9.

170 Georgiades Third ER, ¶ 2.10.

171 Georgiades Third ER, ¶ 2.10.

172 Georgiades Third ER, ¶¶ 2.12-2.13.

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

law.[174] Failure to meet the requirements under Article 41ž could only give rise to a right of compensation under, or even a right to termination of, the Sembi Agreement. Given that no such rights have been exercised, this matter is irrelevant for purposes of the assignability.[175]

169. Serbia's erroneous argument that Mr. Obradović's identity as the buyer under the Privatization Agreement was "*of importance*" to the Privatization Agency[176] changes nothing on the conclusion that the Sembi Agreement was valid under Cypriot law.

170. The argument is based on an incorrect premise because there is nothing in the Privatization Agreement, or the Law on Privatization for that matter, that would imply that Mr. Obradović's identity was "*of importance*" to the Privatization Agency. As explained above, Mr. Obradović was only required to satisfy a certain number of undemanding statutory requirements that were also easily met by Mr. Rand, MDH, Sembi and almost any legal entity or natural person in Serbia and abroad.[177]

171. It is clear from the Privatization Agreement, as well as Article 41ž of the Law on Privatization, that it was only important for the Privatization Agency to approve assignment of the Privatization Agreement from Mr. Obradović to a third party before the agency would treat that third party as its contractual counterparty.[178]

172. As a result, the requirement for the Privatization Agency's prior consent made any assignment of the Privatization Agreement unenforceable as against the Privatization Agency until the Agency gave its consent, but could not make the Sembi Agreement invalid as between Mr. Obradović and Sembi.[179]

173. In any event, the Privatization Agency's consent under Article 41ž was only required for the assignment of the Privatization Agreement, not for the transfer of legal title to the Beneficially Owned Shares and Mr. Obradović's receivables against BD Agro. Therefore, Article 41ž could not affect the validity of Mr. Obradović's obligations with

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174 Georgiades Third ER, ¶ 2.15.

175 Georgiades Third ER, ¶ 2.13.

176 Rejoinder, ¶¶ 663-665.

177 Law on Privatization, Art. 12, 12a and 12b, **CE-220**.

178 Georgiades Third ER, ¶ 2.19.

179 Georgiades Third ER, ¶¶ 2.10, 2.19.

respect to these transfers and the creation of Sembi's beneficial ownership of the Beneficially Owned Shares.

4. The Sembi Agreement is consistent with the provisions of the 2004 and 2011 Laws on Companies

174. According to Serbia, the Sembi Agreement is inconsistent with Article 295 of the 2004 Law on Companies and Article 359 of the 2011 Law on Companies (which contains the same restriction as Article 295). Serbia's reasoning is the same as with respect to the MDH Agreement: Sembi agreement could not serve as a valid basis for Mr. Rand's control over BD Agro because at the time of its conclusion, he was a member of BD Agro's board of directors.[180]

175. The Claimants have already explained above why the MDH Agreement was consistent with Article 295. The Sembi Agreement is consistent with Article 295 of the 2004 Law on Companies and Article 359 of the 2011 Law on Companies for the same reasons:

a. It was Sembi—not Mr. Rand who concluded an agreement with Mr. Obradović. The effect of Articles 295 and 359 cannot be extended to non-signatories of the Sembi Agreement.

b. The aim of Articles 295 and 359 is to limit the managements' influence on shareholders—not to limit a beneficial owner's possibility to direct the nominal owner's exercise of voting rights.

176. Additionally, Mr. Rand ceased to be a member of BD Agro's board of directors on 9 July 2012.[181] Even if there had been any inconsistency between the Sembi Agreement and Article 359 of the 2011 Law on Companies (*quad non*), it was cured as of that date.

5. The Sembi Agreement is consistent with the Privatization Agreement

177. Serbia seems to claim that the Sembi Agreement is inconsistent with Article 5.3.1 of the Privatization Agreement.[182] However, Serbia's case seems to be based entirely on a

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180 Rejoinder, ¶ 713.

181 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, 23 August 2017, p. 1, **CE-072**.

182 Rejoinder, ¶¶ 610-613.

false allegation that the Claimants "*explicitly admit that Article 5.3.1. prohibited the conclusion of the Sembi Agreement while the provision was in effect.*"[183]

178. The Claimants have stated no such thing. On the contrary, the Claimants merely observed that the prohibition under Article 5.3.1 no longer applied when the Sembi Agreement was concluded:

> As explained above, Article 5.3.1 of the Privatization Agreement prohibited for a period of two years from the day of conclusion of the agreement, being 4 October 2005, the sale, assignment or alienation of the Privatized Shares. As a result, this prohibition expired on 4 October 2007, and no longer applied when the Sembi Agreement was entered into on 22 February 2008. As such, the Sembi Agreement is consistent with the Privatization Agreement.[184]

179. The Claimants certainly did not analyze whether any of Mr. Obradović's obligations under the Sembi Agreement might have been in conflict with Article 5.3.1 of the Privatization Agreement had Article 5.3.1 applied when the Sembi Agreement was concluded. Since the Parties agree that it did not apply at that date, the Claimants see no reason to engage in such an analysis.

J. Mr. Rand continued to control BD Agro through Sembi

180. As the beneficial owner of the Beneficially Owned Shares under the Sembi Agreement, Sembi had the legal right to direct Mr. Obradović's exercise of his shareholder rights in BD Agro and, as a result, to control BD Agro.[185]

181. Sembi used that right and BD Agro was regularly discussed at the meetings of Sembi's directors.[186] For example, Sembi's directors were informed about purchases of land,[187]

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183 Rejoinder, ¶ 611.

184 Reply, ¶ 126.

185 Georgiades Second ER, ¶ 3.17.

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

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

renovation of the farm,[188] imports of heifers,[189] crop production[190] and the financial status of the company.[191]

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

183. Mr. Rand continued to be personally involved in management of BD Agro.[192] Mr. Rand thus received periodic reports on various aspects of BD Agro's business, as well as financial reports.[193] Mr. Rand also remained involved in communication with various consultants and business partners—including the Canadian exporters of Holstein Friesian heifers that BD Agro intended to purchase.[194]

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

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

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

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

[192] Reply, ¶¶ 131-142.

[193] Reply, ¶ 131. *See also* Email from M. Leposavić (BD Agro) to W. Rand, 9 October 2008, **CE-673**; Email from M. Leposavić (BD Agro) to W. Rand, 28 July 2008, **CE-674**; Email from W. Rand to M. Leposavić (BD Agro), 1 August 2008, **CE-676**; Email from W. Rand to L. Jovanović et al., 10 April 2013, **CE-428**; Email from L. Jovanović to I. Markićević and D. Wood, 21 April 2013, **CE-677**; Email communication between L. Jovanović and W. Rand, 1 November 2012, **CE-678**; Email from W. Rand to BD Agro, 29 March 2013, **CE-429**; Email from W. Rand to E. Brosko et. al, 19 July 2012, **CE-679**; Rand Second WS, ¶ 65; Obradović Second WS, ¶ 53.

[194] Reply, ¶ 132. *See also* Email communication between W. Rand and PWC, 27 November 2008, **CE-695**; Email communication between W. Rand and A. King (EBRD), 10 June 2008, **CE-696**; Email from W. Rand to M. Bogićević and I. Markićević dated 27 September 2013, **CE-278**; Email communication between W. Rand and Bigadan, 13 December 2013, **CE-697**; Email communication between W. Rand and T. Smith (Dairy Strategies), 28 July 2008, **CE-698**; Email from E. Broshko to W. Rand and I. Markićević, 13 May 2014, **CE-699**; Email from V. Nedeljković to W. Rand, 22 August 2010, **CE-700**; Email communication between W. Rand and L. Rougeau, 16 September 2008, **CE-701**; Email from J. Shore (Willjill Farms), 30 December 2008, **CE-683**; Email form L. Jovanović to W. Rand, 2 April 2008, **CE-684**; Email communication between P. Trudeau, L. Jovanović et al., 23 December 2008, **CE-685**; Email from L. Jovanović to W. Rand, 4 December 2008, **CE-686**; Email from K. Lutz to A. Janičić, 28 February 2008, **CE-687**; Email from P. Trudeau to W. Rand, 19 December 2008, **CE-688**; Email communication between W. Rand and I. Cvetković, 28 February 2008, **CE-689**; Confirmation of wire

K. Mr. Rand's ownership of BD Agro remained widely known and disclosed also after the conclusion of the Sembi Agreement

184. As the Claimants explained in their previous submissions, Mr. Rand's ownership of BD Agro remained widely known and regularly disclosed also after conclusion of the Sembi Agreement.[195]

1. Disclosure of Mr. Rand's ownership to BD Agro's business partners and creditors

185. After the conclusion of the Sembi Agreement, Mr. Rand and Mr. Jovanović continued to regularly inform BD Agro's business partners about Mr. Rand's ownership of BD Agro.[196]

186. BD Agro's creditors also knew about Mr. Rand's ownership. Most importantly, Mr. Markićević repeatedly discussed Mr. Rand's ownership of BD Agro with Mr. Milan Ristović—who at that time worked as an expert advisor at the Deposit Insurance Agency, another governmental agency of the Republic of Serbia. For example, on 22 April 2014, Mr. Markićević sent an email to Mr. Ristović, inviting him to a meeting regarding BD Agro's reorganization plan that was to be attended also by Mr. Broshko. In his email, Mr. Markićević expressly described Mr. Broshko as a "*[r]epresentative of*

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transfer from William Rand to Wiljill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 607,759.00 executed on 21 October 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 460,216.00 executed on 24 December 2008 **CE-021**; Confirmation of wire transfer from William Rand to Sea Air International Forwarders of CAD 695,030.90 executed on 21 October 2008; Confirmation of wire transfer from William Rand to Sea Air International Forwarders of CAD 124,100 executed on 9 December 2008, Confirmation of wire transfer from William Rand to Sea Air International Forwarders of CAD 309,415 executed on 22 December 2008, **CE-022**; Confirmation of wire transfer from William Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-023**; Confirmation of wire transfer from William Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-024**; Email from K. Lutz to A. Janičić, 30 September 2008, **CE-691**; Email from K. Lutz to A. Janičić, 9 December 2008, **CE-692**; Email from W. Rand to Canadian Embassy, 6 February 2008, **CE-693**.

[195] *E.g.* Reply, ¶¶ 132-142.

[196] Reply, ¶¶ 133-137. *See also* Email communication between W. Rand and A. King (EBRD), 10 June 2008, p. 1, **CE-696**; Email communication between W. Rand and T. Smith (Dairy Strategies), 28 July 2008, **CE-698**; Email communication between W. Rand and L. Rougeau, 16 September 2008, **CE-701**; Email from V. Nedeljković to W. Rand, 22 August 2010, **CE-700**; Email from D. Roberts to S. Ameye and T. Hanson, 16 December 2011, **CE-702**; Rand Second WS, ¶¶ 45-51, 68.

the owner from Canada."[197] Mr. Ristović knew full well that Mr. Markićević's reference to "*the owner from Canada*" was to Mr. Rand.[198]

2. Events organized by the Canadian Embassy

187. The Canadian Embassy was also well aware of Mr. Rand's ownership of BD Agro and his contribution to the good reputation of Canadian investors in Serbia. For example, when Mr. John Morrison, the then Canadian Ambassador in Serbia, wrote to Mr. Rand in June 2010, he noted that Mr. Rand "*obviously [has] a winning team down on the farm*" and that it was "*a great credit to [his] business skills and the partnerships [he has] established here*." Finally, he noted that the successes of BD Agro's management "*heighten enormously the respect that Serbians have for Canadian investments generally.*"[199]

188. Serbia tries to downplay the importance of the Canadian Embassy's involvement by arguing that the interest of the Canadian diplomatic staff in BD Agro could have been caused by the fact that Mr. Obradović has also Canadian nationality.[200] This is borderline absurd. The only reason why the Canadian Embassy had been interested in BD Agro was that they knew Mr. Rand and knew that he was the beneficial owner of BD Agro. In June 2010, Mr. Rand even attended Mr. Morrison's wedding. Enough to say, Mr. Obradović was not invited.

189. Given the high opinion that the Embassy had about Mr. Rand, it often invited him to various events. For example, Mr. Rand attended a reception organized by the Embassy on 14 May 2010. As the Claimants explained in their Reply, at that reception, Mr. Rand met with Mr. Damjan Krnjević Mišković, the then advisor to the Minister of Foreign Affairs, and discussed with him his ownership of BD Agro and various matters related to the company. Mr. Rand followed up on the conversation with Mr. Mišković in a letter

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197 Email from I. Markićević to M. Ristović, 22 April 2014, **CE-289**.

198 Igor Markićević Fourth Witness Statement dated 5 March 2020, ¶ 14.

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

200 Rejoinder, ¶ 50.

from 17 May 2010. In this letter, Mr. Rand reiterated that he owned BD Agro and explained to Mr. Mišković some of the challenges faced by the company.[201]

190. On 17 July 2010, the Canadian Embassy organized a visit of BD Agro by members of a Canadian parliamentary delegation that was touring Serbia. The visit of BD Agro was coordinated with the representatives of the Serbian parliament, and it was very successful.[202] Serbia is therefore clearly incorrect when it claims that the communication between Mr. Rand and the Canadian Embassy was performed without the involvement of Serbian authorities.[203]

3. The Ministry of Economy and the Privatization Agency were aware of Mr. Rand's ownership

191. In December 2013, Mr. Markićević asked Mr. Milan Kostić, the then chair of the economic counsel of the Serbian Progressive Party for New Belgrade, for his assistance in communication with Serbian authorities.[204] Mr. Kostić agreed and on 18 December 2013 contacted Mr. Saša Radulović, the then Minister of Economy of Serbia, with a request for a meeting and assistance with BD Agro matters. Mr. Kostić made it clear in his letter that Mr. Rand was the "*majority owner*" of BD Agro:

> Dear Mr. Minister,
>
> I hereby address you with the kind request, respecting the efforts of the Ministry to assist commercial entities which have realistic basis to maintain the production and working capacities, to schedule a short meeting with the representative of the owner of the company BD AGRO Dobanovci from Canada, the attorney Mr. Erinn Broshko, who would like to collect sufficient level of information for the purpose of furthering the development plan of the company and inform *Mr. William Rand from Canada who is a majority owner of PD BD AGRO*.[205]

192. In a desperate attempt to at least appear responsive to the existence of this damming email, Serbia claims that it was not 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*

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

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

203 Rejoinder, ¶ 50.

204 Markićević Fourth WS, ¶ 8.

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

2001", and that Minister Radulović did not "*deal with said email at all, but simply forwarded it to his assistant and referred it to SIEPA*."[206]

193. Serbia's feeble arguments entirely miss the point. It is completely irrelevant to what extent Mr. Radulović dealt with the email. What is relevant is that Mr. Radulović—the Minister of Economy of the Republic of Serbia—was expressly informed that "*Mr. William Rand from Canada [...] is a majority owner of PD BD AGRO*."[207]

194. After Minister Radulović read the letter from Mr. Kostić, he forwarded it to Mr. Vladimir Milenković, the then director of the Serbian Investment and Export Promotion Agency ("**SIEPA**"), who was also an advisor to the Minister of Economy, with a note that it was for SIEPA to look into this issue.[208] Mr. Milenković in turn asked Mr. Goran Džafić, the then deputy director of SIEPA, to organize an "*urgent*" meeting with BD Agro representatives.[209]

195. On 19 December 2013, *i.e.* the very next day, the meeting between SIEPA and BD Ago representatives took place. The meeting was attended by Messrs. Broshko and Markićević, who described the meeting in detail in their second witness statements. Most importantly, Mr. Markićević explained the background of the privatization of BD Agro and that Mr. Obradović was only the nominal owner, because the beneficial owner was Mr. Rand.[210] After the meeting, Mr. Džafić reported back to Mr. Milenković.[211]

196. Serbia refers to the email from Mr. Džafić as purported evidence that "*Mr. Rand was aware of the fact that his arrangement with Mr. Obradovic was simply impossible under Serbian law*."[212] Messrs. Markićević and Broshko explain in their witness statements that this is not what they conveyed to Mr. Džafić during the meeting. They did not state

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206 Rejoinder, ¶ 35.

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

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

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

210 Igor Markićević Second Witness Statement dated 16 January 2019, ¶¶ 65-66; Erinn Broshko Second Witness Statement dated 16 January 2019, ¶ 32.

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

212 Rejoinder, ¶ 36. Similarly also Rejoinder, ¶ 687.

that beneficial ownership was impossible under Serbian law. They merely explained that under Serbian law, the nominal owner, and not the beneficial owner, was the registered owner of shares in BD Agro.[213]

197. This is consistent with the Serbian original of Mr. Džafić's email, which explains that Mr. Obradović acquired BD Agro as a nominal owner and states that Mr. Obradović was registered as the owner of the company because "*naš zakon ne* ***prepoznaje*** *vlasništvo u ovakvom obliku[.]*"[214] This Serbian sentence translates into English as "*our law does not recognize ownership in this form,*"[215] but with the important caveat that the verb "*recognize*" has only the meaning of "*to know someone or something because you have seen or heard him or her or experienced it before*."[216] Mr. Džafić thus only stated in his email that beneficial ownership was not known as a special category of ownership under Serbian law.

198. The English translation of Mr. Džafić's words is correct, but may be confusing because in English, the verb "*recognize*" has also the meaning of "*acknowledge the existence, validity, or legality of*." However, the Serbian verb "*prepoznati*," which Mr. Džafić uses in the third-person singular "*prepoznaje*" and which translates into English as "*recognize*," does not have that other meaning. The Serbian verb corresponding to that other meaning of "*recognize*" is "*priznati*," with third-person singular "*priznaje*"—and it was not used by Mr. Džafić.

199. The Privatization Agency was also obviously aware of the fact that Mr. Rand was the beneficial owner of BD Agro. On 30 January 2014, Messrs. Broshko and Markićević met with the Privatization Agency. Mr. Broshko explained during this meeting that Mr. Rand was the beneficial owner of BD Agro shares, while Mr. Obradović was merely a nominal owner, who no longer had any involvement in management of BD Agro.[217]

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213 Markićević Fourth WS, ¶ 12; Erinn Broshko Fourth Witness Statement dated 5 March 2020, ¶ 13.

214 Email communication between G. Džafić and I. Markićević dated 19 December 2013, p. 6 (emphasis added), **CE-311**.

215 Email communication between G. Džafić and I. Markićević dated 19 December 2013, p. 2, **CE-311**.

216 *See e.g.* https://dictionary.cambridge.org/dictionary/english/recognize.

217 Broshko Fourth WS, ¶ 16; Markićević Fourth WS, ¶ 17.

200. The minutes of this meeting submitted by Serbia in this arbitration clearly reflect this fact. The minutes state the following:

> 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 William Rand was not satisfied with the work and management by the man to whom [the job] of purchasing the company was entrusted*, and that he was interested to finish the assignment as soon as possible.[218]

201. While the minutes do not use the term "*beneficial ownership*", Messrs. Broshko and Markićević confirm in their witness statements that Mr. Broshko used this term in the meeting to describe Mr. Rand's ownership. Mr. Broshko also explained that the structures separating nominal and beneficial ownership were "*common in Canada*".[219]

202. Serbia's argument that Messrs. Broshko and Markićević told the Agency that Mr. Rand merely provided financing to Mr. Obradović is thus clearly false[220]—same as Serbia's allegation that the meetings between Messrs. Broshko and Markićević and the Privatization 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*."[221]

203. While the Privatization Agency continued to address official communication to Mr. Obradović, and Mr. Obradović continued signing letters to the Agency, this was simply because Mr. Obradović remained the registered owner. It certainly was not because the Agency did not know about Mr. Rand, as Serbia incorrectly claims.[222]

204. On 3 November 2014, Messrs. Broshko and Markićević attended a meeting at the Ministry of Economy, at which Mr. Broshko reiterated that Mr. Rand was the beneficial

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

219 Broshko Fourth WS, ¶ 18; Markićević Fourth WS, ¶ 21.

220 Rejoinder, ¶¶ 43-45, 693.

221 Rejoinder, ¶ 42.

222 Rejoinder, ¶¶ 57-61; Obradović Second WS, ¶ 91.

owner of BD Agro and that Mr. Obradović was only a nominal owner and no longer had the authority to represent BD Agro.[223]

205. Mr. Broshko also stressed that Coropi Holdings Limited ("**Coropi**"), to which the Privatization Agreement was supposed to be assigned, was also beneficially owned by the Rand family.[224] After the meeting, Ms. Neda Galić, the then advisor in the Minister of Economy's cabinet, followed up with Mr. Broshko and asked him to provide "*the official document (scan would be enough) that shows Coropi Holding is a company within Rand Investment*."[225] Mr. Broshko explains that he always understood that Ms. Galić requested this information to confirm that BD Agro would remain in the beneficial ownership of the Rand family after completion of the requested assignment of the Privatization Agreement to Coropi.[226]

206. The Government's correct understanding of the reality of Mr. Rand's and Mr. Obradović's respective roles in the ownership of BD Agro was unequivocally demonstrated also during a meeting held at the Ministry of Economy on 15 December 2014. On that date, Messrs. Broshko and Markićević met with Mr. Dragan Stevanović, the then State Secretary at the Ministry of Economy, Ms. Galić and certain other representatives of the Ministry of Economy and the Privatization Agency.[227]

207. When Messrs. Broshko and Markićević came to the meeting, they realized that Mr. Obradović was also present. After Mr. Broshko reiterated to Ms. Galić that Mr. Obradović's presence was not welcomed because he no longer had the authority to represent BD Agro and Mr. Rand, Mr. Stevanović asked Mr. Obradović to leave.[228]

208. It is undisputed between the parties that Mr. Obradović followed the request and left the meeting.[229] He did so without any hesitations or any protests. It is difficult to imagine

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223 Broshko Fourth WS, ¶ 22; Markićević Fourth WS, ¶ 20.

224 Broshko Fourth WS, ¶¶ 23-24; Markićević Fourth WS, ¶ 20.

225 E-mail from Ms. Neda Galić to Mr. Erinn Broshko, 9 November 2014, **CE-070**.

226 Broshko Fourth WS, ¶ 24.

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

228 Broshko Fourth WS, ¶¶ 26-28; Markićević Fourth WS, ¶¶ 22-24.

229 *E.g.* Rejoinder, ¶ 40.

why he would have done so if he had been anything more than a nominal owner. Indeed, the owner of a company would hardly accept to leave a meeting entirely focused on his company and the potential transfer of its ownership. Mr. Obradović's reaction thus only confirmed what everyone knew at that point—that the beneficial owner of BD Agro was Mr. Rand.

209. Serbia's argument that Mr. Obradović was asked to leave the meeting because it was organized based on the request of Messrs. Markićević and Broshko, rather than based on the request of Mr. Obradović, is therefore nothing short of ridiculous.[230] Serbia also incorrectly claims that Messrs. Broshko and Markićević attended the meeting as "*representatives of Coropi.*"[231] In reality, Mr. Broshko attended all the meetings with the Privatization Agency and the Ministry of Economy in his capacity as the Managing Director of Rand Investments and, hence, a representative of Mr. Rand. Mr. Markićević attended the meetings with the Privatization Agency and the Ministry as a representative of both BD Agro and its beneficial owner, Mr. Rand.[232]

210. On 8 September 2015, the Canadian Embassy initiated a meeting attended by Mr. Philip Pinnington, the Canadian Ambassador to Serbia, Ms. Djurdjevka Ćeramilac, the Trade Commissioner of the Canadian Embassy in Belgrade, Mr. Rand, Mr. Markićević and Mr. Ivica Kojić, the Chief of Staff to the Prime Minister of Serbia.

211. At the beginning of the meeting, Mr. Pinnington introduced Mr. Rand to Mr. Kojić as the owner of BD Agro and explained that Mr. Obradović was holding the Beneficially Owned Shares as a mere nominal owner.[233] Mr. Pinnington also explained that Mr. Rand had been active as an investor in Serbia for many years and that his activities were related to various companies, most notably BD Agro. Mr. Pinnington then noted that for Canada, it is important to see not only Serbia's efforts to attract new investors, but also Serbia's approach to investors who encounter certain issues in Serbia—such as Mr. Rand's problems with the Privatization Agency and the Ministry of Economy.

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230 Rejoinder, ¶ 40.

231 Rejoinder, ¶¶ 40, 48.

232 Broshko Fourth WS, ¶¶ 34-36; Markićević Fourth WS, ¶ 26.

233 Rand Third WS, ¶ 59.

212. After hearing from Messrs. Pinnington and Mr. Rand, Mr. Kojić apologized and promised that Serbia would resolve all issues related to BD Agro to the full satisfaction of Mr. Rand.[234] Needless to say, this never happened.

* * *

213. All of the above facts prove that Mr. Rand continued to transparently disclose his ownership of BD Agro also after the conclusion of the Sembi Agreement and restructuring of his beneficial ownership over BD Agro. The fact that Mr. Rand was the owner of BD Agro was, among others:

   a. repeatedly communicated to employees and creditors of BD Agro;

   b. disclosed to Mr. Damjan Krnjević Mišković, the then advisor to the Minister of Foreign Affairs;

   c. made obvious during the visit of a Canadian parliamentary delegation—attended by Mr. Rand's son, Mr. Robert Rand, and coordinated with the representatives of the Serbian parliament;

   d. expressly disclosed to Serbian Minister of Economy—Mr. Radulović;

   e. communicated to SIEPA—Serbian Investment and Export Promotion Agency;

   f. expressly disclosed to representatives of the Privatization Agency on 30 January 2014;

   g. expressly disclosed to representatives of the Ministry of Economy and the Privatization Agency on 3 November 2014 and 15 December 2014; and

   h. expressly disclosed to Mr. Ivica Kojić, the Chief of Staff to the Prime Minister of Serbia.

L. BD Agro was not mismanaged

214. In the Rejoinder, Serbia advances a completely new jurisdictional objection that the Claimants' investment was illegal and, hence, not protected under the Treaties and the

[234] Rand Second WS, ¶ 101.

ICSID Convention because the Claimants and Mr. Obradović allegedly mismanaged BD Agro and engaged in asset-stripping. The factual submissions purported to support this new objection span over 42 pages.[235]

215. As the Claimants explain in Part III of this Rejoinder on Jurisdiction, Serbia's objection is obviously inadmissible because it is belated and suffers from a number of other legal flaws.

216. Most importantly, Serbia's objection is entirely fabricated and divorced from reality. There was no asset-stripping and Serbia again raises serious accusations without any evidentiary support or, sometimes, based on purported evidence presented in a highly misleading, if not distorted manner.

217. Serbia's deliberate decision to raise its sensationalist accusations only in the Rejoinder makes Serbia's procedural conduct even more problematic. Serbia's accusations relate to events that allegedly occurred in the period 2005 – 2013, and mostly in the earlier years. Serbia cannot—and does not even purport to—provide any reasons why it could not have raised these issues in its Counter-Memorial. The justification certainly cannot be that Serbia discovered the issues only recently because Serbia frequently admits that it was on notice contemporaneously.

218. From a purely practical perspective, the belated timing effectively forced the Claimants to respond to Serbia's 42 pages of new factual allegations within six weeks rather than the five and a half months they had for their Reply. The belated timing also shielded Serbia's allegations from the Claimants' document requests, which would have been important because the Claimants no longer have access to BD Agro's archives while Serbia does.

219. Despite these constraints unfairly imposed by Serbia's belated submission, the Claimants refute each of Serbia's baseless—and irresponsible—accusations below.

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235 Rejoinder, §§ I.F, I.H.

1. Balance of money transfers between BD Agro, Mr. Obradović and other Serbian companies owned by Mr. Rand

220. As the Claimants explained in their previous submissions, and again here, Mr. Rand secured EUR 13.8 million for his investments in BD Agro.[236] These fund were provided mainly by the Lundin family and forwarded to Mr. Obradović,[237] who used them for the: (*i*) payments of the first and second installments of the purchase price, amounting to approximately EUR 2.6 million;[238] (*ii*) additional investment required under the Privatization Agreement amounting to approximately EUR 2 million;[239] (*iii*) direct payments to BD Agro's suppliers;[240] (*iv*) financing of Inex's purchases of BD Agro's

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236 Memorial, ¶ 90; Reply, ¶ 495. *See also* Rand Third WS, ¶ 40; Obradović Third WS, ¶ 22.

237 Agreement between Mr. Obradović and Sembi, 22 February 2008, Preamble C, **CE-029**; Agreement between Mr. Djura Obradović, The Lundin Family, Mr. William Rand and Sembi, 22 February 2008, **CE-028**; Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, 15 September 2005, **CE-384**; Confirmation of transfer EUR 399,950 from Oil Company to Mr. Obradović, 2 January 2006, **CE-385**; Bank confirmation of transfer of EUR 399,950 from Oil Company to Mr. Obradović, 2 January 2006, **CE-386**; Confirmation of transfer of EUR 100,000 from Oil Company to Mr. Obradović, 20 January 2006, **CE-387**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 1 February 2006, **CE-388**; Confirmation of transfer of EUR 500,000 from Mr. Lundin to Mr. Obradović, 20 February 2006, **CE-389**; Confirmation of transfer of EUR 400,000 from Mr. Lundin to Mr. Obradović, 23 February 2006, **CE-390**; Confirmation of transfer of EUR 5,000 from Mr. Lundin to Marine Drive Holding, 3 March 2006, **CE-391**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 6 March 2006, **CE-392**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 7 April 2006, **CE-393**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 20 April 2006, **CE-394**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 5 May 2006, **CE-395**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović,11 May 2006, **CE-396**; Confirmation of transfer from Longdale Assets Ltd of EUR 50,000 to Mr. Obradović,13 June 2006, **CE-397**; Confirmation of transfer from Longdale Assets Ltd of EUR 10,000 to Marine Drive Holding, 5 July 2006, **CE-398**; Confirmation of transfer from Longdale Assets Ltd of EUR 130,000 to Mr. Obradović, 11 July 2006, **CE-399**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović, 17 July 2006, **CE-400**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 7 August 2006, **CE-401**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović, 28 August 2006, **CE-402**; Confirmation of transfer from Longdale Assets Ltd of EUR 1,200,000 to Mr. Obradović, 2 November 2006, **CE-403**; Confirmation of transfer from Longdale Assets Ltd of EUR 200,000 to Mr. Obradović, 28 December 2006, **CE-404**; Confirmation of transfer of EUR 800,000 from Mr. Lundin to Mr. Obradović, 29 December 2006, **CE-405**; Confirmation of transfer of EUR 250,000 from Mr. Lundin to Mr. Obradović, 5 April 2007, **CE-406**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 4 May 2007, **CE-407**; Confirmation of transfer from Longdale Assets Ltd of EUR 230,000 to Mr. Obradović, 30 May 2007, **CE-408**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 7 June 2007, **CE-409**; Confirmation of transfer from Longdale Assets Ltd of EUR 350,000 to Mr. Obradović, 1 November 2007, **CE-410**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 1 February 2008, **CE-411**.

238 That much is not disputed by Serbia. *See* Rejoinder, ¶¶ 90, 386.

239 Amendment No. 2 to the Privatization Agreement, 15 March 2006, **CE-076**; Confirmation of the Privatization Agency of the Completion of Investment, 10 October 2006, **CE-018**. Obradović Third WS, ¶ 25.

240 Obradović Third WS, ¶ 25.

debt prior to its privatization;[241] and (*v*) provision of interest-free shareholder loans to BD Agro.[242]

221. Serbia's allegation that there is no evidence that the funds provided by the Lundins were used to finance BD Agro's privatization, is thus clearly misplaced.

222. Serbia is equally wrong when it claims that Mr. Obradović "*extracted*" money from BD Agro.[243] According to Serbia, Mr. Obradović did so under the guise of repayments of shareholder loans.[244] However, there was absolutely nothing wrong with BD Agro's repayment of the shareholder loans. The reasons why Serbia's analysis implies something different is that it is both incomplete and incorrect.

223. First of all, Serbia's—and Mr. Cowan's—analysis is conceptually flawed because it purports to analyze the shareholder loans and their repayments on the basis of money transfers between the bank accounts of BD Agro and Mr. Obradović. Such an analysis is necessarily incorrect because it equates obligations between BD Agro and Mr. Obradović with direct cash flows between their accounts. Such an equation does not exist.

224. To state the obvious, a loan may be disbursed to a third person's account—such as when Mr. Obradović paid in BD Agro's stead to BD Agro's suppliers[245] and/or when he sent the funds to BD Agro's subsidiaries.[246] Similarly, a loan may be repaid by the debtor borrowing the money from a third party and directing the third party to make the disbursement directly to the creditor. Again, there will be no corresponding cash flow between Mr. Obradović and BD Agro for such repayment. Serbia—and Mr. Cowan—made no effort to capture such transactions in their purported analysis.

225. Another major flaw is that Serbia purports to rely entirely on the descriptions of the purpose for each payment as stated in the bank account statements. Thus, Serbia claims

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241 Obradović Third WS, ¶ 25.

242 Obradović Third WS, ¶ 25.

243 Rejoinder, ¶ 402.

244 Rejoinder, ¶¶ 330 *et seq.*

245 Audit Report from Konsultant – revizija, 10 March 2006, **CE-051 (corrected)**; Audit Report from Konsultant – revizija, 9 June 2006, **CE-052 (corrected)**. *See also* Obradović Third WS, ¶¶ 25, 82.

246 Obradović Third WS, ¶ 25.

that the transfers labelled as "*investments*" and "*goods and services*", which were included in Mr. Cowan's calculations, should be excluded from the final calculation. According to Serbia, the payments labelled as "*investments*" allegedly represented Mr. Obradović's fulfillment of his obligation to make additional investments under the Privatization Agreement and the payments labelled as "*goods and services*" were payments for purchases.[247] Serbia's approach is incorrect because descriptions of payments that appear in the banks statements are filled in by bank clerks, who can often put in any unclear description. As a result, the descriptions often fail to reflect the true purpose of the payments.[248]

226. The payments labelled as "*investments*" actually represent a perfect example. The obligatory investment under the Privatization Agreement was made in form of direct payments to BD Agro's suppliers and some additional payments to the account of BD Agro's subsidiary PPK Budućnost Mlekara (later renamed as BD Agro Mlekara).[249] Therefore, these investments did not give rise to any cash-flows between Mr. Obradović and BD Agro. The payments made to BD Agro that were labelled as "*investments*" were, in reality, shareholder loans. The same can be said about the payments labelled as "*goods and services*". These were again shareholder loans because Mr. Obradović was not buying or selling any goods and services from or to BD Agro (with the exception of the purchase of a certain land plot, discussed below, which he paid for by set-off against a part of BD Agro's debt under the shareholder loans).[250]

227. Dr. Hern conducted his own analysis of the money transfers between the bank accounts of Mr. Obradović and Mr. Rand's other Serbian companies, on the one hand, and BD Agro and its subsidiaries, on the other hand and concludes that in period between years 2005 and 2013, the total outflows amounted to RSD 814,209,270[251] (approximately EUR 7.2 million)[252] and the total inflows to RSD 606,475,307 (approximately EUR 5.4

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247 Rejoinder, ¶ 336.

248 Obradović Third WS, ¶ 51.

249 Obradović Third WS, ¶ 82.

250 Obradović Third WS, ¶ 51.

251 This value does not involve a land purchase by Mr. Obradović in 2007. Richard Hern Third Expert Report dated 6 March 2020, ¶ 126.

252 Using the average exchange rate in 2013 of 113.1369. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

million).[253] The net outflows of funds is therefore RSD 207,733,963 (approximately EUR 1.8 million).

228. While Dr. Hern's analysis is certainly more complete than Mr. Cowan's, it still could not capture all shareholder loans and their repayments.

229. *First*, Dr. Hern's analysis is based *solely* on the bank statements submitted by Serbia—given that the Claimants do not have access to BD Agro's bank statements, they cannot verify whether Serbia actually submitted all banks statements that there are. The Claimants were also unable to obtain banks statements for all banks accounts that Mr. Obradović had been using in the relevant period.[254]

230. *Second*, as the Claimants explain in more detail below, Mr. Obradović provided certain funds to BD Agro through direct payments to BD Agro's suppliers.[255] Given that the Claimants were unable to obtain all banks statements for Mr. Obradović's account, they are unable to calculate the exact amount that was paid directly to BD Agro's suppliers. Thus, the analysis understates the actual amount of shareholder loans provided to BD Agro.

231. *Third*, RSD 31,820,000 (approximately EUR 400,000)[256] payment for land purchased by Mr. Obradović from BD Agro, which was set-off against outstanding shareholder loans in 2007, needs to be added to the analysis.[257]

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253 Using the average exchange rate in 2013 of 113.1369. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

254 During the preparation of this Rejoinder, Mr. Obradović requested his bank statements from Priredna Banka, Unicredit Banka and Vojvodjanska banka. He was only able to obtain bank statements from Vojvodjanska banka, which, however, do not provide information about counterparties to individual transactions.

255 *See* Audit Report from Konsultant – revizija, 10 March 2006, **CE-051 (corrected)**; Audit Report from Konsultant – revizija, 9 June 2006, **CE-052 (corrected)**.

256 Using the average exchange rate in 2007 of 79.9640. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

257 Rejoinder, ¶ 337.

232. *Fourth*, BD Agro's debt purchased by Inex of RSD 114,000,000 (approximately EUR 1.4 million),[258] which resulted in subsequent repayments from BD Agro towards Inex should be added to cash flows from Inex to BD Agro.[259]

233. *Fifth*, two of the companies beneficially owned by Mr. Rand in Serbia—Crveni Signal and Inex—still owe money to BD Agro. Under Serbia's own calculations, the funds owed by Inex and Crveni Signal amount to RSD 70,386,222.01 (approximately EUR 622,133).[260] Even though these amounts represent BD Agro's receivables, they are not reflected in Dr. Hern analysis because there have not been corresponding money inflows yet.

234. *Sixth*, Dr. Hern's analysis does not take into account RSD 22,057,356 (approximately EUR 181,786)[261] that Crveni Signal paid instead of BD Agro as a guarantor for one its loans,[262] because it does not represent a direct transaction with BD Agro. In order to provide a full picture of transactions between individual companies beneficially owned by Mr. Rand, BD Agro and Mr. Obradović, it needs to be included.

235. *Finally*, Mr. Rand has provided loans to BD agro and directly paid for part of the heifers imported by BD Agro from Canada. These payments amount to EUR 2,396,903[263] (approximately RSD 295,101,664).[264] While these payments are not included in Dr. Hern's analysis, because they do not represent transactions with BD Agro, they again need to be considered in order to obtain a complete picture of the funds used by Mr. Rand for benefit of BD Agro.

236. Taking all the above into consideration, it is clear that Dr. Hern's analysis of money transfers between the bank accounts of BD Agro, Mr. Obradović and companies

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258 Using the average exchange rate in 2005 of 82.9904. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

259 Hern Third ER, ¶ 126.

260 Rejoinder, ¶ 226. Using the average exchange rate in 2013 of 113.1369. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

261 Using the average exchange rate in 2017 of 121.3367. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

262 Reply, ¶ 197; Decision of the Commercial Court in Belgrade on Crveni Signal's receivables, 30 March 2018, p. 2, **CE-547**.

263 Memorial, ¶ 592.

264 Using the average exchange rate in 2016 of 123.1179. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

beneficially owned by Mr. Rand is just a starting point. In order to achieve a complete overall balance, it is necessary to include all the above mentioned transactions. If all these transactions are included, the net balance of payments between BD Agro, on one side, and Mr. Obradović together with Mr. Rand and the Serbian companies owned by Mr. Rand, on the other side, the result would be *a net inflow of RSD 337,070,855.01 (approximately EUR 3,293,456).*

	RSD	**EUR (approximately)**
Dr. Hern's balance based solely on bank transfers	(207,733,963)	(1,800,000)[265]
Documented payments to suppliers[266]	75,079,576	892,634[267]
Land purchase in 2007	(31,820,000)	(400,000)
BD Agro debt purchased by Inex	114,000,000	1,400,000
Outstanding receivables toward Inex and Crveni Signal	70,386,222.01	622,133
Crveni Signal's repayment of BD Agro's loan	22,057,356	181,786
Mr. Rand's receivables	295,101,664	2,396,903
Net balance	**337,070,855.01**	**3,293,456**

237. It also bears repeating that the shareholder loans provided to BD Agro were *interest-free*. Average interest rates between 2005 and 2013 were between 11.26% and 16.95%.[268] Simple average rate for this period equals to 15.35%. If such average was applied to the total loans provided to BD Agro through Mr. Obradović, *i.e.* RSD

[265] Using the average exchange rate in 2006 of 84.1101. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

[266] Hern Third ER, ¶ 126.

[267] Using the average exchange rate in 2013 of 113.1369. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

[268] Overview of average interest rates, **CE-834**; Average interest rates after 2011, **CE-893**.

620,607,348 (approximately EUR 5.5 million[269]),[270] the resulting interest would amount to RSD 95,263,227.918 (approximately EUR 842,017).[271]

238. It is also important to stress that Serbia's analysis ignores the most important source of information that would reflect potential siphoning of assets—BD Agro's financial statements. Interestingly enough, Serbia entirely ignores BD Agro's financial statements in its analysis—even though BD Agro was a publicly traded company and between years 2005 and 2013 its financial statements were audited by three different auditors, including PricewaterhouseCoopers.[272]

239. The financial statements show that, in general, the shareholder loans were provided mainly in the first years after privatization and reached their peak in 2006 when they amounted to RSD 464,937,000 (approximately EUR 5.5 million)[273] at the year end.[274] All shareholder loans had been repaid by the end of 2013 and there were no shareholder loans after that date.[275]

240. If Mr. Obradović indeed "siphoned" money from BD Agro—as alleged by Serbia—his conduct would be reflected in the financial statements, or the auditors would have spotted that BD Agro's bookkeeping was inaccurate. Nothing of the sort happened. Mr. Rand's Canadian accountant, who was visiting BD Agro on quarterly basis and reviewing the financial documents of the company, also did not raise any issues.[276]

241. Most importantly, if Serbia were right that BD Agro had repaid more shareholder loans than it had received, BD Agro would have a claim against Mr. Obradović for the return

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269 Rejoinder, ¶ 226. Using the average exchange rate in 2013 of 113.1369. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

270 Hern Third ER, ¶ 126.

271 Using the average exchange rate in 2013 of 113.1369. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

272 Obradović Third WS, ¶ 52.

273 Using the average exchange rate in 2006 of 84.1101. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

274 Notes to BD Agro's financial statements for 2006, pp. 13-15, 6 July 2017 (accessed), **CE-819**.

275 Markićević Fourth WS, ¶ 39.

276 Obradović Third WS, ¶ 52; Rand Third WS, ¶ 48.

of the excessive repayments. Tellingly, BD Agro, fully controlled by Serbia since 21 October 2015, never alleged to have such a claim.

2. Transactions with BD Agro's land

242. Serbia also accuses Mr. Obradović from alleged "*machinations*" with BD Agro's land.[277] Same as with respect to alleged "*extraction*" of money from BD Agro, the documentary evidence clearly demonstrates that Serbia's allegations are entirely meritless.

243. First of all, Serbia refers to sales of land to Hypo Park Dobanovci and Eko Elektrofrigo and takes an issue with the fact that part of proceeds from these loans were used to repay shareholder loans provided to BD Agro.[278] This is a non-issue. As explained above, Mr. Obradović provided BD Agro with shareholder loans worth millions of euros. It is only logical that the company was repaying these loans.

244. Serbia also claims that in 2007, Mr. Obradović made BD Agro sell him approximately four hectares of land for EUR 400,000. According to Serbia, this price was below the market value, which enabled Mr. Obradović to resell the land with additional profit.[279] Same as with respect to the shareholder loans, the facts are significantly different than the picture painted by Serbia.

245. In reality, BD Agro first offered the land to the Ministry of Agriculture, which had pre-emptive rights to agriculture land, and published several adverts in main Serbian newspapers.[280] However, neither the Ministry nor any other buyer was interested.

246. Given that BD Agro could not find any buyer, the decision was eventually made to sell the land to Mr. Obradović and set off its value against the outstanding shareholder loans. The idea was that Mr. Obradović would continue to search for the potential buyer and reinvest money from the sale to one of Mr. Rand's companies in Serbia.[281]

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[277] Rejoinder, ¶¶ 342-351.

[278] Rejoinder, ¶¶ 343-344.

[279] Rejoinder, ¶ 346.

[280] Obradović Third WS, ¶ 57.

[281] Obradović Third WS, ¶ 58.

247. In June 2007, Mr. Obradović managed to sell the land to the Serbian company Calpro Project for EUR 1,417,000.[282] The annex to the agreement stated that Calpro would pay the full purchase price only if they would be able to convert the land from agricultural to building land and providing that an access road to the land is built. Given that this did not happen, Calpro paid only around EUR 800,000 to EUR 900,000.[283] Calpro later resold the land, without any involvement of BD Agro or Mr. Obradović.[284]

248. Serbia also refers to an envisaged sale of 20 hectares of BD Agro land to Mr. Obradović in 2010. According to Serbia, the envisaged sale price was again too low.[285] It is not disputed that Mr. Obradović concluded the agreement and even paid a part of the purchase price amounting to RSD 28,114,000.[286] However, it was eventually decided not to proceed with the sale and the agreement was rescinded. The part of the purchase price paid by Mr. Obradović remained in BD Agro as another shareholder loan.[287]

249. Another example to which Serbia refers is a transfer of land to Ms. Nedeljković, an employee of BD Agro. According to Serbia, Mr. Obradović gave Ms. Nedeljković approximately one hectare of BD Agro's land because she was his "*close associate*."[288] Once again, the reality is strikingly different.

250. Ms. Nedeljković was an employee of BD Agro who had been with the company since before the privatization and used to live in one of the apartments owned by BD Agro. She was, however, evicted because a member of the pre-privatization management of BD Agro wanted to use the apartment for himself. Given that Ms. Nedeljković was a single mother, she could not afford to buy her own apartment and thus approached Mr. Obradović in a hope that he would help resolve her housing problems.[289]

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282 Agreement between D. Obradović and CALPRO PROJECT DOO BEOGRAD, 21 June 2007, **RE-488**.

283 Obradović Third WS, ¶ 59.

284 Obradović Third WS, ¶ 59.

285 Rejoinder, ¶ 348.

286 Bank statement from Privredna Banka Beograd, 20 April 2010, **CE-832**.

287 Obradović Third WS, ¶ 60.

288 Rejoinder, ¶ 349.

289 Obradović Third WS, ¶ 61.

251. Mr. Obradović, moved by Ms. Nedeljković's story, decided to help by giving Ms. Nedeljković a piece of land that was owned by BD Agro, but could not be used by the company. It was a small—around one hectare—narrow plot of agriculture land located next to railway tracks. As such, this land plot had no real value for BD Agro.[290] It is absurd—and coldhearted—for Serbia to call BD Agro's humanitarian gesture a "machination." Even more so given that it was a common practice for agriculture companies in Serbia to gift land to their employees.[291]

252. Finally, Serbia claims that BD Agro agreed on a "*fraudulent land exchange with the Ministry of Economy.*"[292] Once again, this is not true. As explained in more detail below, the land swap was concluded based on the: (*i*) recommendation from the cadaster; and (*ii*) *express approval* of the Ministry of Agriculture.

253. BD Agro and the Ministry of Agriculture started to discuss a land swap in April 2007, when BD Agro proposed to exchange certain land plots it owned, but could not properly use because of their location, for land plots owned by Serbia that were being used by BD Agro.[293] While this land swap eventually did not materialize,[294] discussions with the Ministry of Agriculture continued also in following years.

254. The land swap referred to by Serbia took place in January 2010. It was a result of restitution decisions from the early 1990s, whereby Serbia restituted certain socially owned land plots used by BD Agro to various individuals. Despite these decisions, persons who were awarded the land plots did not register as their owners. These land plots were therefore included as BD Agro's assets during the privatization process.

255. After the privatization, BD Agro became the registered owner of these land plots. This situation created a lot of uncertainty. BD Agro was therefore looking for a solution how to deal with this issue. When BD Agro approached the cadaster office, they were

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290 Obradović Third WS, ¶ 62.

291 Obradović Third WS, ¶ 62.

292 Rejoinder, ¶¶ 350, 395-401.

293 Letter from BD Agro to the Ministry of Agriculture, 13 April 2007, **RE-401**. *See also* Obradović Third WS, ¶ 88.

294 Obradović Third WS, ¶ 88.

informed that the restituted land plots could be exchanged for the land plots owned by state:

> Regarding your memo dated 26/11/2007, we issue the requested data, with the excerpts from ownership listings for cadastral plots assigned in the procedure of the return of agricultural land and cadastral plots to be returned to the company BD AGRO AD which is located at the Cadastral Municipality Dobanovci.
>
> The overall surface of the land that was returned to natural entities per decisions in effect of the Return Committee on which **BD AGRO** is entered is **52ha, 32a and 95m2** .
>
> All this land consists of a part of the cadastral plot number 4647 the surface area of which is 14ha, 50a and 86m2 and cadastral plots number 5571/1,2,3,4,5,6,7,8,9,10,11 and 12 the surface area of which is 37ha, 82a and 9m2 . They are entered into the ownership folio number 3681 CM Dobanovci, and they are entered as fields of 3rd and 4th class.
>
> The land that may be assigned to the company **BF AGRO AD as compensation,** for the land they are not using and **that is their property** could be the cadastral plot 5552 which is entered into the ownership folio 3627, CM Dobanovci and it is in the same stretch of land as the repossessed land and is owned by BD AGRO AD. This is state owned land and is cited as a 3rd class field in the surface of 24ha, 32a and 71m2.[295]

256. Based on the recommendation from the cadaster, BD Agro contacted the Ministry of Agriculture. The negotiations were very slow but on 4 January 2010, the Ministry of Agriculture finally approved the swap.[296] The decision of the Ministry expressly stated that it served as "*the basis for conclusion of the Land Exchange Agreement*":

> **DECISION**
>
> 1. Approving the exchange of agricultural land owned by the Republic of Serbia, having a total surface area of **46ha, 60 ares and 27 m2**, and total market value of RSD **932,054,000.00**, situated in Land Registry Municipality Dobanovci and Land Registry Municipality Ugrinovci, registered in property deed Nos. 2994 and 3627, issued by the Republic Ordnance Survey Authority - Real Estate Registry Service Surein, and in folio Nos. 2804 and 2960, issued by the FOURTH MUNICIPAL COURT OF THE CITY OF BELGRADE, Land Registry Department in Zemun, with full ownership 1/1, for agricultural land owned by BD AGRO AD DOBANOVCI, having a total surface area of **46ha, 60 ares and 27m2**, and total market value of RSD **932,054,000.00**, situated in Land Registry Municipality Dobanovci, registered in property deed No.

[295] Letter from the Cadaster Office to BD Agro, 8 February 2008, **RE-395**. *See also* Obradović Third WS, ¶ 90.

[296] Decision of Ministry of Agriculture, 4 January 2010, **CE-762**. *See also* Obradović Third WS, ¶ 91.

> 3681, issued by the Republic Ordnance Survey Authority - Real Estate Registry Service Surein, as well as in folio No. 3003, issued by the FOURTH MUNICIPAL COURT OF THE CITY OF BELGRADE, Land Registry Department in Zemun, with full ownership 1/1.
>
> 2. This decision serves as the basis for conclusion of the Land Exchange Agreement referred to in point 1.
>
> […]
>
> 10. By this decision, all the necessary conditions have been met for drafting the Land Exchange Agreement and the submission thereof to the STATE ATTORNEY'S OFFICE for an opinion in accordance with Article 13 of the Law on the State Attorney's Office ("Official Gazette of the Republic of Serbia", No. 43/91).[297]

257. Despite the clear wording of the Ministry's decision, Serbia claims that the decision represented only a "*proposal*" for, not the approval of, the land swap.[298] The Claimants respectfully submit that the wording of the decision speaks for itself. Mr. Obradović also confirms that BD Agro understood this decision as the approval of the land swap.[299]

258. After the Ministry issued its decision, it provided BD Agro with the form of swap agreement. The form was non-negotiable and BD Agro signed it as provided by the Ministry.[300]

259. Serbia's claims that the swap was illegal because the form of swap agreement was rejected by the State Attorney's Office and was not approved by the Government.[301] The fact is that BD Agro did not even know that the State Attorney's Office rejected the agreement.[302] Furthermore, when the Ministry provided the form of the agreement, its representatives confirmed to BD Agro that all formalities were fulfilled and the agreement can be signed.[303]

260. Furthermore, contrary to Serbia's assertions, the land swap did not breach the Privatization Agreement. As Serbia itself notes, the Privatization Agreement obliged

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297 Decision of Ministry of Agriculture, 4 January 2010, pp. 1, 4 (emphasis in the original), **CE-762**.

298 Rejoinder, ¶ 398.

299 Obradović Third WS, ¶ 92.

300 Agreement between the Ministry of Agriculture and BD Agro, 4 January 2010, **RE-396**. *See also* Obradović Third WS, ¶ 93.

301 Rejoinder, ¶ 398.

302 Obradović Third WS, ¶ 94.

303 Obradović Third WS, ¶ 94.

Mr. Obradović to refrain from "*legal and factual actions in order to prevent application of special regulations which define the issue of restitution of property to previous owners.*"[304] Mr. Obradović did not breach this provision in any way. On the contrary, nothing prevents Serbia from ceding the land it has received from BD Agro to individuals having the restitution claims.

3. Bank loans taken by BD Agro

261. Serbia argues in its Rejoinder that "*[t]he most notable fact that led to the devastation of BD Agro*" was that BD Agro took several loans from various banks.[305] According to Serbia, the main issues with the loans taken by BD Agro is that certain amounts of these loans were used to repay the shareholder loans provided to BD Agro by Mr. Obradović.[306]

262. Serbia's claim is—yet again—based on an erroneous assumption that BD Agro's repayment of shareholder loans was improper, because BD Agro repaid more than it received from Mr. Obradović. As was already demonstrated above, this was not the case.

263. There was also nothing improper in the fact that BD Agro used bank loans to repay certain amounts of the shareholder loans. On the contrary, companies commonly use new bank loans to refinance their older obligations. Indeed, Mr. Rand explains in his witness statement that the shareholder loans were provided to BD Agro in order to help it in the first years after privatization when BD Agro was unable to source standard bank financing. Once BD Agro was at the point where its financial conditions had improved such that it had access to standard bank financing—there was no need to maintain the interest-free shareholder loans and they were gradually repaid with the funds obtained through bank loans.[307]

264. Serbia also takes issue with the fact that part of the loan received from Agrobanka in 2010 was used by BD Agro to: (*i*) pay the loan that BD Agro assumed from Crveni

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[304] Rejoinder, ¶¶ 399-400; Privatization Agreement, Art. 6.3.1, **CE-017**.

[305] Rejoinder, ¶¶ 352-365.

[306] Rejoinder, ¶¶ 355-357, 363-365.

[307] Rand Third WS, ¶ 50.

Signal; and (*ii*) provide a loan to Inex.[308] The Claimants have explained the rationale behind both these transaction already in their Reply.[309]

265. In its Rejoinder, Serbia now makes a new argument that the loan provided to Inex, as well as the funds received by Crveni Signal under the agreement that was assumed by BD Agro, actually ended in Mr. Obradović's account.[310] Serbia thus stresses that "*immediately*" after Crveni Signal received the funds under the loan that was later assumed by BD Agro, it "*transferred RSD 65.000.000 [approximately EUR 630,804]*[311] *to the personal account of Mr. Obradović.*"[312] What Serbia conveniently omits to mention is that the payments made to the "*personal account of Mr. Obradović*" were: (*i*) a repayment of a shareholder loan to Crveni Signal in the amount of RSD 34,300,000 (approximately EUR 332,870)[313] and (*ii*) a loan provided to Mr. Obradović by Crveni signal in the amount of RSD 30,180,000 (approximately EUR 292,887),[314] which was later settled:[315]

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308 Rejoinder, ¶ 358.

309 Reply, ¶¶ 154-158.

310 Rejoinder, ¶¶ 359-360.

311 Using the average exchange rate in 2010 of 103.0431 RSD/EUR. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

312 Rejoinder, ¶ 359.

313 Using the average exchange rate in 2010 of 103.0431 RSD/EUR. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

314 Using the average exchange rate in 2010 of 103.0431 RSD/EUR. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

315 Crveni Signal Bank Statement from Agrobanka, 2 June 2010 (emphasis added), **RE-372**.

Order no.	Name and seat of the recipient – principal	Deponent from (name and seat of the bank)		Amount		Code	Name and seat of the recipient – payer	Reference number (Charge) Reference number (Clearance)	Complaint information
	Account number			Charge	Clearance		Purpose of payment		
358	ANDROMEDA D.O.O 1, 275-0000220006966-27	SOCIETE GENERALE YUGOSLAV BANK A.D.		0.00	28,674.00	221	TRANSFER OF GOODS AND SERVICES – FINAL CONSUMPTION – LEGAL ENTITIES		8700001235450
359	AGROBANKA – Functional 780-0000000000263-02	NOVA AGROBANKA AD BEOGRAD		0.00	65,000,000.00	270	Short-term loans k-181/10-00	5-0013-07082860	4270103029400
360	AGROBANKA – Functional 780-0000000000263-02	NOVA AGROBANKA AD BEOGRAD		520,000.00	0.00	290	Other transactions fee	5-0013-07082860	3470108252200
361	Nbg Djura Obradovic, 355-0001595891015-24	VOJVOĐANSKA BANKA A.D. NOVI SAD		34,300,000.00	0.00	282	Return of the borrowing for the liquidity to founder		3470108252500
362	Nbg Djura Obradovic, 355-0001595891015-24	VOJVOĐANSKA BANKA A.D. NOVI SAD		30,180,000.00	0.00	221	Supply of goods and services Consumption based on the Contract 37 of 02/06/2010		3470108252800

266. The same holds true for the funds loaned to Inex, which according to Serbia also "*ended up on the personal accounts of Mr. Obradović*"—Inex was simply repaying loans provided to it by Mr. Obradović. Once again, Serbia entirely omits this fact, even though it is clearly stated in the bank statements relied upon by Serbia:[316]

No.	Ordering party – Legal entity – Name and headquarters	Ordering party – Legal entity – Registration number	Ordering party – Natural person – Name and surname	Natural person – Name and surname	Natural person – PIN / Date of birth and number of ID card	Account number of Beneficiary	Date	Amount – credit	Amount – debit	Balance	Base code	Textual description of code
1	2	3	4	9	10	11	12	13	14	15	16	17
51			OBRADOVIC DJURA			840000000132772176	14.02.2011	.000	3000.000	133.5000	223	INVESTMENTS INTO BUILDINGS AND EQUIPMENT
52			OBRADOVIC DJURA			840000000132772176	14.02.2011	.000	16014724.000	-16014590.5000	223	INVESTMENTS INTO BUILDINGS AND EQUIPMENT
53			OBRADOVIC DJURA			245000000002145092	14.02.2011	.000	3000.000	-16017590.5000	281	LOAN OF THE FOUNDER FOR LIQUIDITY
54			OBRADOVIC DJURA			840000000132772176	14.02.2011	.000	10852374.6200	-26869965.1200	223	INVESTMENTS INTO BUILDINGS AND EQUIPMENT
55			OBRADOVIC DJURA			245000000002145092	14.02.2011	.000	3040000.000	-29909965.1200	281	LOAN OF THE FOUNDER FOR LIQUIDITY
56			AD INEX NOVA VAROS	OBRADOVIC DJURA	1011951710534	355000159589101524	14.02.2011	30400000.000	.000	490034.8800	282	RETURN OF LOAN FOR LIQUIDITY
57			OBRADOVIC DJURA			840000000132772176	14.02.2011	.000	3000.000	487034.8800	223	INVESTMENTS INTO BUILDINGS AND EQUIPMENT

No.	Description of the transaction	Date of payment	Amount of payment in RSD	Payment made by	Account number from which the payment was received	NOTE
63	Repayment of liquidity loan to the founder	18/01/2011	4,000.00	BD AGRO AD DOBANOVCI	245-4374-07	Payment received on the transitory account of the Bank no. 245-70-18, from which it was transferred to Đ.Obradović 245-45203-31
64	Repayment of liquidity loan to the founder	18/01/2011	9,000,000.00	AD INEX NOVA VAROŠ	205-106349-74 (KOMERCIJALNA BANKA AD BEOGRAD)	Payment received on the transitory account of the Bank no. 245-70-18, from which it was transferred to Đ.Obradović 245-45203-31
65	Repayment of liquidity loan to the founder	20/01/2011	3,500,000.00	AD INEX NOVA VAROŠ	205-106349-74 (KOMERCIJALNA BANKA AD BEOGRAD)	Payment received on the transitory account of the Bank no. 245-70-18, from which it was transferred to Đ.Obradović 245-45203-31
66	Repayment of liquidity loan to the founder	25/01/2011	10,500,000.00	AD INEX NOVA VAROŠ	205-106349-74 (KOMERCIJALNA BANKA AD BEOGRAD)	Payment received on the transitory account of the Bank no. 245-70-18, from which it was transferred to Đ.Obradović 245-45203-31

316 Payments to Mr. Obradović's bank account no. 245-0100101831196-74 for 18-25 January 2011 (excerpt, emphasis added), **RE-551**; Payments to Mr. Obradović's bank account no. 245-0100101831196-74 on 8 April 2011 (emphasis added), **RE-552**; Mr. Obradović's Bank Statement from Vojvodjanska Banka on 14 February 2011 (emphasis added), **RE-437**.

No.	Description of the transaction	Date of payment	Amount of payment in RSD	Payment made by	Account number from which the payment was received	NOTE
73	Repayment of liquidity loan to the founder	08/04/2011	50,000,000.00	AD INEX NOVA VAROŠ	245-60344-04	Payment received on the transitory account of the Bank no. 245-70-18, from which it was transferred to Đ.Obradović 245-45203-31

267. Serbia further argues that approximately RSD 84 million (approximately EUR 815,192)[317] from the loan provided by Agrobanka in 2010 was used to pay for goods and services provided to BD Agro by Inex.[318] This is not true. In reality, this was a repayment of BD Agro's debt to Inex.[319]

268. As the Claimants explained in their Reply, in 2005, Inex purchased from third parties BD Agro's old debts in the principal amount of approximately RSD 114 million (approximately EUR 1.4 million).[320] The amount of RSD 84 million paid by BD Agro to Inex represented a partial repayment of this debt. The reason why the bank statements label this transaction as "*turnover of goods and services*" is that the majority of the debt acquired by Inex actually consisted from BD Agro's liabilities *vis-á-vis* it suppliers.[321]

269. Serbia also takes an issue with the fact that BD Agro "*guaranteed for a number of debts of third persons, i.e. companies, without justification.*"[322] This, however, was not the case. Serbia refers to three documents in support of this allegation: (*i*) a proposal of the Center for Control, according to which BD Agro allegedly issued bill of exchange "*related to diverse Surety Contracts […]*"; (*ii*) Guarantee Agreement between BD Agro and Agrobanka related to loan of Crveni Signal; and (*iii*) Agreement on Assumption of Debt between BD Agro and Crveni Signal.[323]

270. The reason why BD Agro agreed to guarantee the loan taken by Crveni Signal was very simple. Crveni Signal needed liquidity and it would not be able to obtain the loan

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317 Using the average exchange rate in 2010 of 103.0431 RSD/EUR. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

318 Rejoinder, ¶ 358.

319 Obradović Third WS, ¶ 68.

320 Reply, ¶ 158. *See also* Email from Marine Drive Holdings Inc. to W. Rand and P. Bagnara, 29 December 2006, pp. 6, 16, 39 (pdf), **CE-443**; Letter from D. Obradović to Auditor doo Belgrade, 5 November 2012, pp. 1-2, **RE-020**; Agreements on assignment of debt to Inex, **CE-444**.

321 Obradović Third WS, ¶ 68.

322 Rejoinder, ¶ 353.

323 Rejoinder, ¶ 353 and fn. 558.

without the guarantee. Given that both companies were owned by Mr. Rand, it seemed only natural that BD Agro helped Crveni Signal.[324]

271. The Claimants explained in their Reply that BD Agro assumed debt of Crveni Signal because the guarantee agreement created an exposure of BD Agro.[325] Crveni Signal helped out BD Agro less than two years later, in June 2012, when BD Agro and Nova Agrobanka, which had taken over Agrobanka's loan portfolio, concluded another loan agreement, this time for EUR 9.5 million.[326] Crveni Signal acted as a guarantor for BD Agro's obligations under the 2012 Loan Agreement and pledged its real estate to secure the loan to BD Agro.[327]

272. As for the alleged "*surety contracts*", Serbia does not even specify what surety contracts it means and why these contracts should represent any issue. On the contrary, the proposal of the Center for Control on which Serbia relies as an evidence of the existence of these contracts, expressly states that with respect to these surety contracts that "*the Control Centre is not informed of all the agreement and which obligations they secure.*"[328]

273. Finally, the point that BD Agro used part of the bank loans to pay for goods and services provided by other companies owned by Mr. Rand is also a non-issue.[329] Serbia cannot seriously argue that BD Agro was not supposed to pay for the goods and services it received.

4. Other allegedly "*unjustified*" spending

274. Serbia also refers to other allegedly "*unjustified*" spending by BD Agro. For example, Serbia mentions that BD Agro leased sheep milking parlor that was to be used by PIK

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324 Obradović Third WS, ¶ 70.

325 Reply, ¶ 157.

326 Reply, ¶ 157. *See also* Loan agreement between BD Agro and Nova Agrobanka, 22 June 2012, **CE-441**.

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

328 Proposal of the Center for Control for the session of the Commission for Control, 10 July 2013, pp. 12, 23, **RE-049**.

329 Rejoinder, ¶¶ 357, 363.

Pester, while BD Agro allegedly "*had absolutely no financial interest in buying this equipment [...].*"[330] Once again, Serbia is wrong.

275. It is true that BD Agro leased the milking parlor from the supplier, however, it further sub-leased it to PIK Pester.[331] According to Article 4 of this agreement, the value of the milking parlor as of the date of the conclusion of the agreement was RSD 3,827,760.01 (approximately EUR 40,742[332]).[333] According to Article 5 of the agreement, the amount of due sub-lease payments as of 30 September 2009 was RSD 3,084,697.11 (approximately EUR 32,833[334]).[335] In other words, the sublease payments due as of September 2009 were almost equal to the total price of the milking parlor.

276. Serbia also refers to the issue with the contractor who overbilled construction works on the farm. According to Serbia, this is "*one of the most severe cases of unjustified spending*."[336] Serbia's argument does not make any sense.

277. Serbia provides no explanations whatsoever as to how the fraudulent overbilling by a contractor can represent an "*unjustified spending*." Serbia's argument is even more irrational in light of the fact that Serbia itself admits that Mr. Markićević, in the name of BD Agro, actually filled a criminal complaint related to the fraudulent conduct of the contractor.[337] The fact that Mr. Jovanović, as the former CEO of BD Agro was also implicated in the criminal complaint does not change anything. On the contrary, it is proof of the fact that Mr. Rand insisted on the investigation of all irregularities pertaining to BD Agro—even if they related to former employees.

278. It is also important to stress that the fact that the contractor overbilled BD Agro does not mean that no work was conducted at all. On the contrary, the expert hired by BD

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330 Rejoinder, ¶ 370.

331 Agreement between BD Agro and PIK Pester, 2 November 2009, **CE-829**.

332 Using the average exchange rate in 2009 of 93.9517 RSD/EUR. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

333 Agreement between BD Agro and PIK Pester, 2 November 2009, Art. 4, **CE-829**.

334 Using the average exchange rate in 2009 of 93.9517 RSD/EUR. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

335 Agreement between BD Agro and PIK Pester, 2 November 2009, Art. 4, **CE-829**.

336 Rejoinder, ¶ 371.

337 Rejoinder, ¶ 371.

Agro to assess the works conducted by the contractor concluded that the value of works actually undertaken by the contractor was EUR 3,564,687.76.[338]

279. Other examples mentioned by Serbia also do not demonstrate any mismanagement of BD Agro.[339]

5. Alleged "*misrepresentation of the performance of the Privatization Agreement*"

280. According to Serbia, Mr. Obradović "*misled*" the Privatization Agency with respect to the payment of the purchase price and provision of additional investment required under the Privatization Agreement. Serbia also claims that Mr. Obradović "*disregarded the contractual obligation concerning the restitution of land.*"[340] As the Claimants explain in detail below, none of these allegations has any merit.

a. The Privatization Agency confirmed that Mr. Obradović fulfilled his obligation to pay the purchase price

281. As the Claimants explained in their Reply, the full purchase price was paid on 8 April 2011, when the Privatization Agency received the last installment of the aggregate EUR 5.5 million purchase price for the Privatized Shares.[341]

282. On 6 January 2012, the Privatization Agency issued a formal confirmation that "*the buyer, as of April 8, 2011, has settled his obligations in respect of the 1st, 2nd, 3rd, 4th, 5th and 6th installment and thus paid the entire sale and purchase price*."[342]

283. While Serbia does not dispute that the purchase price was paid in full, it takes an issue with "*the origin of the funds used for the payments*."[343] Specifically, Serbia claims that the installments three to six of the purchase price were allegedly paid using BD Agro's

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338 Criminal Complaint against Mr. Jovanovic and others, 8 December 2014, p. 5, **RE-258**.

339 Rejoinder, ¶¶ 367-369, 372.

340 Rejoinder, ¶ 373.

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

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

343 Rejoinder, ¶ 374.

funds and BD Agro thus paid "*the purchase price for itself.*"[344] This is a gross misinterpretation of the facts.

284. First, Serbia claims that installments three to five and the interest on installment six were paid from funds received as repayments of shareholder loans to BD Agro.[345] This argument entirely misses the point because it was perfectly legitimate to use the repaid funds for the payment of the purchase price, and it is nothing short of absurd for Serbia to suggest otherwise.

285. Second, Serbia also claims that "*BD Agro's funds*" transferred through Inex were used for the payment of the sixth installment of the purchase price.[346] Once again, this was not the case.

286. First of all, the money transfers between Mr. Obradović and Inex to which Serbia refers were repayments of the shareholder loans that Mr. Obradović had provided to Inex. This is expressly stated in the bank statements to which Serbia refers.[347] Excerpts of these bank statements were provided above.

287. Same as with respect to BD Agro, the funds loaned to Inex were provided by Mr. Rand and borrowed to Inex when it needed liquidity.[348] Inex was therefore *obliged* to repay these funds and the repaid funds obviously could be used for any purpose, including payment of the purchase price for BD Agro.

288. Serbia further implies that the funds used by Inex to repay the shareholder loans were actually "*BD Agro's funds.*"[349] Once again, this is simply not true. Serbia refers to two specific payments provided by BD Agro to Inex on 29 December 2010: (*i*) RSD

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344 Rejoinder, ¶¶ 376-387.

345 Rejoinder, ¶¶ 376-384.

346 Rejoinder, ¶¶ 383-384.

347 Payments to Mr. Obradovic's bank account no. 245-0100101831196-74 in Nova Agrobanka, for the period of 18-25 January 2011, **RE-551**; Mr. Obradovic's Bank Statement from Vojvodjanska Banka for 14 February 2011, **RE-437**; Payments to Mr. Obradovic's bank account no. 245-0100101831196-74 in Nova Agrobanka, for 8 April 2011, **RE-552**.

348 Obradović Third WS, ¶ 80.

349 Rejoinder, ¶ 383.

30,670,690 (approximately EUR 317,058)[350] interest-free loan; and (*ii*) RSD 84,130,160 (approximately EUR 816,456)[351] payment labelled as a payment for "*goods and services*."[352]

289. As for the RSD 30 million loan (approximately EUR 300,000), this was indeed provided by BD Agro to Inex. As the Claimants explained already in their Reply, Inex had provided very significant financial help to BD Agro. In 2005, Inex had bought BD Agro's debt in the principal amount of RSD 114 (approximately EUR 1.4 million) and interest of RSD 146 million (approximately EUR 1.7 million). Inex completely waived the interest.[353] BD Agro gave a loan to Inex as compensation for Inex having waived the EUR 1.7 million interest.[354]

290. As for the remaining RSD 84 million, these were not for "*goods and services*."[355] These funds represented partial repayments of BD Agro's old debts that Inex had purchased in 2005. They were labelled as "*turnover of goods and services*" only because the majority of the debt acquired by Inex were BD Agro's liabilities towards its suppliers of goods and services.[356]

b. The Privatization Agency confirmed that Mr. Obradović fulfilled his obligation to provide the additional investment

291. The Claimants demonstrated in their previous submissions that Mr. Obradović made the required additional investments in BD Agro of almost EUR 2 million in full satisfaction of Article 5.2.1 of the Privatization Agreement. This fact is confirmed, among other

350 Using the average exchange rate in 2010 of 103.0431 RSD/EUR. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

351 Using the average exchange rate in 2010 of 103.0431 RSD/EUR. Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

352 Rejoinder, ¶ 383.

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

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

355 Rejoinder, ¶ 383.

356 Obradović Third WS, ¶ 79.

evidence, by two reports from the audit and tax consulting company Konsultant-revizija, which Mr. Obradović provided to the Privatization Agency in 2006.[357]

292. These audit reports explain that Mr. Obradović made the required investment in the form of: (*i*) payments made to the account of PPK Buducnost Mlekara, BD Agro's subsidiary;[358] and (*ii*) payments to certain suppliers on behalf of BD Agro.[359] The funds provided by Mr. Obradović to make these investment were first registered as shareholder loans. Later, in August 2006, a part of these loans was converted into equity, leading to the issuance of 171,974 new BD Agro shares at a nominal value of RSD 1,000 each.

293. The Privatization Agency accepted the audit reports and confirmed in writing that Mr. Obradović had fulfilled the obligation to provide additional investment.[360] Despite this fact, Serbia now claims that Mr. Obradović allegedly "*misrepresented fulfillment of the investment obligation*."[361] Serbia's allegation is—not for the first time—based on an utter misrepresentation of the factual record of this case.

294. First of all, Serbia points to the fact that the required investment is not reflected in BD Agro's banks statements reviewed by Mr. Cowan.[362] This is not surprising given that the funds had been disbursed to BD Agro's suppliers and BD Agro's subsidiary PPK Buducnost Mlekara. These funds never hit BD Agro's bank accounts.

295. Serbia also claims that a part of the assets acquired as the obligatory investment were not in BD Agro's possession.[363] While Serbia does not expressly state which assets it means, based on the documents Serbia refers to, it seems that Serbia means: (*i*) a subsoiler worth approximately EUR 15,000; (*ii*) a Lada Niva, which is a type of car,

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[357] Audit Report from Konsultant – revizija, 10 March 2006, **CE-051 (corrected)**; Audit Report from Konsultant – revizija, 9 June 2006, **CE-052 (corrected)**.

[358] This payment was rather minor, only RSD 5,893,565.78. Audit Report from Konsultant – revizija, 10 March 2006, p. 2, **CE-051 (corrected)**.

[359] Audit Report from Konsultant – revizija, 10 March 2006, p. 2, **CE-051 (corrected)**; Audit Report from Konsultant – revizija, 9 June 2006, **CE-052 (corrected)**.

[360] Confirmation of the Privatization Agency of the Completion of Investment, 10 October 2006, **CE-018**. *See also* Obradović Second WS, ¶ 72.

[361] Rejoinder, ¶¶ 389-390.

[362] Rejoinder, ¶¶ 389-390.

[363] Rejoinder, ¶¶ 391-392.

worth approximately EUR 8,000; (*iii*) hens worth approximately EUR 169,000; and (*iv*) "*accompanying equipment*", related to the hens, worth approximately EUR 11,000.[364]

296. As for the missing hens, which create the biggest part of these "missing" assets, these were on the farm for some time, but BD Agro eventually sold them.[365] As for the allegedly missing Lada Niva, which supposedly represents the "*brand new SUV*" referred to by Serbia,[366] Serbia itself recognizes that while it was used by PIK Pešter for some period of time, it was returned to BD Agro in 2011 at the latest.[367] Finally, with respect to the allegedly missing subsoiler, this was sold and proceeds were transferred to BD Agro's account.[368]

6. Criminal proceedings

297. Serbia dedicates no less than eight pages of its Rejoinder to descriptions of various criminal complaints and allegations raised against Messrs. Obradović and Markićević.[369] While Serbia attempts to describe Messrs. Obradović and Markićević as criminals subject to numerous criminal proceedings, the reality is that neither Mr. Obradović nor Mr. Markićević has ever been found guilty based on any accusation referred to by Serbia. In fact, neither of three criminal complaints against Mr. Markićević[370] to which Serbia refers, has even resulted in an indictment.

298. The number of criminal proceedings illustrates only one point: in Serbia, criminal proceedings are, unfortunately, often misused for executing personal vendettas or even pressuring public officers. As the Claimants explained in the Reply, Ms. Vučković—

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364 In its Rejoinder, Serbia does not name any specific assets that were allegedly missing. It does, however, refer to a proposal of the Center for Control from July 2013, which mentions these assets. Proposal of the Center for Control for the session of the Commission for Control, 10 July 2013, pp. 27-28, **RE-049**.

365 *E.g.* Email from W. Rand to Marine Drive Holdings Inc, 15 February 2006, **CE-610**; Email communication between W. Rand and BD Agro, 26 July 2006, CE-611; Email communication between W. Rand and A. Jorga, 10 August 2006, **CE-605**. *See also* Obradović Third WS, ¶ 86.

366 Rejoinder, ¶ 392.

367 Rejoinder, ¶ 392.

368 Obradović Third WS, ¶ 86.

369 Rejoinder, ¶¶ 402-424.

370 Rejoinder, ¶¶ 416-418.

one of Serbia's witnesses in this arbitration—had a first-hand experience with such pressure when she was arrested on allegations of abuse of office in 2012.[371]

299. As for Mr. Obradović, Serbia claims that there are "*several criminal proceedings*" ongoing with respect to "*Mr. Obradovic's mismanagement of BD Agro*" and various pending investigations "*against responsible persons of BD Agro, Crveni Signal, Inex and PIK Pester.*"[372]

300. In reality, Mr. Obradović was indicted in only two proceedings. The first one relates to the land swap agreed between BD Agro and Ministry of Agriculture in January 2010.[373] The proceeding is still pending and the first instance decision is expected to be rendered before the end of March. As the Claimants already explained above, this transaction was concluded with the express consent of the Ministry of Agriculture.

301. The second proceeding relates to the assignment of land to Ms. Nedeljković and the sale of 4 hectares of land to Mr. Obradović in 2007.[374] Interestingly, the indictment was issued only ten years later, at the beginning of 2018, a few months after the Claimants filed their Notice of Claim.

302. The remaining complaints and accusations mentioned by Serbia have not lead to any indictments against Mr. Obradović.[375] Some of the complaints to which Serbia relates are from 2007—*i.e.* they are more than a decade old.[376] The fact that these accusations have never materialized into indictments is the best evidence of the fact that they are entirely meritless.

303. Despite the fact that the vast majority of accusations to which Serbia refers are years old and have not lead to any indictments against either Mr. Obradović or Mr. Markićević,

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[371] Reply, ¶ 311. *See also Arrests because of "Azotara": Damage caused to state exceeds 1 billion dinars*, Novosti.rs, 23 April 2012, **CE-772**; *Dacic confirms arrests of seven individuals suspected of abuse in Azotara*, Radio Pancevo, 12 February 2020 (accessed), **CE-894**; *Illegal privatizations: Arrests in Azotara*, Vreme, 23 April 2012, **CE-895**; *Julijana Vuckovic released from custody*, Press Online, 25 April 2012, **CE-896**; *Julijana Vuckovic released from custody*, Privatization Agency, 25 April 2012, **CE-897**.

[372] Rejoinder, ¶ 402.

[373] Rejoinder, ¶ 414.

[374] Rejoinder, ¶ 413.

[375] Rejoinder, ¶¶ 403-411.

[376] Rejoinder, ¶ 403.

Serbia has the audacity to claim that the Claimants "*misuse the present arbitration to obstruct criminal prosecution*" of Messrs. Obradović and Markićević.[377] This allegation must be rejected in the strongest terms.

304. In fact, Serbia's own Rejoinder confirms that Serbia misused the pending investigations to put pressure on the Claimants' witnesses shortly before submission of the Reply—*i.e.* at a crucial point in these proceedings. Serbia expressly states that "*virtually all of the proceedings [to which Serbia refers]* ***pre-date*** *the commencement of this arbitration*", specifically that "*first criminal complaints and investigations have been initiated as early as in 2009.*"[378]

305. Serbia thus had *an entire decade* to proceed with the investigations and interrogate Messrs. Obradović and Markićević. It could have obtained all the information it needed well before this arbitration commenced, and definitely well before the summer of 2019. However, Serbia decided not to do so and conveniently picked a moment right before the submission of the Reply.[379]

7. Other companies beneficially owned by Mr. Rand

306. For the sake of completeness, the Claimants note that Serbia also claims that various companies beneficially owned by Mr. Rand in Serbia—other than BD Agro—are also allegedly in bad financial conditions. To do so, Serbia primarily relies on financial results of these companies.[380] Serbia's approach is highly misleading. Mr. Rand's other Serbian companies, *i.e.* companies besides BD Agro, are holding long term assets, including prime real estate, which do not create any regular cash flows. It is therefore disingenuous to claim that these companies are in a bad shape simply because they generate accounting loss.

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377 Rejoinder, ¶¶ 419-424.

378 Rejoinder, ¶¶ 419, 422.

379 Individual steps taken by Serbia in the summer of 2019, *i.e.* during the preparation of the Reply, were described in detail in the Reply and witness statements submitted by Messrs. Obradović and Markićević. *See* Reply, ¶¶ 477-483; Obradović Second WS, ¶¶ 92-95; Igor Markićević Third Witness Statement dated 3 October 2019, ¶¶ 139-167.

380 Rejoinder, ¶¶ 529-539.

307. Furthermore, Serbia submitted three pictures of buildings allegedly owned by Crveni Signal, Obnova and Inex.[381] These pictures are significantly outdated. For example, the very first picture that Serbia submits, and which allegedly shows a building owned by Crveni Signal. A major part of the building in the picture actually burned down in 2004, three years before Mr. Rand acquired Crveni Signal.[382]

308. In any event, the financial status of Mr. Rand's other companies in Serbia has little relevance for the case at hand.

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[381] Photographs of the premises of Crveni Signal, Inex and Obnova, **RE-423**.

[382] Police report, 30 April 2004, **CE-898**; Assignment agreement between V. Vukelić and D. Obradović, 2 March 2007, **CE-565**.

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

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

309. The investment of the Canadian Claimants consisted of the following assets:

  a. the Beneficially Owned Shares;

  b. the indirect interest in Sembi's rights under the Sembi Agreement;

  c. Mr. Rand's Indirect Shareholding; and

  d. Mr. Rand's direct payments to BD Agro's Canadian suppliers for the purchase and transport of heifers and other payments and loans for the benefit of BD Agro.

310. As explained below, each of these assets qualifies as a "covered investment" under Article 1 of the Canada-Serbia BIT and thus falls within the Tribunal's jurisdiction.

1. The Beneficially Owned Shares are a protected investment

311. The Beneficially Owned Shares are "shares" and thus an "investment" under the definition set forth in Article 1 of the Canada-Serbia BIT.[383] Serbia does not claim otherwise. Serbia's insistence[384] that public international law does not create property rights, but rather only recognizes rights created under municipal law is thus irrelevant. The Beneficially Owned Shares are undisputedly an asset created under Serbian law.

312. The only remaining issue is whether the Canadian Claimants "*owned or controlled*" the Beneficially Owned Shares within the meaning of Article 1 of the Canada-Serbia BIT. The answer is simple: the Claimants were the beneficial owners of the Beneficially Owned Shares under the 2005 oral agreement between Mr. Rand and Mr. Obradović,[385] the MDH Agreement and the Sembi Agreement and consistently acted as such during

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

384 Rejoinder, ¶ 550.

385 Rand First WS, ¶¶ 17, 19; Obradović First WS, ¶¶ 7, 13.

the entire lifetime of the investment.[386] Furthermore, it is a "*general principle of international law*" that public international law protects beneficial ownership.[387]

313. In response, Serbia advances two broad lines of objections against the Canadian Claimants' beneficial ownership. *First*, the term "owned"—which Serbia conveniently, but incorrectly transforms into "right of ownership"—under Article 1 of the Canada-Serbia BIT allegedly only covers rights *in rem* and cannot be satisfied by any contractual rights or beneficial ownership rights.[388] *Second*, the MDH Agreement and Sembi Agreement did not grant to the Claimants beneficial ownership over the Beneficially Owned Shares.[389]

314. Each of these objections will be refuted in turn below.

a. Beneficial ownership is recognized under public international law, the Canada-Serbia BIT and Serbian law

315. The Claimants and Serbia both agree that under international law, "*the notion [of beneficial ownership] applies when the legal title is split between "a nominee and a beneficial owner*."[390] While the Claimants have adduced numerous support for the proposition that such a beneficial ownership is protected under public international law,[391] Serbia did not point to a *single* authority to the contrary.

316. Because its objections against the Claimants' beneficial ownership lack any support under international law, Serbia continues to emphasize the undisputed facts that the Claimants never became a party to the Privatization Agreement, never acquired *nominal* ownership of the Beneficially Owned Shares and were never registered as the

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

387 David J. Bederman, "*Beneficial Ownership of international Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 936 (emphasis added), **CLA-078**

388 Rejoinder, ¶¶ 549 *et seq*.

389 Rejoinder, ¶¶ 552 *et seq*.

390 Counter-Memorial, ¶ 335.

391 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, ¶¶ 262 and 272, **CLA-005**; *Trust Co. v. Hungary* (U.S. For. Cl. Settlement Comm'n 1957), **CLA-004**; David J. Bederman, "*Beneficial Ownership of international Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 936, **CLA-078**; Robert Jennings and Arthur Watts eds., *Oppenheim's International Law – Volume 1*, 9th ed., Longman Group UK Limited and Mrs Tomoko Hudson 1992, p. 514, **CLA-079**.

shareholders of BD Agro in the Central Securities Registry.[392] These observation are, however, entirely irrelevant to the Claimants' beneficial ownership of the Beneficially Owned Shares. Indeed, as Bederman observes, "*beneficial ownership, by definition, implicates the standing of a person who does not have legal title to property.*"[393]

317. When pressed by the Claimants about its failure to reflect the fundamental distinction between nominal and beneficial ownership, Serbia observes that "*[t]he real problem with the Claimants' case is the fact that Serbian law ignores the distinction.*"[394] This is not an isolated statement (based on an incorrect premise), but rather a leading principle underlying all of Serbia's objections.

318. To advance this principle, Serbia concocted a theory that beneficial ownership is not protected under international law, when it relates to an investment in Serbia, more specifically to shares in a Serbian joint stock company such as BD Agro.[395] Serbia alleges that the threshold question is "*who would be considered an owner of BD Agro under Serbian law*?"[396] In response to its own question, Serbia asserts that because Serbian law does not recognize the concept of beneficial ownership (which is not correct), only persons with "*right of ownership (as a right in rem)"* may be considered as "owners" under Serbian law.[397]

319. To tie its theory to the text of the Canada-Serbia BIT, Serbia claims that the term "owned" in Article 1 of the Canada-Serbia BIT has to refer—at least with respect to shares in a Serbian company—to rights *in rem*, rather than rights *in personam*.[398] Accordingly, although Serbia does not openly dispute the principle of protection of beneficial owners under public international law or the Canada-Serbia BIT, it maintains that it does apply to shares in a Serbian company.[399]

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392 *E.g.* Rejoinder, ¶¶ 563, 737; Counter-Memorial, ¶¶ 233-240, 328-330, 337-340.

393 David J. Bederman, "*Beneficial Ownership of International Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 935, **CLA-078**.

394 Rejoinder, ¶ 1049.

395 Rejoinder, ¶ 549 *et seq*.

396 Rejoinder, ¶ 635.

397 Rejoinder, ¶ 558.

398 Rejoinder, ¶ 549.

399 Rejoinder, ¶¶ 542, 549; 554.

320. The Claimants will show below that, contrary to Serbia's allegations, the protection of beneficial ownership does not require that the beneficial owner has any right *in rem* to the beneficially owned asset, nor does it require that the bundle of rights creating beneficial ownership be enforceable against anyone other than the nominal owner. The Claimants will show that this holds true under: (*i*) public international law in general; (*ii*) Canada-Serbia BIT in particular; and (*iii*) Serbian law.

i. Public international law protects beneficial ownership

321. The protection of beneficial ownership under public international law has been repeatedly recognized by numerous scholars and international tribunals. As aptly stated by Bederman "*[t]he notion that beneficial (and not nominal) owner of property is the real party-in-interest before an international court may be justly considered as a general principle of international law*.[400]

322. In *Saghi*, the Iran-U.S. Claims Tribunal ("**IUSCT**") expressly rejected the very same arguments advanced here by Serbia, *i.e.* that protection of beneficial ownership under international somehow hinges on the: (*i*) acquisition of nominal title by the beneficial owner; or on (*ii*) recognition of beneficial ownership under national law; or on (*iii*) enforceability of the beneficial ownership against anyone else other than the nominal owner. The IUSCT held in no uncertain terms that:

> *The Respondent has argued that Article 40 of the Commercial Code of Iran bars the alleged beneficial ownership. However, the issue here is not the validity vel non under Iranian law of beneficial ownership interests vis-a-vis the company or third parties. Rather, it is whether the Government of Iran is responsible, under international law, to beneficial owners for "expropriations and other measures affecting property rights".*
>
> The Tribunal's awards have recognized that beneficial ownership is both a method of exercising control over property and a compensable property interest in its own right. [...] [I]t is the nationality of the beneficial owner of the claim, rather than that of the nominal owner, that determines the nationality of the claim. As the United States Foreign Claims Settlement Commission put it in Claim of American Security & Trust Co., "*the national character of a claim must be tested by the nationality of the individual holding a beneficial interest therein*

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

> *rather than by the nationality of the nominal or record holder of the claim.*"[401]

323. *Saghi* is devastating to Serbia's jurisdictional objections. It directly rejects Serbia's key assertion that to ground the Tribunal's jurisdiction over the Beneficially Owned Shares, the Claimants would have to prove that "*Serbian law recognizes and protects this [sic] particular kind of property rights and that the Serbian legal system perceives them rather than Mr. Obradović as owners of the shares.*"[402]

324. Serbia thus attempts to distinguish *Saghi* by alleging that the Claims Settlement Declaration (the "**CSD**")—which formed the basis of IUSCT's jurisdiction—is "*particularly broad*" and that the definition of "covered investment" under Canada-Serbia BIT is "*much narrower.*"[403]

325. This is allegedly because the IUSCT' *ratione materiae* jurisdiction applied to "*measures affecting property rights.*"[404] Serbia, however, fails to explain how this makes the CDS's definition broader than the one set forth in Canada-Serbia BIT or which rights would be protected under the CDS, while falling outside of the Canada-Serbia BIT.

326. An abstract debate about the comparative breadth of those definitions is, in any event, irrelevant. The Canada-Serbia BIT not only protects "shares"[405] as the beneficially owned asset, but also purely contractual rights that may give rise to, or stem from, beneficial ownership. For example, it covers "*an interest in an enterprise that entitles the owner to share in income or profits of the enterprise*"[406] or "*an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory*."[407]

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401 *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. The Islamic Republic of Iran*, IUSCT Case No. 298, Award, ¶¶ 25-26 (emphasis added), **CLA-080**.

402 Rejoinder, ¶ 555.

403 Rejoinder, ¶¶ 640-641.

404 Iran-US Claims Settlement Declaration, Art. 2, **RLA-173**.

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

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

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

327. More importantly still, the requisite nexus between the claimant and the protected asset is defined more broadly under the Canada-Serbia BIT than under the CDS. While the Canada-Serbia BIT simply provides that the asset must be "owned or controlled" by the investor,[408] the CDS defines such link as a "*proprietary interests in juridicial persons, provided that the ownership interests […] were sufficient at the time the claim arose to control the corporation or other entity […].*"[409]

328. Accordingly, the CDS required ownership and control cumulatively, while the Canada-Serbia BIT clearly considers them as an alternative.[410] Moreover, the CDS makes clear that the link between the claimant and such an asset has to be "*proprietary*". No such requirement applies under the Canada-Serbia BIT. Finally, unlike the CDS, the Canada-Serbia BIT expressly recognizes "trusts" as an investment and, thus logically, also that "*own[ership]*" encompasses not only nominal ownership, but beneficial ownership as well.[411]

329. Accordingly, the conclusions reached by the *Saghi* tribunal—that protection of beneficial ownership under international law is not contingent upon its recognition under domestic law, or its enforceability against the beneficial owned company—are fully applicable under the Canada-Serbia BIT.

330. Serbia's attempts to downplay the relevance of *Occidental* is similarly misplaced. Serbia does acknowledge the Occidental Annulment Committee's finding that beneficial ownership "*will enjoy the protection granted under the treaties which benefit their nationality.'*"[412]

331. Serbia, however, misses the point when it claims that *Occidental* lacks any further relevance, because it did not opine on whether AEC's "*economic rights acquired in*

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408 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 1, definition of "covered Investment," **CLA-001**.

409 Iran - US Claims Settlement Declaration, Art. 7(2), **RLA-173**.

410 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 1, definition of "covered Investment," **CLA-001**.

411 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 1, definition of "enterprise," **CLA-001**; Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 1, definition of "investment," item (a), **CLA-001**.

412 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2012, ¶¶ 262 and 272, **CLA-5**.

breach of contract or the host State's law must be protected, regardless of whether or not those rights are enforceable against the State."[413] Naturally, because the Annulment Committee did not have any jurisdiction over AEC, it could not opine on the prospects of any hypothetical illegality objection that would be raised by Ecuador in a hypothetical arbitration against AEC.

332. This, however, changes nothing about the Occidental Annulment Committee's conclusion that AEC was a beneficial owner of rights transferred under the Farmout Agreement, despite not having any rights *in rem*.[414] Finally, in reaching these conclusions, the Occidental Annulment Committee did not consider it necessary to examine the recognition of beneficial ownership under Ecuadorian law.

333. The protection of beneficial ownership was confirmed by other investment tribunals. For example, in *Al-Bahloul v. Tajikistan*, the claimant owned 5,000 shares in Vivalo, a Bahamian company holding shares in two Tajik joint venture companies. While the claimant held all but one share in Vivalo both beneficially and nominally, the remaining one share was nominally owned by a third person in trust for the claimants' benefit. The *Al Bahloul* tribunal assumed jurisdiction over all of the shares, including the single share owned by the claimant "only" beneficially.[415] While the one share which the claimant did not hold nominally formed only a fraction of his investment, this does not disturb the principle that the *Al Bahloul* tribunal again confirmed the protection of beneficial ownership under international law.

334. In *Kim v. Uzbekistan*, the claimants' investment into Uzbek cement plant companies—Bekabadcement ("**BC**") and Kuvasaycement ("**KC**")—was channelled through a complex and multi-layered ownership structure. While the claimants were both legal and beneficial owners of certain aspects of their holding structure, they only had

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413 Rejoinder, ¶ 639.

414 *See* e.g. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 216, **CLA-075**.

415 *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, ¶¶ 144-145, **CLA-153**.

beneficial ownership over part of the intermediary companies based on an oral trust agreement governed by Cypriot law.[416]

335. Uzbekistan argued that even if valid, "*such trusts give Claimants at best beneficial ownership*"[417] and thus cannot be used to channel the claimants' investment. The claimants, however, argued—in reliance on *Saghi* and *Al-Bahloul*—that under international law, beneficial owners enjoy at least the same level of protection as "*legal owners*".[418] After concluding that oral trusts are indeed valid under Cypriot law, the tribunal sided with the claimants and rejected Uzbekistan's objection against the claimants' beneficial ownership in a summary fashion:

> Tribunal does not consider the fact that certain aspects of the ownership holding structure entail a beneficial, rather than a legal, ownership, to be material to the jurisdictional issue.[419]

336. The tribunals in both *Al-Bahloul* and *Kim* thus assumed jurisdiction over beneficial owners without hesitation. This yet again confirms that protection of beneficial owners is "*a general principle of international law*", which "*by definition"* does not require the beneficial owner to have legal title in the property[420] and does not rest upon the enforceability of the beneficial owner against anyone else other than the nominal owner.[421]

337. Serbia did not cite *any* authority to the contrary. The only authority Serbia did cite on beneficial ownership is *Anglo-Adriatic Group v. Albania.[422]* There, the claimant undisputedly did not have nominal ownership in the Albanian company AAIF, nor any

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416 *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 289-300, **CLA-154**.

417 *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 315, **CLA-154**.

418 *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 289-300, **CLA-154**.

419 *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 320, **CLA-154**.

420 David J. Bederman, "*Beneficial Ownership of International Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 935, **CLA-078**.

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

422 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, **RLA-007**.

rights enforceable against AAIF, but alleged that they had beneficial ownership over AAIF's shares based on a trust deed governed by English law.[423]

338. The tribunal considered that beneficial ownership would be sufficient to ground its jurisdiction, when it held that "*the protected investment must be owned (or title must be held).*"[424] The tribunal dismissed its jurisdiction only because it determined that the claimant was not the beneficial owner of AAIF's shares.[425] Obviously, the Anglo-Adriatic tribunal would not have engaged in such a detailed analysis of the claimant's alleged beneficial ownership if beneficial ownership were not protected under public international law.

ii. Canada-Serbia BIT protects beneficial ownership

339. The protection of beneficial ownership fully applies under the Canada-Serbia BIT. Serbia's insistence that the term "owned" in the definition of covered investment requires that the investor have a right *in rem* over the "owned" asset fails for a number of reasons.

340. *First*, as a matter of principle, the use of the word "owned" under Article 1 of the Canada-Serbia BIT is not a *renvoi* to any meaning of that term under Serbian law; the term "owned" has an autonomous meaning under the Canada-Serbia BIT. Therefore, the protection of Claimants' beneficial ownership under the Canada-Serbia BIT does not depend on whether Serbian law recognizes beneficial ownership (which it does), nor on the meaning of "owned" under Serbian law.

341. *Second*, contrary to what seems to be Serbia's central argument, "owned" encompasses not only rights *in rem*, but also applies to purely *in personam* rights. This conclusion is supported by the equally authoritative French version of the Canada-Serbia BIT, which employs the terms "*détenu ou contrôlé*" instead of "owned or controlled".[426] The term

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[423] *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 200, **RLA-007**.

[424] *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 222, **RLA-007**.

[425] *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶¶ 222-247, **RLA-007**.

[426] Accord entre le Canada et la République de Serbie concernant la promotion et la protection des investissements, "investissement visé", **CLA-155**.

"*investissement détenu*" (investment held) is, of course, not limited to *in rem* relationships between the investor and the investment, but equally applies where the investor "holds" the investment on the basis of a contractual right.

342. That "*owned*" entails contractual rights is clear also because it defines the link between the covered investor and all categories of assets listed under the definition of investment. This alone belies Serbia's central claim that "*ownership as [a] purely contractual right cannot exist*."[427] It is obvious that, even under Serbian law, a loan does not involve any right *in rem*, but is a purely contractual right. Yet, a loan is susceptible of being "owned" under the Canada-Serbia BIT.

343. Serbia's reading is thus premised on the term "owned" taking a different meaning with respect to each category of assets listed in the definition of "investment." This cannot be correct. A single term "owned" should be given a single meaning equally applicable to each of listed assets. "Owned" therefore must comprise both rights *in rem* and contractual rights and, thus, also beneficial ownership rights.

344. Because "owned" covers contractual rights, it *a fortiori* covers rights of beneficial ownership. This is because under British Columbian law (which governed the MDH Agreement)[428] and Cypriot law (which governs the Sembi Agreement),[429] beneficial ownership entails elements of *in personam* and proprietary rights.[430]

345. However, 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, or even international law. Even if recognized as purely contractual, the Claimants' beneficial ownership under the MDH Agreement and Sembi Agreement falls squarely within the protection of Canada-Serbia BIT.

346. Serbia, nevertheless, maintains that the purported "*in rem*" requirement applies in particular with respect to shares, because the "*ownership over […] share[s] […] is by*

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427 Rejoinder, ¶ 1177.

428 Deane ER, ¶¶ 51-76; Grušić First ER, ¶¶ 10-17; Grušić Second ER, ¶¶ 37 *et seq*.

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

430 Deane ER, ¶¶ 100-101; Georgiades Second ER, ¶¶ 3.14-3.16.

definition a right in rem."[431] While it is unclear which "definition" Serbia refers to, it cannot be the one contained in Article 1 of the Canada-Serbia BIT. There is strictly no support for the purported "*in rem"* requirement under the Canada-Serbia BIT.

347. *Third*, Serbia's theory that "owned" only refers to rights *in rem* is also inconsistent with the notion of ownership as referred to elsewhere in the BIT. For example, the definition of investments also includes "*an interest in an enterprise that entitles the* ***owner*** *to share in income or profits of the enterprise*."[432] It is clear that such "ownership" refers to a contractual right, rather than right *in rem* only. This conclusion is also supported by the French version of the Canada-Serbia BIT, which refers to a "*droit de participation aux revenus ou aux bénéfices d'une entreprise*."[433]

348. Similarly, Article 19 of the Canada-Serbia BIT allows the contracting parties to deny benefits to an investor, if it is "*own[ed] or control[led]*" by a person from a third state, against which the denying party adopted economic sanctions.[434] Under Serbia's theory, Serbia could not deny benefits to a Canadian company owned by the North Korean government as long as the North Korean government would not hold any right *in rem* over the Canadian company's shares, but would, for example, own them as a beneficiary of a trust. This would of course deprive the denial of benefits clause of any meaning. Indeed, as held by the tribunal in *Plama v. Bulgaria* when interpreting similarly phrased denial of benefits clause, "*ownership includes indirect and beneficial ownership*."[435]

349. *Fourth*, the Canada-Serbia BIT contemplates the protection of beneficial ownership. For example, the definition of "enterprise" in Article 1 includes trusts.[436] An enterprise, and therefore also a trust, constitutes an investment susceptible of being "owned" by an investor of the other Party. The beneficiaries of the trust however, do not have rights *in*

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431 Rejoinder, ¶ 549.

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

433 Accord entre le Canada et la République de Serbie concernant la promotion et la protection des investissements, definition of "investissement", item (f), **CLA-155**.

434 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 19(a), **CLA-001**.

435 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 170, **CLA-166**.

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

rem over the trust, but "only" *beneficial* ownership over the trust's assets. The term "owned" in Article 1 of the Canada-Serbia BIT—which describes the requisite nexus between "investor" and "investment"—therefore includes beneficial ownership.

350. *Finally*, while the distinction between rights *in rem* and rights *in personam* may be relevant for determining the scope of remedies available under national law, it cannot be transposed on the international plane as to disqualify rights otherwise covered by the relevant treaty. To do so would not only impose limitations that are nowhere to be found under the Canada-Serbia BIT, but would also hardly advance the goal of stimulating "*the development of economic cooperation*"[437] between Serbia and Canada.

351. The tribunal in *Magyar Farming v. Hungary* reached the same conclusion when it held that:

> While *the dichotomy between in rem and in personam rights* has its place in determining the rights and obligations of private parties vis-à-vis one another, the prohibition of uncompensated expropriation is a rule restricting the State authority towards private parties. Because of the different legal functions involved, the civil law dichotomy *should not be mechanically transposed into public law. Indeed, it would be excessively formalistic and not consonant with economic reality, if the BIT protected a usufruct-holder from an uncompensated taking, while at the same time withholding that protection from a lessee with a pre-lease right for the sole fact that such right is not in rem.*[438]

352. This conclusion applies with full force here and further confirms that not only rights *in rem*, but also rights *in personam* and rights of beneficial ownership, are protected under international investment law.

iii. Serbian law recognizes beneficial ownership

353. The protection of beneficial ownership under international law does not rest upon the recognition of the same under host state's law. This principle directly flows from the principle of autonomous meaning of international treaties and was followed by

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[437] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, Preamble, **CLA-001**.

[438] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, Award, 13 November 2019, ¶ 359 (emphasis added), **CLA-156**.

international tribunals either implicitly—because they rightfully did not considered this issue relevant—or explicitly, as in *Saghi v. Iran*.[439]

354. Nevertheless, for the sake of completeness, the Claimants will explain below that Serbian law indeed recognized beneficial ownership, both in name and substance.

355. *First*, while the 2006 Takeover Law did not yet introduce the term of beneficial ownership, as concluded by Mr. Milosevic, it clearly recognized the "*core characteristics of beneficial ownership*."[440] The 2006 Law on Takeovers provided that a physical or legal person is deemed to control a legal person if it has the right to manage the controlled entity on the basis of a contract, or if it has, directly or indirectly, prevailing influence on the business management and decision-making of the controlled entity.[441]

356. *Second*, the term "beneficial owner" was introduced into Serbian law in 2011, with Article 2 (34) of the Law on Capital Markets defining beneficial owner as:

> [A] person who has the benefits of ownership of a financial instrument either entirely or partially, including the power to direct the voting or disposition of the financial instrument or to receive the economic benefits of ownership of that financial instrument, and yet does not nominally own the financial instrument itself.[442]

357. Serbia, however, disputes, the translation of the Republic of Serbia Securities Commission, which the Claimants used without alteration. This is because, the term "*posredni vlastnik*" should allegedly be translated as an "*indirect owner*" rather than "*beneficial owner.*"[443] Serbia similarly argues that the correct translation should refer to "*legal title holder*", rather than to nominal owner.[444]

358. Even if the translation proposed by Serbia were to be preferred, it would not change anything about the substance. Serbian law clearly recognizes as an "owner"—be it a

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

440 Milošević Third ER, ¶ 17.

441 2006 Takeover Law, Article 4(2) and (3), **CE-540**.

442 2011 Law on Capital Markets, Art. 2 (34), **CE-728**.

443 Rejoinder, ¶ 575.

444 Rejoinder, ¶ 574.

"beneficial" or "indirect" one—a person who has no title to an asset, but nevertheless holds it by virtue of its control over, or economic interest in, such an asset.

359. Contrary to Serbia's suggestion, and even under its translation, the meaning of "indirect owner" is not circumscribed to the position of a person "C", who owns shares in a company "B", which in turn owns shares in company "A", as Serbia appears to argue in the Rejoinder.[445] Serbia's example is only one possible scenario that would fall under the term beneficial (indirect) owner.

360. The definition under Article 2 (34) of the Law on Capital Markets is met whenever a person other that the nominal owner may enjoy economic benefits from the beneficially owned asset or has the power to direct the nominal owner ("lawful title holder") on the latter's exercise of voting rights. As concluded by Mr. Milošević, the Law on Capital Markets "*recognized beneficial ownership, both in name and, more importantly, in substance.*"[446]

361. *Third*, in 2017, Serbia introduced the Anti Money-Laundering Act which provides in Article 3 the following detailed definition of "beneficial owner":

> (11) the beneficial owner of a company or other legal person means the following:
>
> (1) a natural person who owns, directly or indirectly, 25% or more of the business interest, shares, *voting rights or other rights, based on which they participate in controlling the legal person*, or who participates in the capital of the legal person with 25% or more of the interest, or a natural person who indirectly or directly has a dominant influence on business management and decision-making;
>
> (2) *a natural person who has provided or provides funds to a company in an indirect manner, which entitles him to influence significantly the decisions made by the managing bodies of the company concerning its financing and business operations.*[447]

362. The definition of beneficial owner under the Anti Money-Laundering is a broad one and covers various types of beneficial ownership, including a direct or indirect "*own[ership] of the business interest*" in the target company, rights stemming from the beneficial

445 Rejoinder, ¶ 576.

446 Milošević Third ER, ¶ 22.

447 Law on the Prevention of Money Laundering and the Financing of Terrorism, Article 3(11) (emphasis added), **CE-867**.

owner's financial contribution to the target company or rights to direct the nominal owner on his voting with shares.

363. *Finally*, the definition of beneficial owner under the Law on Centralized Records of Beneficial Owners ("**Law on Beneficial Owners**") is also broad and covers all instances of beneficial ownership, including beneficial ownership of a beneficiary of a trust or any other person under foreign law.[448]

364. Serbia's observation[449] that the Law on Centralized Records of Beneficial Owners does not apply to joint stock companies (and thus to BD Agro) is correct, but irrelevant. The fact that joint stock companies did not have the reporting obligation under the Law on Beneficial Owners does not mean that joint stock companies could not be owned beneficially.

365. Serbia, nevertheless, claims that the exclusion of joint stock companies from the scope of Law on Beneficial Owners means that the person registered in the Central Security Registry "*is both nominal and the beneficial owner*."[450] This is clearly not correct. Even absent a split in ownership title, an indirect shareholder—even if only one step removed from the target joint stock company—will *not* be recorded in the Central Security Registry. The Central Security Registry is only concerned with registration of the nominal owner ("*lawful holder of shares*") and offers no information whatsoever about beneficial ownership of any company.

366. Serbia's argument is not correct also because it conflicts with the Law on Capital Markets, which *does* apply to joint stock companies. Article 2(34) of the Law on Capital Markets defines beneficial (indirect) owner as a person which is not registered in the Central Security Registry, but still has the "*benefits of ownership of a financial instrument*," including the "*power to direct the voting*" with that instrument and to "*receive the economic benefits of [its] ownership*."[451]

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448 Milosević Second ER, ¶ 177-179.

449 Rejoinder, ¶ 579.

450 Rejoinder, ¶ 581.

451 2011 Law on Capital Markets, Art. 2 (34), **CE-728**.

367. Accordingly, the notion of beneficial ownership is recognized under Serbian law and covers the Canadian Claimants' beneficial ownership over the Beneficially Owned Shares under the MDH Agreement and the Sembi Agreement.

b. The MDH Agreement granted to Mr. Rand beneficial ownership over the Beneficially Owned Shares

368. As the Claimants already explained, the Tribunal's jurisdiction over the Beneficially Owned Shares is not contingent upon the validity or effects of the MDH Agreement. This is because, already on 22 February 2011, the MDH Agreement was replaced by the Sembi Agreement as the source of the Claimants' beneficial ownership.[452] This restructuring occurred years prior to any alleged breach of the Canada-Serbia BIT or Serbia-Cyprus BIT, and the alleged nullity of the MDH Agreement would not deprive the Claimants of their standing under either of these treaties.

369. In any event, the Claimants already demonstrated that the MDH Agreement, governed by the law of British Columbia,[453] created MDH's beneficial ownership over the Beneficially Owned Shares.[454]

370. This is because the MDH Agreement clearly stipulated in Articles 4 and 5 Mr. Obradović's obligation to: (*i*) hold the Beneficially Owned Shares "*at the risk of MDH*"; (*ii*) not encumber, pledge, sell, option or alienate the Beneficially Owned Shares; (*iii*) not encumber, pledge, sell, option or alienate the Beneficially Owned Shares; (*iv*) cause the board of directors of BD Agro to consist of MDH's nominees; and (*v*) follow MDH's instructions regarding the management of BD Agro.[455]

371. As opined by Mr. Deane, MDH thus became the beneficial owner of these rights, and accordingly the beneficial owner of the Beneficially Owned Shares themselves, as soon as Mr. Obradović acquired them and independent of the call option.[456]

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[452] Reply, ¶ 558.

[453] Reply, ¶¶ 72-73; Grušić First ER, ¶¶ 10-17; Grušić Second ER, ¶¶ 37 *et seq.*; Deane ER, ¶¶ 10-17.

[454] Deane ER, ¶¶ 91-92.

[455] MDH Agreement, 19 September 2005, Arts. 4-5, **CE-015**.

[456] Reply, ¶ 515-519; Deane ER, ¶¶ 91-92.

372. Moreover, the position of MDH as a beneficial owner is apparent from the provision that Mr. Obradović would hold the Beneficially Owned Shares "*at the risk of MDH.*"[457] This is a clear confirmation of Mr. Obradović's position of a nominal owner and MDH's status as beneficial owner.

373. Serbia, nevertheless, continues to assert that without exercising the call option, MDH would acquire neither nominal nor beneficial ownership of the Beneficially Owned Shares.[458] This is allegedly so because Article 2 of the MDH Agreement stipulates that, upon MDH's exercise of the call option, the share certificates delivered by Mr. Obradović to MDH "*shall be in the form sufficient to enable [MDH] to become the registered and beneficial owner of the [Beneficially Owned] Shares.*"[459] Serbia, however, does not explain how this potential future obligation of Mr. Obradović could release him from the then pre-existing obligations under Article 4 and 5 of the MDH Agreement.

374. Serbia's reliance on Article 3 of the MDH Agreement for the same proposition is equally misplaced. Serbia alleges that Mr. Obradović's representation to MDH that—upon successful auction of BD Agro—he would become the "*sole nominal and beneficial owner*"[460] somehow prevented MDH from becoming the beneficial owner.[461] However, Article 3 of the MDH Agreement only prevented Mr. Obradović from entering into a similar beneficial ownership arrangement with another entity, and did not derogate from MDH's right under Articles 4 and 5 of the MDH Agreement.

375. The rights conferred to MDH—and thus also to Mr. Rand as MDH's indirect majority shareholder[462]—amply qualify as beneficial ownership rights not only under British Columbia law, but also under public international law. In fact, Serbia itself claims that precisely because the MDH Agreement "*would lead to stripping all material elements*

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

458 Rejoinder, ¶¶ 617 *et seq*.

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

460 MDH Agreement, 19 September 2005, Art. 3, **CE-015**.

461 Rejoinder, ¶ 619 *et seq*.

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

of ownership from Mr. Obradović and leaving him with only nuda proprietas”[463] it should allegedly be considered as Mr. Obradović’s alienation of shares, which was not permitted under Article 5.3.1 within two years from the Privatization Agreement’s conclusion.[464]

376. Serbia’s conclusion is incorrect. The term “alienation”, as observed by Mr. Milošević, “*impl[ies] a change of the legal owner of an asset*.”[465] Therefore, the MDH Agreement did not alienate Mr. Obradović’s shares within the meaning of Article 5.3.1 of the Privatization Agreement.

377. In addition to repeating that the Claimants never became nominal owners of the Beneficially Owned Shares registered in the Central Security Registry, Serbia also alleges that Serbian law prevents a split of title to shares in a joint stock company between nominal owner and beneficial owner. This is allegedly because Article 208(3) of the 2004 Law on Companies makes clear that “*economic rights creating the substance of ownership* […] *save from the very limited exceptions, could not be transferred by contract to third parties.*”[466] This argument is based on a gross misinterpretation of Article 208(3) of the 2004 Law on Companies.

378. Article 208(1) of the 2004 Law on Companies—to which Article 208(3) of the same law closely relates—provides the following demonstrative definition of rights attached to an ordinary share in Serbian joint stock company:

1) right of access to legal acts and other documents and information on the company;

2) right of participation in the assembly of the company;

3) voting rights in the assembly, such that one share gives the right to one vote;

4) the right to receive dividends, after any dividends payable pursuant to preferential rights of preferred shares have been paid in full;

5) right of participation in the distribution of liquidation surplus, after the payment of creditors and shareholders of any preferential shares;

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463 Rejoinder, ¶ 608.

464 Privatization Agreement, Art. 5.3.1, **CE-017**.

465 Milošević Second ER, ¶ 188; Milošević Third ER, ¶ 35.

466 Rejoinder, ¶ 568.

6) pre-emptive rights to acquire newly-issued shares and other securities of the company; and

7) […] right of disposal of shares of all types in accordance with the law.[467]

379. Article 208(3) of the Law on Companies then provides that "*[r]ights referred to in [p]aragraph 1, [s]ubparagraphs 4) and 5) of this Article can be transferred by contract from the shareholder to third parties*."[468] Serbia's insistence that the MDH Agreement somehow violated this provision is wrong for a number of reasons.

380. *First*, under Serbian law, the term "*transfer of rights*" denotes a change of the legal (nominal) owner of the transferred asset.[469] For example, Article 264(1) of the Law on Obligations provides that "*by transferring a right arising from securities their new possessor shall acquire all rights otherwise pertaining to the previous possessor*."[470]

381. Accordingly, as concluded by Mr. Milošević, a right is not "transferred" without the change of its nominal owner.[471] A "transfer" would occur if, for example, Mr. Obradović divested himself of his right to vote at BD Agro's general assembly and granted to MDH the right to directly exercise its voting rights against BD Agro. However, without MDH's exercise of the call option, the MDH Agreement did not purport to effectuate any such direct "transfer" of rights to Sembi. This alone refutes Serbia's theory that the MDH Agreement—and specifically Mr. Obradović's obligation to vote the Beneficially Owned Share in accordance with MDH's instructions[472]—was contrary to Article 208(3) of the Law on Companies.

382. *Second*, Article 208(3) expressly allowed a shareholder to contractually "transfer" to any third party his "*right to receive dividends*."[473] It is thus nonsensical for Serbia to

467 2004 Law on Companies, Art. 208(1), **RE-320**.

468 2004 Law on Companies, Art. 208(3), **RE-320**.

469 Milošević Third ER, ¶ 49.

470 Law on Obligations, Art. 246(1), **CE-865**.

471 Milošević Second ER, ¶ 188; Milošević Third ER, ¶¶ 46 *et seq*.

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

473 2004 Law on Companies, Arts. 208(1), 208(3), **RE-320**.

allege that Article 208(3) of the Law on Companies prohibited transfer of "*economic rights creating the substance of ownership*."[474]

383. Finally, Serbia's claim that the MDH Agreement was null and void because Article 2 of the MDH Agreement could not be effectuated under Serbian law is equally unavailing. Because the remainder of the MDH Agreement—including its Article 4 and 5, conferring beneficial ownership on MDH—is severable from Article 2, the potential nullity of Article 2 of the MDH Agreement is irrelevant for the Tribunal's jurisdiction.[475]

c. The Sembi Agreement granted to the Canadian Claimants beneficial ownership over the Beneficially Owned Shares

384. As already explained, the Sembi Agreement dated on 22 February 2008 restructured Mr. Rand's beneficial ownership by involving the remainder of the Claimants. The effect of the Sembi Agreement, and specifically of Mr. Obradović's obligation to transfer to Sembi "*all his right, title and interest in and to*" the Privatization Agreement, is twofold. *First*, the Sembi Agreement transferred on 22 February 2008 to Sembi all claims for money against BD Agro under the shareholder's loans that Mr. Obradović had provided to BD Agro. *Second*, the Sembi Agreement transferred to Sembi the equitable title to the Beneficially Owned Shares.[476]

385. In addition to the same objections advanced against the MDH Agreement, Serbia alleges that the Sembi Agreement is null and void due to its alleged conflict with Article 41ž of the Law on Privatization providing that a buyer "*may assign*" a privatization agreement "*[s]ubject to prior consent of the* [Privatization] *Agency*."[477]

386. However, under Serbian law, the term "assignment" refers to transfer of legal title.[478] This is confirmed by Article 145(1) of the Law on Obligations, which defines an assignment of a contract as a transaction where "*each party in a bilateral contract may,*

474 Rejoinder, ¶ 568.

475 Tomić Brkušanin ER, ¶ 59.

476 Georgiades Second ER, ¶ 3.13; Georgiades Third ER, ¶ 2.20.

477 2002 Law on Privatization, Art. 41ž, **CE-220**.

478 Milošević Second ER, ¶ 188; Milošević Third ER, ¶ 35.

after obtaining the other party's assent, assign the contract to a third person who thus becomes a holder of all of his rights and obligations arising from that contract."[479]

387. Accordingly, as confirmed by Mr. Milošević, upon an assignment of contract "*the assignee becomes holder of "all rights and obligations" and party to the assigned contract, whereas the assignor will no longer hold any rights and will cease to be a party to the assigned contract*."[480] It is undisputed that Sembi never became party to the Privatization Agreement. The Sembi Agreement thus never conflicted with Article 41ž of the Law on Privatization.

388. Unable to make its case under Serbian law, Serbia seeks to draws parallels with *Occidental*. Serbia argues that because the *Occidental* tribunal considered the transfer of beneficial ownership from Occidental to AEC under the Farmout Agreement as constituting a (prohibited) assignment within the meaning of Article 79 of Ecuadorian Hydrocarbon Law, the Tribunal should reach the same conclusion with respect to Sembi Agreement and Article 41ž of the Law on Privatization.[481]

389. However, to state the obvious, the meaning of "assignment" under Ecuadorian law has no bearing on the proper reading of the same word under Serbian law.

390. Serbia, however, advances an alternative argument accepting that the Sembi Agreement was unaffected by 41ž of the Law on Privatization. Serbia claims that, even if the Sembi Agreement did not conflict with Serbian law, Serbia should not be held liable for a violation of a contract (the Privatization Agreement) that was assigned without the Privatization Agency's consent, to a third party that the Privatization Agency had not known. Serbia's argument suffers from several flaws.

391. *First*, most of the Claimants' claims stem from the Privatization Agency's seizure of the Beneficially Owned Shares rather than from a mere breach of the Privatization Agreement. This is an important difference that Serbia stubbornly ignores throughout all of its submissions.

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479 Law on Obligations, Art. 145(1), **CE-865**.

480 Milošević Third ER, ¶ 37.

481 Rejoinder, ¶¶ 656-657.

392. *Second*, as shown above, the Privatization Agreement was not assigned to Sembi, because Mr. Obradović remained the party to the Privatization Agreement and Sembi did not become one. There was thus no need for the Privatization Agency's approval. When the Claimants did want to assign the Privatization Agreement—from Mr. Obradović to Coropi—they asked for the Privatization Agency's approval, but the Privatization Agency arbitrarily refused to do so.

393. *Third*, there is no requirement that the host State be aware of the foreign investor. As held, for example, by the tribunal in *Krederi v. Ukraine*, absent any express language to that effect in the applicable BIT, "*[t]here is no need for a host State to be aware of specific investments made by investors of the other contracting party*."[482] Moreover, the Claimants have demonstrated that senior Serbian ministers and officials and the Privatization Agency were well aware of Mr. Rand's beneficial ownership.

394. *Fourth*, the Canada-Serbia BIT protects indirect investments and therefore does not require that the host State's measure be directly targeted against the investor.

395. Serbia's reliance on Article 2(1) of the Canada-Serbia BIT does not show otherwise. This provision stipulates that the Canada-Serbia BIT shall apply to "*measures adopted or maintained by a Party relating to: (a) an investor of the other Party; and (b) a covered investment*."[483]

396. Serbia argues, in reliance on the decisions of the NAFTA tribunals in *Methanex v. USA*[484] and *Clayton v. Canada*,[485] that an investor may only challenge a measure if there is "*a legally significant connection between the measure and the investor*." Serbia's reliance on this purported requirement is of no avail. The "*legal significance*" of the connection between the Claimants and the Beneficially Owned Shares stems directly from the simple fact that in accordance with its Article 1, the Canada-Serbia BIT

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

483 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 2(1), **CLA-001**.

484 *Methanex Corporation v. United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶ 139, **RLA-187**.

485 *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 235, **CLA-139**.

protects any "*investment in its territory that is owned or controlled, directly or indirectly*."

397. In *Methanex v. USA*, the dispute concerned several general regulatory measures adopted by California to restrict the sale of methyl tertiary-butyl ether ("**MTBE**"), a methanol-based source of octane and oxygenate for gasoline competing with ethanol.[486]

398. Methanex, however, did not produce or sell either MTBE or ethanol.[487] Instead, its business consisted of production and transportation of methanol, which is used to produce MTBE (but not ethanol). As observed by the tribunal "*neither measure was expressly directed at methanol, methanol producers or Methanex*."[488] Methanex nevertheless argued that by restricting the sale of MTBE, the impugned general measures also decreased the interest in methanol, and thereby affected Methanex. The *Methanex* tribunal cautioned that it is necessary not to read the requirement of "relating to" as allowing for claims of "*suppliers to Methanex who suffered as a result of Methanex's alleged losses, suppliers to those suppliers and so on, towards infinity*."[489] To avoid such situations, the tribunal formulated the test of "*legally significant connection*",[490] which Methanex did not meet.

399. *Methanex* offers strictly no guidance to the Tribunal. There, the "*connection*" at issue was not the one between the claimant and its investment, but rather between the United States' impugned measure and the investment. No such issue arises *in casu*. The Beneficially Owned Shares, which constitute the Claimants' principal investment, were the *direct* object of the Privatization Agency's seizure and expropriation.

400. In *Clayton v. Canada*, Bilcon—one of the claimants' local subsidiaries—entered into a partnership agreement with a Canadian Company, Nova Stone, to develop and operate

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[486] *Methanex Corporation v. United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶¶ 25-34, **RLA-187**.

[487] *Methanex Corporation v. United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶ 128, **RLA-187**.

[488] *Methanex Corporation v. United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶ 24, **RLA-187**.

[489] *Methanex Corporation v. United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶ 137, **RLA-187**.

[490] *Methanex Corporation v. United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶¶ 130 *et seq*, **RLA-187**.

a marine terminal in the Canadian province of Nova Scotia. Prior to signing the partnership agreement, Nova Stone applied with governmental authorities for an industrial permit for the development of a small quarry on the site of the eventual project. The impugned measures consisted of the governmental authorities' failure to issue such an approval to Nova Scotia. Canada objected, in reliance on *Methanex*, that there was no "*legally significant connection*" between the claimants and the challenged measure, because the claimants were not a party to the approval process. The tribunal, however, upheld the jurisdiction over the claimants' claims in holding that "*Bilcon had a significant legal connection with the proposed 3.9 ha quarry—and with the larger quarry and terminal project—as a result of its partnership agreement with Nova Stone*."[491]

401. Accordingly, a partnership agreement—*entered into between the investor's indirectly owned local subsidiary and the directly affected party*—is sufficient to establish a "*legally significant connection*" between the investors and the measure. It is thus evident that the Sembi Agreement, as a contract establishing the Claimants' beneficial ownership over the directly expropriated asset (Beneficially Owned Shares), constitutes a legally significant connection between the Claimants and Serbia's expropriatory conduct.

402. Finally, Serbia raises an iteration of the same argument claiming—in reliance on *Accession Danubius v. Hungary*[492]—that a third party (Privatization Agency) may be held liable for interference with contractual rights (Sembi Agreement) only if it had an "actual knowledge" of the contractual relationship.

403. The decision in *Accession* is an outlier from a long line of cases that considered contractual rights as capable of being expropriated without imposing any "actual knowledge" requirement.[493] The *Accession* tribunal did, however, make an important

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491 *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 241, **CLA-139**.

492 *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, **RLA-148**.

493 *See* e.g. *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 506, **CLA-067**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 663, **CLA-117**; *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, Award, 13 November 2019, ¶ 359, **CLA-156**.

distinction between "*pure contractual rights*" and "*contractual rights as a source of intangible property*":

> *Pure contractual rights cannot be expropriated or taken because they are incapable of being alienated to a third party. For that reason they cannot be equated with property rights. Contracts can, however, be the source of intangible property such as debts and other choses-in-action. There is no doubt that debts and other choses-in-action are capable of being expropriated.* But the object of the expropriation in such a case is the debt or chose in-action and not the contract itself.
>
> The distinction between a contract as a source of bilateral personal obligations and the contract as a source of property rights is critical because international law distinguishes between a state's mere non-performance of its contractual obligations to a foreign party, which cannot constitute an expropriation, and a state's taking of intangible property, which can.[494]

404. The reasoning of the *Accession* tribunal serves to illustrate yet again that Serbia's distinction between rights *in rem* and rights *in personam* is artificial where the right *in personam* is a "*source of intangible property*" and the violation of such "source" leads automatically to deprivation of the innocent party's right *in rem*.

405. Otherwise, the reasoning of the *Accession* tribunal is inapposite because the Privatization Agency did not expropriate the Claimants' intangible property consisting of rights under the Privatization Agreement, but the Beneficially Owned Shares. The Claimants' beneficial ownership of the Beneficially Owned Shares was not contingent on any rights under the Privatization Agreement.

406. Moreover, Serbia's objections are inapposite also with respect to the Sembi Agreement. Even if, for the sake of Serbia's argument, the Privatization Agency did not know of Claimants' beneficial ownership, this would still not allow Serbia to escape its liability under the Canada-Serbia BIT. As observed by the tribunal in *Krederi*, there is no requirement under international law that the State have a "*specific knowledge of the foreign character of an investment and/or investor at the time of the alleged breach*".[495]

407. Accordingly, even if the Privatization Agency, the Ministry of Economy, the Ombudsman and all other bodies of the Republic of Serbia involved in the expropriation

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494 *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, ¶¶ 154, 157, **CLA-167**.

495 *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶¶ 248-249, **CLA-157**.

of the Beneficially Owned Shares and Serbia's other violations of the Treaties genuinely believed that the Beneficially Owned Shares belonged both nominally and beneficially to Mr. Obradović, this would still fail to deprive the Claimants of their standing.

408. In sum, Serbia's objections against the validity and effects of the Sembi Agreement fail under Cypriot law, Serbian law and public international law alike.

2. Mr. Rand's *control* of the Beneficially Owned Shares is protected under the Canada-Serbia BIT

409. The Canada-Serbia BIT expressly applies also to investments directly or indirectly controlled by Canadian nationals.[496] The Claimants will show below that Mr. Rand "controlled" the Beneficially Owned Shares and BD Agro within the meaning of Article 1 of the Canada-Serbia BIT, and—although this is not necessary requirement for the Tribunal's jurisdiction—also within the meaning of Serbian law.

a. The meaning of control under Canada-Serbia BIT

410. *First*, Serbia appears to have abandoned its argument that "control" is not an alternative to ownership, but rather necessary component thereof. It has done so for a good reason. The phrase "*owned* ***<u>or</u>*** *controlled*" makes clear that control of an investment is sufficient to establishing the Tribunal's jurisdiction regardless of the investor's ownership over the same.

411. *Second*, Serbia raises a new, and equally groundless, argument that whether or not Mr. Rand exercised control over BD Agro is irrelevant for the Tribunal's jurisdiction.[497] It clearly is not. Mr. Rand's ability to control BD Agro stems first and foremost from his control over the Beneficially Shares (representing a 75.87% shareholding in BD Agro). In any event, BD Agro is an "enterprise"[498] and Mr. Rand's control over such an enterprise qualifies under item (a) of the Canada-Serbia BIT's definition of investment.

412. *Third*, Serbia fabricates yet another requirement: that in order to demonstrate to control, the investor "*must first demonstrate that [he] invested funds in the acquisition of the*

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

[497] Rejoinder, ¶ 703.

[498] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "enterprise," definition of investment, item (a), **CLA-001**.

investment."[499] In *B-Mex v. Mexico*—Serbia's only authority for this proposition—the tribunal explained that investors cannot pursue "*claims on behalf of an enterprise*", if they "*cannot show to have an investment in that enterprise*." Otherwise, the tribunal reasoned, it would be possible for a "*Mexican company to 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*."[500]

413. Serbia's reliance on *B-Mex* is clearly inappropriate, simply because Mr. Rand is not raising any claims on behalf of BD Agro, but instead makes them in his own name. The problem that the *B-Mex* tribunal sought to address, therefore, does not arise here. Moreover, in addition to the Beneficially Owned Shares, Mr. Rand made separate investments in BD Agro, most notably through his Indirect Shareholding and direct payments to BD Agro's Canadian suppliers and other payments and loans for the benefit of BD Agro.

414. *Finally*, Serbia argues that control "*necessarily means legal capacity to control* under *applicable law*."[501] This is assertion is inconsistent with the ordinary meaning of the term and finds no support in *Aguas del Tunari v. Bolivia*, Serbia's authority for this erroneous proposition.

415. In *Aguas del Tunari*, Bolivia argued that "*controlled*" mandates a showing of *de facto* or actual exercise of control and that legal control is not sufficient.[502] The tribunal first conducted an analysis of the dictionary definitions of the term "control" to determine its ordinary meaning. These definitions make clear that, even in a legal context, the term "control" has a broad meaning encompassing both "*factual control*" and "*legal control*":

> The legal definition for the verb "control" provides several meanings for control. The first definition for "control" is "to exercise power or influence over <the judge controlled the proceedings>." The second definition is "to regulate or govern <by law, the budget officer controls expenditures>." The final definition is "to have a controlling interest in <the five shareholders controlled the company>." *The first definition of control suggests the actual exercise of control with emphasis on the*

[499] Rejoinder, ¶ 705.

[500] Rejoinder, ¶ 703.

[501] Rejoinder, ¶ 703.

[502] *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, **RLA-010**.

> *right to exercise control over an object but does not suggest ownership of the object. The second definition similarly points to a right to control but not ownership of that which is controlled. The third definition of control ties control to ownership interest providing that a "controlling interest"* is understood as a "legal share in something … sufficient ownership of stock in a company to control policy and management; especially a greater-than-50% ownership interest in an enterprise.[503]

416. Accordingly, the ordinary meaning of "control" encompasses: (*i*) factual power to control; (*ii*) legal right to control a company asset without owning the same; and (*iii*) ownership of a controlling interest in a company.

417. The *Aguas* tribunal then rejected the restrictive interpretation advanced by Bolivia and held, by majority, that legal control is *sufficient*. There is no support for the inverse and restrictive interpretation that legal control is *necessary*. The tribunal further emphasized that "*it is not charged with determining all forms which control might take*."[33] Serbia's insistence that "control" is limited to legal control thus finds no support under the ordinary meaning of the term, or the *Aguas del Tunari* decision.

418. Serbia's reliance on the decision of the Annulment Committee in *Caratube v. Kazakhstan* is also misplaced. Serbia assert that *Caratube* stands for the proposition that *de facto* control is necessary, but not sufficient. The Caratube Annulment Committee, however, found that "*control is a factual element*"[504] and does *not* require nominal ownership of shares, but can be achieved by an agreement, even tacit, transferring the *actual control* from the nominal shareholder to a third party:

> Control is normally achieved by ownership of a majority stake in the juridical person, which affords a sufficient number of votes, so that the controller can have a decisive influence on any decisions or resolutions.
>
> But the owner of the equity may only formally be the owner or can by–tacit or explicit–agreement transfer actual control to a third party (e.g., the owner can enter into a fiduciary arrangement with a third party, holding ownership on behalf of such third party, or he can assign his voting rights to another person). *Thus third parties who are not owners*

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[503] *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, ¶ 231, **RLA-010**.

[504] *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, ¶¶ 254, **CLA-016**.

> *of equity stakes can, by contractual arrangements with the formal owners, have actual control over juridical persons*.[505]

419. It is thus obvious that *Caratube* does not support Serbia's position that legal control is required. Furthermore, Serbia's assertion that *de facto* control is not sufficient is also inconsistent with the conclusion of NAFTA tribunals. Because Article 1117 of NAFTA—which requires that the local enterprise be a juridical person that the investor *"owns or controls directly or indirectly*"—is substantial similar to Article 1 of the Canada-Serbia BIT, the conclusions of NAFTA tribunals are particularly instructive here.

420. Several NAFTA tribunals have confirmed that the term control is a broad one and encompasses both "*de facto control*" and "*legal capacity to control*." For example, in *Thunderbird v. Mexico*, the tribunal explained that "control" does not require showing of legal control, but may be also satisfied by factual control:

> The Tribunal does not follow Mexico's proposition that Article 1117 of the NAFTA requires a showing of legal control. The term "control" is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "de facto" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA. In the absence of legal control however, the Tribunal is of the opinion that de facto control must be established beyond any reasonable doubt.[506]

421. The *Thunderbird* tribunal held that such factual control may be established not solely on the basis of a power to make and implement key decision, but also on the basis of the investor's furtherance of the company's business activities:

> Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances*, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation*.[507]

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[505] *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, ¶¶ 253-254, **CLA-016**.

[506] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, ArbitralAward, 26 January 2006, ¶ 106, **CLA-095**.

[507] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, ArbitralAward, 26 January 2006, ¶ 108, **CLA-095**.

422. The tribunal concluded that Thunderbird indeed controlled the local company, because "*without the consistent and significant initiative, driving force and decision-making of Thunderbird, the investment in Mexico could not have materialized*."[508] This reasoning fully applies to Mr. Rand's key involvement in BD Agro's business.

423. In *B-Mex v. Mexico*, the tribunal found that "*there is no specific manner or form that 'control' must take*"[509] and that Article 1117 NAFTA applies even where the investor "*does not own a number of shares sufficient to confer the legal capacity to control but is otherwise able to exercise de facto control*."[510]

424. Accordingly, both the ordinary meaning of the term and the findings of investment tribunals confirm that "control" comprises both "legal control" and "de facto" control. Mr. Rand had both legal capacity to control and in reality exercised such control.

425. *First*, Mr. Rand had the legal capacity to control the Beneficially Owned Shares and thus BD Agro by the virtue of his 2005 oral agreement with Mr. Obradović, the MDH Agreement and the Sembi Agreement.

426. Serbia, however, asserts that the Sembi Agreement did confer on Mr. Rand control over the Beneficially Owned Shares, because Mr. Rand "*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*."[511] Serbia thus yet again argues that an investment in shares must take shape of right *in rem* to said shares, and can never be established through contractual rights. This proposition is incorrect with respect to "ownership", and downright absurd with respect to "control." There is no requirement that control agreements should set forth any remedies other than contractual ones.

427. *Second*, the Claimants have already demonstrated with ample evidence that Mr. Rand exercised factual control over BD Agro. Serbia's observation on Mr. Rand's *de facto* control is limited to an assertion it was Mr. Obradović who received the benefits of the

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508 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, ArbitralAward, 26 January 2006, ¶ 107, **CLA-095**.

509 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 212, **CLA-083**.

510 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 205, **CLA-083**.

511 Rejoinder, ¶ 708.

investment.[512] In making that assertion, Serbia again relies on its false allegations of improper money transfers between BD Agro on the one side, and Inex and Crveni Signal on the other. As shown above, the Claimants vehemently deny Serbia's allegation that BD Agro was stripped of its assets.[513]

428. In sum, the Claimants demonstrated that Mr. Rand controlled the Beneficially Owned Shares and BD Agro and that such control is more than sufficient to qualify for protection under Article 1 of the Canada-Serbia BIT, independent of the Claimants' beneficial ownership of the Beneficially Owned Shares.

429. The Claimants have explained in their Reply that the question of whether Mr. Rand's control over the Beneficially Owned Shares qualified as such under Serbian law is irrelevant for the Tribunal's jurisdiction. Serbia did not raise any argument to the contrary. Nevertheless, for the sake of completeness, the Claimants will show below that Mr. Rand's control qualifies as such under various definitions of the term provided under Serbian law.

430. *First*, the 2006 Takeover Law provides in Article 4(3) that "*a natural or legal person shall be considered to have control over a legal person if it has*":

> 2) indirectly or directly 25% or more of the voting rights in that legal person's general assembly;
>
> 3) the right to manage, that is to run the business and financial policies of a legal person on the basis of the power given under a statute, agreement, or a contract; and
>
> 4) indirectly or directly the prevailing influence on business management and decision making"[514]

431. Accordingly, Article 4(3)(2) of the 2006 Takeover Law makes clear that Serbian law recognizes both legal control and factual control. Moreover, as Ms. Tomić Brkušanin concludes, Mr. Rand's control over BD Agro satisfied all of the alternative grounds set out in Article 4(3) of the 2006 Takeover Law.[515]

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512 Rejoinder, ¶ 721.

513 Rand Second WS, ¶ 15; Obradović Second WS, ¶ 65; Rand Third WS, ¶ 6; Obradović Third WS, ¶ 9.

514 2006 Takeover Law, Article 4(3), **CE-540.**

515 Tomić Brkušanin Second ER, ¶ 23.

432. Serbia, however, argues that the 2006 Takeover Law does not allow for control over a natural person. This is both incorrect and irrelevant. The fact that 2006 Takeover Law does not define control over a natural person does not mean that it does not allow for such a control.[516] Moreover, the basis for the Tribunal's jurisdiction is Mr. Rand's control over the Beneficially Owned Shares and BD Agro, and not his control over Mr. Obradović. The 2006 Takeover expressly covers indirect control and thus also Mr. Rand's control over BD Agro.

433. *Second*, the Law on Protection of Competition defines in Article 5 control as a "*possibility of decisive influence on the conduct of activities of another or other undertakings [...]*."[517] Such a control can be established, for example, based on "*rights deriving from contracts*" or even based on "*terms of business practices that are determined by the controlling participant*."[518] The Claimants demonstrated that all strategic decision regarding BD Agro were made by Mr. Rand and Serbia did not even seek to challenge that evidence.

434. *Third*, the 2011 Law on Capital Market provides in Article 2(29) that control represents a relationship in which a parent company has "*majority of the shareholders' or members' voting rights in the subsidiary company*", or has a "*right to exercise a dominant influence*" over the subsidiary or "*may use other means in management and in formulation of the subsidiary company's policies*."[519]

435. Dr. Radović, however, argues that 2011 Law on Capital Market only defines control as relationship between two companies, rather than between a natural person and a company.[520] This argument, however, contradicts the express language of Article 2(2)(30) of the 2011 Law on Capital Market, which provides that "*control* […] *means the relationship between the parent and the subsidiary in all cases referred to in item*

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516 Tomić Brkušanin Second ER, ¶ 13.

517 Law on protection of competition, Art. 5, **CE-899**.

518 Law on protection of competition, Art. 5, **CE-899**.

519 Article 2 (2) (29) of the 2011 Law on Capital Market, **CE-728**.

520 Radović Second ER, ¶ 102.

29) of this paragraph, ***or a similar relationship between the natural or legal person and a company***.”[521]

436. Dr. Radović also seeks to minimize the relevance of this definition by arguing that it allegedly has “a *limited scope of application*.”[522] This is because this definition establishes the scope of the Securities Commission’s regulatory powers and therefore has to reflect both legal and factual dominant influence over companies so that market participants could be “*effectively supervise*[d] *and sanction*[ed].”[523]

437. However, the attempt of the Serbian legislator to cover the economic reality, rather than only legal formalities, makes the definition of control under 2011 Law on Capital Market all the more consonant with the ordinary meaning of the term and the meaning of control under Canada-Serbia BIT.

438. Accordingly, in addition to satisfying the meaning of control under Canada-Serbia BIT, Mr. Rand’s control over the Beneficially Owned Shares and BD Agro also qualifies as such under Serbian law.

3. The Canadian Claimants’ indirect interest in the Sembi Agreement is an investment protected under the Canada-Serbia BIT

439. As shown above, the Sembi Agreement transferred to Sembi beneficial ownership to the Beneficially Owned Shares. This beneficial ownership provides a link of ownership between the Canadian Claimants—investors protected under the Canada-Serbia BIT—and the Beneficially Owned Shares. The Beneficially Owned Shares are “shares” and thus a qualifying investment under the Canada-Serbia BIT.[524]

440. However, besides providing such a link of ownership, the right stemming from the Sembi Agreement qualifies on their own qualify as an investment.

441. *First*, the Canadian Claimants’ right under the Sembi Agreement—granting Sembi equitable title over the Beneficially Owned shares—qualify as “*an interest in an*

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521 Article 2 (2) (30) of the 2011 Law on Capital Market, **CE-728**

522 Radović Second ER, ¶ 102.

523 Radović Second ER, ¶ 102.

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

enterprise that entitles the owner to share in income or profits of the enterprise."[525] Serbia argues that it is "obvious" that the Canadian Claimants never acquired any such interest, because Sembi "*never acquired Mr. Obradović's shares*."[526] However, the protection of "an interest in an enterprise" is obviously not contingent on acquisition of any ownership to shares, be it nominal or beneficial. If it were, there would be no reason to include such an interest as separate category of investment under the Canada-Serbia BIT.

442. Moreover, contrary to Serbia's suggestion, there is nothing objectionable about the same rights under the Sembi Agreement falling under two different categories of the Canada-Serbia BIT. This especially holds true with respect to right of beneficial ownership. Indeed, as observed by the IUSCT in *Saghi*, "*beneficial ownership is both a method of exercising control over property and a compensable property interest in its own right.*"[527]

443. *Second*, Sembi's rights under the Sembi Agreement also qualify as "*an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory*."[528] This is because, as the Claimants have already explained, Sembi committed capital in Serbia by repaying the loans of Mr. Obradović to the Lundin Family for the acquisition of shares in, and further investment to, BD Agro (a Serbian company). The funds for repaying such loans were provided to Sembi, and thus ultimately committed, by Mr. Rand.[529]

444. *Finally*, Serbia argues that the Canadian Claimants are not entitled to make any claim based on contractual rights belonging to Sembi. There is no support for such an argument under the Canada-Serbia BIT, which defines "*an interest in enterprise*" as

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

526 Rejoinder, ¶ 726.

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

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

529 Confirmation of EUR 3,610,000.00 wire transfer from Mr. William Rand to Sembi executed on 3 August 2008, **CE-060**; Confirmation of EUR 2.001.000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-061**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-056**; Register of Directors of Indonesian Developments Co. Ltd., **CE-075**.

investments and expressly applies to investments "*owned or controlled, directly, <u>or indirectly</u>.*"

445. The decisions in *ST-AD v. Bulgaria*[530] and *Karkey v. Pakistan*[531], which conclude that shareholders cannot directly enforce the company's contractual rights, are inapposite. The Canadian Claimants are not attempting to enforce Sembi's rights under the Sembi Agreement against Mr. Obradović. Instead, the Canadian Claimants' claim is based on the destruction of value of the contractual rights under the Sembi Agreement as a result of Serbia's expropriation of the Beneficially Owned Shares.

446. All of the Canadian Claimants held, directly or indirectly, shares in Sembi and, thus, indirectly owned also Sembi's interest in the Beneficially Owned Shares, stemming from the Sembi Agreement. Accordingly, the Canadian Claimants indirect interest in the Sembi Agreement qualifies as an investment under Article 1 of the Canada-Serbia BIT, items (f) and (h).

4. Mr. Rand's Indirect Shareholding is an investment protected under the Canada-Serbia BIT

447. Mr. Rand's Indirect Shareholding qualifies as an investment in shares, indirectly held by Mr. Rand through MDH Serbia. Mr. Rand's Indirect Shareholding thus squarely qualifies as a covered investment under the Canada-Serbia BIT and Serbia does not appear to argue otherwise.

5. Mr. Rand's direct payments to BD Agro's Canadian suppliers for the purchase and transport of heifers and other payments and loans for the benefit of BD Agro

448. Mr. Rand made payments of approximately EUR 2.2 million for the replacement of BD Agro's herd.[532] Mr. Rand also paid approximately EUR 160,000 for the services

530 *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL), PCA Case No. 2011-06, Award on Jurisdiction, ¶ 278, **RLA-79**.

531 *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 716, **RLA-178.**

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

provided to BD Agro by herd management experts Mr. David Wood and Mr. Gligor Vasile Calin.[533]

449. These payments were loans to BD Agro and thus qualify as "a loan to an enterprise", a qualifying investment under item (d) of the Canada-Serbia BIT's definition of investment.

450. *First*, Serbia argues if the Claimants really were the owners, than these payments cannot qualify as loans, because "*payments made and expenses incurred in day to day operations of BD Agro cannot be regarded as a separate investment*."[534] Serbia's argument is thus premised on the notion that a shareholder cannot grant a loan to a company.[535] However, the term "shareholder loan" exists for a reason. Moreover, there is again no support for Serbia's argument under the Canada-Serbia BIT. "Shares" and "loans" are separate categories of "investment" and ought to be treated as such.

451. *Second*, Serbia does not dispute the clear evidence that any of these payments were made, but rather argues that the Claimants also have to demonstrate that they have constituted loans. There is, however, no requirement that only loans based on written agreements are covered under Canada-Serbia BIT.

452. *Third*, Serbia asserts that these payment cannot constitute an investment, because they qualify as "*claim to money that arises solely from* […] *the extension of credit in connection with a commercial transaction*, *such as trade financing*."[536] However, Mr. Rand's payments for the replacement of the BD Agro's herd did not constitute a trade financing, because they cannot be separated from Mr. Rand's role as the beneficial owner.

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

[533] Overview of Payments to Mr. David Wood, **CE-062**; Overview of Payments to Mr. Gligor Calin, **CE-068**. *See also* First Rand WS, ¶¶ 40, 44.

[534] Rejoinder, ¶ 742.

[535] Rejoinder, ¶ 742.

[536] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, **CLA-001**.

453. In sum, Mr. Rand's payments of approximately EUR 2.4 million for the replacement of BD Agro's herd and fees of BD Agro's herd management consultants thus qualifies as an investment under the Canada-Serbia BIT.[537]

B. The Tribunal has jurisdiction *ratione materiae* under the Serbia-Cyprus BIT

454. Sembi's rights stemming from the Sembi Agreement qualify as investment under at least two categories under Article 1(1) of the Serbia-Cyprus BIT. *First*, the general principle of public international law affording protection to beneficial owners fully applies under Serbia-Cyprus BIT. The Beneficially Owned Shares are "shares" and thus an "investment" within the meaning of Article 1(1) of the Cyprus-Serbia BIT.

455. *First*, Sembi's rights under the Sembi Agreement qualify as "*claims to money or to any performance under contract having economic value*." As shown above, Sembi acquired under the Sembi Agreement an equitable title to the Beneficially Owned Shares, and thus a right enforceable under Cyprus law to compel Mr. Obradović, for example, to vote the Beneficially Owned Shares as instructed by Sembi.

456. Serbia's objections against the Tribunal's jurisdiction *ratione materiae* over Sembi's investments lack any merit.

457. *Second*, Serbia argues that the phrase "any asset *invested*"—employed in the *chapeau* of the definition of investment under Article 1(1) of the Serbia-Cyprus BIT—requires an "*active contribution of a putative investor*."[538] However, as explained by the tribunals in *Saluka v. Czech Republic* and *Mytilineos v. Serbia*, "invested" is used to connect the *chapeau* the listed and asset listed thereunder, and "*does not require the satisfaction of a requirement based on the meaning of "investing" as an economic process*."[539] Accordingly, the Serbia-Cyprus Article 1(1) of the Serbia-Cyprus BIT does not contain any requirement of investors' active contribution. Serbia ignores these authorities.

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537 Overview of Payments to Mr. David Wood, **CE-062**; Overview of Payments to Mr. Gligor Calin, **CE-068**. *See also* Rand First WS, ¶¶ 40, 44.

538 Rejoinder, ¶ 742.

539 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 211, **RLA-073**; *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia I*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶ 130, **CLA-085**.

458. While Serbia consistently maintains that there is such an active contribution requirement, it cannot seem to decide what Sembi needs to show to satisfy it. In its Counter-Memorial, Serbia cited the conclusion of the *Mera v. Serbia* tribunal that this requirement comprises "*holding and management of the investment*."[540]

459. Serbia argued that Sembi did not "invest" in Serbia, because there was "*no evidence that would even suggest any involvement of Sembi in the business activities of BD Agro*."[541]

460. The Claimants have, however, demonstrated in their Reply that Sembi was, in fact, heavily involved in BD Agro's businesses activities. This is because, for example: (*i*) Sembi's Board of Directors always included one Serbian director who had been at the same time on BD Agro's Board of Directors (Mr. Obradović and subsequently Mr. Mr. Markićević[542]; (*ii*) BD Agro was regularly discussed during meetings of Sembi's directors[543]; (*iii*) BD Agro's management submitted for approval of Sembi's Board of Directors strategic decision.

461. Unable to challenge this overwhelming evidence, Serbia now claims that "*holding discussions*" is irrelevant and that the applicable test for "active involvement" is whether an acquisition of the protected asset is a "*result of the contribution made by the investor*." However, Sembi's acquisition of both investments qualifying under the Serbia-Cyprus BIT—*i.e.* of the Beneficially Owned shares and of the claims against Mr. Obradovic under the Sembi Agreement—was the result of Sembi's contribution in the form of Sembi's EUR 5.6 million payment to the Lundins.[544]

462. Serbia, however, argues that because the funds for the payments were advanced to Sembi by Mr. Rand, they do not constitute Sembi's contribution, but rather that of Mr. Rand. There is, however, no requirement under the Serbia-Cyprus BIT that the investment be "of" the investor,

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540 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, ¶ 93, **CLA-022**.

541 Counter-Memorial, ¶ 350.

542 Extract from the Company Register regarding Sembi dated 7 June 2017, **CE-053**.

543 Rejoinder, ¶ 769.

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

463. Serbia's reliance on the decision in *Clorox v. Venezuela* is to no avail.[545] In that case, the Spanish claimant Clorox Spain acquired shares in Clorox Venezuela as a capital contribution from the ultimate mother Clorox US. The tribunal reasoned that it was uncontested that Clorox US made an investment in Venezuela when creating Clorox Venezuela. However, when Clorox Spain was incorporated in 2011, Clorox Spain did not transfer any value to Clorox US in exchange for the shares in Clorox Venezuela. In fact, had it not been for that transfer of shares, Clorox itself would not have existed.[546]

464. Serbia also relies on *Standard Chartered Bank v. Venezuela* and *Alapli v. Turkey* which allegedly demonstrate 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*."[547] However, the applicable test under the Cyprus-Serbia BIT is not whether an investment is "of" Sembi, bur rather whether Sembi "invested" an asset. The *Standard Charter Bank* and *Alapli* decision are inapposite, because the conclusions reached therein are heavily premised on the specific requirement that the investment be "of" the investor.[548]

465. *Finally*, Serbia again argues that Sembi cannot be a beneficial owner of the Beneficially Owned Shares because it is not the ultimate beneficial owner thereof. This is incorrect. As Serbia correctly observes, the doctrine of beneficial ownership relied on by the Claimants "*applies when the legal title is split between* '*a nominee and a beneficial owner.*'"[549] Under the Sembi Agreement, the title to Beneficially Owned Shares was split between Mr. Obradović (the nominal owner) and Sembi (the beneficial owner). Sembi was thus beneficial owner of the Beneficially Owned Shares. Rand Investments holds shares in Sembi, and Mr. Rand is in turn the sole shareholder of Rand Investments. The remaining the Canadian Claimants are beneficiaries of the Ahola Trust, which holds shares in Sembi. The link of beneficial ownership between the Beneficially Owned

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[545] *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Award, 20 May 2019, **RLA-170**.

[546] *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Award, 20 May 2019, ¶ 831 **RLA-170**.

[547] Rejoinder ¶ 764.

[548] *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, ¶¶ 355-361, **RLA-166**; Standard Chartered Bank v. United Republic of Tanzania, ICSID Case no. ARB/10/12, Award, 2 November 2012, ¶¶ 230-232; **RLA-15**.

[549] Counter-Memorial, ¶¶ 334-335.

Shares and all the Canadian Claimants is thus uninterrupted and is protected under the Canada-Serbia BIT.

466. Based on the above, the Tribunal has jurisdiction over Sembi's investments under the Serbia-Cyprus BIT.

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

1. The Claimants made an investment within the meaning of the ICSID Convention

467. The Claimants reiterate their position that this Tribunal should follow the approach of numerous ICSID Tribunals and conclude from the absence of a definition of "investment" in the ICSID Convention that the ICSID Convention does not impose any jurisdictional requirements *ratione materiae* additional to those set forth in the Treaties.

468. Simply put, Article 25(1) of the ICSID Convention cannot be interpreted to impose the additional criteria known as the *Salini* test and the Claimants' investments only need to satisfy the definitions of investment in the Treaties—which they do; and this is the end of this objection to jurisdiction.

469. In the Reply, the Claimants supported that interpretation of Article 25(1) with quotes from the decisions of ICSID tribunals in cases such as *Gruslin v. Malaysia*,[550] *Lanco v. Argentina*,[551] *M.C.I. Power v. Ecuador*[552] and *Ambiente Ufficio v. Argentina*.[553] Many more tribunals reached the same conclusion, but due to the notoriety and persistency of the *Salini* test controversy, the Claimants do not believe that more quotes would be of assistance to this Tribunal.

470. Other tribunals have adopted the *Salini* test, which looks for hallmarks of an investment in the form of the traditional three criteria: commitment of financial resources or other

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550 *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **CLA-087**.

551 *Lanco Int'l, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 4, **CLA-088**.

552 *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 159-60, **RLA-034**.

553 *Ambiente Ufficio SPA and others v. The Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **CLA-089**.

assets; assumption of commercial risks; and certain duration of the commercial operation.[554]

471. A small minority of tribunals have added a fourth criterion: contribution to the host state's development. A vast majority of tribunals, however, do not accept this fourth criterion.[555]

472. The Claimants also explained in their Reply that their investments satisfied even the broadest of tests put forth by any tribunal. Serbia obviously disagrees.

a. The Claimants made substantial contributions

473. In the Reply, the Claimants explained that they had made substantial contributions, including, but not limited to:

a. the payment of the EUR 5,549,000 purchase price for the Privatized Shares;

b. the EUR 2 million additional investment in BD Agro;

c. the EUR 0.2 million purchase price for Mr. Rand's Indirect Shareholding; and

d. Mr. Rand's EUR 2.2 million financing of the replacement of BD Agro's herd and other payments and loans made for the benefit of BD Agro.

474. In the Rejoinder, Serbia seems to argue that the payment of the purchase price cannot count as a contribution because the payments were made by Mr. Obradović from loans he had obtained loans from the Lundins. Thus, Serbia apparently takes the view that the fact that the loans were arranged by Mr. Rand and provided by the Lundins only because of his beneficial ownership of BD Agro is not enough to make the payment of the purchase price count as Mr. Rand's contribution.

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554 *Salini v Morocco,* ICSID Case No Arb/00/04, Decision on Jurisdiction, 23 July 2001, ¶ 52, **CLA-020**.

555 *E.g. Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 295, **CLA-067**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 187, **CLA-032**; *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶ 111, **CLA-090**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Pliurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 Sept. 2012) ¶ 224-25 (affirming Fakes), **RLA-024**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013) ¶¶ 171-73, **RLA-095**.

475. Serbia goes so far as to say that Mr. Obradović,[556] Mr. Rand[557] and Mr. Azrac,[558] long-term banker of the Lundin Family, simply do not tell the truth when they confirm this contribution. According to Serbia, the first installment of the purchase price of some EUR 2.1 million, made on 15 October 2005, must have been paid with Mr. Obradović's own funds simply because Mr. Obradović allegedly received the first payment from the Lundins only three months later on 2 January 2006.[559]

476. The argument is disingenuous because the Claimants clearly showed in the Reply that the Lundins started to provide funding on 15 September 2005 when they wired EUR 3.3 million to MDH's account in Serbia.[560] Mr. Obradović had access to that account and used a part of these funds to pay the first installment of the purchase price.

477. Serbia, however, does not stop there. It states that at least four out of the five remaining installments were paid with money siphoned out of BD Agro[561]—a fallacy, that the Claimants have disproved above.

478. Serbia also does not shy away from alleging that there is no evidence of the additional EUR 2 million investment required under the Privatization Agreement and its financing by the Claimants.[562] The Privatization Agency expressly confirmed the making of the additional investment at the time[563]—and the Claimants have amply shown that it was financed from the money loaned by the Lundins.[564]

479. Mr. Rand's assumption, through Sembi, of Mr. Obradović's EUR 13.8 million debt to the Lundins and its subsequent repayment (up to EUR 5.6 million) does count as Mr. Rand's contribution.

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556 Obradović First WS, ¶ 11.

557 Rand First WS, ¶¶ 16-17; ¶¶ 30-33.

558 Azrac WS, ¶¶ 9-16.

559 Rejoinder, ¶ 1015.

560 Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, 15 September 2005, **CE-384**.

561 Rejoinder, ¶ 1015.

562 Rejoinder, ¶ 1015.

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

564 Reply, ¶ 495.

480. Serbia's theory that the "*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*"[565] is simply absurd. On that theory, an investor buying an existing investment would never be able to satisfy the "contribution" criterion of the Salini test—that clearly is not the purpose of the test.

481. Serbia also cannot seriously claim that that contribution cannot count for both Mr. Rand and Sembi. The channeling of investments through holding companies, such as Sembi, is absolutely commonplace, and the contribution made by the holding company also counts as a contribution by its shareholder.[566]

482. Mr. Obradović paid most of the remaining installments of the purchase price using funds obtained from BD Agro's repayment of the shareholder loans to BD Agro that he had assigned to Sembi under the Sembi Agreement.[567] This is another contribution by Sembi—and its shareholders, which included Mr. Rand, Rand Investments and, starting on 31 August 2008, Mr. Rand's children.[568]

483. In any event, as Sembi's direct and indirect co-owners, all of the Canadian Claimants can benefit from Sembi's contributions, including those made prior to Mr. Rand's children becoming the indirect co-owners of Sembi. Again, an indirect owner of an investment cannot be excluded from investment protection simply because the investment in the host country had been made by the holding company before the indirect owner acquired an interest in the holding company.

484. Mr. Rand's children can also rely on the contribution made by their father, Mr. Rand, as shown, for example, in *Renée Rose Levy de Levi v. Peru*, where the tribunal expressly stated that the "*initial investment made by the Claimant's relatives*" satisfies the Salini

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565 Rejoinder, ¶ 1018.

566 Serbia's reliance on *Doutremepuich v. Mauritius* is misplaced. In *Doutremepuich*, one of the two shareholders of a holding company had not made a contribution. This is completely different from a shareholder making a contribution through the holding company. In such a vertical structure, both the shareholder and the holding company make a contribution.

567 Obradović Third WS, ¶ 40.

568 Extract from the Company Register regarding Sembi, p. 7, **CE-53**.

criteria despite its subsequent gracious assignment to the claimants.[569] Serbia's attempt to distinguish that case on the basis that Mr. Rand retained a part of the investment and is claiming together with his children is simply unconvincing.[570] There is no reason why the principle set out in *Renée Rose Levy de Levi v. Peru* should apply only when the totality of the investment is graciously assigned to close relatives.

485. The EUR 200,000 spent for Mr. Rand's Indirect Shareholding also constitutes a contribution, and it simply does not matter that the money was spent by MDH Serbia and that the amount is relatively modest compared to the sums spent for the acquisition of the Beneficially Owned Shares.

486. Finally, Mr. Rand contributed EUR 2.2 million in financing the replacement of BD Agro's herd and other payments and loans made for the benefit of BD Agro. The Claimants have shown that the payments for the heifers were made from Mr. Rand's personal accounts.[571] Serbia's baseless speculation that the money may have belonged to Mr. Obradović is simply nonsensical. So is Serbia's speculation that the money may have been advanced by the Lundins. As Serbia surely must have noticed, Mr. Rand made the payments for the heifers in the period from April to December 2008, only after the Lundins stopped financing the project and Mr. Rand assumed Mr. Obradović's debt to the Lundins.

487. In sum, each of the Claimants satisfy the "contribution" element and Serbia's attempts to deny it lacks any credibility.

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569 Counter-Memorial, ¶ 151.

570 Rejoinder, ¶ 1025.

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

b. The Claimants' investment was of a sufficient duration

488. The duration of the Claimants' investment was ten years with respect to Mr. Rand and seven years for the remaining Claimants. This amply satisfies the duration criterion.

489. While Serbia had not claimed otherwise in the Counter-Memorial, it had second thoughts in the Rejoinder and claimed that there was no duration because the Claimants had not acquired any assets in Serbia. This is another regurgitation of Serbia's flawed theory that the Treaties only protect "*property rights recognized and protected under the laws of the host state*."[572] It has nothing to do with the duration of the Claimants' investment.

c. The Claimants' investment involved significant risk

490. In the Reply, the Claimants showed that their investment in BD Agro involved not only risks inherent to the volatile agricultural business, but also significant risks connected with the unpredictable legal and business environment in Serbia—which ultimately materialized when Serbia committed the breaches of the Treaties claimed in this arbitration.

491. Serbia's only response is to repeat that, not having made any contribution, the Claimants allegedly did not undertake any risk.[573] This is incorrect not only because all Claimants satisfy the "contribution" test, but also because "risk" and "contribution" are two different criteria. The criterion of risk is satisfied when the investor has the risk of losing the value of its investment and/or the potential to earn future profits, regardless of whether it had made a contribution to acquire the investment.

d. The Claimants' investments contributed to Serbia's development

492. Sadly, Serbia stubbornly continues to ignore all the successes achieved by BD Agro and all the praise that the development of BD Agro received from the top politicians in Serbia and Canada, from its business partners and the media.

493. Knowing that Serbia seems to accept only contemporaneous documentary evidence originating from Serbia itself, the Claimants expressly quoted in their Reply the Serbian

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[572] Rejoinder, ¶ 1047.

[573] Rejoinder, ¶ 1034.

Ministry of Economy praising "*the highest possible level of organization of this type of primary agricultural production with the application of the latest methods in the field of primary production*"[574] at BD Agro.[575]

494. This, obviously, did not stop Serbia from telling the Tribunal the exact opposite in the Rejoinder and advancing its sensationalist asset-stripping theory. Serbia's approach merits no further comments.

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495. In sum, the Claimants' investments clearly satisfies all criteria of the *Salini* "test".

2. The Claimants have standing under the ICSID Convention

496. In its Rejoinder, Serbia continues to allege that the Claimants lack standing to bring claims under the ICSID Convention in relation to the Privatization Agreement because the Privatization Agreement was concluded with Mr. Obradović, and not with them. Serbia's reasoning, predicated, yet again, on the false premise that beneficial owners lack standing to assert claims in relation to their beneficially owned assets, is misplaced.

497. Just like shareholders who invest in companies that in turn sign contracts with the state or invest in other companies, the Claimants entered into agreements—most importantly, the Sembi Agreement—with Mr. Obradović, who, in turn, signed contracts with Serbia. And just like shareholders who derive benefits from their proprietary interests in their subsidiaries, the Claimants derive benefits from their contractual arrangements with Mr. Obradović. Indeed, under the Sembi Agreement, the Claimants were granted beneficial ownership of the Beneficially Owned Shares, which, in turn, entitle the Claimants to assert claims in relation to the Beneficially Owned Shares, including in relations to the Privatization Agreement. This conclusion is perfectly in line with *Lesi v. Algeria*, on which Serbia purports to rely.

498. To be clear, the Claimants did not distinguish *Lesi v. Algeria* in their Reply on the basis that "*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*," as

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

575 Reply, ¶ 688.

Serbia erroneously suggests.[576] Rather, the Claimants distinguished that case because, there, a non-signatory *subsidiary* sought to bring claims in relation to a contract signed by its *parent* companies.

499. The Tribunal faces the opposite scenario: the Claimants, acting just like parent companies, bring a claim in relation to a contract signed by Mr. Obradović, acting just like a subsidiary, on the basis of the Claimants' contractual rights stemming from their agreements with Mr. Obradović. Unlike the subsidiary company in *Lesi v. Algeria*, the Claimants are perfectly entitled to do so.

500. Based on the foregoing, it is entirely appropriate for the Claimants to rely on cases dealing with contracts signed by the claimants' subsidiaries.[577] And, to reiterate, such cases make clear that assertions like those advanced by Serbia here "*ha[ve] been made numerous times, never, so far […] with success*."[578]

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

1. The Tribunal has jurisdiction *ratione voluntatis* because the Claimants did not violate Serbian law

501. In its Counter-Memorial, Serbia raised a single *ratione voluntatis* objection concerning the purported illegality of the Claimants' investment. In making this objection, Serbia asserted that even if the alleged conflict of the MDH Agreement and the Sembi Agreement with Serbian legislation on trading with securities would fail to remove the Tribunal's *jurisdiction materiae*, the very same conflict would deprive the Tribunal of its *ratione voluntatis* jurisdiction ("**Securities Law Objection**").[579] Serbia thus merely incorporated by reference its *ratione materiae* objection into the *ratione voluntatis* section.

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576 Rejoinder, ¶ 1041.

577 *See* e.g. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award on Jurisdiction, 8 December 2003, ¶¶ 65-66, **CLA-064**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction, 17 July 2003, ¶ 68, **CLA-065**. *See* also, Stanimir Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis,* The Law & Practice of International Courts and Tribunals, p. 45, **CLA-092**.

578 *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, ¶ 50, **CLA-066**.

579 Counter-Memorial, ¶¶ 361-362.

502. In their Reply, being faced with no argument to address, the Claimants responded in kind and dedicated exactly two paragraphs to Serbia's barely-pleaded Securities Law Objection.[580]

503. In its Rejoinder, Serbia not only repeats its Securities Law Objection, but also raises a plethora of additional objections, centered around Mr. Obradović's alleged illegal and even criminal conduct relating to his involvement in BD Agro. Serbia now alleges that Mr. Obradović violated Serbian law by: (*i*) failing to disclose Mr. Rand's beneficial ownership to the Privatization Agency (the "**Non-Disclosure Objection**");[581] (*ii*) misappropriating funds from BD Agro's bank accounts (the "**Siphoning Objection**"); and (*iii*) disposing illegally with BD Agro's land (the "**Land Machination Objection**") (together the "**New Illegality Objections**").

504. The New Illegality Objections make no reference to the validity of the MDH Agreement or the Sembi Agreement. They rely, instead, on a distinct set of alleged events applied against different legal provisions of Serbian law. The Claimants will demonstrate *seriatim* below that: (*i*) the New Illegality Objections are belated and thus inadmissible; (*iii*) international law imposes strict limits on any illegality objections; and (*iii*) the Securities Law Objection and all the New Illegality Objections are all without merit.

a. Serbia's New Illegality Objections are inadmissible

505. Article 41(1) of the ICSID Arbitration Rules prescribes that jurisdictional objections must be raised "*as early as possible*", and in the counter-memorial at latest:

> Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible**.** A party shall file the objection with the Secretary-General *no later than the expiration of the time limit fixed for the filing of the counter-memorial*, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.[582]

506. The language of this provision is mandatory and unambiguous: all objections to the tribunal's jurisdiction "*shall be made as early as possible*" and "*no later than* [in] *the*

[580] Reply, ¶¶ 697-698.

[581] Rejoinder, ¶ 801 *et seq*.

[582] ICSID Arbitration Rules, Rule 41(1), **CLA-017**.

Counter Memorial."[583] As empathically observed by the tribunal in *Besserglik v. Mozambique*, the secondary rule means that any objection—unless it meets the sole exception addressed below—*must* be filed with the counter-memorial "*regardless of what happens*":

> The objections must be filed "in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial." *The language is unequivocal. The objections cannot be filed after the counter-memorial has been filed or the time for filing it has expired. The use of the words "in any event" means that the objections must be filed, before this date, regardless of what happens.*[584]

507. It is obvious that the New Illegality Objections do not comply with this rule, because they were only raised in Serbia's Rejoinder. This rule only knows one exception: a respondent may raise a jurisdictional objection later that in its counter-memorial if, and only if, the "*facts on which the objection is based are unknown to the party at that time*."[585] As further explained by the *Besserglik* tribunal, the respondent therefore carries a burden to prove that its objections are not based on facts "*which were known to Respondent or ought reasonably to have been so known*" at the time of filing of its counter-memorial.[586]

508. Accordingly, the New Illegality Objections would thus only be admissible if they were based on facts that Serbia could not have reasonably known on or before 19 April 2019, when it filed its Counter-Memorial.

509. This conclusion is further confirmed by Procedural Order No. 1. According to Article 15.3 thereof, the Parties should limit themselves to responding to arguments that had been raised in the previous submissions. Procedural Order No. 1 provides for a sole exception to this rule—it allows the Parties to make new arguments in case that "*new facts [...] have arisen after the first exchange of submissions*":

> In their second exchange of submissions (Reply and Rejoinder), the Parties shall, in principle, limit themselves to responding to allegations of fact and legal arguments made by the other Party in the first exchange

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583 ICSID Arbitration Rules, Rule 41(1), **CLA-017**.

584 *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 266, **RLA-167**.

585 ICSID Arbitration Rules, Rule 41(1), **CLA-017**.

586 *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 269, **RLA-167**.

> of submissions, unless new facts that have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.[587]

510. As shown below, the New Illegality Objections are based on factual allegations that have been known to Serbia well before 19 April 2019 and are thus contrary to both Article 41(1) of the ICSID Arbitration Rules and Article 15.3 of Procedural Order No. 1.[588]

511. *First*, the Non-Disclosure Objection is based on an assertion that Mr. Obradović violated Serbian law by allegedly failing to formally disclose Mr. Rand's beneficial ownership to the Privatization Agency.[589] Leaving aside the merits of this assertion, it is undisputed that Serbia had known of the Claimants' beneficial ownership at latest since August 2017, when it received the Claimants' Notice of Dispute ("**NoD**"). The NoD contained a detailed description of the Claimants' ownership structure and their acquisition and subsequent beneficial ownership and control of the Beneficially Owned Shares. The NoD thus already laid out all the facts and Claimants' jurisdictional arguments to which the Non-Disclosure Objection responds.

512. In its Counter-Memorial, Serbia did not raise the Non-Disclosure Objection, but rather sought to marginalize the importance of the Claimants' disclosure by raising a strawman that such a disclosure "*could not in any way create the right of property for Mr. Rand*."[590]

513. In making that argument, Serbia remarked in passing that had the Privatization Agency known about Mr. Rand's role, it would have never agreed to enter the Privatization Agreement with Mr. Obradović, "*in clear contravention to the Law on Privatization*."[591] Serbia did not corroborate on this single sentence. Nor did it explain which provision of the Law on Privatization had been purportedly violated by Mr. Obradović or the Claimants. Such a passing remark plainly did not constitute an objection to jurisdiction within the meaning of Article 41(1) of the ICSID Arbitration Rules.

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587 Procedural Order No. 1, Art. 15.3.

588 Procedural Order No. 1, Art. 15.3.

589 Rejoinder, ¶ 801 *et seq*.

590 Counter-Memorial, ¶ 255.

591 Counter-Memorial, ¶ 254.

514. The Non-Disclosure Objection—first raised in the Rejoinder, 30 months after Serbia's receipt of the NoD—is belated and inadmissible.

515. *Second*, the Money Siphoning Objection is based on an allegation that Mr. Obradović transferred money from BD Agro's accounts and used them for the payment for the purchase of the Beneficially Owned Shared, fulfilment of his investment obligations under the Privatization Agreement, and his personal enrichment.[592] These false allegations have been made against Mr. Obradović already in 2009, when the representatives of BD Agro's minority shareholders and employees complained to various Serbian organs, including the Privatization Agency, of the alleged "*suspicious transactions from BD Agro's accounts*."[593]

516. Moreover, Serbia has been in control of BD Agro since 2015, and from that time has known, or ought reasonably to have known, of the allegedly suspicious money transfers between BD Agro, Mr. Obradović and other Serbian companies owned by Mr. Rand. Yet, while these allegations form the bedrock of Serbia's Rejoinder, they were not even hinted at in the Counter-Memorial. The Money Siphoning Objection—raised at least a decade after Serbia first learned about these accusations—is belated and thus inadmissible.

517. *Third*, the Land Machination Objection is based on allegations that Mr. Obradović stripped BD Agro of some of its land and thereby purportedly extracted millions of euros from BD Agro and that he committed some of BD Agro's land to an illegal land swap with the Ministry of Agriculture.[594] Serbia emphasizes that these purported machinations have been since at least 2015 subject of a number of criminal complaints, investigations and, in case of the land swap, of ongoing criminal proceedings.[595] In fact, the very same State Attorney's Office that represents Serbia in this arbitration became aware of the land swap in 2010. Yet, Serbia did not spare a word on these alleged

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592 Rejoinder, ¶¶ 825-844.

593 Counter-Memorial, ¶ 179; Rejoinder, ¶ 265. *See* e.g. 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 Privatization Agency of 11 February 2010, **RE-118**.

594 Rejoinder, ¶¶ 845-850.

595 See e.g. Rejoinder, ¶¶ 412-415.

machinations in its Counter-Memorial. Accordingly, the Land Machination Objection is belated and inadmissible.

518. In sum, all of the New Illegality Objections are based on facts that had been known to Serbia well before the commencement of this arbitration an in any event well before the filing of Serbia's Counter-Memorial. The New Illegality Objections are thus belated and inadmissible.

519. *Finally*, the Claimants respectfully submit that the Tribunal should not exercise its discretionary power under Article 41(2) of the ICSID Arbitration Rules to hear the New Illegality Objections *ex officio*. In dismissing to use its discretionary powers under Article 41(2) of the ICSID Arbitration Rules, the *Vestey* tribunal held succinctly that "*the Tribunal's discretionary power to review its jurisdiction ex officio does not absolve the parties from compliance with ICSID Arbitration Rule 41(1).*"[596]

520. Serbia's strategic choice to only raise the New Illegality Objections in its Rejoinder was obviously premised on a gamble that the Tribunal would exercise its discretionary powers and would entertain the New Illegality Objections despite their belatedness and despite all the difficulties that their belated filing caused to the Claimants, who have only had six weeks to address them. The Tribunal should not reward Serbia for this gamble by hearing the New Illegality Objections *ex officio*.

b. Legality requirement under Canada-Serbia BIT and Serbia-Cyprus BIT

521. The Claimants agree with Serbia that the finding of illegality of investment may, under certain circumstance, remove the jurisdiction of an international tribunal. International law, however, imposes strict limitations on such illegality objections.

522. *First*, as Serbia correctly observes an "*important element of the legality requirement is its timing*."[597] Indeed, there is a clear consensus of investment tribunals that illegality may only affect the tribunal's jurisdiction if it occurred when the investment was made.

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596 Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 149, **CLA-032**.

597 Rejoinder, ¶ 785. *See also Hamester v. Ghana*, Award, ¶ 123, **RLA-115**; Minnotte v. Poland, Award, ¶ 131, **RLA-159**; Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, ¶ 129; **RLA-108**.

Any subsequent illegality may be relevant to the merits but is outside the scope of any jurisdictional inquiry. In the word of the *Pezold* tribunal, "*when determining whether an investment exists it is compliance with the laws at the time the investment is made that is pertinent. Any subsequent alleged breach of law would not affect whether the investment qualifies for protection under the BIT*."[598]

523. This temporal element alone wipes out the vast majority of Serbia's illegality objections. The Claimants' investment in the Beneficially Owned Shares was made on 4 October 2005 when Mr. Obradović entered into the Privatization Agreement, which formed the legal basis of Mr. Obradović's and thus also the Claimants' acquisition of the Beneficially Owned Shares.

524. The only two objections that could fall within the required temporal ambit are the Non-Disclosure Objection and the objection regarding the alleged illegality of the MDH Agreement and Sembi Agreement. The Siphoning Objection and Land Machination Objection are based on allegations that the Mr. Obradović and the Claimants took improper advantage of the Beneficially Owned Shares they had already acquired. These objections thus by definition cannot relate to the acquisition of the Beneficially Owned Shares and thus fall clearly outside the temporal ambit of any legality requirement under the Treaties or the ICSID Convention.

525. To overcome this strict temporal limitation, Serbia alleges that the legality requirement applies to "*the acquisition i.e. making*"[599] of the investment and that such "*making*" in this case cover the entire period from the conclusion of the Privatization Agreement until Mr. Obradović's full payment of the purchase price on 8 April 2011.[600] Serbia's improper terminological jugglery is of no avail and is bellied by Serbia's own legal authorities.

526. As held by the tribunal in Oxus "*legality affects the "making", i.e. arises when initiating the investment itself and not just when implementing and/or operating it*."[601] The

598 *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 420, **CLA-168**.

599 Rejoinder, ¶ 825.

600 Rejoinder, ¶ 826.

601 *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, ¶ 707, **RLA-123**.

tribunal in *Hamester v. Ghana* similarly observed that an investment will not be protected if it has been "*created*" in violation of law.[602]

527. In *Teinver*, the tribunal held—in the context of claimants' investment in shares acquired based on a share purchase agreement—that the scope of the jurisdictional inquiry is limited to the issue whether claimants "*committed any illegalities in entering the SPA*."[603] Conversely, "*once the contract has been executed*", any subsequent illegality is a matter of contractual performance and is not capable of affecting the tribunal's jurisdiction.[604]

528. Accordingly, Serbia's allegation that Mr. Obradović paid the purchase price for the Beneficially Owned Shares from BD Agro's own funds is incapable of extending the scope of the legality requirement beyond 4 October 2005, when Mr. Obradović and the Privatization Agency executed the Privatization Agreement.

529. *Second*, only fundamental violations of law that are necessary to the making of an illegal investment will deprive a tribunal of its jurisdiction. For example, the tribunal in *Liman Caspian* held that the tribunal's jurisdiction "*extend*[s] *also to those investments in respect of which the underlying transaction was made in breach of Kazakh law and was therefore voidable*."[605] The *Liman* tribunal also held that even if the investment is based on a transaction that is null and void, this would still not necessarily deprive the tribunal of its jurisdiction.[606]

530. Similarly *Allard v. Barbados*, the tribunal considered that even if the claimants' failure to obtain an approval of exchange control authority rendered his acquisition of shares null and void under Barbadian law, this would still not amount to a "*breach of*

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602 *Hamester v. Ghana*, Award, ¶ 123, **RLA-115**.

603 *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 Jurisdiction, 21 December 2012, ¶ 327, **CLA-169**.

604 *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 Jurisdiction, 21 December 2012, ¶¶ 326-328, **CLA-169**.

605 *Liman Caspian Oil BV and NCL Dutch Investments BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010 (excerpts), ¶ 187, **CLA-170**.

606 *Liman Caspian Oil BV and NCL Dutch Investments BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010 (excerpts), ¶ 187, **CLA-170**.

fundamental legal principles of Barbados" capable of removing the tribunal's jurisdiction.[607]

c. Serbia's Illegality Objections are unfounded

i. Securities Law Objections

531. Serbia's Securities Law Objection again incorporates by reference the arguments raised in Serbia's objections *ratione materiae*. The only additional argument relates to Mr. Rand's Indirect Shareholding. This 3.9% shareholding in BD Agro was gradually acquired by MDH Serbia between October 2008 and October 2012, and triggered an obligation of Mr. Obradović, Mr. Rand, MDH, Sembi and MDH Serbia to issue take-over for the remainder of BD Agro's shares not yet held by them.

532. According to Serbia, had this failure been discovered by Serbian authorities, all of such persons would lose their voting rights in BD Agro and thus control over the same.[608] This is not correct.

533. As explained by Ms. Tomić Brkušanin, the only sanction that the Serbian Securities Commission would have imposed consisted of: (*i*) temporary suspension of the MDH Serbia's right to vote the 3.9% shareholding; (*ii*) misdemeanor fine up to 3,000,000 dinars [approx. EUR 25 000]; and (*iii*) obligation to launch a mandatory take-over bid.[609]

534. However, while regrettable, the Claimants's omission to publish a take-over bid does not affect the Tribunal's jurisdiction, because it does not affect any fundamental legal principle of Serbian law. This is apparent from the fact that a failure to issue a takeover bid does not affect the validity of the respective transfer of shares, nor the ownership rights to the newly acquired shares.

ii. Non-Disclosure Objection

535. Serbia alleges that the Mr. Rand deceived the Serbian authorities when he allegedly failed to disclose his beneficial ownership to the Privatization Agency during the auction

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607 *Peter A. Allard v. Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014, ¶ 94, **CLA-171**.

608 Rejoinder, ¶ 823.

609 *See* Tomić Brkušanin First ER, ¶ 113.

for the Beneficially Owned Shares or thereafter. Serbia argues, in reliance on *Inceysa v. El Salvador* that this alleged misrepresentation of the "true buyer" of BD Agro should remove the Tribunal's jurisdiction. Serbia's objection is fundamentally flawed.

536. *First*, as the Claimants demonstrated throughout this arbitration, they have always disclosed their beneficial ownership to Serbian authorities, including the Privatization Agency. In fact, the-then Minister Bubalo actively encouraged Mr. Rand to invest in Serbia in general, and to BD Agro in particular. That alone estops Serbia from Non-Disclosure Objection.

537. *Second*, Serbia failed to identify a single provision of Serbian law that would require Mr. Obradović and/or Mr. Rand to formally disclose the beneficial ownership arrangement in the privatization process. Nor does Serbia point to a single misrepresentation made by Mr. Obradović. Instead, Serbia only attempts to infer this alleged disclosure obligation from Article 2 of the Law on Privatization. This provision observes that privatization is based on the principles of "*[c]reation of conditions for economic development and social stability*", "*[f]lexibility*" and, indeed, "*[t]ransparency*."[610] As Mr. Milošević explains, the principle of transparency only applies only to conduct of the public entities involved in the privatization process, and not the buyers.[611]

538. Moreover, even if this provision did apply to the buyer, the Law on Privatization does not provide any sanction for the breach of an alleged failure to act "flexibly" or "transparently." Tellingly, Serbia has failed to point to a single decision of any Serbian body, which would sanction a private entity for the breach of principle of transparency under Article 2 of the Privatization Agreement. It is thus obvious that the Non-disclosure Objection lacks any basis under Serbian law.

539. Finally, Serbia's reliance on *Inceysa v. El Salvador* is fundamentally misplaced. There, the dispute related to a bid for a service contract regarding the operation of mechanical inspection stations.[612] The bidding process required the bidder to submit a number of

610 Law on Privatization, Article 2, **CE-220**.

611 Milošević Third ER, ¶ 70.

612 *Inceysa v. El Salvador*, Award, ¶ 3, **RLA-019**.

documents relating to its capacity to perform the contract.[613] *Incesya* won the bid, the tribunal found, based on clear misrepresentations and forgeries regarding its financial situation, experience and a capacity, and connection to strategic partners.[614] The Tribunal dismissed its jurisdiction on that basis.

540. *Incesya* is fundamentally inapposite. Unlike the claimant in *Incesya*, Mr. Obradović or the Claimants did not commit any misrepresentations or fraud. Moreover, unlike the respondent in *Incesya*, Serbia failed to identify any prejudice suffered as a result of the alleged misrepresentation.

541. The Non-Disclosure Objection lack any merits and must be dismissed accordingly.

iii. The Siphoning Objection

542. In raising the Siphoning Objection, Serbia merely repeats in the legal section the incorrect assertions it had already made in the factual section. The Claimants will not respond in kind. As shown above, Serbia failed to demonstrate any impropriety with respect to the money transfers between Mr. Obradović and BD Agro or between BD Agro, Mr. Obradović and Serbian companies beneficially owned by Mr. Rand.

543. The legal conclusion Serbia draws from its factual allegation is that Mr. Obradović's allegedly improper money transfers from BD Agro's account constituted fraud. Yet, there are no criminal proceedings pending against Mr. Obradović regarding such a fraud. Moreover, as shown above, the Siphoning Objection is not only inadmissible but also outside of the temporal scope of the legal requirement.

iv. The Land Machination Objection

544. The Land Machination Objection is again merely a repetition of the factual assertions made elsewhere in Serbia's Rejoinder. The Claimants have demonstrated above that all of the impugned transactions with BD Agro's land were legitimate.

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613 *Inceysa v. El Salvador*, Award, ¶ 26, **RLA-019**.

614 *Inceysa v. El Salvador*, Award, ¶ 110, ¶ 117-118, **RLA-019**.

545. Although Serbia now alleges that the transaction with BD Agro's land constituted violation of the Privatization Agreement, the Privatization Agency never alleged anything of the kind.

546. Moreover, even under Serbia's characterization, the transactions would only relate to the *performance* of the Privatization Agreement, rather than to the conclusion thereof. As such, the Land Machination Objection are plainly incapable to affect the Tribunal's jurisdiction.

2. The Tribunal has jurisdiction over Mr. Rand's claims in relation to Mr. Rand's Indirect Shareholding

a. Mr. Rand is perfectly entitled to assert claims on his own behalf for compensation for losses sustained to his indirect interest in BD Agro pursuant to Article 21(1) of the Canada-Serbia BIT

547. In its Rejoinder, Serbia continued to remain willfully blind to the actual nature of Mr. Rand's claim in relation to his Indirect Shareholding, insisting, once more, that Mr. Rand seeks redress for injuries sustained by his wholly owned company MDH Serbia—and not his own direct injuries. And, once more, Serbia concludes that Article 21(1) of the Canada-Serbia BIT is not the proper avenue for Mr. Rand to do so, because that provision, Serbia says, does not cover shareholder claims for "indirect" or—a novelty of the Rejoinder—"reflective" losses.

548. Serbia's objection suffers from two fatal defects: (*i*) it distorts the Claimants case; and (*ii*) it relies on a customary international law theory barring individual shareholder claims for "reflective losses," *which has no relevance in investment arbitration.*

549. *First*, Serbia's objection fails because it is based on the false premise that Mr. Rand asserts a claim for *MDH Serbia's loss under Article 21(2) of the Canada-Serbia BIT*. He does not. Mr. Rand asserts—and always has asserted[615]—a claim in his own name for compensation for injuries sustained *directly to his (indirect) interest* in BD Agro, stemming from Serbia's unlawful interference in BD Agro's business, which prevented BD Agro's survival and the sale of its assets—which, in turn, deprived Mr. Rand's shares in BD Agro of any value. This is a typical claim for an indirect shareholder's

[615] Notice of Dispute, ¶¶ 119, 137; Request for Arbitration, ¶¶ 188, 242; Memorial, ¶¶ 299, 387, 405, 408, 563, 565-569; Reply to Request for Bifurcation, ¶¶ 34, 36, 52-56; Reply, ¶¶ 703-712.

loss that is commonplace in investment arbitration. Mr. Rand, therefore, has properly filed his claim *on his own behalf under Article 21(1) of the Canada-Serbia BIT*.

550. *Second*, Serbia's attempt to find solace in the so-called "no reflective loss" theory, which was adopted by the ICJ in its 1970 decision in the *Barcelona Traction* case addressing diplomatic protection under customary international law, is unavailing for the simple reason that *no such theory applies in investment treaty arbitration.*

551. Under that theory, shareholders would only have an independent cause of action for injuries that "directly" affect their shareholder rights, such as a direct seizure of their shares. On the other hand, reflective shareholder losses (or "indirect" losses) that are a mere corollary to the company's losses, typically a diminution in value in shares, would only be recoverable by means of a shareholder derivative action on behalf of that company. The NAFTA parties have argued in favor of that theory—which they usually describe as the "*Barcelona Traction rule*"—in their interpretation of Articles 1116 and 1117 of the NAFTA (NAFTA's equivalents of Articles 21(1) and 21(2) of the Canada-Serbia BIT), and that interpretation was unanimously rejected by all investment arbitration tribunals.

552. The response of international investment tribunals has been unequivocal and systematic: *no customary international law rule barring shareholder reflective loss claims applies in investment arbitration*. In other words, shareholders absolutely have (and, as previously mentioned, abundantly use) the right to submit investment claims for losses sustained as a result of state measures, which caused harm to a company in which they hold shares. Both NAFTA and non-NAFTA tribunals have adopted this position with exceptional consistency, developing, as noted by a number of commentators, a *jurisprudence constante* on the issue.[616]

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616 *See, e.g.*, C. Schreuer, *Shareholder Protection in International Investment Law*, 23 May 2005, p. 20 ("*Shareholder protection extends not only to ownership in the shares but also to the assets of the company. Adverse action by the host State in violation of treaty guarantees that affect the company's economic position gives rise to rights by [sic] the shareholders*."), **CLA-158**; R. Dolzer & C. Schreuer, *Principles of International Investment Law*, (2d ed., 2012), ¶ 57 ("*Most investment treaties offer a solution that gives independent standing to shareholders: the treaties include shareholding or participation in a company in their definitions of 'investment.' In this way, it is not the locally incorporated company that is treated as a foreign investor; rather, the participation in the company becomes the investment. (...) The shareholder may then pursue claims for adverse action by the host state against the company that affects its value and profitability. Arbitral practice illustrating this point is extensive*."), **CLA-130**.

553. This was also the case for the tribunal in *GAMI v. Mexico* chaired by Professor Paulsson. The heart of the debate, in that case, was whether GAMI, a Delaware-incorporated company, which held a minority interest in GAM, one of Mexico's largest sugar producers, was entitled to claim compensation for the diminution in value of its stake in GAM, as a result of Mexico's measures that had damaged GAM's business. The tribunal first held, in response to the United States' reliance on the "*Barcelona Traction rule,*" that the reasoning of the ICJ adopted in that case was not germane to investment arbitration:

> *The Tribunal however does not accept that Barcelona Traction established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection*. The ICJ itself accepted in ELSI that US shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of *measures imposed on that entity*.[617]

554. The *Gami* tribunal then went on to explain that shareholder protection in investment arbitration is not limited to injuries stemming from a state's direct interference with share ownership. Rather, so long as the state's breach "*leads with sufficient directness to loss or damage in respect of a* [shareholder's] *given investment*," the *Gami* tribunal reasoned, the shareholder is entitled to recover such loss:

> The Tribunal does not accept that directness for the purposes of NAFTA Article 1116 is a matter of form. *The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment.* Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.[618]

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617 *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 30, (emphasis added), **CLA-159**.

618 *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 33, (emphasis added), **CLA-159**.

555. Based on that analysis, the *Gami* tribunal upheld jurisdiction in respect of all of Gami's claims.[619]

556. Numerous other tribunals, including the tribunals in *RREEF v. Spain*,[620] *Pope Talbot v. Canada,*[621] *Mondev v. Canada*,[622] *Enron v. Argentina*[623] or *Siemens v. Argentina*,[624] have followed the same line of reasoning.

557. In fact, the tribunal in the *Bilcon v. Canada* case, relied on by Serbia, is the only tribunal to have held that, *in theory*, reflective loss could not be compensated under Article 1116 of the NAFTA. However, the same tribunal *de facto* awarded compensation for reflective loss under Article 1116 of the NAFTA on the theory that the claimants' Canadian company was a mere conduit to facilitate the claimants' operations.[625] There can be no doubt that, on the erroneous reasoning of the *Bilcon* tribunal, MDH Serbia was also a mere conduit to facilitate Mr. Rand's business in Serbia.

558. A shareholders' ability to claim for harms suffered to their shares is only logical: if an investment treaty defines investment to include shares, it makes little sense to prevent

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[619] *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 43, **CLA-159**.

[620] *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 Jurisdiction, 6 June 2016, ¶ 120, **CLA-160**.

[621] *Pope & Talbot Inc. v. Government of Canada,* UNCITRAL, Award in Respect of Damages, 31 May 2002, ¶¶ 79-80, **CLA-132**.

[622] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 79, (emphasis added) **RLA-039**.

[623] *Enron Corporation and Ponderosa Assets LP v. The Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶¶ 46, 49, **CLA-161**.

[624] *Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶¶ 136-144, **CLA-162**.

[625] The *Bilcon* tribunal had to decide whether it was permissible under Article 1116 to compensate the investors for the "loss of opportunity" to invest in a quarry terminal as a result of Canada's unlawful conduct, when that loss was presumably the investors' "reflective loss," corollary to that of the investors' wholly-owned subsidiary, Bilcon of Nova Scotia, which was established for the purposes of operating the prospective quarry. The tribunal's finding that, theoretically, reflective loss could not be compensated under Article 1116 was immediately defeated by its decision to compensate the investors. Bilcon of Nova Scotia, the tribunal noted, had been but "a *conduit to facilitate the Claytons' operations*." In these circumstances, the tribunal held, the compensation was due directly to the investors, and was permissible under Article 1116. The tribunal's reasoning is thus reminiscent of that of other NAFTA tribunals, such as the *GAMI* tribunal, which focus on the directness between the state's breach and the loss incurred, and seek to determine the true identity of the party affected by that state's breach. *Bilcon of Delaware et al v. Government of Canada,* PCA Case No. 2009-04, Award on Damages, 10 January 2019, ¶¶ 390-397, **RLA-154**.

investors from seeking redress for the damage inflicted to their shares. As Professor McLachlan aptly put it:

> Given the wide definition of investment contained in most bilateral investment treaties, *if an 'investment' can include shares in a company there is no conceptual reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value. ... The simplest approach to justify claims [for reflective loss] is ... based upon the wording of the treaty*.[626]

559. Based on the foregoing, there can be no doubt that Mr. Rand is entitled to seek compensation for the diminution in value of his shares in BD Agro, indirectly held through MDH Serbia, under Article 21(1) of the Canada-Serbia BIT. That is because Mr. Rand brought his interest, in the words of the *Mondev* tribunal, "*within the scope of the relevant provisions and definitions*" of the Canada-Serbia BIT—namely:

- Article 21(1) provides that "***An investor** of a Party **may submit to arbitration** […] **a claim that: (a) the respondent Party has breached an obligation** […]; and (b) **the investor has incurred loss** or damage by reason of, or **arising out of, that breach***;"[627]

- Article 1 defines an "***investor of a Party***" as "*a Party, or **a national** or an enterprise of a Party, **that** seeks to make, is making or **has made an investment***;"[628]

- Article 1 includes "***shares***" in the definition of "*investment*;"[629] "*covered investment*" means "*with respect to a Party, an **investment** in its territory that is **owned** or controlled, **directly or indirectly by an investor of the other Party***."[630]

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626 C. McLachlan, L. Shore, M. Weiniger., *International Investment Arbitration: Substantive Principles* (2017) §§ 6.77, 6.79, (emphasis added), **RLA-105**.

627 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 21(1), (emphasis added) **CLA-001**.

628 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "investor of a Party," (emphasis added) **CLA-001**.

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

630 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of "covered investment," (emphasis added) **CLA-001**.

560. In view of the above provisions, Mr. Rand's Indirect Shareholding *undisputedly* qualifies as a protected investment under the Canada-Serbia BIT, which expressly defines investment to include shares. Indeed—and fundamentally—*Serbia itself does not dispute this*. Because Serbia's unlawful interference in BD Agro caused harm to Mr. Rand's investment—that is, his indirectly held BD Agro shares—by depriving it of any value, Mr. Rand has properly submitted a claim for investor losses under Article 21(1) of the Canada-Serbia BIT as the permissive language of Article 21(1) allows him to do.

561. For the sake of completeness, the Claimants note that Serbia's position in respect of Mr. Rand's standing to pursue claims in relation to his Indirect Shareholding appears to be riddled with inconsistencies. Although Serbia uses the terms "*reflective*" and "*indirect*" to qualify Mr. Rand's *loss*, Serbia is presumably complaining not only of the *indirectness of the harm* caused to Mr. Rand's shares in BD Agro, but also of the *indirectness of the manner in which he holds such shares*. To be sure: the plain language of the Canada-Serbia BIT mutes both issues at once because it grants standing not only to direct shareholders, but also to shareholders, like Mr. Rand, who own shares "*indirectly*" through intermediate companies, such as MDH Serbia (under Article 1, "*shares*" are an "*investment*," which, in turn, may be owned "*indirectly*"). This is, once again, fully consistent with basic principles of international investment law—as ample authority confirms.[631]

562. In sum: Mr. Rand is perfectly entitled to seek damages for injuries sustained to his indirectly held shares as a result of Serbia's unlawful conduct targeting BD Agro under Article 21(1) of the Canada-Serbia BIT, and Serbia's colorful attempts to argue otherwise are in vain.

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[631] *See, e.g.*, *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, ¶ 73, **CLA-064** (holding that "*given the wide meaning of investment in the definition in Article I.1(a), the provisions of the [US-Argentina] BIT protect indirect claims*")*; Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 137 (finding that the absence of a specific reference to indirect shareholding in the underlying treaty was not a bar to indirect shareholder claims under that treaty since the latter defined "investment" to include "shares"), **CLA-162**; *Enron Corporation and Ponderosa Assets LP v. The Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶¶ 49, 56-57 (granting standing to a minority indirect shareholder, who invested in a string of locally incorporated companies that in turn invested in the operating company, to pursue its claim for losses stemming from Argentina's measures, which had affected the operating company), **CLA-161**.

b. An initial absence of a waiver from MDH Serbia—which was not even required in the first place—does not affect the Tribunal's jurisdiction

563. In their Reply, the Claimants extensively explained that, because Mr. Rand has properly filed his claim under Article 21(1) of the Canada-Serbia BIT, the sole waiver that Mr. Rand was ever required to submit (and has, in fact, submitted) was his own waiver under Article 22(2)(e)(ii).[632]

564. In addition, whether or not the Claimants were to submit also a waiver from MDH Serbia, the Claimants further explained, was merely a matter of form because neither Mr. Rand nor MDH Serbia ever initiated any parallel proceedings (which is undisputed), and the true purpose of the waiver requirement was, thus, in any event fulfilled. Still, to put an end to Serbia's unwarranted and purely formalistic insistence on the submission of MDH Serbia's waiver, the Claimants provided the waiver on MDH Serbia's behalf on 4 October 2019, concurrent with the submission of the Reply.[633] Mr. Rand and MDH Serbia thus clearly complied—both formally and materially—with all the actual as well as potential waiver requirements under the Canada-Serbia BIT. As a result, Serbia's waiver objection was rendered moot.

565. Now that Serbia can no longer ground its objection on the absence of a—wholly unnecessary—waiver from MDH Serbia, it challenges the manner in which that waiver was submitted. Serbia's arguments are, once again, completely untenable.

566. According to Serbia, the submission of MDH Serbia's waiver along with the Reply could not possibly "cure" the initial absence of that waiver because, to comply with the requirements of Article 22(2) of the Canada-Serbia BIT, MDH Serbia's waiver would have had to be submitted "*at the time the claim is submitted to arbitration.*"[634] Absent the submission of the waiver with the Claimants' Request for Arbitration, Serbia

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[632] The Claimants also made clear that, contrary to Serbia's contentions, Article 22(2)(e)(iii) of the Canada-Serbia BIT would have only been applicable if Mr. Rand claimed for the losses caused to his interest in MDH Serbia—which he fully owns and controls. Because Mr. Rand makes no claim for losses to his interest in MDH Serbia, but seeks compensation for the losses to his (indirect) interest in BD Agro, Article 22(2)(e)(iii) of the Canada-Serbia BIT, with its requirement to submit a waiver from the locally incorporated enterprise, does not apply here. *See*, Reply, ¶¶ 705, 711-717.

[633] MDH Serbia's waiver, 31 May 2019, **CE-793**.

[634] Serbia's Rejoinder, ¶ 872.

concludes, Serbia's "*consent to arbitrate and a valid arbitration agreement did not materialize*."[635]

567. Serbia's extremely formalistic approach regarding the requirement under Article 22(4) of the Canada-Serbia BIT that waivers be included "*in the submission of a claim to arbitration*" stands in stark contrast with a consistent line of case law of the NAFTA tribunals interpreting Article 1121(3) of the NAFTA—which contains that very same requirement.[636]

568. For example, the NAFTA tribunal in *Ethyl v. Canada* was faced with Canada's objection that Ethyl, the US claimant in that case, along with Ethyl Canada, Ethyl's Canadian subsidiary, should have provided the requisite waivers under Article 1121 of the NAFTA with the Notice of Arbitration instead of providing them with the Statement of Claim. As a result, the claimant contended, the tribunal had no jurisdiction. The *Ethyl* tribunal disagreed. It first noted that the waiver requirements under Article 1121 had limited practical significance to the extent that investors effectively waive their rights to pursue remedies in other fora from the moment they initiate arbitration:

> The Tribunal has not gained any insight into the reasons for the *formalities prescribed by Article 1121, which on their face seem designed to memorialize expressis verbis what normally is the case in any event, namely, that the initiation of arbitration constitutes consent to arbitration by the initiator, whereby access to any court or other dispute settlement mechanism is precluded* (except as allowed ancillary to or in support of the arbitration). The Tribunal likewise is uninformed as to any reasons for Ethyl's not having provided the required documentation with the Notice of Arbitration, and equally is unaware of any resulting prejudice to Canada.[637]

569. The *Ethyl* tribunal then concluded that Ethyl's submission of the waiver with its Statement of Claim rather than with its Notice of Arbitration had no bearing on its

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635 Serbia's Rejoinder, ¶ 872.

636 Art. 1121(3) of NAFTA reads:

"*A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.*" North American Free Trade Agreement (NAFTA), Art. 1121(3), **RLA-026**.

637 *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 24 June 1998, ¶ 90 (emphasis added), **CLA-163**.

jurisdiction because the requirement that the waivers be submitted together with the submission of a claim to arbitration was purely formal:

> *The Tribunal has little trouble deciding that Claimant's unexplained delay in complying with Article 1121 is not of significance for the jurisdiction in this case*. While Article 1121's title characterizes its requirements as "Conditions Precedent," it does not say to what they are precedent. Canada's contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern. *Article 1121(3), instead of saying "shall be included in the submission of a claim to arbitration" - in itself a broadly encompassing concept - could have said "shall be included with the Notice of Arbitration" if the drastically preclusive effect for which Canada argues truly were intended. The Tribunal therefore concludes that jurisdiction here is not absent due to Claimant's having provided the consent and waivers necessary under Article 1121 with its Statement of Claim rather than with its Notice of Arbitration.*[638]

570. The tribunal in *Thunderbird v. Mexico* reached the same conclusion:

> Although Thunderbird failed to submit the relevant waivers with the Notice of Arbitration, Thunderbird did proceed to remedy that failure by filing those waivers with the PSoC. *The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA. The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings*. The Tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.[639]

571. The *Pope & Talbot* tribunal similarly held:

> In any case, *there is nothing in Article 1121 preventing a waiver from having retroactive effect to validate a claim commenced before that date. The requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made*. Rather

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638 *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 24 June 1998, ¶ 91 (emphasis added), **CLA-163**.

639 *International Thunderbird Gaming Corporation v. The United Mexican States,* UNCITRAL, Arbitral Award, 26 January 2006, ¶ 117 (emphasis added) **CLA-095**.

> it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected.[640]

572. It follows from the above decisions that the Claimants' submission of MDH Serbia's waiver at a later stage of the proceedings is perfectly adequate—all the more so since the submission of such waiver was not even required in the first place. Indeed, for Serbia to insist otherwise defies basic principles of international law. As the *Mondev* tribunal observed:

> International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved.[641]

573. The particular wording of Article 25(1) of the Canada-Serbia BIT (not present in the NAFTA), which provides that the "[f]*ailure to meet a condition precedent listed in Article 22 nullifies* [the Contracting Parties'] *consent*," does not change anything to that conclusion—despite Serbia's persistent assertions to the contrary. Tribunals obviously have interpretive leeway to decide on the type of acts or omissions, which could be deemed to be tantamount to a "failure" that nullifies the Contracting Parties' consent and deprives the Tribunal of jurisdiction. *Not just any defect in waivers* is of course capable of depriving the Tribunal of jurisdiction. Quite the contrary: only where the purpose of the waiver requirement—that is, to avoid multiplicity of proceedings and minimize the risk of double recovery—was *gravely compromised* did a number of NAFTA[642] and non-NAFTA[643] tribunals refuse to hear the underlying claims (regardless of whether or not the applicable treaty expressly specified that a failure to meet a condition precedent to arbitration nullified consent).

574. This was also the case for the tribunal in *Renco v. Peru*. In that case, Renco submitted a waiver containing an express reservation of rights to initiate subsequent proceedings

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640 *Pope & Talbot Inc. v. The Government of Canada,* UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada ("The Harmac Motion"), 24 February 2000, ¶ 18, (emphasis added) **CLA-107**.

641 *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 86, **RLA-039**.

642 *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, ¶¶ 27-31**, CLA-096**.

643 *The Renco Group, Inc. v. The Republic of Peru,* ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 119, **CLA-097**; *Commerce Group Corporation and San Sebastian Gold Mines Inc. v. The Republic of El Salvador,* Award, ICSID Case No. ARB/09/17, 14 March 2011, ¶¶ 79-115, **CLA-098**.

in domestic courts. In other words, Renco submitted a waiver, which allowed Renco to do exactly what the waiver requirement was designed to prevent. Indeed, the tribunal reasoned that such a waiver *ab initio* undermined the very object and purpose of the waiver requirement.[644] As a result, the tribunal did not allow Renco to cure the defect, and refused to hear Renco's claims.[645]

575. Serbia's reliance on *Renco v. Peru* in support of its position that the initial absence of MDH Serbia's waiver automatically nullified Serbia's consent, and could thus not be cured, is clearly misplaced: the situation in *Renco v. Peru* is plainly incomparable to the case at hand. MDH Serbia, unlike Renco, fulfilled the purpose of the waiver requirement from the outset, and the Claimants' subsequent submission of MDH Serbia's waiver merely confirmed that fact.

576. In sum, even assuming, arguendo, that MDH's waiver was required—and it was *not*—by submitting MDH Serbia's waiver with their Reply, the Claimants have definitively complied with all the possible waiver requirements under the Canada-Serbia BIT, and Serbia's superfluous contentions suggesting otherwise must be rejected.

c. Serbia's waiver objection was raised too late and amounts to an *abus de droit*

577. Finally, Serbia's objection must be dismissed because it was raised belatedly and in bad faith.

578. *First*, Serbia raised its objection more than a year after it first had the opportunity to do so because the pre-registration communications between the Parties and the ICSID Secretariat directly addressed the issue of compliance with applicable waiver requirements.[646] In raising the waiver objection only in its Counter-Memorial, Serbia

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644 *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶¶ 84-87, 184, **CLA-097**.

645 It bears mentioning that, even in such a flagrant case of breach of the waiver requirement, the *Renco* tribunal was redundant to draw all the consequences therefrom. In particular: (i) the decision not to allow Renco to cure the defect was decided by the majority of the tribunal only; (ii) Renco was allowed to resubmit a new claim with a clean waiver; and (iii) when apportioning arbitration costs, the *Renco* tribunal departed from the presumption that Renco must bear the costs of the arbitration, deciding that both parties bear their own costs. *See The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Final Award, 9 November 2016, ¶¶ 31-50, **CLA-164**.

646 Letter from ICSID to the Claimants, 13 March 2018, **CE-794**; Letter from the Claimants to ICSID, 16 March 2018, **CE-795**.

thus failed to comply with ICSID Arbitration Rule 41(1), which provides that objections to jurisdiction must be raised "*as early as possible*."[647]

579. In its Rejoinder, Serbia retorts that its objection complies with ICSID Arbitration Rule 41(1) because it was filed within the time limit fixed for the filing of the Counter-Memorial.[648]

580. This reasoning is yet another illustration of Serbia's excessively formalistic approach towards international investment law. As the Claimants have already explained, ICSID Arbitration Rule 41(1) is an expression of a broader duty of procedural good faith. The purpose of that provision, therefore, is to make sure that the parties' procedural rights are guaranteed. To fulfill that purpose, tribunals bear in mind the particular type of objection that the respondent state raises—and treat it accordingly.

581. Serbia's waiver objection falls within the category of objections having regard to procedural conditions to the parties' consent to jurisdiction. Therefore, Serbia's objection does not comply with ICSID Arbitration Rule 41(1) even though it was submitted within the Counter-Memorial because for the sake of procedural good faith, objections having regard to procedural conditions to consent be raised "*as early as possible.*"

582. The need to preserve procedural good faith was stressed by the tribunal in *AMTO v. Ukraine* when it addressed Ukraine's belated objection to AMTO's alleged failure to comply with the amicable settlement requirements under Article 26(2) of the ECT, which, just like waiver requirements, constitute procedural conditions to the parties' consent to arbitration. Ukraine raised the objection even though it remained silent about the alleged failure at the time when it received AMTO's allegedly defective "claim letters" before the initiation of the arbitration. The *AMTO* tribunal concluded that as a matter of procedural good faith, Ukraine was required to raise its objections immediately upon receipt of the claim letters and by failing to do so, recognized the existence of the dispute and the validity of the claim letters:

> Additionally, *a State party that considers the amicable settlement requirements of Article 26(2) have not been complied with by an*

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647 ICSID Convention, Regulation and Rules, Rule 41(1), **CLA-017**.

648 Rejoinder, ¶ 875.

> *Investor has an obligation, as a matter of procedural good faith, to raise its objections immediately*. This ensures the Investor can, if necessary, remedy the defect so that both parties are in a position to engage in the amicable settlement discussions envisaged by the ECT, and thereby help to preserve their long term cooperation in the energy sector. Accordingly, *the Tribunal finds that by failing to raise any immediate objection to the Claim Letters, the Respondent recognized the existence of the dispute and the validity of the Claim Letters*.[649]

583. The conclusion of the *AMTO* tribunal applies with full force here: by failing to object in the pre-registration phase to the Claimants' purported non-compliance with the waiver requirements under the Canada-Serbia BIT, Serbia, just as Ukraine, recognized the sufficiency of the waivers submitted by the Claimants and lost its right to object thereto in the present proceedings.

584. Serbia next argues that the Tribunal would, in any event, *have* to raise the issue on its own initiative under ICSID Arbitration Rule 41(2), as in the recent decision in *Besserglik v. Mozambique.*[650]

585. Serbia's proposition is defied by the express terms of ICSID Arbitration Rule 41(2):

> The Tribunal *may* on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.[651]

586. The permissive language of that provision makes clear that the present Tribunal absolutely does not have an obligation to examine any jurisdictional objection on its own initiative.

587. The *Besserglik v. Mozambique* case does not lead to a different conclusion. In that case, Mozambique raised an objection that the underlying *South Africa-Mozambique BIT was not in force* some three years after the initiation of the proceedings. The tribunal agreed to hear the belated objection under Article 45(3) of the ICSID Additional Facility Rules

649 *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Award, 26 March 2008, ¶ 53 (emphasis added), **RLA-090**.

650 Rejoinder, ¶ 883.

651 ICSID Convention, Regulation and Rules, Rule 41(2), (emphasis added) **CLA-017**.

because it considered that the objection directly concerned the *very existence* of the parties' consent to arbitration.[652]

588. The *Besserglik v. Mozambique* decision shows that ICSID Arbitration Rule 41(2) is reserved for exceptional circumstances—which are not present here. A purported failure to submit a waiver in due time clearly does not warrant the use of ICSID Arbitration Rule 41(2).

589. *Second*, if there were any doubt that Serbia's objection was abusive, that doubt is now gone. If Serbia truly sought to vindicate its waiver rights by means of its waiver objection, the submission by the Claimants of MDH Serbia's waiver—*expressly confirming* that MDH Serbia would not seek redress elsewhere—would have necessarily put an end to Serbia's complaints. Serbia's persistence shows that Serbia only seeks to "*evade its duty to arbitrate*," as the *Renco* tribunal put it,[653] and its waiver objection thus plainly amounts to an *abus de droit*.

590. Contrary to Serbia's suggestions, it is of course irrelevant that the *Renco* tribunal did not reach this conclusion when considering Renco's argument to the effect that Peru committed an abuse of rights when it advanced an objection relating to Renco's waiver. In *Renco v. Peru*, the tribunal had a good reason for rejecting that argument because Renco had submitted a waiver, which contained a reservation of rights to initiate subsequent proceedings, thus blatantly defying the purpose of any waiver requirement. Neither Mr. Rand, nor MDH Serbia did anything of the sort.

591. In sum: Serbia's waiver objection is both belated and abusive, and the Tribunal shall have little hesitation in dismissing it in its entirety.

E. The Tribunal has jurisdiction *ratione temporis* over the Claimants' claims under the Canada-Serbia BIT

592. The scope of the Tribunal's temporal jurisdiction under the Canada-Serbia BIT is defined in two provisions. The first one is Article 22(ii)(e)(i). Article 22(ii)(e)(i) prescribes that eligible investors bring their investment claim no later than three years

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652 *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 315, **RLA-167**.

653 *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 185 **CLA-097**.

"*from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby.*"[654] The second one is Article 21(1), which provides that investors may only assert claims for host state's breaches of the Canada-Serbia BIT. This means that the Tribunal can only have jurisdiction over measures, which were adopted (or ongoing) when or after the Canada-Serbia BIT entered into force on 27 April 2015.

593. The heart of the Claimants' case in this arbitration is Serbia's unlawful termination of the Privatization Agreement and subsequent seizure of the Beneficially Owned Shares. These two measures, adopted in the autumn of 2015, immediately deprived the Claimants of their investment in Serbia, and prompted them to initiate the present arbitration less than three years later, on 14 February 2018.

594. It could scarcely be clearer that the Claimants' claims comply with the time limitations under the Canada-Serbia BIT, and thus fall within the Tribunal's temporal jurisdiction.

1. Serbia continues to impermissibly mischaracterize the factual basis of the Claimants' claims

a. It is for the Claimants—not for Serbia—to formulate the factual basis for their claims for the purposes of jurisdiction *ratione temporis*

595. In their Reply, the Claimants explained that it is for the Claimants—not for Serbia—to formulate their claims and identify Serbia's measures that the Claimants deem to constitute breaches of the Canada-Serbia BIT. Not only is this principle widely recognized in international investment law, it is also expressly embodied in the Canada-Serbia BIT. Article 22(2)(e)(i) of the Canada-Serbia BIT provides that "*[a]n investor may submit a claim to arbitration [...] only if [...] not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the* ***alleged breach*** *[...].*"[655] This same wording is reiterated in Article 22(2)(e)(ii), which requires that the investor waive its right to initiate or continue proceedings with respect to "*the measure of the Respondent Party that is* ***alleged to be***

[654] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 22(2)(e)(ii), **CLA-001**.

[655] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 22(2)(e)(i) (emphasis added), **CLA-001**.

a breach."[656] The ordinary meaning of the term "alleged," in this context, is "pleaded" or "claimed." There is thus no doubt that the Tribunal must make its jurisdictional assessment on the basis of the Claimants' characterization of their claims.

596. The Tribunal's decision not to bifurcate the present proceedings has strictly no bearing on this conclusion, as Serbia now vehemently, but nonetheless erroneously, suggests.[657] This is confirmed by numerous authorities. For example, the tribunals in *Eli Lilly v. Canada*, *Glamis Gold v. United States* and *Infinito v. Costa Rica*—the first two of which considered time bar objections under similarly worded treaties—all have concurred that only those factual measures that *the claimants allege* constitute respondents' breaches of the underlying treaties are relevant for the purposes of their jurisdictional determinations.[658] These tribunals reached that conclusion regardless of whether they had decided to bifurcate the proceedings—this was the case for the *Infinito* tribunal—or not—the *Glamis* and *Eli Lilly* tribunals heard jurisdictional issues together with the merits.

597. While international investment law of course allows Serbia to dispute the Claimants' compliance with the time limitation requirements under the Canada-Serbia BIT, it certainly does not allow Serbia to recast the Claimants' claims and manufacture a *ratione temporis* objection on that basis. *For that reason alone*, Serbia's entire *ratione temporis* objection falls flat.

b. The Claimants' claims are not be based on acts predating the Canada-Serbia BIT—as Serbia erroneously suggests—because such acts could not possibly amount to Serbia's breaches of its obligations under the Canada-Serbia BIT

598. Throughout this arbitration, the Claimants have made abundantly clear that they challenge the following three instances of Serbia's conduct: *(i)* the continuous refusal to release the pledge over the Privatized Shares; *(ii)*, the unjustified and arbitrary investigation of BD Agro by the Ombudsman and the unlawful issuance of his

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656 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 22(2)(e)(ii) (emphasis added), **CLA-001**.

657 Rejoinder, ¶¶ 948 *et seq*.

658 *Infinito Gold Ltd. v. Republic of Costa Rica,* ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶ 187, **CLA-103**; *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award, 8 June 2009, ¶ 349, **RLA-127**; *Eli Lilly and Company v. The Government of Canada,* UNCITRAL, ICSID Case No. UNCT/14/2, Award, 16 March 2017, ¶¶ 163-165, **RLA-128**.

"recommendations;" and *(iii)* the unlawful termination of the Privatization Agreement and the subsequent unlawful seizure of the Beneficially Owned Shares.

599. Nowhere in their submissions did the Claimants ever argue that the Privatization Agency's finding of the purported violation of the Privatization Agreement, which was notified to Mr. Obradovic for the first time in March 2011, constituted the basis of their claims, as Serbia persistently suggests. Fundamentally, the Claimants could not even theoretically base their claims on the Privatization Agency's first notice (nor any other subsequent notices) for the simple reason that the first notice could not possibly amount to Serbia's breach of its obligations under the Canada-Serbia BIT because the Canada-Serbia BIT was not in force at that time.

600. To be clear: the Claimants obviously *mention* in their submissions the Privatization Agency's notifications as well as the Privatization Agency's other problematic actions that also predate the Canada-Serbia BIT. The Claimants, however, do not refer to these pre-treaty facts because they would consider such facts to constitute Serbia's breaches of the Canada-Serbia BIT. Rather, the Claimants refer to these facts because they provide an important background to Serbia's subsequent breach of its Treaty obligations. This is of course absolutely permissible—and indeed, common practice—under international investment law. As the tribunal in *Spence v. Costa Rica* put it:

> *Pre-entry into force acts and facts cannot* therefore, in the Tribunal's estimation, *constitute a cause of action. Such conduct may constitute circumstantial evidence* that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent (where this is relevant), or to establish estoppel or good faith or bad faith, or to enable recourse to be had to the legal or regulatory basis of conduct that took place subsequently, etc. *Pre-entry into force conduct cannot be relied upon, however, to found liability in-and-of-itself in circumstances in which liability could not properly rest on the post-entry into force breach that has been alleged and on which the Tribunal's jurisdiction was founded.* Any other approach would effectively denude Article 10.1.3 of its purpose and undermine the fundamental principle of effectiveness in treaty interpretation, rooted in good faith, that is expressed in the Latin maxim ut res magis valeat quam pereat (it is better for a thing to have effect than to be made void).[659]

[659] *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, ¶ 217 (emphasis added), **RLA-31**.

601. Serbia's position is flawed for an additional reason. By suggesting that the first notice constitutes the real basis for the Claimants' claim in this arbitration, Serbia would have the Claimants initiate the arbitration already in March 2011 when Mr. Obradović received the first notice. Serbia's theory would thus yield an absurd result because, at that time, the Canada-Serbia BIT did not exist and the Claimants' claim was, in any event, not ripe to adjudication. Indeed, mere threats of expropriation are insufficient to make an expropriation claim ripe, and thus actionable, as the *Glamis Gold* tribunal pertinently observed:

> *In the determination of whether the Tribunal has subject matter jurisdiction to decide the Article 1110 claims before it, the Tribunal begins from the premise that a finding of expropriation requires that a governmental act has breached an obligation under Chapter 11 and such breach has resulted in loss or damage*. NAFTA Article 1117(1) establishes standing for an investor of a State Party to bring a claim for harm done to its subsidiary in the territory of another State Party under the investment provisions of Chapter 11. *Through the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs to have incurred loss or damage in order to bring a claim for compensation under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe*, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor.[660]

602. In sum, Serbia's attempt to recast the Claimants' claims so as to place the basis of the alleged breach of the Canada-Serbia BIT on the Privatization Agency's pre-treaty conduct must be rejected as a matter of fact and law.

603. Instead, the Claimants in turn explain that their claims—based on those facts which the Claimants allege as breaches of the Canada-Serbia BIT—observe the time-limitations set forth by both Article 22(2)(e)(i) of the Canada-Serbia BIT and the principle of non-retroactivity of international treaties.

2. The Claimants' claims are not time barred

604. Serbia continues to allege that the Claimants' claims are time barred by virtue of Article 22(2)(e)(i) because the Claimants allegedly would have first acquired knowledge of Serbia's breach of the Canada-Serbia BIT and of the ensuing loss more than three years

660 *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award, 8 June 2009, ¶ 328 (emphasis added), **RLA-127**.

before initiating this arbitration on 14 February 2018—that is, more than three years before the cut-off date of 14 February 2015. This is, once again, incorrect.

605. The Claimants have already shown, and will show again below, that the Claimants' claims fall well within the Tribunal's jurisdiction because the Claimants became aware of Serbia's breach and loss after the cut-off date.

a. The three-year clock starts ticking when the Claimants acquire both the knowledge of breach and knowledge of loss

606. Article 22(2)(e)(i) of the Canada-Serbia BIT requires the Claimants to submit their investment claim under the Canada-Serbia BIT no later than three years from "*the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby.*"[661] As the *Glamis* tribunal made clear, the three-year limitation period runs from the later of these events to occur in the event that the knowledge of both events is not simultaneous.[662]

607. Once again, the Claimants' claims are timely because the Claimants became aware of Serbia's breach of the Canada-Serbia BIT as well as of the resulting loss on and after 27 April 2015, when the Canada-Serbia BIT entered into force.

b. The Claimants became aware of Serbia's breach of the Canada-Serbia BIT on and after 27 April 2015 when the Canada-Serbia BIT entered into force

608. In their Reply, the Claimants explained that the knowledge of "breach" is predicated on the existence of a legal obligation, which means that the Claimants could only have acquired knowledge of Serbia's breach of the Canada-Serbia BIT on the day that the Canada-Serbia BIT entered into force and thereafter, *i.e.*, after 27 April 2015 (thus in any event after the cut-off date of 14 February 2015). The *Spence* tribunal unambiguously confirmed this principle:

> *A putative claimant cannot acquire knowledge of an alleged breach of a treaty until that treaty enters into force.* While the date of the entry into force of a treaty may be, and usually is, known some time in

661 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 22(2)(e)(i), **CLA-001**.

662 *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award, 8 June 2009, ¶ 347, **RLA-127**.

> advance of the actual entry into force date, *a breach of treaty can only arise once the treaty in question has the force of law. A putative U.S. claimant against Costa Rica could not therefore acquire knowledge, whether actual or constructive, of a breach of the CAFTA until 1 January 2009, at the earliest. Before this date, there was no operable CAFTA obligation to breach.*[663]

609. This bellies Serbia's whole *ratione temporis* objection, which is entirely based on the false assertion that the first notice constitutes the "real" basis of the Claimants' claims in this arbitration.

610. In a last-minute attempt to salvage its case, Serbia now purports to resort to the "constructive knowledge" theory to argue that the Privatization Agency's termination of the Privatization Agreement and subsequent seizure of the Beneficially Owned Shares are mere consequences of the first notice, of which the Claimants *should have been aware* upon receipt of that the first notice long before the cut-off date. The constructive knowledge theory cannot salvage Serbia's case for the following two reasons.

611. *First*, while Article 22(2)(e)(i) contemplates two forms of knowledge of breach and loss, *i.e.,* actual knowledge (what the claimant did in fact know) and constructive knowledge (what the claimant should have known), the very few investment tribunals to have resorted to the inquiry of whether the claimant had constructive knowledge of the alleged breach and loss did so only because that claimant's actual knowledge could not be established on the basis of the available evidence—usually because the proceedings were only at the jurisdictional stage.[664] This is clearly not the case here.

612. *Second*—and more importantly—the constructive knowledge theory does not in any event apply prospectively to the State's conduct after the cut-off date. In other words, the constructive knowledge theory does not mean that the investor would be required to anticipate, prior to the cut-off date, the State's post-cut-off-date conduct, so that the

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[663] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica,* ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, ¶ 220 (emphasis added), **RLA-031**.

[664] *See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, Decisions on Objections to Jurisdiction, 20 July 2006, ¶¶ 54, 57, 58, **RLA-032**; *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, ¶ 170, **RLA-031**.

investor could be deemed to have had knowledge of the State's post-cut-off-date conduct before it actually occurred.

613. As a result, it is wholly irrelevant, for the assessment of the Claimants' compliance with the time limitation under the Canada-Serbia BIT, whether the measures challenged by the Claimants in this arbitration are mere consequences of Serbia's pre-cut-off-date conduct that Serbia erroneously alleges constitutes the real basis of the Claimants' claims.

614. This important temporal limitation to the constructive knowledge theory was unequivocally confirmed by the tribunal in *Grand River v. USA*, on which Serbia itself improperly seeks to rely:

> In the circumstances here, *the Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly presented claims* challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, *even if those provisions are related to earlier events.*[665]

615. In short: neither the first notice nor the Privatization Agency's subsequent notices could have possibly triggered the three-year time limit because the Canada-Serbia BIT was not even in force at that time, and the Claimants could not have acquired any knowledge (actual or constructive) of Serbia's subsequent post-cut-off-date breach.

616. As shown *seriatim* below, the Claimants acquired knowledge of Serbia's breaches of the Canada-Serbia BIT on or after 27 April 2015 when the Canada-Serbia BIT entered into force, and thus after the cut-off date of 14 February 2015.

i. The Claimants' became aware of the breach consisting of Serbia's continuing refusal to release the pledge on 27 April 2015

617. Serbia breached the Canada-Serbia BIT by the Privatization Agency's continuous refusal to release the pledge over the Beneficially Owned Shares. This breach was ongoing when the Canada-Serbia BIT entered into force and lasted until the expropriation of the Claimants' investment.

[665] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, Decisions on Objections to Jurisdiction, 20 July 2006, ¶ 86, **RLA-032**.

618. The Claimants explained that international law recognizes that a continuous breach of an international obligation by a conduct of the state, which begins before a treaty enters into force and continues after that treaty's entry into force falls within the tribunals' jurisdiction *ratione temporis*. This is generally known as the doctrine of continuous breach of an international obligation, which is embodied in Articles 14(2)[666] and Article 15[667] of the ILC Draft Articles, and has been applied by numerous investment tribunals, including the tribunals in *Feldman v. Mexico*,[668] *Société Générale v. Dominican Republic*[669] and *Bau v. Thailand.*[670]

619. Serbia disputes that the Privatization Agency's failure to release the pledge constitutes a continuous wrongful act by arguing that (*i*) it is merely a contractual breach; and (*ii*) it has not been challenged by the Claimants before the domestic courts. Serbia concludes that these two factors, along with Mr. Obradovic's purported failure to act as a prudent investor, constitutes (*iii*) impermissible "tolling of the cut-off date." Each of these arguments is wrong as a matter of law, as explained, in turn, below.

620. *First*, Serbia's main argument is that the failure to release the pledge is contractual in nature and cannot therefore constitute a continuous wrongful act. Serbia disputes the relevance of *Feldman v. Mexico* and *Société Générale v. Dominican Republic* on the

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666 Article 14(2) defines a continuous breach as follows:

*The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation [...].*ILC Draft Articles, Art. 14(2), **CLA-024**.

667 The ILC commentary defines a composite act as follows:

Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct. Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in aggregate as wrongful".

Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. *an act defined in aggregate as wrongful.* Article ILC Draft Articles, pp. 62-63, **CLA-024**.

668 *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (English), 6 December 2000, ¶ 62, **CLA-105.**

669 *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic,* UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 87, 90-92, **CLA-106.**

670 *Walter Bau AG v. Kingdom of Thailand,* UNCITRAL, Award, 1 July 2009, ¶¶ 12.36-12.37, **CLA-055**.

basis that the tribunals, in those cases, did not address contractual breaches. Serbia's contentions are misplaced.

621. It is absolutely irrelevant, for the purposes of determining the applicability of the doctrine of continuous breach, whether or not the conduct at issue is contractual in nature. For any internationally wrongful act to be considered as continuing, there must be a breach of a norm of international law *attributed to a state*. The Claimants have already amply showed that Serbia is responsible for the conduct of the Privatization Agency because its conduct at issue in this arbitration is attributable to Serbia. Therefore, just like the regulatory measures at issue in *Feldman v. Mexico* and *Société Générale v. Dominican Republic*—both perfectly relevant to the present case—the Privatization Agency's failure to release the pledge is a *continuous wrongful act of the state.*

622. In any event, the tribunal in *SGS v. Philippines* expressly recognized that nonperformance of a contract, specifically, may constitute a continuous breach within the meaning of international law:

> It may be noted that in international practice a rather different approach is taken to the application of treaties to procedural or jurisdictional clauses than to substantive obligations. It is not, however, necessary for the Tribunal to consider whether Article VIII of the BIT applies to disputes concerning breaches of investment contracts which occurred and were completed before its entry into force. At least *it is clear that it applies to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach.*[671]

623. Serbia's reliance on the *MCI v. Ecuador* and *Impregilo v. Pakistan* cases, where the tribunals refused to exercise their temporal jurisdiction over alleged continuous contractual breaches, is unavailing because the relevant breaches, in those cases, were consummated before the applicable treaties entered into force. This is not the case here: the Privatization Agency's failure to release the pledge started in April 2011 and continued until the expropriation of the Claimants' investment. There is thus no doubt

[671] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 19 January 2004, ¶ 167 (emphasis added), **CLA-172**.

that the Privatization Agency's breach, unlike the alleged breaches in *MCI v. Ecuador* and *Impregilo v. Pakistan*, is *continuous*.

624. *Second*, Serbia next argues, in reliance on *Parkerings v. Lithuania* and *Generation v. Ukraine*, that the Claimants' failure to challenge the Privatization Agency's refusal to release the pledge before the Serbian courts means that the Claimants are precluded from asserting a claim for Serbia's breach of its international obligations based on that refusal.[672] This is incorrect.

625. International claims are not predicated on the requirement of an exhaustion of local remedies. *Parkerings v. Lithuania* and *Generation Ukraine v. Ukraine*—neither of which addresses continuous breaches—do not state otherwise.

626. In *Parkerings v. Lithuania*, the object of the agreement in dispute was a concession for operating street parking and multi-storey car parks in the City of Vilnius.[673] The dispute concerned non-compliance with the commercial terms of the Agreement,[674] and the tribunal expressly held that there was no evidence that the City of Vilnius would have acted in the use of sovereign powers.[675] The tribunal pointed out that the Lithuanian courts would be a more suitable forum for settling the purely commercial dispute.[676]

627. The *Parkerings v. Lithuania* case thus related to purely commercial contractual disputes and the tribunal's conclusion on the requirement to turn to domestic courts or to contractually agreed forum were motivated by the fact that no sovereign act was involved in the breach. This stands in sharp contrast with the present case where the Privatization Agency itself exercised sovereign powers.

628. The tribunal in *Generation Ukraine v. Ukraine*, for its part, made clear that international investment law does not impose any general requirement of exhaustion of local

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672 Rejoinder, ¶¶ 914-915.

673 *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶¶ 81-84, **RLA-114**.

674 *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 190, **RLA-114**.

675 *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 445, **RLA-114**.

676 *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 316, ¶¶ 318-319, ¶ 448, ¶¶ 453-454, **RLA-114**.

remedies for international claims. Rather, the tribunal held, only in circumstances where the *very reality of conduct tantamount to a breach of an international obligation is seriously doubtful*—in that case, expropriation—could the international claim be disqualified by the claimants' failure to seek redress before courts:

> The fact that an investment has become worthless obviously does not mean that there was an act of expropriation; investment always entails risk. Nor is it sufficient for the disappointed investor to point to some governmental initiative, or inaction, which might have contributed to his ill fortune. Yet again, it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, *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*.[677]

629. This is of course not the case here. The Claimants' claims are by no means "doubtful", the Claimants' investment had been directly expropriated as a result of the conduct of the Privatization Agency. But for the Privatization Agency's failure to release the pledge, the Beneficially Owned Shares would not have been seized. As a result, the Claimants are absolutely not required to have sought redress before the courts in order to assert a claim of Serbia's breach of its international obligations on the basis of the Privatization Agency's refusal to release the pledge.

630. *Finally*, Serbia concludes that the above factors, taken together with "*Mr. Obradović's indolence to remedy the alleged breaches, taken together with manipulative promises addressed to the Agency" amount to impermissible "'tolling, extension….modification….' of the cut-off date*." This is, once again, incorrect. Mr. Obradovic's alleged "*indolence to remedy the alleged breaches*" could not have possibly amounted to any "tolling" of the time limitation period for submitting a claim to arbitration under the Canada-Serbia BIT because the Claimants did not even have a claim to arbitrate at the time of that alleged conduct.

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677 *Generation Ukraine Inc. v. Ukraine,* ICSID Case No. ARB/00/9, Award of 16 September, 2003, ¶ 20.30. (emphasis added), **RLA-074**.

631. The Claimants never asked for any "tolling" of the time limitation period because they did not need to do so. They did not sit on their rights. Instead, they initiated this arbitration within three years of having become aware of Serbia's violations of the Canada-Serbia BIT.

632. All in all, Serbia's argumentation is seriously misplaced. Serbia's continuing refusal to release the pledge over BD Agro's shares undisputedly qualifies as a continuous act which became a breach of the Canada-Serbia BIT on the day that the Canada-Serbia BIT entered into force. There is no doubt that the Claimants acquired knowledge of that continuous breach of the Canada-Serbia BIT resulting from Serbia's refusal to release the pledge over the Beneficially Owned Shares *after* the cut-off date of 14 February 2015.

ii. The Claimants became aware of the Ombudsman's unlawful interventions on 23 June 2015

633. Serbia further breached the Canada-Serbia BIT because the Ombudsman subjected BD Agro to unjustified, heavily publicized and politically-motivated investigations that culminated in the issuance of his unlawful "recommendations," which directly prompted the termination of the Privatization Agreement and the expropriation of the Claimants' investment. The Claimants became aware of the Ombudsman's unlawful investigation and his "recommendations" on 23 June 2015, *i.e.*, after the cut–off date of 14 February 2015.

iii. The Claimants became aware of the termination of the Privatization Agreement on 28 September 2015 and they became aware of the subsequent seizure of the Beneficially Owned Shares on 21 October 2015

634. Finally and most importantly, Serbia breached the Canada-Serbia BIT because the Privatization Agency unlawfully terminated the Privatization Agreement on 28 September 2015, and subsequently unlawfully ordered the transfer of the Beneficially Owned Shares on 21 October 2015. The Claimants thus acquired knowledge of both these events after the cut-off date of 14 February 2015.

c. The Claimants became aware of Serbia's loss as a result of Serbia's breach of the Canada-Serbia BIT after the cut-off date of 14 February 2015

635. The limitation period can only be triggered once the investor has become aware of not only the breach, but also that it "*has incurred loss or damage.*"[678] This was unequivocally confirmed by numerous tribunals, including the tribunals in *Spence v. Costa Rica,*[679] *Grand River v. Canada,*[680] *Mondev v. USA*[681] and *Corona v. Dominican Republic*[682] (all relied on by Serbia). The *Mobil II*[683] and *Pope&Talbot*[684] tribunals, for their part, made clear that predicted damage, rather than actual damage, is not sufficient to make the time limitation running.

636. For the Claimants' claims to be time barred, Serbia would thus have to prove that the Claimants had become aware that they had suffered loss as a result of Serbia's breach of the Canada-Serbia BIT more than three years before initiating this arbitration. It is obviously impossible for Serbia to make such a showing. Serbia refrained from even attempting to do so.

637. In its Rejoinder, Serbia conceded[685] that its only "analysis" of the requirement of the knowledge of loss in this arbitration was the following statement:

> 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*

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678 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 22(2)(e)(ii), **CLA-001**.

679 *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica,* ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, ¶ 211, **RLA-031**.

680 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, Decisions on Objections to Jurisdiction, 20 July 2006, ¶ 38, **RLA-032**.

681 *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 22 October 2002, ¶ 52, **RLA-039**.

682 *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, ¶ 194, **RLA-028**.

683 *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 155, **CLA-108**.

684 *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL Award in Relation to Preliminary Motion by the Government of Canada ("The Harmac Motion"), 24 February 2000, ¶ 12, **CLA-107**.

685 Rejoinder, ¶ 896.

> *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.*'[686]

638. The Claimants acquired knowledge of the loss caused by Serbia's violations of the Canada-Serbia Treaty only on 21 October 2015, *i.e.*, when the Beneficially Owned Shares were seized and the Claimants were thus definitively deprived of their investment. This took place after the cut-off date of 14 February 2015. Even if the Claimants could be said to have acquired knowledge of the loss due to the failure to release the pledge and the Ombudsman's unlawful interference on 27 April 2015 and 23 June 2015, respectively, both these dates are also well after the cut-off date.

639. All in all, there can be no doubt that the Claimants' claims are *not* time-barred under Article 22(2)(e)(i) of the Canada-Serbia BIT : the Claimants acquired actual knowledge of Serbia's breaches of the Canada-Serbia BIT, as well as of the losses they suffered as a result of those breaches, after the cut-off date of 14 February 2015.

3. The Claimants' claims are not precluded by the principle of non-retroactivity

640. In their Reply, the Claimants explained that the Claimants' claims under the Canada-Serbia BIT are not precluded by the principle of non-retroactivity of international treaties because they are based on Serbia's conduct, which occurred after the cut-off date of 27 April 2015 when the Canada-Serbia BIT entered into force.[687]

641. *First*, the Privatization Agency was in continuous breach of its obligation to release the pledge over the Beneficially Owned Shares from the moment when it first refused to release the pledge upon the full payment of the purchase price on 8 April 2011 until the moment when the Beneficially Owned Shares were expropriated on 21 October 2015. This breach became a breach of the Canada-Serbia BIT when the Canada-Serbia BIT entered into force on 27 April 2015. Serbia thus violated its international obligations based on its continuous failure to release the pledge on the cut-off date of 27 April 2015 and subsequently. Under the doctrine of continuous breach of an international

686 Counter-Memorial, ¶ 401.

687 Reply, ¶¶ 813-834.

obligation set forth above, the Claimants' claims based on the Privatization Agency's refusal to release the pledge comply with the principle of non-retroactivity.

642. *Second*, while the Ombudsman initiated his unlawful investigation of BD Agro in late 2014, he only made this investigation public on 23 June 2015 when he also issued his unlawful "recommendations." The Claimants' claims based on both the Ombudsman's continuous investigation—ongoing as of the cut-off date of 27 April 2015—and his unlawful "recommendations" to terminate the Privatization Agreement post-dating the cut-off date—comply with the principle of non-retroactivity.

643. *Third*, the Privatization Agency terminated the Privatization Agreement on 28 September 2015, and subsequently transferred the Beneficially Owned Shares on 21 October 2015. Once again, both these measures occurred after the cut-off date, and the Claimants' claims based on these measures also comply with the principle of non-retroactivity.

644. In sum, each instance of Serbia's conduct that the Claimants challenge in this arbitration occurred (or at least continued) when the Canada-Serbia BIT was in force. Therefore, the Claimants' claims are not precluded by the principle of non-retroactivity.

645. Serbia attempts to circumvent this clear conclusion by arguing, in reliance on *MCI v. Ecuador* and *Eurogas v. Slovakia*, that the present "dispute" had arisen before the cut-off date, and the Claimants' claims are therefore excluded from the Tribunal's jurisdiction. This argument fails for the following two reasons: (*i*) the assessment of the existence of a "dispute" is irrelevant for the determination of the Tribunal's temporal jurisdiction under the Canada-Serbia BIT; (*ii*) the present dispute in any event arose after the cut-off date.

646. *First*, the Canada-Serbia BIT limits the tribunals' *ratione materiae* jurisdiction to alleged breaches of the Canada-Serbia BIT. This stems from Article 21(1), which grants standing only to those investors who claim breaches of the Canada-Serbia BIT:

> 1. *An investor of a Party may submit to arbitration under this Section a claim that*:

(a) the *respondent Party has breached an obligation under Section B*, other than an obligation under Articles 8(3), 12, 15 or 16 [688]

647. Because of the principle of non-retroactivity, such limitation implicitly restricts also the tribunals' *ratione temporis* jurisdiction.[689] The *Feldman* tribunal, constituted under the similarly–worded NAFTA, explained this as follows:

> The reliance of the Tribunal on alleged violations of NAFTA Chapter Eleven Section A also implies that *the Tribunal's jurisdiction ratione materiae becomes jurisdiction ratione temporis as well. Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal ratione temporis. Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date*. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.[690]

648. Thus, the Tribunal's jurisdiction *ratione temporis* under the Canada-Serbia BIT is restricted *to claims of breaches of the Canada-Serbia BIT*. The only relevant question, therefore, is whether the Claimants bring claims of breaches of the Canada-Serbia BIT. They undoubtedly do.

649. The findings of the tribunals in *MCI v. Ecuador* and *Eurogas v. Slovakia* are inapposite for the simple reason that they applied differently worded treaties. As the Claimants already explained, the *Eurogas* tribunal applied a very common type of clause—one which explicitly excludes jurisdiction over "disputes" arising before a treaty's entry into force.[691] The *MCI* tribunal, for its part, applied a treaty, which does not provide any specification (implicit or explicit) on its temporal applicability. Tribunals have

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688 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 21(1), **CLA-001**.

689 The Canada-Serbia BIT shares this specificity with the NAFTA, CAFTA and most treaties concluded with the NAFTA parties.

690 *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (English), 6 December 2000, ¶ 62 (emphasis added), **CLA-105**.

691 Article 15(6) of the Canada-Slovakia BIT limits the treaty's application "*to any dispute that has arisen not more than three years prior to its entry into force.*" *See*, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic,* ICSID Case No. ARB/14/14, Award, 18 August 2017, ¶¶ 427, 457-459 (emphasis added), **RLA-043.**

interpreted such treaties to exclude jurisdiction over pre-treaty "disputes" as well.[692] In those cases, the tribunals therefore dealt with the question of whether or not the relevant "dispute" (or the "real cause of the dispute") predated the treaties. The determination of the tribunals in that respect provides no guidance to the present Tribunal.

650. *Second*—and only for the sake of completeness—the Claimants reiterate that the present dispute is not rooted in any events predating the entry into force of the Canada-Serbia BIT.

651. The Claimants have already extensively explained that the First Notice is not the real source of this dispute because at that time, the Claimants could not have known that Serbia would proceed to expropriate the Claimants' investment more than four years later. Serbia's assertions that the termination of the Privatization Agreement and transfer of the Beneficially Owned Share "*were nothing but direct and imminent result of Mr. Obradović's breach of the Privatization Agreement that occurred in December 2010*"[693] is absurd. Once again, Serbia's breaches were not the result of Mr. Obradović's conduct. Serbia's breaches were the result of its own, deliberate and unlawful conduct.

652. Moreover, the "*dozens of notices and warnings that the contract would be terminated, the pledge retention*"[694] at best show that the termination of the Privatization Agreement and expropriation of the Beneficially Owned Shares were neither automatic nor "unavoidable" until they were decided by Serbia in the autumn of 2015.

653. All in all, it is the date of the actual expropriation of the Beneficially Owned Shares, which falls to be assessed for the purpose of determining the Claimants' compliance with the principle of non-retroactivity, not the date of the first notice (or subsequent notices). Similarly, the notification of Privatization Agency's refusal to release the pledge dated 4 February 2014 is neither a real cause nor the "inseparable root" of the Claimants' claims. Rather, the real and actual source of the Claimants' claim related to

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692 For the avoidance of doubt, the Canada-Serbia BIT, unlike the treaty applied in *MCI v. Ecuador*, is not silent on its temporal applicability: the Canada-Serbia BIT implicitly restricts its temporal applicability by its subject-matter applicability.

693 Rejoinder, ¶ 922.

694 Rejoinder, ¶ 939.

Serbia's refusal to release the pledge is the Privatization Agency's continuous and unremedied refusal to do so on and after the cut-off date.

F. The Tribunal has jurisdiction *ratione personae* under the Cyprus-Serbia BIT

654. Sembi has its "seat" in Cyprus within the meaning of Article 1(3)(b) of the Cyprus-Serbia BIT because it has its registered office there. By providing its Certificate of Registered Office, Sembi has conclusively established its compliance with Article 1(3)(b). It is as simple as that. While certain jurisdictional requirements may in some cases require lengthy analyses of the facts and the law, the requirement of "seat" under the Cyprus-Serbia BIT, as applied here, clearly is not one of them. This is all the more so since the recent decision of the *Mera* tribunal, which was constituted *under the very same treaty*, unequivocally confirmed that "seat" simply means "registered office."[695] Indeed, this sole paragraph is all that it takes to put an end to Serbia's objection *ratione personae*.

655. Serbia, however, continues to desperately seek to import into Article 1(3)(b) of the Cyprus-Serbia BIT the requirement of "effective management"—and thus, the Claimants are compelled to address Serbia's recitals once more.

656. Serbia's efforts are, yet again, completely off the mark. The interpretation of the term "seat" cannot be guided by findings of investment tribunals constituted under treaties, which, unlike the Cyprus-Serbia BIT, set forth real seat tests.

657. However, even if the Tribunal were to conclude that the term "seat" indeed means the location of Sembi's effective management (it should not), Sembi's seat would still be in Cyprus.

1. The meaning of "seat" under the Cyprus-Serbia BIT is governed by Cyprus—not international—law

a. International law does not include a uniform definition of "seat" and the meaning of "seat" is thus governed by Cyprus law

658. In their Reply, the Claimants explained that the term "seat" in Article 1(3)(b) of the Cyprus-Serbia BIT cannot be interpreted by reference to international law for the simple

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695 *Mera Investment Fund Limited v. Republic of Serbia,* ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, 93, **CLA-022**.

reason that international law does not uniformly define that term.[696] This was recently confirmed by several authorities. For example, in his separate opinion in *CEAC v. Montenegro*, Professor Park observed that none of "*[t]he relevant sources of international law […] [which] include conventions, international custom and general principles of law, as well as judicial decisions and teachings of highly qualified publicists […] provides an 'ordinary meaning' for seat*."[697] Indeed, "*[i]nternational law as it currently stands*," Professor Park concluded, "*provides no uniformly accepted* '*ordinary meaning*' *of corporate seat*."[698]

659. The *Mera* tribunal—which addressed the meaning of "seat" under the Cyprus-Serbia BIT—reached the same conclusion in equally unambiguous terms and noted that the term "seat" ought, therefore, to be interpreted by reference to Cyprus law:

> Since there is no definition of "seat" in the ICSID Convention, nor in the BIT, and *no uniform definition under international law*, the Arbitral Tribunal considers *that the term in question must be interpreted by way of renvoi to municipal law*.[699]

660. The tribunal in *Tenaris v. Venezuela*—on which Serbia itself heavily relies—also confirmed that international law, *generally speaking*, has no uniform definition of "seat." The *Tenaris* tribunal expressly pointed out to have reviewed the parties' "*compilation of authorities and instances in international law and practice*,"[700] including scholarly articles and arbitral case-law, only to conclude that there is no uniform definition of the term "seat" in international law:

> *Having carefully considered the extensive submissions and voluminous materials provided by both sides on this issue, it is clear that neither term has been used in international law and practice as a consistent "legal term of art", with only one meaning*. On the contrary, the range

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696 Reply, ¶¶ 843-845.

697 *CEAC Holdings Limited v. Montenegro,* ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, ¶ 12, **CLA-023**.

698 *CEAC Holdings Limited v. Montenegro,* ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, ¶ 18, **CLA-023**.

699 *Mera Investment Fund Limited v. Republic of Serbia,* ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 89 (emphasis added), **CLA-022**.

700 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 138, **RLA-045**.

> of references upon which each side has relied indicates that these terms are susceptible of either a formal or substantive meaning.[701]

661. In short: Serbia's lengthy appeals to international law theories, treaty and arbitral practices are *a priori* futile because the term "seat" under Article 1(3)(b) of the Cyprus-Serbia BIT must be assessed in the light of Cyprus law.

b. Findings of investment tribunals under different investment treaties are not determinative for the analysis of the Cyprus-Serbia BIT

662. In their Reply, the Claimants further explained that if the Tribunal were to turn to sources of international law to establish the content of the requirement of "seat" under the Cyprus-Serbia BIT (and it should not), it would find strictly no guidance in the findings of those tribunals, which were constituted under differently worded treaties. For the avoidance of doubt, by referring to treaties that are "worded differently" than the Cyprus-Serbia BIT, the Claimants obviously had in mind those treaties that contain, in particular, requirements akin to real seat tests, such as "effective management," "real economic activities" or "real seat."

663. Contrary to Serbia's suggestions, the Claimants are perfectly consistent in their position when they invoke the *Orascom v. Algeria* case. That is because the BLEU-Algeria BIT—the investment treaty applied in that case—does not set forth any real seat test and it is thus not a "differently worded" treaty. Quite the contrary: the BLEU-Algeria BIT and the Cyprus-Serbia BIT contain exactly the same incorporation test for the purposes of determining an investor's nationality—constitution in accordance with local law and registered office in the respective state[702]—which, in turn, makes the findings of the *Orascom* tribunal relevant to the present case.

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[701] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 144 (emphasis added), **RLA-045**.

[702] Article 1(1)(b) reads:

"*For the purposes of this Agreement,*

1. The term "investors" shall mean:

(...)

(b) "Companies", i.e. any legal person constituted in accordance with Belgian, Luxembourg or Algerian legislation and having its registered office in the territory of Belgium, Luxembourg or Algeria."

Agreement between the Belgo-Luxembourg Economic Union and the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments, signed 24 April 1991, **CLA-110**.

664. Serbia's reliance on the *Alps v. Slovak Republic* case, however, is utterly misplaced, and so are its creative attempts to draw parallels between the Switzerland-Slovakia BIT—the applicable treaty there—and the Cyprus-Serbia BIT. The definition of investor under the Switzerland-Slovakia BIT is of course not "*almost the same as the one provided in [the] Cyprus-Serbia BIT.*"[703] Article 1(1)(b) of the Switzerland-Slovakia BIT—which contains that treaty's definition of investor—expressly requires qualifying investors to "*have their seat, **together with real economic activities***" in the respective state.[704] This is a textbook example of a real seat test, which is absent in the Cyprus-Serbia BIT. As a result, the findings of the *Alps* tribunal—which held that the term "seat" under the Switzerland-Slovakia BIT meant the "actual place of business" of a company—are plainly inapposite here. This was, once again, confirmed also by the *Tenaris* tribunal.[705]

665. After all, only the findings of those tribunals, which applied *the very same treaty,* are *truly relevant* to the present case.

666. Most notably, the tribunal in *Mera v. Serbia,* constituted under the Cyprus-Serbia BIT, relied on the definition of "seat" under Cyprus law and concluded that the correct meaning of "seat" under Cyprus law—and hence under the Cyprus-Serbia BIT—was the place of the company's "registered office." [706] The *Mera* tribunal thus expressly endorsed the opinion of Professor Park in *CEAC v. Montenegro* who also emphasized that "*the plain meaning of registered office, best matches the meaning of 'seat' in Cyprus as used in this particular [Cyprus-Serbia] Treaty.*"[707]

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703 Rejoinder, ¶ 970.

704 Article 1(1)(b) of the Switzerland-Slovakia BIT reads:

(1) The term "investor" refers with regard to either Contracting Party to […]

(b) 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* [P]*arty*."

Agreement Between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Art. 1, **CLA-165**.

705 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 141, **RLA-045**.

706 *Mera Investment Fund Limited v. Republic of Serbia,* ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 96, **CLA-022**.

707 *CEAC Holdings Limited v. Montenegro,* ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, ¶ 22, **CLA-023**.

667. As a result, Sembi clearly meets the requirement of "seat" under *Mera v. Serbia.*

c. International law does not allow Serbia to import the requirement of effective management into the definition of "investor" under the Cyprus-Serbia BIT

668. The Claimants next explained that the wording of Article 1(3)(b) of the Cyprus-Serbia BIT includes no requirement of "effective management" and interpretive methods mandated by Article 31 of the VCLT do not allow the importation of such a requirement into the wording of that provision.

669. This was confirmed, for example, by the *Orascom* tribunal, constituted under the BLEU-Algeria BIT, which, just like the Cyprus-Serbia BIT, defines investor by reference to both the place of incorporation and the "*siège social*" in the host state, but makes no reference to "effective management" or "real seat." The *Orascom* tribunal rejected Algeria's attempts to import the "place of effective management" into the definition of investor for several reasons, which are particularly relevant to the present case.

670. *First*, the tribunal concluded that "*a good faith interpretation of the ordinary meaning of Article 1(1)(b)*" shows that "*siège social means […] registered office.*"[708] The ordinary meaning of the term "seat" under international law is thus the same as that term's ordinary meaning under Cyprus domestic law: "seat" equals "registered office."

671. *Second*, relying on the landmark *Barcelona Traction* case, the tribunal made clear that, contrary to Serbia's suggestions, interpreting the term "*siège social*" as "registered office" was fully consistent with the principle of effectiveness because "registered office" and "constitution in accordance with local law" were two components of the same incorporation test.[709]

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708 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Final Award, 31 May 2017, ¶ 298, **CLA-111**. Serbia's contention that the *Orascom* tribunal "*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*" while, here, "*terms "registered office" (incorporation) and "seat" are listed cumulatively, which clearly excludes possibility that those terms have the same meaning*" thus plainly distorts not only the content of Article 1(1)(b) of the BLEU-Algeria BIT, but also the *Orascom* tribunal's interpretation of it.

709 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Final Award, 31 May 2017, ¶¶ 289-290, 296, **CLA-111**.

672. *Third*, the *Orascom* tribunal noted that the Contracting Parties' treaty practice also confirmed that "*siège social*" meant "registered office" because, as here, none of the treaties concluded by the Contracting Parties included the requirement of "effective management."[710]

673. Serbia seeks to distinguish the findings of the *Orascom* tribunal by arguing that the latter concluded that "*siège social"* means "registered office" "*for reasons which were only relevant for that particular BIT*."[711] This is incorrect. The "reasons" that Serbia points to practically[712] all stem from the tribunal's application of supplementary means of interpretation. By resorting to those means of interpretation, however, the *Orascom* tribunal merely sought to confirm—and to make sure that none of them flagrantly contradicts—its analysis under Article 31 of the VCLT:

> *The primacy of the text of the Treaty, viewed in its context and bearing in mind the Treaty's object and purpose under Article 31 of the VCLT, implies that recourse to supplementary means* (including the travaux préparatoires and the circumstances of the Treaty's conclusion) *is only allowed in limited circumstances.*
>
> […]
>
> The *following supplementary means are noteworthy as they confirm the interpretation of the term siège social to which the Tribunal has arrived by application of Article 31.*[713]

674. In other words, the "reasons" that Serbia invokes are by no means the *primary* reasons, which led the *Orascom* tribunal to conclude that "*siège social*" means registered office. As mentioned above, that conclusion stems primarily from the tribunal's good faith interpretation of the text of Article 1(1)(b), as mandated by Article 31 of the VCLT. Because the wording of Article 1(1)(b) of the BLEU-Algeria BIT and that of Article

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710 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Final Award, 31 May 2017, ¶ 303, (emphasis added) **CLA-111**.

711 Rejoinder, ¶ 978.

712 The only "reason" invoked by Serbia, which stems from the tribunal's application of Article 31 of the VCLT, is the tribunal's use of dictionaries. The *Orascom* tribunal however noted that, although dictionaries "*are a helpful starting point*," they are "*not the end of the Tribunal's interpretive inquiry.*" *See*, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Final Award, 31 May 2017, ¶ 286, **CLA-111**.

713 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Final Award, 31 May 2017, ¶¶ 299-300 (emphasis added) **CLA-111**.

1(3)(b) of the Cyprus-Serbia BIT is essentially the same, the *Orascom* tribunal's findings are perfectly germane to the present case.

675. Serbia's contention that the term "*siège social*" under the BLEU-Algeria BIT could well have meant "*siège réel*"—as Professor Stern would have opined in *Orascom v. Algeria*—also cannot stand. Serbia misinterprets Professor Stern's reasoning: Professor Stern disagreed with the majority of the tribunal's *methodology*; not with its interpretation under international law of the meaning of "*siège social*." Indeed, unlike the majority of the tribunal, which sought to establish an "autonomous meaning" of that term, Professor Stern considered that "*siège social*" should have been interpreted by reference to domestic laws:

> Arbitrator Stern considers that siège social as referred to in the BIT can only mean siège réel, if interpreted, as it should be according to the Barcelona Traction case (para. 50), by reference to the rules generally accepted by municipal laws.[714]

676. Because the applicable domestic laws set forth real seat tests, Professor Stern naturally concluded that "*siège social*" meant "*siège réel*." Professor Stern's conclusions are thus not applicable here simply because Cyprus law does not set forth any real seat test.

677. Unlike the *Orascom* tribunal, this Tribunal does not face any discrepancy between domestic corporate nationality tests and the nationality test provided for in the treaty[715] because under both the Cyprus-Serbia BIT and Cyprus law, a company's registered office determines that company's nationality.[716]

2. Sembi has a "seat" in Cyprus because it has its registered office there

678. Rather than disputing that Sembi meets the definition of "seat" upheld by the tribunal in *Mera v. Serbia*, Serbia, once more, seeks to undermine the conclusions of the *Mera* tribunal by arguing, in reliance on the conclusions of its expert on Cyprus law, Thomas Papadopoulos, that the *Mera* tribunal failed to acknowledge that Cyprus law itself allegedly distinguishes between a "registered office" and a "seat." Mr. Papadopoulos'

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714 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Final Award, 31 May 2017, footnote 356, **CLA-111**.

715 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Final Award, 31 May 2017, ¶ 279, **CLA-111**.

716 Georgiades Second ER, ¶ 2.18.

new—but still flawed—contentions in support of that argument are addressed *seriatim* below.

679. *First*, Mr. Papadopoulos argues that the terms "registered office" and a company's place of incorporation necessarily mean the same thing under Cyprus law because companies, which were previously incorporated abroad and then transferred their registered office in Cyprus are then "reincorporated" in Cyprus. As a result, Serbia concludes, "*incorporation goes hand in hand with registered office*."[717] This is incorrect.

680. As Serbia's expert on Cyprus law, Mr. Agis Georgiades, explains, Mr. Papadopoulous purposefully distorts the language of the Companies Law: in reality, the Companies Law provides that companies, which transfer their registered office from a different jurisdiction, are "*registered (not re-incorporated) in Cyprus*."[718] The place of incorporation referred to in the Companies Law, in these circumstances, Mr. Georgiades continues, is the "'*original' incorporation, which may not coincide with the place of the registered office, if the company has transferred the latter to Cyprus from another jurisdiction*."[719] In other words, such companies remain incorporated at the original jurisdiction of incorporation, remain subjected to that jurisdiction's law, and merely transfer their registered office to Cyprus.[720]

681. Thus, the terms "incorporation" and "registered office" are by no means interchangeable under Cyprus law. This bellies Serbia's whole *ratione personae* objection, which is entirely based on the incorrect assertion that "incorporation" equals "registered office" under Cyprus law and "seat" must mean something more.

682. *Second*, Mr. Papadopoulous further asserts that the legislator's use of both the terms "seat" and "registered office" shows an intention to attribute different meanings to such terms. This is not true.

717 Rejoinder, ¶ 992.

718 Georgiades Third ER, ¶ 3.4.

719 Georgiades Third ER, ¶ 3.4.

720 Georgiades Third ER, ¶ 3.4.

683. As Mr. Georgiades explains, there are many examples, including in the Cyprus Companies Law, of different words being used to denote the same meaning.[721] Notably, Mr. Georgiades points out, "*if the Cypriot legislature intended to introduce a new concept of 'seat', different to 'registered office', it would require that a record is kept of each company's seat*."[722] Because there is no such provision, Mr. Georgiades concludes, "'*seat' means 'registered office' in the Cyprus Companies Law*."[723]

684. *Third,* in further support of the contention that Cyprus law distinguishes between "registered office" and "seat," Mr. Papadopoulos relies on Article 391 of the Companies Law, which purportedly "*put on an equal basis: 'seat'/head office [...] which apply in addition, and cumulatively to the criterion of incorporation.*"[724] According to Mr. Georgiades, that analysis is erroneous because Mr. Papadopoulous conflates "seat" with "head office."[725] Article 391 does not "*suggest that 'seat' is different to 'registered office*,'"[726] Mr. Georgiades clarifies. To the contrary, Mr. Georgiades concludes once again, "*the provisions equate 'seat' to 'registered office'*."[727]

685. *Finally,* Mr. Papadopoulos argues that "seat" under Cyprus law means "real seat" because the term was introduced into Cyprus law as a result of Cyprus's accession to the EU and its subsequent implementation of EU law—which would somehow apply the real seat theory. As Mr. Georgiades explains, this is, yet again, wholly incorrect:

> But it is important to stress that *EU Law did not attempt to harmonize the law on this matter. To the contrary, EU law acknowledges the different approaches adopted in different Member States and leaves it to each Member State's conflict of laws rules to determine the criteria that determine where a company has its 'seat.'* This is also evident in Recital 27 of Council Regulation (EC) No.2157/2001 of 8 October 2001 on the Statute for a European company (SE). Under Cyprus conflict of laws rules, the 'seat' is the 'registered office'.[728]

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721 Georgiades Third ER, ¶ 3.6.

722 Georgiades Third ER, ¶ 3.7.

723 Georgiades Third ER, ¶ 3.7.

724 Thomas Papadopoulos Second Expert Report dated 24 November 2020, ¶ 34; Rejoinder, ¶ 994.

725 Georgiades Third ER, ¶ 3.16.

726 Georgiades Third ER, ¶ 3.16.

727 Georgiades Third ER, ¶ 3.16.

728 Georgiades Third ER, ¶ 3.13 (emphasis added).

686. All in all, there can be no doubt that Cyprus law uses the terms "seat" and "registered office" interchangeably—and that puts an end to Serbia's wishful—but wholly fabricated— attempt to argue that these terms are different as a matter of Cyprus law.

3. Sembi in any event meets the *Tenaris* test for a seat

687. Finally, even if the Tribunal were to find that the term "seat" under the Cyprus-Serbia BIT somehow implied the requirement of "effective management" (it should not), it would still have jurisdiction *ratione personae* over the Claimants' claims because *Sembi is effectively managed from Cyprus*.

688. To establish the "effective seat" of holding companies, such as Sembi, the *Tenaris* tribunal acknowledged that, given their specific nature, (*i*) holding companies are not held to the same demanding standards of "effective management" as ordinary companies;[729] and examined whether (*ii*) the meetings of the Board of Directors took place at the purported seat; (*iii*) the books and records were kept at the purported seat; and whether (*iv*) administrative services were provided at the purported seat.

689. Fundamentally, however, the *Tenaris* tribunal categorically rejected Venezuela's assertion that Tenaris was not seated in Luxembourg, but rather in Argentina because its directors and CEO resided in Argentina and it had thousands of employees there. For the *Tenaris* tribunal, such facts were wholly irrelevant for the purposes of determining Tenaris's "effective seat."[730] Serbia's primary argument that Sembi is not effectively managed from Cyprus, but from Canada because Mr. Rand lives there is thus expressly contradicted by the very findings of the *Tenaris* tribunal, on which Serbia seeks to rely.

690. Equally irrelevant for the analysis of Sembi's "effective seat" is Serbia's accusation that Sembi has not timely filed all of its annual returns. There is no requirement that a company must timely file all of its annual returns in order to maintain its "effective seat" in the jurisdiction of its registered office. Serbia does not explain why Sembi's belated filing of some of its annual returns would deprive it of its "effective seat" in Cyprus.

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[729] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 199, **RLA-045**.

[730] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶¶ 218-219, **RLA-045**.

691. Applying the *relevant* criteria described above to the case at hand, there can be no doubt that Sembi fulfills them all.

692. *First*, in determining Sembi's "effective seat," the Tribunal must take into account that the activity of managing Sembi necessarily is "*a relatively limited one,*" as the *Tenaris* tribunal put it,[731] because, contrary to Serbia's absurd contentions,[732] Sembi is merely a holding company. Indeed, Article 3 of Sembi's Memorandum of Association expressly defines Sembi as an "investment holding company:"

> 3. *The objects for which the Company is established are:*
>
> 3.1 *To carry on the business of an investment holding company and for that purpose to acquire and to hold as an investment*, immovable property, shares, stock, debentures, debenture stock, bonds, notes, obligations and securities issued or not or guaranteed or not by any Government or public body or public authority in any part of the world […].[733]

693. Sembi's financial reports equally confirm that "*the principal activity of the Company [Sembi] is to act as a holding company.*"[734] This is of course precisely how Sembi acted also when it acquired beneficial ownership of shares in BD Agro.[735] Sembi is thus clearly a holding company also within the meaning of Article 148(4) of the Cyprus Companies Law, which provides that "*a company shall be deemed to be another's holding company if, but only if, that other is its subsidiary*."[736] As a result, Sembi cannot

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731 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 205, **RLA-045**.

732 Rejoinder, ¶ 1004.

733 Sembi's Memorandum of Association, Art. 3 (emphasis added), **CE-866**.

734 *See e.g.* Report and financial statements of Sembi Investment Limited as of 31 December 2017, p. 14, **CE-664**.

735 Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, p. 13, **CE-420**; Report and financial statements of Sembi Investment Limited as of 31 December 2009, p. 15, **CE-656**; Report and financial statements of Sembi Investment Limited as of 31 December 2010, p. 14, **CE-657**; Report and financial statements of Sembi Investment Limited as of 31 December 2011, p. 14, **CE-658**; Report and financial statements of Sembi Investment Limited as of 31 December 2012, p. 14, **CE-659**; Report and financial statements of Sembi Investment Limited as of 31 December 2013, p. 14, **CE-660**; Report and financial statements of Sembi Investment Limited as of 31 December 2014, p. 14, **CE-661**; Report and financial statements of Sembi Investment Limited as of 31 December 2015, p. 14, **CE-662**; Report and financial statements of Sembi Investment Limited as of 31 December 2016, p. 14, **CE-663**; Report and financial statements of Sembi Investment Limited as of 31 December 2017, p. 14, **CE-664** ; Minutes of a meeting of the Board of Directors of Sembi of 12 October 2010, **CE-191**. *See also* Rand Second WS, ¶ 60.

736 The Companies Law, Art. 148(4), **CE-500**.

be required to meet the same demanding standards of "effective management" as ordinary companies.

694. *Second*, the meetings of the Board of Directors all took place in Cyprus. This is expressly confirmed by the minutes of such meetings, such as the minutes of the meeting of Sembi's Board of Directors dated 12 October 2010:[737]

MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF **SEMBI** **INVESTMENT LIMITED** (THE "COMPANY") HELD AT THE OFFICES OF HLB AFXENTIOUS AND PARTNERS, CHARTERED ACCOUNTANTS, PALACEVIEW HOUSE, CORNER OF PRODROMOS STREET & ZINONOS KITIEOS, NICOSIA, CYPRUS ON TUESDAY, THE 12TH DAY OF OCTOBER, 2010 AT THE HOUR OF 11:00 A.M. CYPRUS TIME (10:00 A.M. BELGRADE TIME).

695. That such meetings were often held by teleconference, with some participants calling-in from abroad, changes nothing to that conclusion. Remote meetings by teleconference are very common in Cyprus, and nothing in Sembi's Articles of Association, other relevant documents or Cyprus law forbids such practice.

696. *Third,* Sembi's books and records had been kept at Sembi's registered office in Cyprus, as expressly required under Article 128 of Sembi's Articles of Association:

> *The books of account shall be kept at the Registered Office of the Company*, or, subject to section 141(3) of the Law, at such other place or places as the Directors think fit, and shall always be open to the inspection of the Directors.[738]

697. This was confirmed by Mr. Georgiades, who, upon visiting—without prior notice—Sembi's registered office in Cyprus on 11 January 2019, had been presented with such books and records:

> After presenting our engagement letter and business cards, *we asked Mrs Theisen to confirm* that the registered office of Sembi was at that address, and *that Sembi's books and registers where kept there. Mrs Theisen confirmed* both matters *and presented Sembi's file containing the said books and registers*.[739]

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

738 Sembi's Articles of Association, Art. 128, (emphasis added), **CE-864**.

739 Agis Georgiades First Expert Report dated 16 January 2019, ¶ 2.16 (emphasis added).

698. *Finally*, administrative services were all provided in Cyprus by the Cypriot company HLB, which also provided directors of Sembi.[740] HLB handled, in particular, Sembi's (*i*) secretarial work; (*ii*) accounting; (*iii*) audit; (*iv*) tax affairs;[741] and (*v*) correspondence, faxes and invoices.[742] Sembi's brass plate is affixed right next to the main entrance of the HLB's building, where Sembi currently have its registered office.[743]

699. Based on the foregoing, Sembi is without doubt "effectively managed" from Cyprus under the *Tenaris* test for holding companies. Even under Serbia's incorrect theory that the term "seat" requires "effective management," Sembi still has its seat in Cyprus.

G. The Claimants' claims are not an abuse of process

700. Serbia's entire abuse of rights objection rests on the incorrect premise that the Treaties only protect property rights that were "*recognized and protected under the laws of the host state*"[744] and the Claimants abuse of this investment arbitration process because they dare to think otherwise.

701. As the Claimants extensively explained in the above section on the Tribunal's *ratione materiae* jurisdiction, international investment law clearly protects not only proprietary rights, but also rights *in personam* and rights of beneficial ownership. Numerous international tribunals[745] and scholars[746] have recognized and applied the principle. Contrary to Serbia's suggestions, the language of Article 1 of the Canada-Serbia BIT also supports this conclusion.

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740 Corporate Register of Sembi, 27 June 2019, **CE-417**.

741 Sembi Investment Limited Standard Terms & Conditions, 31 December 2007, **CE-554**.

742 Sembi Investment Limited Standard Terms & Conditions, 31 December 2007, **CE-554**.

743 Georgiades First ER, ¶ 2.14.

744 Rejoinder, ¶ 1047.

745 See, e.g., *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, ¶¶ 144-145, **CLA-153;** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 216, **CLA-075**.

746 David J. Bederman, "*Beneficial Ownership of international Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 936 (emphasis added), **CLA-078**.

702. Serbia's could not be more wrong when it asserts that *"[t]he real problem with the Claimants' case is the fact that Serbian law ignores the distinction [between nominal and beneficial ownership].*"[747]

703. International investment law protects beneficial owners regardless of whether or not that notion is recognized in the host state where the investment is made. This is of course merely a consequence of the basic principle of autonomous meaning of international treaties. Indeed, the language of the Canada-Serbia BIT, once again, also confirms that the use of the term "owned" under Article 1 is not a *renvoi* to any meaning of that term under Serbian law.

704. Moreover, Serbian law does not ignore the distinction between nominal and beneficial ownership. For example, as explained by the Claimants' Serbian law expert, Mr. Miloš Milošević, the 2011 Law on Capital Markets recognizes the essence of beneficial ownership, *i.e.* the right of a person who "*does not nominally own*" a financial instrument such as the shares in a joint-stock company, to "*[have] the benefits of ownership [...], the power to direct the voting or disposition of the financial instrument [and] to receive the economic benefits of ownership*."[748]

705. Furthermore, Serbia cannot seriously claim that "*the beneficial ownership theory was fabricated in order to circumvent jurisdictional obstacles*."[749] On the basis of the Sembi Agreement, Sembi recorded its beneficial ownership of the Beneficially Owned Shares in its annual returns for 2008, which were filed in 2009.[750] The dispute arose only seven years later, in 2015.

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747 Rejoinder, ¶ 1049.

748 2011 Law on Capital Markets, Article 2(34), **CE-728**; Milošević Third ER, ¶ 20.

749 Rejoinder, ¶ 1054.

750 Reply, ¶ 490; Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, p. 13, **CE-420**; Report and financial statements of Sembi Investment Limited as of 31 December 2009, p. 15, **CE-656**; Report and financial statements of Sembi Investment Limited as of 31 December 2010, p. 14, **CE-657**; Report and financial statements of Sembi Investment Limited as of 31 December 2011, p. 14, **CE-658**; Report and financial statements of Sembi Investment Limited as of 31 December 2012, p. 14, **CE-659**; Report and financial statements of Sembi Investment Limited as of 31 December 2013, p. 14, **CE-660**; Report and financial statements of Sembi Investment Limited as of 31 December 2014, p. 14, **CE-661**; Report and financial statements of Sembi Investment Limited as of 31 December 2015, p. 14, **CE-662**; Report and financial statements of Sembi Investment Limited as of 31 December 2016, p. 14, **CE-663**; Report and financial statements of Sembi Investment Limited as of 31 December 2017, p. 14, **CE-664**.

706. Similarly, it is disingenuous for Serbia to portray the Claimants' attempts to obtain nominal ownership of the Beneficially Owned Shares in 2013 – 2015, unlawfully thwarted by Serbia's arbitrary refusal to release the pledge thereon, as an attempt to restructure the investment to obtain international protection for a foreseeable dispute.[751]

707. In 2013, when Mr. Rand sought to assign the Privatization Agreement to his Cypriot company, Coropi, the termination of the Privatization Agreement—let alone the subsequent seizure of the Beneficially Owned Shares—was certainly not "*foreseeable*." Quite the contrary. The Privatization Agency was merely requesting instructions from the Ministry of Economy and it essentially sought to avoid making any decisions on its own.[752] The Privatization Agency started to act only upon receiving the instructions of the Ministry of Economy dated 7 April 2015[753] and the Ombudsman's "recommendations" in summer 2015.[754]

708. Numerous tribunals have indeed confirmed that corporate restructuring made before the occurrence of the host state's breach cannot be considered as an abuse of process. The *Pac Rim* tribunal, for example, put it as follows:

> The Tribunal does not dispute (nor did the Respondent) that if a corporate restructuring affecting a claimant's nationality was made in good faith before the occurrence of any event or measure giving rise to a later dispute, that restructuring should not be considered as an abuse of process.[755]

709. In sum: the Claimants did not act in bad faith and did not abuse the process by raising their claims in the present arbitration.

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751 Rejoinder, ¶ 1057.

752 Reply, ¶ 190.

753 Reply, ¶ 281.

754 Reply, ¶¶ 327 *et seq.*

755 *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.47, **CLA-173**.

IV. COMPENSATION DUE FOR LOSSES SUFFERED BY CLAIMANTS

710. As the Claimants explained in their letter to the Tribunal of 11 February 2020, Serbia misused its Rejoinder to introduce several completely new arguments related to its case on quantum.[756] In its email dated 20 February 2020, the Tribunal granted the Claimants' request to address these new arguments. In accordance with the Tribunal's decision, the Claimants demonstrate below that:

a. Serbia improperly excludes certain land plots from BD Agro's valuation;[757]

b. Serbia improperly proposes a provision in an amount of EUR 9.2 million for pending court proceedings that BD Agro was allegedly likely to lose;[758]

c. Ms. Ilic's criticism of Dr. Hern's expert report is entirely unfounded;[759]

d. Serbia incorrectly calculates Serbian taxes applicable in the but-for scenario proposed by the Claimants;[760] and

e. Serbia erroneously argues that the tax gross-up requested by the Claimants should not be awarded.[761]

711. The Claimants' arguments on quantum provided in this submission are limited to the above mentioned new arguments raised by Serbia in its Rejoinder. For the avoidance of any doubts, the Claimants confirm also the remaining arguments made in their previous submissions, which they will address further at the hearing.

A. Serbia improperly excludes certain land plots from BD Agro's valuation

712. In its Rejoinder, Serbia claims that 394 hectares of the land owned by BD Agro should be excluded from BD Agro's valuation because it: (*i*) is "*actually not BD Agro's*

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756 Letter from the Claimants to the Tribunal, 11 February 2020.

757 Rejoinder, ¶¶ 1408, 1412-1416, 1449-1450, 1467-1473; Danijela Ilic Expert Report dated 23 January 2020, ¶ 6 of Introduction; Sandy Cowan Second Expert Report dated 24 January 2020, ¶¶ 1.5 (third bullet point), 5.5-5.9, 5.12, 6.41.

758 Rejoinder, ¶ 1469; Cowan Second ER, ¶¶ 2.4, 2.6.2, 2.8, 6.33-6.37, 6.41, 7.8.2, 7.31-7.32, Appendix 2.

759 Rejoinder, ¶¶ 1425-1431; Ilic ER, ¶¶ 4.2, 4.4, 4.6-4.8, 4.10-4.12, 4.16-4.17, 4.19-4.20, 4.22, 4.25, 4.27, 4.32-4.33, 4.52, 4.57, 5.1-5.24, 6.4.

760 Rejoinder, ¶¶ 1492-1496.

761 Rejoinder, ¶¶ 1499-1515.

property"; and/or (*ii*) "*was subject to disputes.*"[762] The first category includes land that was allegedly "*given away (to employees to build family houses or to the local municipality of Zemun) or was subject to expropriation or restitution (denationalization).*"[763] The second category includes land plots whose legal status is allegedly "*controversial*" because they are, according to Serbia, "*subject to court disputes, 'the real consequence of which may be the deletion of the ownership right'.*"[764]

713. As the Claimants explain in more detail below, Serbia's claims fail for two main reasons: (*i*) Serbia utterly fails to substantiate its claims with any relevant evidence; and (*ii*) the reasons for exclusion invoked by Serbia are in any event incorrect.

1. Serbia failed to substantiate its claims with any relevant evidence

714. Serbia's allegations are entirely based on the valuation report prepared by Mr. Bodolo in January 2019 for the purposes of the bankruptcy sale of BD Agro[765] and a "*List of BD Agro's land which was not sold*", submitted by Serbia as its exhibit RE-451.[766]

715. The fundamental problem with Serbia's argument is that the "*List of BD Agro's land which was not sold*" and Mr. Bodolo's report do not refer to *any* evidence showing that the excluded land was not owned by BD Agro or that its legal status was controversial as of any date, let alone as of the valuation date.

716. On the contrary, Serbia itself admits that, as of today, the excluded land is actually "*recorded in the cadaster*" as the land owned by BD Agro.[767] Serbia does not dispute that the land was also recorded as owned by BD Agro as of the valuation date.

717. The status of the excluded land as of the valuation date and Serbia's failure to provide any evidence of the alleged third-party ownership and claims—as of that or any other

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762 Rejoinder, ¶¶ 1411-1412.

763 Rejoinder, ¶ 1413.

764 Rejoinder, ¶ 1413.

765 Rejoinder, ¶ 1412; 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), **CE-511**.

766 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

767 Rejoinder, ¶ 1411.

date—should be the end of the matter because Serbia simply failed to prove its and Mr. Bodolo's allegations.

2. The stated reasons for exclusion of the land plots from BD Agro's valuation are in any case incorrect

718. Serbia's failure to provide any evidence is unsurprising because the stated reasons for exclusion do not withstand scrutiny. The Claimants address each of them *seriatim* below.

a. Alleged court disputes

i. Dispute with ZZ Budućnost Dobanovci

719. Almost one half of the land excluded by Mr. Bodolo was allegedly subject to a "*dispute with [ZZ] Buducnost Dobanovci.*"[768] Mr. Markićević explains in his witness statement that, during his time at BD Agro, he never heard of ZZ Budućnost Dobanovci and its purported claims.[769]

720. According to information publicly available at the Portal of Judiciary System of the Republic of Serbia (*in Serbian: Portal pravosudja Srbije*), an entity called ZZ Budućnost Dobanovci filed its claim against BD Agro on 8 June 2018, the court had rejected the claim on 21 December 2018, and the rejection became final and binding on 21 February 2019.[770]

721. This means that *the claim was filed three weeks before 30 June 2018*, the date that the bankruptcy trustee later instructed Mr. Bodolo to use as his valuation date, it was rejected approximately a month before Mr. Bodolo issued his report, and the rejection became final and binding a month and a half before the infamous bankruptcy sale on 9 April 2019. Interestingly, neither Mr. Bodolo, nor the trustee deemed it necessary to take into account the rejection of the claim and re-include the land in the valuation and in the sale, respectively.

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768 The total amount of excluded land is approximately 394 hectares and the land excluded because of the dispute with ZZ Budućnost Dobanovci amounts to approximately 183 hectares. *See* List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

769 Markićević Fourth WS, ¶ 47.

770 Overview of court proceedings No. P-3093/2018, 2 March 2020 (accessed), **CE-806**.

722. Given the intriguing nature of this claim, the Claimants tried to obtain more information about it. On 19 February 2020, the Claimants' Serbian counsel reached out to the Agency for Licensing of Bankruptcy Trustees—which acts as BD Agro's bankruptcy trustee—and requested information about these proceedings. The request was made in the name of Crveni Signal, one of Serbian companies beneficially owned by Mr. Rand, which is also one of BD Agro's creditors.[771]

723. On 21 February 2020, the Agency replied and refused to provide the requested information. Instead, it "*directed*" the Claimants' counsel to obtain the requested information from a court, with "*evidence of your legal interest.*"[772] The Claimants' counsel followed the directions from the Agency for Licensing of Bankruptcy Trustees and on 29 January 2020 submitted the request for inspection of the file to Commercial Court Belgrade.[773] When the Counsel followed up with the court on 21 February 2020, it was told that the request was rejected. The court, however, refused to provide its rejection in writing.

724. The timing of the purported claim, its swift rejection and the cone of silence that the Serbian authorities have imposed on it, all speak volumes. The claim obviously did not have merit, the purported claimant does not appear to have meaningfully pursued it, and the opportunistic use of the claim by the bankruptcy trustee and Mr. Bodolo seem to suggest that the main purpose of the claim was to give credence to the trustee's decision to exclude the land from the sale. This is entirely consistent with the criticism of the bankruptcy sale that the Claimants set out in their Reply.

725. In any event, a claim filed on 18 June 2018 and rejected with final and binding effect as of 21 February 2019 obviously has no relevance for the valuation of the Claimants' claims as of 21 October 2015.

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771 Email communication between NSTLAW and the Agency for Licensing of Bankruptcy Trustees, 21 February 2020, **CE-853**.

772 Email communication between NSTLAW and the Agency for Licensing of Bankruptcy Trustees, 21 February 2020, **CE-853**.

773 Request to Commercial Court Belgrade, 29 January 2020, **CE-854**.

ii. Dispute with the Republic of Serbia

726. The list further refers to a "*court dispute with the Republic of Serbia*."[774] The Claimants understand this to be the dispute related to the land swap agreement concluded between BD Agro and the Ministry of Agriculture in January 2010.[775] The Claimants explained the details of this transaction above.

727. In June 2015, Serbia initiated civil proceedings in which it requested declaration of nullity of the swap agreement and the return to Serbia of approximately 46 hectares of BD Agro's land. The Claimants understand that these proceedings are still pending.[776]

728. In any event, this litigation would not affect the value of BD Agro because if the land swapped is declared null and void, Serbia will have to return BD Agro's land that it had received under the swap, which was also 46 hectares, or provide monetary compensation for land that it cannot return, which will be equal to its market value. Therefore, the value of BD Agro will not change.

729. Even if Serbia were somehow able to avoid the obligation to return BD Agro's land, or provide compensation therefore, the impact on the valuation of BD Agro would still be minimal. The swapped land is agricultural land,[777] which Dr. Hern values at EUR 0.7 to EUR 2.9 per m^2.[778] Therefore, the total value of the disputed 46 hectares of BD Agro's land is between EUR 322,000 and EUR 1,334,000. Ms. Ilic values agricultural

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774 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

775 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**; Agreement on exchange of land between the Ministry of Agriculture, Forestry and Water Management and BD Agro, 4 January 2010, p. 3, **RE-396**. *See also* Markićević Fourth WS, ¶ 48.

776 Markićević Fourth WS, ¶ 49.

Same as with respect to the dispute with ZZ Buducnost Dobanovci, the Claimants tried to obtain further information about this dispute. The Claimants in fact requested information about these proceedings in the very same request in which they requested information about the claim of ZZ Buducnost Dobanovci. As explained above, the Claimants' request was rejected by the Agency for Licensing of Bankruptcy Trustees and the Claimants were "*directed*" to obtain the requested information from the court. *See* Email communication between NSTLAW and the Agency for Licensing of Bankruptcy Trustees, 21 February 2020, **CE-853**.

The Claimants' counsel again followed the directions from the Agency for Licensing of Bankruptcy Trustees and on 13 February 2020 submitted the request for inspection of the court file to Commercial Court Belgrade. The court did not respond. *See* Request to Commercial Court Belgrade, 13 February 2020, **CE-855**.

777 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**. *See also* Markićević Fourth WS, ¶ 50.

778 Richard Hern First Expert Report dated 16 January 2019, ¶ 108.

land in Dobanovci at EUR 1 per m^2.[779] Thus, the value according the her is only EUR 460,000.

iii. Dispute with Inter kop

730. The list of excluded land plots also refers to a dispute with the company Inter kop. Mr. Markićević explains in his witness statement that he has no knowledge about any dispute with Inter kop. Therefore, if the dispute really exists, it must have arisen only after Mr. Markićević left BD Agro in December 2015.[780]

731. On 25 February 2020, the Claimants made a request to inspect the relevant court file in order to learn more about this dispute. As of the date of this submission, the request remains unanswered.[781]

732. Mr. Markićević also confirms that Inter kop voted in favor of the pre-pack reorganization plan and did not raise any claims to BD Agro's land while Mr. Markićević was at BD Agro.[782]

733. Therefore, the claim, if it exists, clearly arose only after the valuation date of 21 October 2015 and is irrelevant for this arbitration.

iv. Dispute with EKO ELEKTROFRIGO

734. Another dispute mentioned in the list of the excluded land plots is an alleged dispute with the company EKO ELEKTROFRIGO. The dispute with EKO ELEKTROFRIGO relates to a sale of approximately 4 hectares of BD Agro's land in October 2008. The sale agreement specified that EKO ELEKTROFRIGO was buying 41,000 m^2 out of a large land plot of 182,340 m^2, but failed to specify the exact part of the land subject to the sale.[783]

735. EKO ELEKTROFRIGO therefore initiated court proceedings to obtain a binding determination of the specific part of the land plot that BD Agro must transfer to EKO

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779 Ilic ER, ¶ 9.87.

780 Markićević Fourth WS, ¶ 51.

781 Request to the Commercial Court Belgrade, 25 February 2020, **CE-856**.

782 Markićević Fourth WS, ¶ 51.

783 Purchase agreement between BD Agro and Eko Elektrofrigo, 27 October 2008, Art. 1, **CE-145**. *See also* Markićević Fourth WS, ¶ 52.

ELEKTROFRIGO.[784] The Claimants made a request to inspect the court file related to this dispute,[785] but same as the Claimants' other requests, it was rejected.

736. The 41,000 m^2 sold to ELEKTROFRIGO were not included among BD Agro's assets as of the valuation date. Therefore, they were not valued by Dr. Hern and need not be excluded again. The remainder of the land plot was included and valued, and this was correct because a claim for 41,000 m^2 of BD Agro's land does not justify the exclusion of the 171,344 m^2 from the valuation.[786]

b. Land that was allegedly distributed to employees

737. The list of excluded land plots also includes various land plots that were "*distributed to employees*," supposedly sometime between 1998 and 2002.[787] Mr. Markićević confirms in his witness statement that during the time when he was the general manager of BD Agro, no employees made any claims regarding these land plots.[788] Mr. Markićević also confirms that he is not aware of any claims that would have been made before he joined BD Agro.[789]

738. Therefore, there is no evidence that the claims exist, let alone that they existed at the valuation date of 21 October 2015.

c. Land excluded due to "*possibility of restitution*"

739. Another stated reason for exclusion of certain land plots was an alleged "*possibility of restitution*."[790] Serbia claims that the "*possibility of restitution*" exists with respect to land plots in Novi Bečej Nos. 21842, 22062/2, 22062/5, 22414/2 and 2063/1.[791] Serbia does not specify what exactly it means by the "*possibility of restitution*" nor does it refer to any evidence that would support the alleged existence of this "*possibility*".

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784 Markićević Fourth WS, ¶ 52.

785 Request to the Commercial Appellate Court Belgrade, 14 February 2020, **CE-857**.

786 Without explaining why, the list excludes only 171,344 m^2, not the entire land plots of 182,344 m^2. List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

787 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

788 Markićević Fourth WS, ¶ 53.

789 Markićević Fourth WS, ¶ 53.

790 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

791 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

740. Given the utter lack of any specific information provided by Serbia, the Claimants submitted an official request to the Serbian Restitution Agency, in which they inquired whether any restitution requests have been made with respect to the land in Novi Bečej.[792]

741. On 28 February 2020, the Agency replied that "*by access to the electronic database of the Agency for Restitution, it was determined that there was no request for return of confiscated property or for indemnification for cadastral parcels*" specified in the Claimants' request.[793] This conclusion is consistent with the testimony of Mr. Markićević, who confirms that during his time at BD Agro, there were no restitution requests to land in Novi Bečej.[794]

742. Furthermore, even if there were some restitution requests that would not be recorded in the Restitution Agency database,[795] such claims could not lead to restitution of BD Agro's land in Novi Bečej. This is because private entities, such as BD Agro, do not have a duty to restitute property. In accordance with Article 9 of the Law on Restitution of Property and Compensation, this duty only falls on various public entities, companies with major social capital and cooperatives.[796] If any restitution requests related to BD Agro's land were granted, Serbia would pay the applicant monetary compensation and the land would remain in BD Agro's ownership.[797]

d. Allegedly expropriated land

743. The list also excludes certain land plots that were allegedly expropriated in 1991.[798] Same as with respect to the possible restitution claims, no expropriation claims were made against BD Agro's land during Mr. Markićević's time at the company.[799]

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792 Request to the Serbian Restitution Agency, 27 February 2020, **CE-858**.

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

794 Markićević Fourth WS, ¶ 54.

795 The Agency noted in its response that some requests may not be registered because they refer to numbers of old land plots, which have changed in the meantime. In such a case, the current land plots to which a request relates would be identified only during the restitution proceedings. Response from the Serbian Restitution Agency, 28 February 2020, **CE-859**.

796 Law on Restitution of Property and Compensation, Art. 9, **CE-860**.

797 Law on Restitution of Property and Compensation, Art. 9, **CE-860**.

798 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

799 Markićević Fourth WS, ¶ 54.

Therefore, there is no evidence that any expropriation claims were pending as of the valuation date of 21 October 2015.

744. Furthermore, even if any land owned by BD Agro indeed were to be expropriated, BD Agro would be compensated at market price. Therefore, the expropriation would have no effect on BD Agro's valuation.

e. Land sold to Hypo Park

745. The table also excludes approximately nine hectares of land plot No. 4647/8 with an explanation that they were "*sold to Hip park Dobanovci*" and 0.9 hectares of land plots Nos. 4655/1 and 4655/2 with the explanation that they were allegedly "*not in RGO*".[800]

746. Parts of the land plots Nos. 4647 and 4655 were sold to Hypo Park in June 2008, when Hypo Park bought approximately 102 hectares of land from BD Agro.[801] That land has not been included in BD Agro's assets as from the date of the sale in 2008—there is therefore no need to exclude it again now.[802]

f. Land plots that were allegedly "*conceded*" to Zemun municipality

747. Serbia further excludes some land plots because they were allegedly "*conceded to Zemun municipality*," either partially or fully.[803] Mr. Markićević confirms in his witness statement that he is not aware of any cession of these land plots to the Zemun municipality.[804]

748. Serbia also excluded most of the land plots Nos. 1285 and 2/84, for two reasons. First, because 333,648 m^2 was purchased by Galenika.[805] That part of these land plots was indeed purchased by Galenika in March 2013.[806] However, same as with respect to the

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800 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**; Markićević Fourth WS, fn. 58;

801 Purchase agreement between BD Agro and Hypo Park, 11 June 2008, Art. 1, **CE-144**. *See also* Markićević Fourth WS, ¶ 55.

802 Markićević Fourth WS, ¶ 55.

803 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

804 Markićević Fourth WS, ¶¶ 56-57.

805 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

806 Purchase Agreement between BD Agro AD Dobanovci and Galenika Fitofarmacija AD for land located in Bečmen, 4 March 2013, Art. 2, **CE-185**.

land plots sold to Hypo Park, this land was not in BD Agro's ownership and was not reported as such since the date of its sale in 2013.[807]

749. Second, Serbia further excluded 217,500 m^2 of these land plots because they were allegedly "*conceded to Zemun municipality*".[808] As explained above, Mr. Markićević confirms in his witness statement that he is not aware of any cession of these land plots to the Zemun municipality.[809]

g. Land plots excluded for other reasons

750. The table excludes three land plots because of alleged requests for their exclusion from the bankruptcy assets and another two land plots with an explanation simply stating "*public roads, green areas*".[810] Given this vague description, the Claimants are unable to provide any comments with respect to these land plots. That being said, the Claimants reiterate that Serbia did not submit *any* evidence showing that these land plots were not in BD Agro's ownership as of the valuation date of 21 October 2015.

B. Serbia improperly lowers BD Agro's valuation by a purported EUR 9.2 million provision for pending court proceedings that BD Agro was allegedly likely to lose

751. Serbia relies on Mr. Cowan's second report to argue that a "*provision for EUR 9.2 million*" should be included in the valuation of BD Agro "*due to pending court proceedings, which were likely to be lost by the company's own admission in its financial reports.*"[811]

752. Serbia's proposal is a textbook example of double counting. At least 99% of the provision proposed by Mr. Cowan were already included in BD Agro's liabilities or BD Agro had already made the required provision.[812] With respect to the remaining 1%, there was simply no reason to make any provisions.

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807 Markićević Fourth WS, ¶ 57.

808 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

809 Markićević Fourth WS, ¶¶ 56-57.

810 List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

811 Rejoinder, ¶ 1469.

812 The total provision proposed by Mr. Cowan equals RSD 1,097,643,899. Out of this amount, claims worth RSD 1,090,936,491 were already included in BD Agro's liabilities and BD Agro made provision for court fess worth RSD 50,000. Cowan Second ER, Appendix 2, points 4-5, 9-11, 13, 16-17, 53 and p. 64 (pdf). *See* Markićević Fourth WS, ¶ 63.

753. More than 97% of the provision proposed by Mr. Cowan is for Banca Intesa's EUR 9 million claim.[813] The EUR 9 million loan from Intesa was properly included among BD Agro's liabilities reported on its balance sheet filed with the financial statements for 2015 (and for the previous years). There was no other loan from Intesa in this amount, as was repeatedly confirmed by the bank itself.

754. For example, on 3 March 2015, Intesa sent an IOS confirmation to BD Agro, which showed only one loan in the amount of EUR 9 million.[814] Intesa also did not dispute the amount of debt included in the pre-pack reorganization plan (RSD 1,142,380,867 (approximately EUR 9.4 million)—including interest).[815] Finally, when Intesa applied for recognition of its receivables in BD Agro's bankruptcy proceedings, it referred to two receivables: (*i*) RSD 1,282,543,978.31 (approximately EUR 10.4 million)[816] based on the loan agreement for EUR 9.9 million dated 29 December 2008 (including interest); and (*ii*) RSD 44,755.89 (approximately EUR 363)[817] for various fees.[818]

755. Dr. Hern confirms, on his analysis of data from BD Agro's pre-pack reorganization plan and 2015 financial statements, that the loan from Intesa for which Mr. Cowan proposes to make a provision was already reported on BD Agro's balance sheet.[819]

756. Furthermore, the court proceedings to which Mr. Cowan refers are foreclosure proceedings initiated by Intesa in November 2013. These proceedings, however, ended one month later, in December 2013, when the appellate court canceled the decision on

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813 The exact amount claimed in these proceedings was RSD 1,069,971,700. *See* Cowan Second ER, Appendix 2, point 11 of the table.

814 Email from Banca Intesa to BD Agro, 9 March 2015, p. 5, **CE-809**.

815 Markićević Fourth WS, ¶ 65.

816 Using average exchange rate in 2016 of 123.1179 RSD/EUR. *See* Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

817 Using average exchange rate in 2016 of 123.1179 RSD/EUR. *See* Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

818 Registration of Intesa's receivables in BD Agro's bankruptcy, 25 October 2016, **CE-812**.

819 Hern Third ER, ¶¶ 111-113.

enforcement.[820] It was, therefore, an error for these proceedings to be included in the notes to BD Agro's financial statements for 2015.[821]

757. As for the remaining proceedings for which Mr. Cowan proposes the provision,[822] almost all corresponding liabilities were also reported on BD Agro's balance sheet.[823] The claimants were also included in the pre-pack reorganization plan, in the group of unsecured creditors.[824]

758. It is true that some of the claimed liabilities referred to by Mr. Cowan—with the total value of approximately EUR 46,400—were not reported on BD Agro's balance sheet. Mr. Markićević explains that with the exception of a EUR 400 court fee due to the commercial court, for which BD Agro made a provision, BD Agro did not report these liabilities on the balance sheet, nor made any provisions for them, because none of the claims had any merit.[825]

759. Finally, Mr. Cowan includes in his list certain proceedings that commenced only in 2016.[826] Given that the valuation date in this arbitration is 21 October 2015, these claims are irrelevant.

C. Ms. Ilic's criticism of Dr. Hern's expert report is entirely unfounded

760. As the Claimants explained in their letter to the Tribunal of 11 February 2020, Ms. Ilic raises several new criticisms of Dr. Hern's report.[827] In his third expert report, Dr. Hern demonstrates that Ms. Ilic's criticism of his first report is entirely unfounded.

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[820] Overview of proceedings No. Iv. 12725/2013, 20 February 2020, **CE-808**. *See also* Markićević Fourth WS, ¶ 64.

[821] BD Agro AD Dobanovci, Notes to the Financial Statements for Year 2015, p. 22 (pdf), **CE-171**.

[822] Sandy Cowan Second Expert Report dated 24 January 2020, Appendix 2.

[823] These include claims under points 4-5, 9-10, 13, 16-17. Proceeding under point 10, dispute with "Biro duros" doo Beograd, actually ended in in July 2015, when the appellate court upheld the claim. Sandy Cowan Second Expert Report dated 24 January 2020, Appendix 2; Overview of court proceedings No. P-5103/2013, 2 March 2020 (accessed), **CE-813**. *See also* Markićević Fourth WS, ¶¶ 66 *et seq*.

[824] *See* Amendment to the Pre-pack Reorganization Plan of BD Agro, 6 March 2015, pp. 38-40, **CE-101**. *See also* Markićević Fourth WS, ¶ 66.

[825] Markićević Fourth WS, ¶ 69.

[826] Sandy Cowan Second Expert Report dated 24 January 2020, Appendix 2, point 63 and last three disputes.

[827] Letter from the Claimants to the Tribunal, 11 February 2020.

1. Ms. Ilic's remarks regarding valuation of industrial and commercial land owned by BD Agro

a. Ms. Ilic incorrectly claims that Dr. Hern's methodology is inconsistent with international valuation standards

761. Ms. Ilic argues that Dr. Hern's valuation of BD Agro's commercial and industrial land in Dobanovci, regulated under the General Regulation Plan for BD Agro Complex Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin ("**GRP for Zones A, B and C**"[828] and "**Construction land in Zones A, B and C**") is inconsistent with international valuation standards because: (*i*) the evidence relied upon by Dr. Hern is allegedly not market evidence under international valuation standards;[829] and (*ii*) Dr. Hern did not adjust for the differences in the size of BD Agro's land and comparator evidence.[830] Ms. Ilic is wrong on both accounts.

i. Evidence relied upon by Dr. Hern is consistent with the principles underpinning the valuation standards

762. Ms. Ilic claims that Dr. Hern's valuation is not in line with international valuation standards.[831] That is incorrect. As Dr. Hern demonstrates in his report, all his evidence represents "market-derived" evidence consistent with the valuation standards cited by Ms. Ilic.[832]

763. Indeed, all evidence relied upon by Dr. Hern can be characterizes as "market-derived" evidence. Dr. Hern specifically relies on: (*i*) completed transactions of identical property; (*ii*) completed transactions of other similar property; (*iii*) other indirect evidence based on actual market transactions; and (*iv*) valuations based on asking prices for comparable land.[833] All of the evidence relied upon by Dr. Hern is therefore consistent with the broad principles underpinning the valuation standards that Ms. Ilic refers to.[834]

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828 General regulation plan for the "BD Agro" complex, zones "A", "B" and "C" in the suburb of Dobanovci, municipality of Surčin, 31 December 2008, **CE-143**.

829 Ilic ER, ¶¶ 4.8-4.12, 5.4-5.15.

830 Ilic ER, ¶¶ 4.10, 5.16.

831 Ilic ER, ¶ 4.8.

832 Hern Third ER, ¶¶ 25-35.

833 Hern Third ER, ¶ 31.

834 Hern Third ER, ¶ 33.

ii. No size adjustment of price is required under Dr. Hern's valuation

764. Ms. Ilic argues that Dr. Hern's valuation fails to reflect an appropriate adjustment for the differences in the size of BD Agro's land being valued and the size of comparable transactions.[835]

765. Ms. Ilic's criticism stems from a fundamental misunderstanding of the meaning of the fair market value. The fair market value as a concept reflects the hypothetical outcome of a sales process including proper marketing, contacting relevant investors, etc., that allows a knowledgeable seller to maximize its gain. As a result, if a higher value from the land could be derived by selling it individually in a number of pieces, this should be reflected in the fair market valuation. There is, therefore, no basis to apply a size discount, given that the land does not need to be sold as a whole.[836]

b. Ms. Ilic's calculation of size of Construction land in Zones A, B and C is incorrect

766. Ms. Ilic raises two points related to Dr. Hern's calculation of the size of the Construction land in Zones A, B and C: (*i*) Ms. Ilic argues that Dr. Hern's assumption on the total area of BD Agro's land in Zones A, B and C is incorrect;[837] and (*ii*) Ms. Ilic refers to the allegedly controversial legal status of some of the land owned by BD Agro in Zone A, B and C, as discussed in the valuation report prepared by Mr. Bodolo for the purpose of the bankruptcy valuation.[838] Once again, Ms. Ilic is wrong with respect to both points.

767. Dr. Hern's starting point for calculation of the area of the Construction land in Zones A, B and C is the total area reported in the textual part of the GRP for Zones A, B and C.[839] To arrive to the area of land owned by BD Agro as of the valuation date, Dr. Hern subtracts from the total area in the GRP for Zones A, B and C the area of the land sold by BD Agro.[840]

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835 *E.g.* Ilic ER, ¶ 4.10.

836 Hern Third ER, ¶ 40.

837 Ilic ER, ¶¶ 4.6, 4.11.

838 Ilic ER, p. 6 (pdf).

839 General regulation plan for the "BD Agro" complex, zones "A", "B" and "C" in the suburb of Dobanovci, municipality of Surčin, 31 December 2008, **CE-143**.

840 Hern Third ER, ¶ 44.

768. Ms. Ilic criticizes this approach and argues that "*without graphic annexes of GRP it is not possible to rely on information relating to the size of BD Agro land given in the text of GRP and this is exactly what is stated there*." To support her claim, Ms. Ilic refers to Section A.4 of the GRP.[841]

769. Ms. Ilic clearly misread the GRP for Zones A, B and C, because there is nothing in Section A.4. of the GRP for Zones A, B and C—or any other section of the plan—that could support Ms. Ilic's assertion.[842] There is simply no reason at all to dismiss the area directly reported in the textual part of the plan.

770. In contrast, Ms. Ilic entirely fails to explain—less substantiate—how she calculated her own area of the Construction land in Zones A, B and C. Ms. Ilic merely states that her calculation is based on the graphical annex of the GRP for Zones A, B and C.[843] This annex, however, does not contain any direct information about the size of the Construction land in Zones A, B and C.[844]

771. Ms. Ilic's calculation is further disproved by the calculation conducted by Mr. Mrgud in 2014. Mr. Mrgud calculated the size of the industrial and commercial land by superposing the graphic part of the regulation plan on the cadastral map and concluded that the area of the industrial and commercial land was approximately 295 hectares.[845] Mr. Mrgud even engaged a surveyor to measure the exact size of Zones A, B and C.[846] Given that BD Agro did not sell any industrial and commercial land between Mr. Mrgud's valuation and December 2015, the number calculated by Ms. Ilic does not seem to be correct.[847]

772. Ms. Ilic also argues that not all of the land in Zones A, B and C can be developed for commercial purposes, as some areas are reserved for public infrastructure (such as green

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841 Ilic ER, ¶ 4.6.

842 Hern Third ER, ¶¶ 46-47.

843 Ilic ER, ¶ 4.11.

844 Hern Third ER, ¶ 48.

845 Report on the valuation of the market value of building land in the BD Agro complex Zones A, B and C in the town of Dobanovci, December 2014, p. 4, **CE-175**.

846 Markićević Fourth WS, ¶ 42.

847 Markićević Fourth WS, ¶ 43.

areas and roads) and that this fact should be reflected in the valuation.[848] Ms. Ilic is wrong. There is no need to make adjustments for this factor because the land designed land designated for public purposes has to be developed by public authorities, which implies this land would have to be expropriated, with compensation to the owner based on the market value of the land.[849]

773. As for Ms. Ilic's reference to the allegedly controversial legal status of certain land plots owned by BD Agro in Zone A, B and C based on the conclusion in the valuation report prepared by Mr. Bodolo, the Claimants already explained that this point is entirely unsubstantiated by either Mr. Bodolo or Serbia. Furthermore, as rightly pointed out by Dr. Hern, while Ms. Ilic refers to this point in her report, she does not make any adjustments for the allegedly controversial land plots in her valuation.[850]

c. Ms. Ilic's criticims of Dr. Hern's comparator evidence related to Construction land in Zones A, B and C

774. Ms. Ilic makes several arguments concerning the comparator evidence used by Dr. Hern. Specifically, Ms. Ilic claims that:

a. the two transactions of BD Agro's actual land sold in Zone A, B and C used by Dr. Hern (EUR 20/m^2 and EUR 23/m^2) are not relevant market evidence;[851]

b. Dr. Hern's calculation of the price related to purchases of land in Dobanovci by Singidunum-buildings ("**Singidunum**") is unreliable;[852] and

c. the evidence from Serbian tax authorities is not relevant because it does not represent market transactions.[853]

775. As the Claimants explain in detail below, none of Ms. Ilic's arguments have any merit.

848 Ilic ER, ¶ 4.11.

849 Hern Third ER, ¶ 52.

850 Hern Third ER, ¶ 53.

851 Ilic ER, ¶¶ 4.16-4.17, 4.39, 5.9.

852 Ilic ER, ¶ 5.10.

853 Ilic ER, ¶¶ 4.19, 4.20, 5.6, 5.11, 5.12, 5.15.

i. Ms. Ilic erroneously dismisses evidence from BD Agro's actual transactions

776. Ms. Ilic claims that the transactions relied upon by Dr. Hern do not represent relevant market evidence because they are too old. Ms. Ilic is wrong. Even though the two transactions relied upon by Dr. Hern are indeed slightly dated (being from 2008 and 2009), they remain relevant. This is because they reflect transactions with the exact land whose fair market value is being established in this arbitration and, thus, represent the most direct evidence available.[854]

777. Ms. Ilic's also claims that the agreements concluded between BD Agro and EKO Elektrofrigo and between BD Agro and Trajan, relied upon by Dr. Hern, are allegedly conditional. This argument is both incorrect and irrelevant. Ms. Ilic refers to the following provisions in these agreements:[855]

   a. In the agreement with Elektrofrigo: "*[t]he Seller undertakes to implement the detailed regulation plan concerning the plots that are the subject of the sale/purchase, and to establish, by way of the detailed regulation plan, four plots intended for construction in accordance with the request of the Buyer*";[856] and

   b. In the SPA with Trajan: "*[t]he SELLER agrees that if the road envisaged by the urban design (the so-called 'Sremska Gazela') is not built by October 2010, the BUYER may exchange the immovable property for other land of his choice in the area of CM Bečmen, which exchange will be the subject of a separate agreement.*"[857]

778. Neither of the provisions cited by Ms. Ilic actually represents a "*condition*". They merely represent certain obligations on BD Agro's site. Furthermore, the obligation in the agreement with EKO Elektrofrigo to implement a detailed regulation plan became

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854 Hern Third ER, ¶ 58.

855 Ilic ER, ¶¶ 4.16-4.17.

856 Purchase Agreement between BD Agro AD Dobanovci and Eko Elektrofrigo d.o.o, 27 October 2008, Art 1, **CE-145**.

857 Purchase Agreement between BD Agro AD Dobanovci and Trajan d.o.o Beograd, 12 November 2009, Art. 7, **CE-146**.

irrelevant in December 2008—as a result of the adoption of the GRP for Zones A, B and C.

779. Pursuant to Article 39 of the Law on Planning and Construction: "*[p]lan of detailed regulation is enacted for parts of the settlements, in accordance with the general plan, or plan of general regulation.*"[858] Neither the general plan applicable to the Construction land in Zones A, B and C nor the GRP for Zones A, B and C envisaged adoption of a detailed regulation plan for the Construction land in Zones A, B and C.

780. On the contrary, according to Section G2 of the GRP for Zones A, B and C, borderlines of "*construction plots on the other construction land are analytically defined in graphic display No. 7: "The other construction land and plot division plan" - scale 1:2.500,* ***means that the construction plots may be formed directly from the plan****, except in cases of division of construction plots (plot division) or merging of construction plots (plots merging), when urban [project] is obligatory.*"[859] In other words, the GRP for Zones A, B and C expressly states that the construction plots can be formed directly based on the plan—without the need for any further regulation documents.[860]

781. The fact that no detailed regulation plan is needed for the development of the Construction land in Zones A, B and C was also confirmed by the municipality of Surčin, in which the land is located. The Surčin municipality published on its website a presentation titled "*Municipality of Surcin – Invest in Surcin*."[861] The presentation expressly states that the BD Agro complex has a general regulation plan with "*direct implementation*."[862] Furthermore, the presentation refers also to several other localities *and expressly notes that a detailed regulation plan needs to be prepared for some of them*.[863] Given that it does not state so with respect to the Construction land in Zones

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[858] Law on Planning and Development, Art. 39, **CE-900**.

[859] GRP for Zones A, B and C, p. 14 (pdf) (emphasis added), **CE-143**.

[860] For the sake of completeness, the Claimants note that the urban project represent merely a technical (nor regulatory) document that is prepared for the purposes of parcelization and re – parcelization, as well as for the purposes of implementation of an urban plan when it is envisaged by such the plan. *See* Law on Planning and Development, Arts. 13 and 60, **CE-861**.

[861] Presentation "Municipality of Surcin – Invest in Surcin", **CE-862**.

[862] Presentation "Municipality of Surcin – Invest in Surcin", p. 12, **CE-862**.

[863] Presentation "Municipality of Surcin – Invest in Surcin", pp. 13-30, **CE-862**.

A, B and C, it is clear that the municipality does not consider the adoption of a detailed regulation plan to be a pre-condition for development of this area.

782. The above belies Ms. Ilic's assertion that a detailed regulation plan was necessary for development of the Construction land in Zones A, B and C.[864] The fact is that Ms. Ilic herself actually does not provide *any* meaningful explanation as to why a detailed regulation plan was allegedly needed. While Ms. Ilic makes bold statements, such as: "*building on the land of BD Agro requires existence of the DRP which would define more accurately rules for future building activities*"; and there is "*no possibility to build anything until adoption of DRP*,"[865] she provides strictly no evidence that would support her conclusions.

783. Ms. Ilic starts her analysis by citing to various provisions of the Law on Planning and Construction, as well as one sentence from the spatial plan for the Surčin municipality.[866] Neither of these provisions states that a detailed regulation plan is needed for development of land governed by a general regulation plan. On the contrary, the very provisions cited by Ms. Ilic show that the Construction land in Zones A, B and C could be developed *without* a detailed regulation plan.

784. First of all, Ms. Ilic refers to the so-called "*location conditions.*" According to Ms. Ilic, the location conditions are a document that "*allows a land owner and / or investor to find out about the possibilities and limitations of development on cadastral parcel, how large building they can build and what are the conditions for access to the public roads and connection to communal infrastructure.*"[867]

785. While Ms. Ilic does not state so expressly,[868] the Claimants understand her reference to mean that she considers the issuance of the location conditions to be a pre-condition for potential development of the land. Even if that were indeed the case, it would not change the conclusion that the Construction land in Zones A, B and C could have been

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864 Ilic ER, ¶ 4.43, 4.45, 4.52, 4.57, 6.4, 8.4, 9.15, 9.79 and Appendix 1.3.

865 Ilic ER, Appendix 1.3.

866 Ilic ER, Appendix 1.3.

867 Ilic ER, Appendix 1.3.

868 Ilic ER, Appendix 1.3.

developed without a detailed regulation plan. This is because the location conditions would be issued based on the GRP for Zones A, B and C.

786. Ms. Ilic actually confirms in her report that, according to Article 57 of the Law on Planning and Construction, the location conditions "*are issued on the basis of the **general regulation plan (GRP)**, for parts of the territory for which it is not envisaged to prepare **detailed regulation plan (DRP)**.*"[869] As explained above, preparation of a detailed regulation plan has never been envisaged for the Construction land in Zones A, B and C, meaning that the location conditions would be issued based on the GRP for Zones A, B and C and that there was no need for a detailed regulation plan.

787. Ms. Ilic's statement that "*[i]n order to be able to build in BD Agro Zone A, B and C, it is necessary to establish a construction parcel in accordance with the valid Plan (to separate public from other construction land), and to finish construction of anticipated roads and infrastructure in order to secure conditions for development*" is equally inapposite.[870]

788. First of all, as explained above, the construction parcels could be formed directly based on the GRP for Zones A, B and C. Ms. Ilic herself admits that much:

> The GRP for the complex BD AGRO – ZONA A, B, C in Dobanovci defines analytically boundaries of the construction parcels on the public and other construction land, in the graphic addendums, *meaning that construction parcels may be shaped directly from the GRP*, except in cases of division of construction parcels (subdivision) which demands preparation of the urban project.[871]

789. As for Ms. Ilic's argument that certain infrastructure would need to be developed, this is entirely irrelevant since the development of infrastructure is addressed in detail in the GRP for Zones A, B and C.[872]

790. The provision in the SPA with Trajan provided for BD Agro's obligation to swap the land for alternative land in Bečmen if the agreed conditions had not been met by October

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869 Ilic ER, Appendix 1.3 (emphasis in the original).

870 Ilic ER, Appendix 1.3.

871 Ilic ER, Appendix 1.3 (emphasis added).

872 GRP for Zones A, B and C, pp. 2, 4-5-8 (pdf), **CE-143**.

2010. Importantly, such swap would have been realized under a separate agreement—conditions of which remain absolutely unclear.

791. In any case, the obligations in agreements with EKO Elektrofrigo and Trajan do not impact the reliability of the transaction prices as comparator evidence for Dr. Hern's valuation. Both these transactions have been completed and the buyers continue to own the land to this day. This implies that the buyers were happy to retain the BD Agro land that they purchased as is for the price they paid without any additional demands.[873]

ii. Ms. Ilic's criticism of the calculation of the price related to purchases of land in Dobanovci by Singidunum has no merit

792. To calculate the price paid for the land by Singidunum, Dr. Hern relies on the purchase price of the land reported in Singidunum's annual accounts for 2011, as there are no earlier accounts available. Given that the Singidunum accounts only include information on the value of land purchased, but not the total area, Dr. Hern takes the total area of the purchased land from the annual accounts of Lamda, the parent company on Singidunum, for 2008 and 2009.[874]

793. Ms Ilic raises the concern that by combining values on the land owned from the Singidunum annual accounts for 2011 and the information on area purchased from the Lamda annual accounts in 2008 and 2009, Dr. Hern has omitted land purchased after 2009.[875] Ms Ilic's concern is unwarranted. The 2010 and 2011 Lamda annual reports show the same amount of land owned by Singidunum in 2011 and in 2010 as in the 2009 Lamda report. Dr. Hern's calculation of the price paid for this land is therefore correct.[876]

iii. Ms. Ilic's criticism of evidence from tax authorities has no merit

794. Ms Ilic raises several concerns with the evidence from the Serbian tax authorities relied upon by Dr. Hern. As explained below, neither of these concerns is warranted.

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873 Hern Third ER, ¶ 60.

874 Hern Third ER, ¶ 62.

875 Ilic ER, ¶ 5.10.

876 Hern Third ER, ¶ 64.

795. First of all, Ms. Ilic raises a general concern that all of the evidence from the Serbian tax authorities is irrelevant, because it does not represent actual market transactions.[877] That is not correct. As Dr. Hern explain in his report, the evidence he relies on makes it clear that it provides *market value* of the land plots in question.[878]

796. While the specific way in which the tax authorities calculated the market value in individual cases slightly varies, this does not change the fact that the presented values represent *market values* and as such are relevant for Dr. Hern's assessment.[879]

797. In any case, Dr. Hern explains that the tax documents he relies on[880] make it clear that they rely on actual market transactions or previous tax assessments. Where the tax documents rely on a previous tax assessment, it is the assessment made for determining the tax on transfer of absolute rights.[881] Calculation of the market value of land for these purposes is governed by the Law on Property Taxes[882] and the Instruction on the Procedure and Method of Determining Tax on the transfer of absolute rights ("**TA Instruction**").[883]

798. Pursuant to Article 27 of the Law on Property Taxes, the tax base for the tax on transfer of absolute rights is primarily the contracted price. If the tax authorities consider the contractual price to be below the market price, they determine the tax base based on the market value:[884]

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877 Ilic ER, ¶¶ 4.19-4.20, 5.11-5.12, 5.15.

878 Hern Third ER, ¶ 69.

879 Hern Third ER, ¶ 69.

880 Tax Administration Branch B Stara Pazova, 23 December 2016, **CE-158**; Tax Administration Zemun Branch, 17 March 2016, **CE-159**; Tax Administration Zemun Branch, 8 June 2016, **CE-160**; Tax Administration Zemun Branch, 24 August 2016, **CE-161**; Tax Administration Head Office, 26 March 2013, **CE-162**; Tax Administration Zemun Branch, 5 August 2014, **CE-163**.

881 Tax Administration Head Office, 26 March 2013, pp. 1-2, **CE-162**.

882 Law on Property Taxes, **RE-525**.

883 Instruction on the Procedure and Method of Determining Tax on the transfer of absolute rights, **RE-526**.

884 Law on Property Taxes, Art. 27 (emphasis added), **RE-525**.

Tax base
Article 27
The tax base for the tax on the transfer of absolute rights is the contracted price, at the time when the tax liability arises, if it is not lower than the market value.
If the competent tax authority considers that the contracted price is lower than the market price, it shall have the right to, within 60 days from the day of receipt of the tax form in accordance with the provision of Article 36, paragraph 1 of this Law, or from the date when the competent tax authority was informed about the transfer, determine the tax base in the amount of market value.

799. Pursuant to Section 8 of the TA Instructions, the tax authorities determine whether the contracted price represents the market price by comparing it to the market value of similar real estate:[885]

> The competent tax authority makes an assessment of the contracted price by comparing it with the market values of similar types of real estate from legally concluded cases of transfer of absolute rights relating to the real estate, which were subject to pay that tax and in which tax base was assessed at market value in the process of determining the absolute rights transfer tax, as well as comparison with the market values of similar rights at the time when the tax liability arises.

800. In case the tax authorities consider the contracted price to be lower than the actual market value of the land being transferred, they will calculate the market value of the transferred land, which will serve as the tax base. The rules for this calculation (with respect to agriculture and construction land) are provided in Section 13 of the TA Instruction, which states that the market value is determined based on at least two previous decisions of the tax authorities. These are, in turn, based on actual transactions or other decisions providing the market value of land (which are eventually based, again, on specific market transactions):[886]

885 TA Instruction, Section 8 (emphasis added), **RE-526**.

886 TA Instruction, Section 13, **RE-526**.

13. Assessment of the land referred to in point 10, paragraph 1, indent 2 of this Instruction shall be made on the basis of: - information on the market value determined in at least two final decisions of the tax authority, issued in the process of determining the tax for the transfer of absolute rights, for the sale of the same or similar land on the market (construction or agricultural), which is in the same cadastral municipality, neighboring or near cadastral parcels, of the same or similar crops (arable land, orchard, meadow, forest, etc.) and class (first, second, third, etc.) and which is closest to the date when the taxable amount to be determined is incurred. The assessed value of the land can be reduced or increased up to a maximum of 10%, by applying corrective factors depending on location, proximity to roads, availability of the infrastructure, proximity to urbanized area, etc.

801. Ms. Ilic's remaining concerns related to evidence from tax authorities used by Dr. Hern are equally meritless. First of all, Ms. Ilic incorrectly claims that Dr. Hern selectively ignored the evidence on the value of comparable land in Krnješevci, which was included in the documents from the tax administration related to Nova and Stara Pazova.[887] Dr. Hern did not rely on the evidence on the value of land in Krnješevci because it was not comparable. The fact that the land is not comparable is expressly stated in the very document to which Ms. Ilic refers.[888]

802. Ms. Ilic also wrongly dismisses some of the tax evidence related to Stara and Nova Pazova and Batajnica simply because it slightly post-dates the valuation date.[889] Given the lack of other sources of market evidence, Dr. Hern decided to rely on this document to provide a wider range of evidence. Nevertheless, this evidence remains close (2016) to the expropriation date (21 October 2015).

803. Furthermore, Ms. Ilic incorrectly argues that Dr. Hern has compared BD Agro's land to land in Zemun, which is fully developed and hence not comparable.[890] Dr. Hern actually did not rely on the evidence for Zemun at all. Exactly because the land in Zemun was

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[887] Ilic ER, ¶ 4.20.

[888] Tax Administration Branch B Stara Pazova (23 12 2016), Number 235-464-08-00090/2016-J2B02, Delivery on Information Request from December 23, 2016, p.1 (in the pdf file), last paragraph, **CE-158**. *See also* Hern Third ER, ¶ 75.

[889] Ilic ER, ¶¶ 5.11-5.12.

[890] Ilic ER, ¶ 4.52.

fully developed and showed substantially higher values than his valuation of BD Agro's land in Zone A, B and C.[891]

804. Finally, Ms. Ilic incorrectly claims that Dr. Hern was inconsistent when he used documents that considered the Construction land in Zones A, B and C as agriculture land, but he himself did not value it as such.[892] Ms Ilic's criticism completely ignores the development potential of BD Agro's land. The objective of Dr. Hern's valuation is to estimate the fair market value of BD Agro's land in Zone A, B and C. Since BD Agro's land in Zone A, B and C can be developed for industrial and commercial purposes, this potential is properly reflected in his valuation by valuing it on the basis of comparable land with similar development potential.[893]

805. The fact that, for tax purposes, this land may be considered as agricultural land does not mean that in determining the fair market value thereof it should be valued as agricultural land when it can be developed at a much higher value as industrial and commercial land.[894] Similarly, the fact that the conversion fee should be calculated on the basis of equivalent agricultural land, also does not change the fact that the fair market value of this land should reflect its potential to be developed for industrial/commercial purposes.[895]

2. Ms. Ilic's remarks regarding valuation of other construction land

806. Ms. Ilic's raises two concerns related to Dr. Hern's valuation of other construction land. Ms. Ilic argues that: (*i*) Dr. Hern should have excluded the outlier transaction of 30 EUR/m^2 which involved only 50m^2 of land from his comparable evidence and used a median instead of an average value;[896] and (*ii*) Dr. Hern's use of a third party valuation report (Confineks) is inconsistent with international valuation standards.[897]

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891 Hern Third ER, ¶ 77.

892 Ilic ER, ¶ 4.12.

893 Hern Third ER, ¶ 79.

894 Hern Third ER, ¶ 79.

895 Hern Third ER, ¶ 79.

896 Ilic ER, ¶¶ 4.25 to 4.27.

897 Ilic ER, ¶ 5.20.

807. Ms. Ilic is wrong on both accounts. First of all, the evidence from sale of 50m^2 of land is supported by another comparator transaction of a much larger area of almost 7,000 m^2 at a price 34 EUR/m^2.[898] Hence the transaction at 30 EUR/m^2 is in line with the other transactions, and there is no evidence that its smaller size makes it less relevant. Second, both average and median calculations represent reasonable measures of the central tendency of the comparator evidence from a statistical point of view.[899] Finally, the Confineks valuation represents relevant evidence on the fair market value of BD Agro's assets, given that it was used to revalue the assets in the 2015 annual accounts as approved by the shareholders (with the Privatization Agency as the main shareholder at the time).[900]

3. Ms. Ilic's remarks regarding valuation of agriculture land

808. Ms. Ilic claims that in his valuation of the agriculture land, Dr. Hern relied on two expropriations: (*i*) which are not comparable in terms of size and location; (*ii*) one of which post-dates the expropriation date; and (*iii*) which Dr. Hern presents an expropriation price of 5 EUR/m^2, the source for which is unclear.[901]

809. Ms. Ilic clearly misunderstood the expropriations evidence relied upon by Dr. Hern. Dr. Hern relied on 50 different expropriations of different sizes and locations, not just two. Neither of these expropriations post-dates the valuation date. The prices paid in these expropriations ranged between 2.2 EUR/m^2 and 5 EUR/m^2.[902]

810. Ms Ilic also reiterates her argument that the use of a third party valuation report (Confineks) is inconsistent with international valuation standards. As explained above, this argument is without any merits.

D. Serbia incorrectly calculates tax obligation applicable in the but-for scenario proposed by the Claimants

811. In its Rejoinder, Serbia also introduces two new arguments related to Serbian taxes.

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898 The comparable transaction at 34 EUR/m^2 has an area of 6,996 m^2. Ilic ER, ¶ Table 3. *See also* Hern Third ER, ¶ 83.

899 Hern Third ER, ¶ 84.

900 Hern Third ER, ¶ 85.

901 Ilic ER, ¶ 4.32.

902 Hern Third ER, ¶ 90.

First, Serbia argues that the Claimants should have reflected in their calculations a 15% capital gain tax that would have been paid by Mr. Obradović upon sale of BD Agro shares.[903] *Second*, Serbia claims that MDH Serbia would need to pay a 15% dividend tax on the amount transferred to Mr. Rand after the sale of BD Agro.[904]

812. The suggestion that the Claimants' calculation of damages should somehow take into account Mr. Obradović's capital gain taxes is incorrect because it is the Claimants' case that, but for Serbia's unlawful conduct, Mr. Obradović would have been able to transfer nominal ownership of BD Agro shares to Sembi, which would then receive any proceeds from BD Agro's business directly. It would not be for Mr. Obradović to sell BD Agro's shares to a third party. This means that there would not be any additional proceeds received by Mr. Obradović that would be subject to Serbian taxes.

813. Serbia does not dispute that under the Cyprus-Serbia double taxation treaty, Sembi's income would not be subject to the Serbian capital gain tax.

814. The Claimants, however, accept Serbia's argument that MDH Serbia would be obliged to pay dividend tax on any amounts distributed to Mr. Rand and will reflect that tax in their updated calculation of damages, which they will present at the hearing.

E. Tax gross-up for Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand

815. Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand claim for a tax gross-up for the Canadian tax they will have to pay on any amounts received as compensation for damages that may be awarded by this Tribunal. This is because no Canadian tax would have been due if they had received distribution of capital from the Ahola Family Trust as it is a non-resident trust from a Canadian income tax perspective.[905]

816. Serbia only now argues the opposite: that the tax gross up claimed by the Claimants should not be awarded because The Ahola Family Trust is apparently resident in Canada and, as such, any proceeds distributed from The Ahola Family Trust to its beneficiaries

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903 Rejoinder, ¶ 1492.

904 Rejoinder, ¶ 1494.

905 Memorial, ¶¶ 581-591; Reply, ¶¶ 1432-1442.

would allegedly be subject to taxation in Canada.[906] Serbia's arguments are incorrect and based on a misinterpretation of Canadian law and the facts of this case.

817. It is true that the Canadian tax residence of the Ahola Family Trust is to be determined based on the location of central management and control of the trust. While it is also true that the trust had been at all relevant times controlled by Mr. Rand, who is a Canadian resident, this does not automatically mean that the trust was controlled from Canada.

818. In *Fundy Settlement v. Canada*, the decision relied upon by Serbia,[907] the Supreme Court of Canada concluded that tax residence should not be concluded based on a tax residence of a person controlling a trust, but based on the actual place from which the management and control are exercised:

> *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***. The residence of the trust is not always that of the trustee. It will be so where the trustee carries out the central management and control of the trust where the trustee is resident. Here, however, the trusts are resident in Canada, since the central management and control of the trusts was exercised by the main beneficiaries in Canada and the trustee's limited role was to provide administrative services and it had little or no responsibility beyond that.[908]

819. Contrary to the facts determined in the *Fundy* decision, Mr. Rand has never exercised the central management and control of the Ahola Family Trust from Canada. As noted by the Canada Revenue Agency, the notion of management and control should be interpreted as "*high level strategic decision making*" rather than "*day to day functions.*"[909] Mr. Rand has had investments located around the world and his activities have involved a significant amount of international travel. Given this fact, Mr. Rand was advised by his tax attorneys that his participation in high level strategic decision making relating to Sembi, and by extension also The Ahola Family Trust, should be

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906 Rejoinder, ¶¶ 1504-1509.

907 Rejoinder, ¶ 1505.

908 *Fundy Settlement v. Canada*, 2012 SCC 14, 12 April 2012, p. 3 (pdf) (emphasis added), **RE-366**.

909 Canada Revenue Agency document 2015-0610791C6, 24 November 2015, **CE-863**.

done while he was physically outside of Canada. In case of Sembi, this included also the attendance of all board meetings in person or by teleconference.[910]

820. Mr. Rand has always followed this advice and any high level strategic decision making relating to Sembi and/or the Ahola Family Trust was done while he was physically outside of Canada.[911] The Ahola Family Trust therefore cannot be considered as centrally managed and controlled from Canada and, thus, is a non-resident trust for Canadian tax purposes.

821. Serbia also argues that, even if the central management and control of The Ahola Family Trust was exercised outside Canada, which is the case, the trust would still be deemed to be a Canadian tax resident because its beneficiaries are tax residents.[912] To support its claim, Serbia relies on Article 94(3) of the Canadian Income Tax Act.[913] This provision, however, requires that there be a contribution to the trust from a resident (or, in some instances, a former resident) of Canada.[914] There was no such contribution made to the trust and Serbia does not provide any evidence whatsoever to the contrary.

822. Serbia is, therefore, wrong when it claims that the disposition by the beneficiaries of their interest in The Ahola Family Trust "*would have been taxable in Canada regardless of whether the trust was resident in Canada or not.*"[915] A capital distribution from a non-resident trust, such as The Ahola Family Trust, in satisfaction of a capital interest in the trust held by Canadian resident beneficiaries, results in disposition of that capital interest by the beneficiaries but would not be a taxable disposition for Canadian tax purposes.

823. This is expressly stated in Subsection 107(2) of the Canadian Income Tax Act, which provides a tax deferred rollover where property is distributed from a trust to a beneficiary in satisfaction of all or part of a beneficiary's capital interest:

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910 Rand Third WS, ¶ 55.

911 Rand Third WS, ¶ 55.

912 Rejoinder, ¶ 1507.

913 Rejoinder, ¶ 1507; Income Tax Act (Canada), Art. 94(3), **RE-566**.

914 Income Tax Act (Canada), Art. 94(3), **RE-566**.

915 Rejoinder, ¶ 1512.

> 107(2) Distribution by personal trust
>
> Subject to subsections (2.001), (2.002) and (4) to (5), if at any time a property of a personal trust or a prescribed trust is distributed (otherwise than as a SIFT trust wind-up event) by the trust to a taxpayer who was a beneficiary under the trust and there is a resulting disposition of all or any part of the taxpayer's capital interest in the trust,
>
> (a) the trust shall be deemed to have disposed of the property for proceeds of disposition equal to its cost amount to the trust immediately before that time;
>
> (b) subject to subsection (2.2), the taxpayer is deemed to have acquired the property at a cost equal to the total of its cost amount to the trust immediately before that time and the specified percentage of the amount, if any, by which
>
> (i) the adjusted cost base to the taxpayer of the capital interest or part of it, as the case may be, immediately before that time (determined without reference to paragraph (1)(a)) exceeds
>
> (ii) the cost amount to the taxpayer of the capital interest or part of it, as the case may be, immediately before that time […].[916]

824. Serbia is also wrong to claim that 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 Income Tax Act and that any capital gain on the disposition for Canadian tax purposes should be reduced by the tax cost in the shares.[917] Subsection 56(2) of the Income Tax Act has no tax impact on the recipient of an indirect payment, such as to the beneficiaries. For example, if the Ahola Family Trust is considered to have directed a benefit to the beneficiaries pursuant to subsection 56(2), the effect of that provision would be to include the directed amount in the income of The Ahola Family Trust. As the Ahola Family Trust is a non-resident of Canada, such inclusion in income would not have resulted in any Canadian taxation to The Ahola Family Trust.

825. Finally, Serbia argues that, if the Ahola Family Trust had been a resident Canadian trust (*quad non*) for Canadian tax purposes, then even if Sembi was a non-resident, the sale of BD Agro shares by Sembi would have been taxable in Canada to the Ahola Family Trust.[918] While Serbia's logic in this respect is unclear, it is presumed that they are referring to "foreign accrual property income" which, if the trust was resident in Canada,

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[916] Income Tax Act (Canada), Art. 107(2), **CE-373**.

[917] Rejoinder, ¶ 1513.

[918] Rejoinder, ¶ 1509.

would be included in its income under subsection 91(1) of the Income Tax Act.

826. The definition "foreign accrual property income" under subsection 95(1) of the Income Tax Act, however, excludes "excluded property". That term is also defined in subsection 95(1) of the Income Tax Act and would upon disposition include shares of BD Agro where all or substantially all of the fair market value of the property of BD Agro is attributable to property used or held by BD Agro principally for the purpose of gaining or producing income from an active business carried on by it.[919] As a result, given that all of BD Agro's property was used or held for the purpose of generating income, the disposition of its shares by Sembi would not be included in the definition of foreign accrual property income and, as a result, would not be included in the income of the Ahola Family Trust, even if Sembi were, which it is not, a controlled foreign affiliate of the trust.

827. Serbia also only now argues that, as Mr. Rand always had control of Sembi, that the company was likely also a resident for the purposes of Canadian tax law and should have been paying tax in Canada on its world-wide income.[920] Again, Serbia is incorrect. Like with the Ahola Family Trust, the residency of Sembi for Canadian tax purposes is the place where the central management and control—more specifically, the high level strategic decision making—is exercised. As noted above, Mr. Rand makes clear in his third witness statement that his high level strategic decision making in respect of Sembi was at all times done outside of Canada. As a result, Sembi is a non-resident corporation for Canadian tax purposes.

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[919] Income Tax Act (Canada), Art. 95(1), **RE-566**.

[920] Rejoinder, ¶ 1509.

V. REQUEST FOR RELIEF

828. The Claimants request that the Tribunal issues an award:

a. declaring that Serbia has breached the Cyprus-Serbia BIT;

b. ordering Serbia to pay compensation to Sembi of no less than EUR 81 million;

c. declaring that Serbia has breached the Canada-Serbia BIT;

d. in the alternative to request b. above, ordering Serbia to pay compensation to:

   (i) Rand Investments of no less than EUR 14.7 million;

   (ii) Ms. Kathleen Elizabeth Rand of no less than EUR 22 million, plus a gross-up of 33.2% on that amount;

   (iii) Ms. Allison Ruth Rand of no less than EUR 22 million, plus a gross-up of 33.2% on that amount; and

   (iv) Mr. Robert Harry Leander Rand of no less than EUR 22 million, plus a gross-up of 33.2% on that amount;

e. in the alternative to request d.(i) above, ordering Serbia to pay compensation to Mr. William Rand of no less than EUR 14.7 million.

f. ordering Serbia to pay compensation to Mr. William Rand:

   (i) no less than EUR 3.6 million for loss of value of Mr. Rand's Indirect Shareholding; and

   (ii) no less than EUR 3.2 million for loss of value of Mr. Rand's receivables against BD Agro;

g. ordering Serbia to pay interest on any amounts awarded at the rate of Serbian statutory default interest rate (currently 8%) from 4 October 2019 until payment in full;

h. ordering Serbia to pay the costs of this proceeding, including costs of legal representation; and

i. ordering such other relief as the Tribunal may deem appropriate in the circumstances.

829. The Claimants reserve the right to supplement or otherwise amend their claims and the relief sought.

Submitted on behalf of Rand Investments Ltd., Mr. William Archibald Rand, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand, Mr. Robert Harry Leander Rand and Sembi Investment Limited

Rostislav Pekař
Stephen Anway
Mária Polaková
Matej Pustay
David Seidl
Nicole Jančová
Tereza Psutková
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Nenad Stanković
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