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

BETWEEN

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

AND

SEMBI INVESTMENT LIMITED
(CYPRUS)
("**Claimants**")

- and -

THE REPUBLIC OF SERBIA
("**Respondent**")

Respondent's Submission on Quantum

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16 March 2020

BEFORE:

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

Secretary of the Tribunal
Ms. Marisa Planells-Valero

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I. INTRODUCTION

1. In accordance with the Tribunal's instruction of 20 February 2020, the present submission responds to Claimants' arguments concerning quantum contained in Claimants' Rejoinder on Jurisdiction. Specifically, Respondent will deal with the following:

   - the status of BD Agro's land that was excluded from the sale in the bankruptcy proceedings;

   - Mr. Cowan's response to Dr. Hern's criticism and Mr. Cowan's new calculation of value of BD Agro;

   - Ms. Ilic's answer to Dr. Hern's third expert report in part dealing with real estate valuation;

   - Serbian tax issues; and

   - Canadian tax gross up requested by Claimants.

2. Respondent introduces two new expert reports with this submission: (1) Mr. Cowan's Third Expert Report; and (2) Ms. Ilic's Second Expert Report, as well as new exhibits RE-567 to RE-655 and corrected exhibit RE-399.

II. RESPONSE TO CLAIMANTS' SUBMISSIONS ON QUANTUM

A. CLAIMANTS DO NOT HAVE THE RIGHT TO COMPENSATION FOR THE LAND THAT DOES NOT BELONG TO BD AGRO

3. In the Rejoinder on Jurisdiction Claimants assert that Respondent has improperly excluded certain land plots from the valuation of BD Agro for two 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] Respondent will refute each of Claimants' points.

1. Respondent provided sufficient evidence

4. Claimants argue that Respondent failed to provide sufficient evidence for the exclusion of the subject land from the valuation of BD Agro.[2] However, Respondent provided a list of cadastral parcels for which BD Agro's bankruptcy trustee determined that were either not in the ownership of BD Agro or that their ownership was controversial.[3] Claimants put much emphasis on the assertion that this is not sufficient evidence[4] but this is incorrect. The bankruptcy trustee, as will be explained in more detail below, has the duty to manage BD Agro's property in manner that would achieve its highest possible value in order to satisfy the purpose of the bankruptcy proceedings and ensure the most favorable collective disbursement of creditors. Moreover, the bankruptcy trustee is personally liable for any damage he causes to the participants of the bankruptcy proceedings, either intentionally or through gross negligence.[5] As such, he is liable to the creditors and his role is to protect their interest, for which reason he represents a credible source of information on the property of the bankruptcy debtor. This is to say that no bankruptcy trustee would base conclusions that do not favor the bankruptcy estate on frivolous or groundless claims. Therefore, by providing the list of the excluded land prepared by BD Agro's bankruptcy trustee, Respondent has provided sufficient evidence to carry its burden of proof. It was then up to Claimants to prove otherwise, but, as will be seen below, they failed to do so.

5. Additionally, Claimants rely on the fact that the land in question was recorded in the competent land cadasters as owned by BD Agro.[6] However, this is not sufficient evidence of BD Agro's ownership. The record in the land cadaster creates only a presumption, and as Respondent will show further below, for each of the parcels listed, there was a ground for the transfer of ownership to other persons which existed prior to the valuation date.

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[1] Rejoinder on Jurisdiction, para.713; see also para. 712.
[2] See Rejoinder on Jurisdiction, paras. 713-717.
[3] See List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.
[4] See Rejoinder on Jurisdiction, para. 715.
[5] See Article 31 of the Law on Bankruptcy, **RE-639**.
[6] See Rejoinder on Jurisdiction, para. 716.

2. Issues concerning Claimants' request for access to certain court files

6. Claimants make much of the fact that the Agency for the Licensing of Bankruptcy Trustees and certain courts in Serbia refused to allow them access to the below-mentioned court case files that relate to BD Agro's land.[7] However, this is nothing but the continuation of Claimants' groundless accusations that Respondent is obstructing their case and pressuring their witnesses. As Respondent will further explain, (i) Claimants did not file request for access to the court files, (ii) instead, Crveni Signal did but misrepresented the reasons for seeking access to court files; (iii) the bankruptcy trustee was not competent nor obliged to allow access to court files making requests addressed to him inapposite, (iv) Crveni Signal could never have a justified interest to access court files for the relevant disputes, making the courts' decisions not to allow it access to the files the only logical outcome.

7. At the outset, it should be noted that Claimants did not file any request for access to the court files. Instead, another company in supposed beneficial ownership of Mr. Rand, Crveni Signal, filed those requests, citing their position as BD Agro's bankruptcy creditor as the false reason for which they needed access to the court files.[8] Had the Claimants filed the request for access to the court files and honestly stated the purpose of their request for access to the case files of BD Agro's disputes with ZZ Buducnost, Inter kop Sabac, the Republic of Serbia and Eko Elektrofrigo, explaining that they were involved in international arbitration against the Republic of Serbia where the exact state of BD Agro's assets is one of the crucial issues, the requirement of justified interest would have been judged on different grounds and might well have been judged differently. Moreover, if the Claimants considered that they had a better chance at seeing the case files if applying in the name of a bankruptcy creditor, however dubious the reasoning, it remains unclear why would they choose Crveni Signal, rather than Mr. Rand, who himself is on the list of creditors. All this inevitably points to the conclusion that Claimants acted in bad faith when they hid behind Crveni Signal, and failed to reveal their real interest in seeking the court files.

[7] See Rejoinder on Jurisdiction, paras.722-723, 731 & 735 and footnote 776.

[8] See Email communication between NSTLAW and the Agency for Licensing of Bankruptcy Trustees dated 21 February 2020, **CE-853**; Request to Commercial Court Belgrade dated 29 January 2020, **CE-854**; Request to Commercial Court Belgrade dated 13 February 2020, **CE-855**; Request to the Commercial Court Belgrade dated 25 February 2020, **CE-856**; Request to the Appellate Court Belgrade dated 14 February 2020, **CE-857**.

8. On the other hand, Claimants' insinuation that the courts' refusal to provide access to Crveni Signal was deliberate is completely unfounded and ultimately irrelevant for this dispute, which does not concern Crveni Signal. In any case, while it is true that Crveni Signal is one of BD Agro's bankruptcy creditors, this fact alone is not sufficient to establish its legal interest to access court files related to an ongoing dispute between BD Agro and a third party. To begin with, Article 10(1) of the Bankruptcy Law provides that: "*[b]ankruptcy proceedings shall be open to the public and all participants in the proceedings shall be entitled to timely access to data relating to the conduct of the proceedings, except the data constituting a business or official secret*."[9] Also, a bankruptcy creditor is entitled to *"the right to ask and timely receive from the bankruptcy administrator all information related to the bankruptcy debtor, the course of the bankruptcy proceedings, and property and management of the assets of the bankruptcy debtor."*[10] However, these provisions do not impose an obligation on the bankruptcy trustee to provide the creditors with access to documents but to provide them with information about the property and management of the assets, which is something different. They do not provide Crveni Signal with the right to access the court files relevant to BD Agro's disputes with third parties - ZZ Buducnost, Inter kop Saba, the Republic of Serbia or Eko Elektrofrigo. For that reason, and because he is not the actual competent organ in the circumstance, the Bankruptcy Trustee was correct in referring Crveni Signal to the relevant courts.

9. Namely, access to court files is regulated by the Law on Civil Procedure, which in Article 149 provides that:

> *„The parties to the dispute and their legal and authorized representatives, have the right to review, photocopy, copy and photograph case files of the dispute they are participating in.*
>
> *Other persons, having a justified interest, shall be allowed to undertake the actions referred to in paragraph 1 of this Article in relation to certain court files.*
>
> *Where the court proceedings are ongoing, the permission for the actions referred to in paragraphs 1 and 2 of this Article is given by*

[9] Article 10(1) of the Law on Bankruptcy, **RE-199**.
[10] Article 10(2) of the Law on Bankruptcy, **RE-199**.

the acting judge, and where the court proceedings had been completed the permission is given by the President of the Court or the person designated by him."[11]

10. The relevant question when establishing a justified interest is whether Crveni Signal could adequately protect its legal rights without getting access to the case files. The right of Crveni Signal as a bankruptcy creditor is to have its claim against BD Agro settled in the most advantageous manner achievable, but it does not fall upon an individual creditor to protect these rights directly. Rather, that is the role of the bankruptcy trustee once the bankruptcy proceedings are initiated. Namely, the very purpose of the bankruptcy proceedings is the most favorable collective disbursement of the creditors by realizing *the highest possible value for the bankruptcy debtor or its assets*,[12] and the bankruptcy trustee must manage the bankruptcy estate in a manner which would achieve this goal. Creditors' insight in, and oversight of, the work of the bankruptcy trustee is not realized by giving them direct access to the disputes between the bankruptcy debtor and third parties, but by their right to be provided with the information about the property and management of debtor's assets as set out in Article 10 of the Law on Bankruptcy cited above. Consequently, creditors, including Crveni Signal, do not have the required justified interest to directly access the case files concerning these disputes. In fact, giving such access to bankruptcy creditors would lead to absurd results. Each bankruptcy debtor may have tens or even hundreds of creditors and giving each of them access to court files of the debtor's disputes with third parties would in effect make those files publicly available, while at the same time risk overburdening the courts with their requests.

11. In addition, Claimants also mention that the Commercial Court in Belgrade refused to provide them with rejection in writing.[13] However, there is no provision of the law obligating the court to issue a written document in such instances,[14] and it has been the long-standing practice of the courts not to do this, which Claimants' Serbian counsel are certainly aware of. Finally, if they were dissatisfied with the decision of the acting

[11] Article 149 of the Law on Civil Procedure, **RE-640**.
[12] Article 2 of the Law on Bankruptcy, **RE-639**.
[13] See Rejoinder on Jurisdiction, para. 723.
[14] See Article 98 of Court Rules of Procedure, **RE-641**.

judges, the Claimants could have filed a complaint with the President of the relevant court asking him to review the decision.[15]

12. In any case, for the avoidance of any contrived conspiracy arguments concerning the nature of these claims, Respondent provides the complete court files for the cases in question, except for the case file of the dispute with Eko Elektrofrigo, which, despite Respondent's best efforts, the Commercial Appellate Court could not provide within the short deadline for this submission. Respondent agree to provide this file at a later stage, upon request of Claimants and with the permission of the Tribunal.

3. Reasons for exclusion

13. Respondent will now proceed to explain each ground for exclusion of the land from valuation of BD Agro, in detail. However, it is important to note at the outset that, despite Claimants' continuous assertions to the contrary, each of the grounds existed before the valuation date, while a number of them must have been known to BD Agro. The fact that claims relied upon below were submitted to the courts after the valuation date is irrelevant. What matters is when did the third party ownership rights arise and that this was prior to 21 October 2015 for each of the claims.

14. Further, it should be noted that Claimants attempt to use these proceedings to contest the decisions of the bankruptcy trustee on exclusion of certain land from sale although Mr. Rand, as BD Agro's bankruptcy creditors, had full opportunity to raise a challenge in the bankruptcy proceedings, but chose not to do so. It is presumed that Mr. Rand, if he had genuine concerns with the manner and method in which BD Agro was sold, had sufficient interest as bankruptcy creditor to file a complaint to the bankruptcy judge against the bankruptcy trustee's decisions.[16]

3.1. Dispute with ZZ Buducnost Dobanovci

15. Claimants argue that the circumstances of the claim brought by ZZ Buducnost Dobanovci, namely the fact that it was brought in proximity to the valuation date for purposes of the bankruptcy sale and the fact that it was rejected by the competent court relatively soon after, make it controversial and question the validity of the claim

[15] See Articles 8 & 55 of the Law on the Organization of Courts, **RE-644**.
[16] See Article 133 of the Bankruptcy Law, **RE-445**.

itself.[17] Moreover, they assert that a claim brought in 2018 cannot have any bearing on the valuation of the company as of 21 October 2015.[18] Respondent will show that both of these points are incorrect.

16. The Agricultural Cooperative (*in Serbian: "Zemljoradnička zadruga" or "ZZ"*) Buducnost Dobanovci (**"ZZ Buducnost Dobanovci"**) filed a request for the exclusion of certain land parcels from BD Agro's bankruptcy estate. [19] Namely the cooperative sought to exclude cadastral parcels nos. 4671/1, 4680, 4681/1, 4683, 5527, 5545/1, 5547/1, 5571/14, 5575, 5583, 5584/1, 5587/1, 5588 and 5592/1 CM Dobanovci, encompassing a total surface of 1,838,721 m2. The request was contested in the final list of claims issued by the bankruptcy trustee on 13 March 2018. As a legal remedy, the Cooperative brought a claim on 8 June 2018 before the Commercial Court in Belgrade seeking the exclusion of the same land from the bankruptcy estate.[20]

17. The ZZ Buducnost Dobanovci lawsuit refers to the 1996 Law on Cooperatives which provided that land owned by cooperatives after 1 July 1953 which was transferred without consent or any legal basis, by statutory changes or on some other grounds, to users other than the cooperatives or cooperative councils was to be returned, either to the cooperatives that originally owned it or cooperatives of the same type operating within the same area.[21] ZZ Buducnost Dobanovci brought the claim as the legal successor of the old Agricultural Cooperative Buducnost Dobanovci formed in 1961.[22]

18. According to the claim of ZZ Buducnost,[23] as part of extensive agricultural reforms in the former Yugoslavia following World War II, which were aimed ultimately at creating self-managing agricultural giants, the Agricultural Cooperative Buducnost Dobanovci was assimilated into the Agricultural Industrial Combine (*in Serbian: PIK*) "Srem" in 1963.[24] A series of decisions, both from the Agricultural Cooperative Buducnost Dobanovci and PIK Srem shows that the cooperative was obliged to

[17] See Rejoinder on Jurisdiction, paras. 720-724.
[18] See Rejoinder on Jurisdiction, para. 725.
[19] Notice from the Agricultural Cooperative Buducnost Dobanovci dated 20 June 2018, **RE-573**.
[20] See Claim brought by the ZZ Buducnost Dobanovci against BD Agro Dobanovci, dated 8 June 2018, **RE-574**.
[21] Article 95 of the 1996 Law on Cooperatives, **RE-642**. The 2015 Law on Cooperatives takes these processes into account and provides that they will be concluded in accordance with the procedure set out in the 1996 Law. See Article 107 of the 2015 Law on Cooperatives, **RE-643**.
[22] See Certificate of the Serbian Business Registers Agency dated 6 July 2009, **RE-575**.
[23] Claim brought by the ZZ Buducnost Dobanovci against BD Agro Dobanovci, dated 8 June 2018, **RE-574**.
[24] See Certificate of the Serbian Business Registers Agency dated 6 July 2009, **RE-575**.

transfer all its assets to PIK Srem[25], including the land it had previously acquired.[26] With the assimilation, the cooperative seized to exist as a legal entity.[27]

19. A Certificate of the Serbian Business Registers Agency, provided as Exhibit RE-575, shows (1) the legal succession from PIK Srem to the new ZZ Buducnost Dobanovci and (2) the mergers and changes in the organizational structure and status of agricultural combines which included PIK Srem, and ultimately resulted in the land which was transferred from the Agricultural Cooperative Buducnost Dobanovci to PIK Srem being allocated to PPK Buducnost[28] which changed its name to BD Agro after the privatization.

20. The claim brought by ZZ Buducnost Dobanovci against BD Agro was never decided on the merits, i.e. it was not rejected as Claimants assert. Namely, the Commercial Court in Belgrade found that the claim had certain formal deficiencies that had to be rectified before the court could act upon it. Consequently, on 14 June 2018, the Court ordered ZZ Buducnost Dobanovci to specify the claim by clearly stating the assets for which it was requesting exclusion from the bankruptcy estate.[29] On 22 June 2018, the cooperative submitted an updated claim which partially complied with the Court's order and specified some of the land plots.[30] These plots correspond to the plots excluded from the sale of BD Agro.[31]

21. At the hearing held on 18 September 2018, the legal representative of the cooperative requested that the preparatory hearing be postponed as the cooperative was still in the process of collecting the relevant information from the competent cadaster offices to fully identify the land parcels that should be returned to it. This was an arduous

[25] Excerpt from the Minutes of the Session of the Workers Committee of PIK Srem dated 20 September 1963, **RE-576**; Decision from the Session of the Cooperative Council of the Agricultural Cooperative Buducnost Dobanovci dated 15 September 1963, **RE-577**.

[26] Decision from the Session of the Cooperative Council of the Agricultural Cooperative Buducnost Dobanovci dated 18 October1962, **RE-578**.

[27] Excerpt from the Minutes of the Session of the Workers Committee of PIK Srem dated 20 September 1963, **RE-576**; Decision from the Session of the Cooperative Council of the Agricultural Cooperative Buducnost Dobanovci dated 15 September 1963, **RE-577**.

[28] In that sense, see also Agreement concluded between PKB, PPK Buducnost and the Agricultural-industrial combine Zemun dated 18 April 2000, **RE-579**.

[29] Order of the Commercial Court in Belgrade no. 19 P-3039/18 dated 21 December 2018, **RE-580**. It should be noted that the claim was formulated by the cooperative itself, without the assistance of an attorney, and the cooperative was considered and treated as a so-called lay party to the proceedings.

[30] Order of the Commercial Court in Belgrade no. 19 P-3039/18 dated 21 December 2018, **RE-580**.

[31] Compare Order of the Commercial Court in Belgrade no. 19 P-3039/18 dated 21 December 2018, **RE-580** with List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

process because of the significant changes and structural updates made to the land registers between the early 1960s when the land was acquired and the present day. This resulted in both reshaping and renumbering of the relevant parcels. The court allowed the postponement, however, the cooperative did not manage to gather the relevant information for the subsequent hearing scheduled for 21 December 2018. The court found that it provided the cooperative with sufficient chance to specify its claim and proceeded to dismiss (not reject) the claim on purely formal grounds.[32]

22. The above clearly shows that this was not a frivolous or merely contrived claim for the sole purpose of excluding the land from the sale of BD Agro as suggested by the Claimants[33]. The bankruptcy trustee had every reason to exclude the land in question from the sale, as the court proceedings were still ongoing at the cut-off date for the valuation of the company for purposes of sale set at 30 June 2018. As shown above and contrary to Claimants' assertions, the claim is prima facie not without merit. Nevertheless, collecting the data to support a claim such as this is inevitably a complex process, particularly for a lay party like the cooperative.

23. Moreover, because the claim of ZZ Buducnost Dobanovci was never decided on the merits, but was only dismissed (*odbačen*), there is no *res judicata* effect and the claim remains controversial as it could be raised again,[34] i.e., nothing precludes ZZ Buducnost from bringing a new claim to establish its ownership rights.

24. Finally, it is obvious that ZZ Buducnost Dobanovci's claim of ownership over the relevant land predates the alleged expropriation, which is, according to Claimants, set on 21 October 2015. Therefore, it is undoubtedly relevant to the valuation of BD Agro.

3.2. Dispute with the Republic of Serbia

25. Claimants are correct to assume that the dispute in question concerns the land exchange between the Ministry of Agriculture and BD Agro and that the proceedings

[32] Order of the Commercial Court in Belgrade no. 19 P-3039/18 dated 21 December 2018, **RE-580**.
[33] See Rejoinder on Jurisdiction, para. 724.
[34] See Article 80(3) of the Law on Bankruptcy, **RE-639**. (*"An exclusion creditor can realize his claim in any court or other type of proceedings"*)

are still pending.[35] However, Claimants' actual arguments why the exclusion of this land would not affect the valuation of BD Agro fall short.

26. As a way of background, this land exchange concerned, in part, the land that was nationalized in post-WWII agricultural reforms.[36] In the period between 1993 and 1996, the land, which was at the time in BD Agro's ownership, was subject to restitution and it was returned to its original owners.[37] BD Agro and Mr. Obradovic became aware of this at the latest as of February 2008.[38] Despite that, in 2010, BD Agro exchanged this land for land owned by the Republic of Serbia, effectively giving Serbia the land BD Agro did not own and receiving in exchange land parcels nos. 5552 and part of 5594 CM Dobanovci and 3999/1 CM Ugrinovci.[39] All this is subject of criminal proceedings conducted against *inter alia* Mr. Obradovic and Mr. Jovanovic.[40]

27. Claimants on the other hand, give a presentation of the dispute that is erroneous and a deliberate misrepresentation of the facts. Claimants argue that the land swap was recommended in the letter of the Cadaster Office of Surcin, and rely presumably on the following quote: *"[t]he 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*

[35] See Rejoinder on Jurisdiction, para. 726.

[36] This refers to cadastral parcels nos. 4647/1, 4647/2, 4647/3, 4647/4, 4647/5, 4647/6, 4647/7, 5571/3, 5571/4, 5571/5, 5571/5, 5571/6, 5571/6, 5571/7, 5571/7, 5571/8, 5571/8, 5571/9, 5571/9, 5571/10, 5571/10, 5571/11, 5571/11, 5571/12, 5571/12, all CM Dobanovci, which BD Agro exchanged for the land of the Republic of Serbia. See Agreement on exchange of land between the Ministry of Agriculture, Forestry and Water Management and BD Agro, 4 January 2010, **RE-396.**

[37] See Letter from the Cadastre Office to BD Agro, dated 8 February 2008, **RE-395**, which confirms that all of the cadastral parcels that BD Agro put to exchange, and which are listed in footnote 35 above, had been returned to natural persons who were their original owners in the process of restitution of agricultural land. Respondent also provides individual Decisions of the Commission for Conducting Restitution Procedure on the restitution of parcels nos. 4647/1, 4647/2, 4647/3, 4647/5, 4647/6, 4647/7, 5571/4, 5571/5, 5571/6, 5571/9, 5571/10 and 5571/12. See Decision of the Commission for Conducting Restitution Procedure 462-442/91-III dated 13 September 1993, **RE-581**; Decision of the Commission for Conducting Restitution Procedure 462-32/92-III dated 25 October 1995, **RE-582**; Decision of the Commission for Conducting Restitution Procedure 462-370/91-III dated 24 October 1996, **RE-583**; Decision of the Commission for Conducting Restitution Procedure 462-25/92-III dated 3 November 1994, **RE-584**; Decision of the Commission for Conducting Restitution Procedure 462-390/91-III dated 3 November 1994, **RE-584**; Decision of the Commission for Conducting Restitution Procedure 462-35/92-III dated 17 March 1994, **RE-586**. The court proceedings before the Commercial Court in Belgrade are still ongoing and the State Attorney Office, which represents Serbia in the subject case, is still in process of collecting evidence for which reason Respondent is not in the position to provide the Decisions relevant to each of the parcels at the moment.

[38] Letter from the Cadastre Office to BD Agro, dated 8 February 2008, **RE-395.**

[39] See Agreement on exchange of land between the Ministry of Agriculture, Forestry and Water Management and BD Agro, 4 January 2010, **RE-396.**

[40] See Rejoinder, paras. 395-401.

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"[41] However, nothing in the Cadaster's letter can be construed as a *"recommendation"*, and especially not as a recommendation for BD Agro to use the land it did not actually own as the object of exchange. The letter is a response from the Cadaster Office to a specific inquiry by BD Agro (Mr. Jovanovic)[42] and is a simple statement on whether the land used at the time by BD Agro may be suitable for a *"compensation"* for the land that the company cannot use, and not a recommendation on how BD Agro could solve its *"issue"*.[43] In fact, BD Agro's request for the land exchange preceded the cited letter from the Cadaster,[44] meaning that the letter was received only while the execution of the criminal act was well under way. The testimonies of Mr. Obradovic and Mr. Jovanovic in the criminal proceedings only confirm that the Cadaster's letter was never used as a defense, and that it was never even claimed that the criminal acts in question were incited by the Cadaster in any way.[45] There is no doubt that the management of BD Agro was fully aware of what it was doing.

28. Moreover, the Privatization Agreement provided that the "*integral part of the subject's property includes nationalized property*", and the buyer agreed to act pursuant to the relevant regulation on the issue of restitution.[46] Mr. Obradovic bought the social capital of BD Agro, with all its rights and obligations included, in accordance with the law and provisions of the Privatization Agreement,[47] and confirmed that *"he was enabled to examine and check the subject, its property and financial activities and he entirely relies on self-performed examinations at the time of*

[41] Letter from the Cadastre Office to BD Agro, dated 8 February 2008, **RE-395.** See also Rejoinder on Jurisdiction, paras. 255-256.

[42] Indictment no. KTI 65/16, 5 April 2017, p. 18, **RE-399_corrected** ("*In this Request, the accused Ljubisa Jovanovic, as CEO of the business entity, asks the cadaster to determine all precise surfaces of the land assigned to the natural persons, with determined class, surface, crops and to deliver this data to the Ministry of Agriculture and that the business entity "BD-agro" is assigned with an adequate land. The Request further states that the proposal is that this should be cadastral lot 5552 CM Dobanovci as well as some other lots owned by the state and whose user is this business entity*.")

[43] Letter from the Cadaster Office to BD Agro, dated 8 February 2008, **RE-395**. See also Rejoinder on Jurisdiction, para. 255.

[44] Indictment no. KTI 65/16, 5 April 2017, pp. 8-9, **RE-399_corrected** (the request was submitted on 13 April 2007, while the Letter from the Cadaster Office to BD Agro was sent almost one year later, on 8 February 2008)**.**

[45] Indictment no. KTI 65/16, 5 April 2017, pp. 11-12, **RE-399_corrected.**

[46] Article 6.1.1 of the Privatization Agreement with Annexes, **CE-17**.

[47] Article 1.1 of the Privatization Agreement with Annexes, **CE-17**.

purchase of the capital".[48] Bearing all the above in mind Mr. Obradovic was well aware that certain land parcels of BD Agro could be the object of restitution and that no compensation would be owed to the company for those parcels. He also accepted all the pre-existing obligations of the company.

29. Even though the proceedings related to this dispute are still ongoing, the court has ruled that the Agreement on Exchange of Land between the Ministry of Agriculture and BD Agro is null and void, and this decision is final.[49] The court has also found that both parties to the Agreement (*i.e.* the accused individuals from the criminal proceedings) had acted in bad faith. Namely, both parties had to be aware of the fact that the conclusion of the Agreement had to be approved by a decision of the Government, and that the Ministry's decision could not serve as the basis for it.[50] This is a mandatory provision of the law.[51] Moreover, the letter to the Ministry proposing the land exchange specifically cited the relevant norm to that effect, i.e. Article 73 of the Law on Agriculture.[52] In view of this, Claimants' statement that BD Agro was unaware of this requirement and naively trusted the supposed assurances of the representatives of the Ministry or simply took the wording of the Decision of the Ministry literally,[53] is disingenuous, to say the least. This is especially true when taking into account that as an agricultural company BD Agro could never be understood as a lay party, and would have a heightened obligation of due diligence.

30. The court ruling means that BD Agro shall have to return the land it had received from the Republic of Serbia in the exchange, namely the cadaster parcel no. 5552 and part of the cadastral parcel 5594 in the size of 127,126 m2 which corresponds to cadastral parcels no. 5594/1, 5594/5, 5594/6 and 5594/7 CM Dobanovci, and cadastral parcels no. 3999/1 in the size of 47, 750 m2 and 3999/1 in the size of 47, 880 m2 CM Dobanovci.[54]

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[48] Article 5.1.5 of the Privatization Agreement with Annexes, **CE-17**.

[49] First Instance Judgment of Commercial Court in Belgrade dated 14 September 2017, **RE-587**; Second Instance Judgment of Commercial Appellate Court dated 31 January 2019, **RE-588**.

[50] See First Instance Judgment of Commercial Court in Belgrade dated 14 September 2017, **RE-587**; Second Instance Judgment of Commercial Appellate Court dated 31 January 2019, **RE-588**.

[51] Article 73(2) of the Law on Agriculture, **RE-234**.

[52] Letter from BD Agro to the Ministry of Agriculture, Forestry and Water Management, 13 April 2007, **RE-401**.

[53] See Rejoinder on Jurisdiction, paras. 256-257 & 259.

[54] Agreement on exchange of land between the Ministry of Agriculture, Forestry and Water Management and BD Agro, 4 January 2010, **RE-396**; List of BD Agro's land which was not sold, dated 30 June 2018,

31. Certain issues related to the restitution of the land still need to be ascertained in the continued proceedings, with one of the key questions being the obligation of the Republic of Serbia to compensate BD Agro for the parcels it cannot return to BD Agro because they have been handed into the possession of third parties.[55] Namely, as noted in the Letter of the Cadaster Office, the land parcels that BD Agro had exchanged were subject to restitution before the conclusion of the Agreement on Exchange of Land, and BD Agro was well aware of this.[56] By entering into the Agreement BD Agro knowingly disposed of assets that were not in its ownership, to begin with, and the Republic of Serbia never entered into the possession of this land because it was returned to private persons to whom it was awarded by decisions on restitution. In these circumstances, it is not to be expected that the court will rule that Serbia should provide monetary compensation to BD Agro for this property which was not BD Agro's in the first place.

32. In conclusion, the Agreement between the Ministry of Agriculture and BD Agro is null and void. BD Agro will almost certainly have to return the land it received from Serbia in the exchange to the land that it did not own and will not receive compensation in return.

3.3. Dispute with Inter kop Sabac

33. Claimants rely on Mr. Markicevic to ascertain that there could have not been any dispute with Inter kop Sabac that arose before the valuation date.[57] This is simply not true and Mr. Markicevic's statement is simply not proper evidence in that regard.

34. On 30 April 2012, Inter kop Sabac as the buyer and BD Agro as the seller concluded a Real Estate Purchase Agreement the object of which was 67,039m2 of land in Zones A, B and C.[58] Article 3 of the Real Estate Purchase Agreement provided that the

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RE-451. The combined size of cadastral parcels no. 5594/1, 5594/5, 5594/6 and 5594/7 CM Dobanovci is 126936m2.

[55] Second Instance Judgment of Commercial Appellate Court dated 31 January 2019, **RE-588**.

[56] Letter from the Cadaster Office to BD Agro, dated 8 February 2008, **RE-395**.

[57] See Rejoinder on Jurisdiction, paras. 730-733.

[58] The land in question were parts of cadastral parcels nos. 5590, 5591, 5592 and 5593 CM Dobanovci in the combined size of 67,039 m2. According to the Agreement, all listed cadastral parcels correspond to parcels from the General Regulation Plan for BD Agro Zones A, B and C, and their parts which make the object of the Agreement are located in block C8. See Articles 1 & 2 of the Real Estate Purchase Agreement between BD Agro and Inter kop Sabac dated 30 April 2010, **RE-589**. Based on the Information on location issued by the Municipality of Surcin, block C-8 is comprised of cadastral parcels nos. 5589/3, 5600/5, 5590/2, 5591/2, 5592/2, 5593/3, 5625/2, 5626/2 and 5601/3 CM Dobanovci. See

payment of the purchase price amounting to EUR 1,139,663 will be made through set-off against certain works that Inter kop Sabac was to conduct on BD Agro's farm.[59] In April 2011 BD Agro and Inter kop Sabac signed a Declaration on set-off for the amount of RSD 114,060,809.22 (approx. EUR 1,139,000 at the time)[60] and signed an open item statement for RSD 9,994,196.35 (approx. EUR 99,000 at the time it was due).[61] Inter kop even paid property taxes for the stated real estate.[62]

35. Despite this, BD Agro's bankruptcy trustee contested Inter kop's request for exclusion of the relevant land parcels from the bankruptcy estate. Consequently, on 31 January 2018, Inter Kop filed a claim before the Commercial Court in Belgrade seeking recognition of its ownership rights over the land parcels and their exclusion from the bankruptcy estate.[63] The proceedings are still ongoing. They have been suspended by the order of the court dated 22 January 2020 because bankruptcy proceedings have been opened against Inter kop but should resume as formal requirements for their continuation have been met.[64]

36. Based on the above, there were strong reasons for BD Agro's bankruptcy trustee to exclude the said land. Moreover, Inter kop's claim is based on an agreement concluded before the valuation date and represents sufficient ground for this land to be excluded from BD Agro's valuation.

3.4. Dispute with Eko Elektrofrigo

37. The dispute concerns Eko Elektorfigo's claim of ownership over 61,000 m2 of the surface of cadastral parcel no. 4665 CM Dobanovci. On 27 October 2008 BD Agro and Eko Elektrofrigo concluded a Real Estate Purchase Agreement by which BD Agro sold part of cadastral parcel no. 4665 CM Dobanovci encompassing the surface of

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Information on Location, no. 350-62/2019 dated 22 September 2019, **RE-590**. Accordingly, the object of the Agreement were cadastral parcels nos. 5590/2, 5591/2, 5592/2 and 5593/3 CM Dobanovci

[59] Real Estate Purchase Agreement between BD Agro and Inter kop Sabac dated 30 April 2010, **RE-589**.

[60] Compensation Statement dated 14 April 2011/9 May 2011, **RE-591**.

[61] Open Item Statement signed by BD Agro and Inter Kop dated 23 March 2016, **RE-592**.

[62] Inter kop doo Tax Return for Calculated Property Tax for 2014, **RE-593**; Inter kop doo Tax Return for Calculated Property Tax for 2015, **RE-594**; Inter kop doo Tax Return for Calculated Property Tax for 2016, **RE-**; Inter kop doo Tax Return for Calculated Property Tax for 2017, **RE-596**.

[63] Inter Kop's Statement of Claim dated 31 January 2018, **RE-597.**

[64] See Order of the Commercial Court in Belgrade on Suspension of Proceedings dated 22 January 2020, **RE-598**. See also, Articles 222 & 225 of the Law on Civil Procedure, **RE-640.** The proceedings will resume when the bankruptcy trustee of Inter kop Sabac takes over the proceedings or is instructed by the court to do so on the request of the opposing party.

41,000 m2 to Eko Elektrfrigo.[65] On 10 April 2010 the parties concluded an annex to this contract by which Eko Elektrofrigo acquired further 20,000 m2 of the cadastral parcel no. 4665 CM Dobanovci.[66] On the basis of this contract and the annex Eko Elektrofrigo sought the exclusion of the referenced land from the bankruptcy estate, but the bankruptcy trustee contested the request.[67] However, the Judgment of the Commercial Court in Belgrade no. 1886/2019 dated 9 May 2019, which became final in its relevant part, i.e. paragraphs I, II and III of the operative part, on 26 June 2019, recognized Eko Elektrofrigo's ownership on 61,000m2 od the cadastral parcel no. 4665 CM Dobanovci.[68] Based on this Eko Elektrofigo's ownership was also entered into the records of the Cadaster Office of Serbia.[69]

38. Claimants argue that the land excluded by BD Agro's bankruptcy trustee related to the dispute with Eko Elektrofrigo was already excluded from Dr. Hern's valuation and thus "*need not be excluded again"*.[70] While Dr. Hern lists the contract with Eko Elektrofrigo among the sources based on which he calculated the surface of the land owned by BD Agro in Zones A, B and C and the total surface of the land owned by BD Agro,[71] his method does not allow Respondent to verify with certainty whether he actually made this exclusion. Dr. Hern never provided a list of cadastral parcels for which he asserts BD Agro's ownership, which would allow Respondent to check it against information about BD Agro's ownership. Bearing this in mind, Respondent maintains its position and reserves its right to return to this issue.

39. In any case, even if Claimants' assertion is correct, Dr. Hern needs to adjust his valuation by excluding another 20,000 m2 of the surface of cadastral parcel no. 4665 CM Dobanovci, considering that Eko Elektrofrigo's ownership rights over the surface of 61,000 m2 of cadastral parcel no. 4665 CM Dobanovci have been recognized by a final court decision.[72]

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[65] See Purchase agreement between BD Agro and Eko Elektrofrigo dated 27 October 2008, **CE-145**.
[66] Annex to the Purchase agreement between BD Agro and Eko Elektrofrigo dated 10 April 2010, **RE-599**.
[67] See Judgment of the Commercial Court in Belgrade no. 1886/2019 dated 9 May 2019, **RE-600**.
[68] Judgment of the Commercial Court in Belgrade no. 1886/2019 dated 9 May 2019, **RE-600**.
[69] Excerpt from the Cadaster Online Database for the land parcel no. 4665 CM Dobanovci, **CE-807**.
[70] Rejoinder on Jurisdiction, para. 736.
[71] See First Expert Report of Richard Hern, para. 55, Tables 3.1 & 3.2, Sources. See also Purchase agreement between BD Agro and Eko Elektrofrigo dated 27 October 2008, **CE-145**.
[72] See Judgment of the Commercial Court in Belgrade no. 1886/2019 dated 9 May 2019, **RE-600**; Excerpt from the Cadastre Online Database for the land parcel no. 4665 CM Dobanovci, **CE-807**.

40. Finally, Respondent submits that the exclusion of the entire surface of the cadastral parcel no. 4665 CM Dobanovci that was at the time entered into the cadastral records as owned by BD Agro, i.e. 171,344 m2 for the purpose of sale of BD Agro was a reasonable action of the bankruptcy trustee. Namely, at the cut-off date (30 June 2018), the court proceedings in this dispute were still ongoing, and because their subject-matter concerned ideal and not factual parts of the land parcel in question, the bankruptcy trustee could only exclude the entire parcel from the sale.

3.5. Land distributed to employees

41. Claimants argue, relying again on Mr. Markicevic, that they were not aware of any claims on land by BD Agro employees, and that there is simply not sufficient evidence for Respondent's assertion that this land needs to be excluded.[73]

42. Respondent provides Agreements on the Allocation of Land concluded by PPK Buducnost, as BD Agro was named before the post-privatization name change, with individual employees and relevant to the following land parcels:

    a. Cadaster parcel no. 2/6 CM Bečmen;[74]

    b. Cadaster parcel no. 2/15 CM Bečmen;[75]

    c. Cadaster parcel no. 2/20 CM Bečmen;[76]

    d. Cadaster parcel no. 2/28 CM Bečmen;[77]

    e. Cadaster parcel no. 2/32 CM Bečmen;[78]

    f. Cadaster parcel no. 2/35 CM Bečmen;[79]

    g. Cadaster parcels nos. 2/64 and 1281/17 CM Bečmen;[80]

    h. Cadaster parcels nos. 2/78 and 1281/13 CM Bečmen;[81]

[73] See Rejoinder on Jurisdiction, paras. 737-738.
[74] See Agreement on the Allocation of Land concluded with Goran Raukovic dated 19 April 2005, **RE-601**.
[75] See Agreement on the Allocation of Land concluded with Dobrinka Catic dated 19 April 2005, **RE-602**.
[76] See Agreement on the Allocation of Land concluded with Stevan Vukovic dated 19 April 2005, **RE-603**.
[77] See Agreement on the Allocation of Land concluded with Dejan Milicevic, **RE-604**.
[78] See Agreement on the Allocation of Land concluded with Radule Canic dated 19 April 2005, **RE-606**.
[79] See Agreement on the Allocation of Land concluded with Vuk Raskovic dated 19 April 2005, **RE-607**.
[80] See Agreement on the Allocation of Land concluded with Sinisa Petrovic dated 19 April 2005, **RE-608**.

i. Cadaster parcels nos. 2/79 and 1281/12 CM Bečmen;[82]

j. Cadaster parcels nos. 2/80 and 1281/11 CM Bečmen;[83]

k. Cadaster parcels nos. 2/82 and 1281/9 CM Bečmen;[84]

l. Cadaster parcels nos. 1281/3 and 1281/4 CM Bečmen;[85]

m. Cadaster parcel no. 1281/5 CM Bečmen;[86]

n. Cadaster parcel no. 1281/6 CM Bečmen;[87]

o. Cadaster parcel no. 1281/7 CM Bečmen;[88]

p. Cadaster parcel no. 1281/8 CM Bečmen;[89]

q. Cadaster parcel no. 1281/10 CM Bečmen;[90]

r. Cadaster parcel no. 1281/14 CM Bečmen;[91]

s. Cadaster parcel no. 1281/18 CM Bečmen.[92]

43. These contracts have been concluded based on the lists established by the Decisions of the Managing Board of PPK Buducnost dated 31 January 1998 and 27 February 1998.[93] In May 2005 PPK Buducnost (BD Agro) asked for the approval of the Privatization Agency to have the employees register their ownership with the Cadastral Office. The application for approval explicitly states that these land plots had been excluded from the assessment of the value of capital which was at the time

[81] See Agreement on the Allocation of Land concluded with Goran Lazic, **RE-609**.
[82] See Agreement on the Allocation of Land concluded with Pavle Djovcos dated 19 April 2005, **RE-610**.
[83] See Agreement on the Allocation of Land concluded with Ivica Djordjevic dated 19 April 2005, **RE-611**.
[84] See Agreement on the Allocation of Land concluded with Dragan Gigev dated 19 April 2005, **RE-612**.
[85] See Agreement on the Allocation of Land concluded with Igor Koldzic dated 19 April 2005, **RE-613**.
[86] See Agreement on the Allocation of Land concluded with Milica Musicki dated 19 April 2005, **RE-614**.
[87] See Agreement on the Allocation of Land concluded with Ilinka Stevanovic dated 19 April 2005, **RE-615**.
[88] See Agreement on the Allocation of Land concluded with Vucica Jovanovic dated 19 April 2005, **RE-616**.
[89] See Agreement on the Allocation of Land concluded with Radojka Dimitrijevic, **RE-617**.
[90] See Agreement on the Allocation of Land concluded with Musicki Negovan dated 19 April 2005, **RE-618**.
[91] See Agreement on the Allocation of Land concluded with Milorad Cvetic dated 19 April 2005, **RE-619**.
[92] See Agreement on the Allocation of Land concluded with Stana Radenkovic dated 19 April 2005, **RE-620**.
[93] See Decision of the Managing Board of PPK Buducnost dated 31 January 1998, **RE-621**; Decision of the Managing Board of PPK Buducnost dated 27 February 1998, **RE-622**.

conducted for purposes of privatization.[94] The contracts had also been included in the documentation of the Privatization Program,[95] and therefore, Mr. Obradovic was aware of them.

44. Likewise, cadastral parcels nos. 2/26, 2/51, 2/76, 2/83, 2/84, 1281/2, 1281/15, 1281/16 appear on the portal of the National Spatial Data Infrastructure (GEOSRBIJA.rs) as streets providing infrastructure to the neighborhood built on the land mentioned above.[96]

45. Respondent also provides Decisions of the Labor Council of PPK Buducnost (now BD Agro) relevant to the cadaster parcels nos. 5415/4, 5416/8, 5416/9, 5416/11, 5416/12, 5416/14, 5416/23, 5416/24 and 5416/27 CM Dobanovci, which constitute part of the neighborhood "Ciglana".[97] Based on these decisions, the employees of BD Agro were awarded the apartments located in the mentioned neighborhood and thus the attached land. For this reason, the referenced parcels should be excluded from the valuation of BD Agro.

3.6. Land excluded due to the possibility of restitution

46. Claimants also take issue with the status of certain land plots, which the bankruptcy trustee excluded from sale due to possibility of restitution. These are land plots nos. 21842, 22062/2, 22062/5, 22414/2 and 2063/1 located in Novi Becej. While not much information is available in this regard, as noted above, the bankruptcy trustee certainly cannot be taken to have acted without due care, and it is to be presumed that each ground of exclusion is based on extensive research rather than frivolity. In any case, if Claimants had a problem with the exclusion of these land plots, Mr. Rand could have raised this issue in the bankruptcy proceedings, which he did not do.

3.7. Expropriated land

47. In 1991 PPK Buducnost and the City Social Fund for Construction Land and Roads concluded a contract regulating the expropriation of cadaster parcel no. 5023/1 encompassing the surface of 185,551 m2; cadaster parcel no. 5023/3 encompassing the

[94] See Application for Issuing Approval dated 10 May 2005, **RE-623**.
[95] See Attachments to the Privatization Program, **RE-624**.
[96] Printouts from the GEOSRBIJA.rs. portal, **RE-625**.
[97] See Agreements on the Allocation of Residential Apartments to Employees of PPK Buducnost, **RE-626**.

surface of 26,846 m2; cadaster parcel no. 5039/1 encompassing the surface of 176,560 m2; cadaster parcel no. 5040 encompassing the surface of 1,998 m2 and cadaster parcel no. 5041 encompassing the surface of 2,494 m2 CM Dobanovci.[98] The parties agreed that the City Social Fund will pay compensation of RSD 33,443,165.00 for the expropriated land,[99] which it duly did.[100]

48. However, in 2008, BD Agro sued JP Putevi, the legal successor of City Social Fund, claiming unlawful use of the cadastral parcel no. 5023/5 and asking for either compensation in the form of new land or damages.[101] The court found that the expropriation had been lawfully completed in 1991 and that the legal predecessor of the defendant paid the required purchase price. The court also established that the cadastral parcel no. 5023/5 CM Dobanovci was established by subdivision of the cadaster parcel no. 5023/1 CM Dobanovci and is part of its original surface of 185,551 m2.[102] This corresponds to Report on Changes on Cadastral Parcel no. 5023 CM Dobanovci issued by the Cadaster Office Surcin, which also confirms that the cadastral parcel no. 5023/7 is part of the land that was expropriated.[103]

49. In conclusion, cadastral parcels nos. 5023/1, 5023/5 and 5023/7 CM Dobanovci had been lawfully expropriated in 1991, and no compensation is due as it has already been paid. Finally, while Mr. Markicevic may not be aware of any expropriation of BD Agro's land (which is in any case irrelevant)[104] it is impossible to say the same of another of Claimants witnesses, Mr. Obradovic, as he initiated court proceedings against JP Putevi and the Privatization Agency both in his name and in the name of BD Agro related precisely to the above-described expropriation.[105]

3.8. Land sold to Hypo Park

50. Respondent also submits that cadastral parcel no.4647/8 should be excluded from the valuation of BD Agor based on the fact that the land was sold to Hypo Park. Claimants

[98] Article 2 of the Contract between PPK Buducnost and the City Social Fund for Construction Land and Roads dated 1 April 1991/23 April 1991, **RE-627**.
[99] Articles 4 & 5 of the Contract between PPK Buducnost and the City Social Fund for Construction Land and Roads dated 1 April 1991/23 April 1991, **RE-627**.
[100] Confirmation of payment of the compensation amount, **RE-628**.
[101] Judgment of the Commercial Court in Belgrade no. P-7649/2010 dated 30 March 2012, **RE-629**.
[102] Judgment of the Commercial Court in Belgrade no. P-7649/2010 dated 30 March 2012, **RE-629**.
[103] Report on Changes on Cadastral Parcel no. 5023 CM Dobanovci dated 27 February 2007, **RE-630.**
[104] See Claimants' Rejoinder on Jurisdiction, para. 743.
[105] See Judgment of the Commercial Court in Belgrade no. P-7649/2010 dated 30 March 2012, **RE-629**.

argue that Dr. Hern has already made the adjustment for the sold land in his valuation of BD Agro.[106] However, as with the land sold to Eko Elektorfrigo, Dr. Hern does not provide a list of cadastral parcels for which he asserts BD Agro's ownership, which would allow Respondent to check it against information about BD Agro's ownership. Bearing this in mind, Respondent maintains its position and reserves its right to return to this issue.

3.9. Land conceded to the Municipality of Zemun

51. Claimants once again simply argue that Mr. Markicevic was not aware of any cession of land to the Municipality of Zemun (which might be true but is irrelevant) and thus object exclusion of certain parcels from BD Agro's land.[107]

52. PPK Buducnost ceded several land parcels to the Municipality of Zemun through several contracts in 1997 and 1998. These contracts were included in the documentation of the Privatization Program,[108] meaning that it is presumed that Mr. Obradovic was aware of them.[109]

53. On 3 December 1997 PPK Buducnost and the Municipality of Zemun concluded a contract by which PPK Buducnost ceded cadastral parcel no. 4065 in cadastral municipality Ugrinovci encompassing the surface of 125,704 m2 to the Municipality.[110] After that, on 23 January 1998, PPK Buducnost, Meridijanprojekt and the Municipality of Zemun concluded another contract that provided for the cession and re-parcellation of cadastral parcel no. 4055 CM Ugrinovci encompassing the surface of 98,590 and cadastral parcel no. 4071 CM Ugrinovci encompassing the surface of 56,628 m2, from PPK Buducnost to the Municipality.[111] The Municipality requested that these parcels, together with the parcel no. 4070 CM Becmen be excluded from the bankruptcy estate, also because the Grmovac neighborhood is

[106] See Rejoinder on Jurisdiction, paras. 745-746. See also Purchase Agreement between BD Agro DB Dobanovci and Hypo Park Dobanovci dated 11 June 2008, **CE-144**. Dr. does list the contract among sources based on which he calculated the surface of the land owned by BD Agro in Zones A, B and C and the total surface of the land owned by BD Agro. See First Expert Report of Richard Hern, para. 55, Tables 3.1 & 3.2, Sources.
[107] See Rejoinder on Jurisdiction, paras. 747 & 749.
[108] See Attachments to the Privatization Program, **RE-624**.
[109] See Article 5.1.5 of the Privatization Agreement with Annexes, **CE-17**.
[110] See Contract between PPK Buducnost and the Municipality of Zemun dated 3 December 1997, **RE-631**.
[111] See Contract between PPK Buducnost, Meridijanprojekt and the Municipality of Zemun dated 23 January 1998, **RE-633**.

located on them.[112] The Municipality also filed a request with the Cadastral Office Zemun for the change in ownership rights to be recorded.[113]

54. Finally, in February 1998 PPK Buducnost and the Municipality of Zemun concluded a contract by which PPK Buducnost ceded to the Municipality cadastral parcels nos. 28, 29, 31, 32/1, 33, 34, 35, 36 and 38 CM Becmen, encompassing 217,500 m2 in total.[114] Based on the Certificate on the Identification of Land Parcels provided by the Surcin Cadaster Office shows that the parcel nos. 28, 29, 31, 32/1, 35, 36, 38 and part of 1757 CM Becmen now constitute cadastral parcel no. 1285 CM Becmen.[115] Based on this, and on the bankruptcy trustee's determination,[116] Respondent submits that the surface of 217,500 m2 of the cadastral parcel no. 1285 CM Becmen ceded to the Municipality of Zemun needs to be excluded from the valuation of BD Agro.

55. In addition, the lot of 333,648 m2 of the cadastral parcel no. 1285 CM Becmen was sold to Galenika.[117] Claimants state that Dr. Hern already made adjustments for this land.[118] However, as with the land sold to Eko Elektorfrigo and Hypo Park, Dr. Hern never provided a list of cadastral parcels for which he asserts BD Agro's ownership, which would allow Respondent to check it against information about BD Agro's ownership. Bearing this in mind, Respondent maintains its position and reserves its right to return to this issue.

56. In conclusion, Respondent submits that it is evident that the listed land parcels do not belong to BD Agro and should be excluded from the valuation.[119]

3.10. Land sold to Dusan Milurovic and Milurovic Komerc

57. Respondent has also requested the exclusion of the cadastral parcel no. 4054 CM Ugrinovci encompassing the surface of 114,999 m2, because this land is in the actual

[112] Request for exclusion of certain land from the bankruptcy estate dated 27 August 2018, **RE-634**.
[113] Request of the Municipality of Zemun to the Cadastral Office Zemun dated 27 September 2018, **RE-635**; Addendum to the Request of the Municipality of Zemun to the Cadastral Office Zemun dated 5 October 2018, **RE-636**.
[114] See Contract between PPK Buducnost and the Municipality of Zemun dated 4 February 1998/10 February 1998, **RE-632**.
[115] Certificate on the Identification of Land Parcels dated 13 March 2017, **RE-637**
[116] List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.
[117] Purchase Agreement between BD Agro AD Dobanovci and Galenika Fitofarmacija AD for land located in Bečmen, **CE-185**.
[118] See Rejoinder on Jurisdiction, para. 748.
[119] Respondent notes that reasons for the exclusion of cadastral parcel no. 2/84 erroneously mentioned by Claimants under this subsection have already been explained above at II.A.3.5.

ownership of Mr. Dusan Milurovic. Namely, Mr. Milurovic and BD Agro concluded a Real Estate Purchase Agreement on 30 July 2012 which stipulates in Article 3 that BD Agro is selling to Mr. Milurovic part of the cadastral parcel no. 4054 encompassing the surface of 11.50.00 ha.[120] Moreover, Article 3 of the Agreement stipulates that the purchase price has already been paid.

58. Based on the above, it is clear that the described land must be excluded from the valuation of BD Agro, as it is not in its ownership any longer.

4. Claimants were aware of the controversial ownership

59. Respondent also submits that Claimants have always been aware of the contentious ownership issues related to the land that should be excluded from the valuation of BD Agro. In the original Pre-pack Reorganization Plan submitted in November 2014, Claimants provide a list of real estate intended for sale (highlighted parcels correspond to the parcels on the list of the excluded land compiled by BD Agro's bankruptcy trustee):[121]

Table 3.2 Overview of real estate intended for sale

Ser.no.	Cadastral municipality	Plot number	Surface area (m^2)	Estimated value (EUR)
1	Dobanovci	5415/4	510.0	5,671.2
2	Dobanovci	5416/8	598.0	6,649.8
3	Dobanovci	5416/9	560.0	6,227.2
4	Dobanovci	5416/11	772.0	8,584.6
5	Dobanovci	5416/12	60.0	667.2
6	Dobanovci	5416/14	555.0	6,171.6
7	Dobanovci	5416/23	702.0	7,806.2
8	Dobanovci	5416/24	699.0	7,772.9
9	Dobanovci	5416/27	510.0	5,671.2
10	Becmen*	2/1	51,850	374,771.8
11	Becmen	2/15	676.0	7,517.1
12	Becmen	2/17	676.0	7,517.1
13	Becmen	2/20	676.0	7,517.1
14	Becmen	2/24	676.0	7,517.1
15	Becmen	2/26	2,304.0	25,620.5
16	Becmen	2/27	676.0	7,517.1
17	Becmen	2/28	677.0	7,528.2
18	Becmen	2/32	676.0	7,517.1
19	Becmen	2/35	677.0	7,528.2
20	Becmen	2/51	2,304.0	25,620.5
21	Becmen	2/64	519.0	5,771.3
22	Becmen	2/76	1,333.0	14,823.0

[120] Real Estate Purchase Agreement between BD Agro and Dusan Milurovic dated 30 July 2012, **RE-**.
[121] Pre-pack Reorganization Plan dated November 2014, pp.31-32, **CE-321**. Compare with List of BD Agro's land which was not sold, dated 30 June 2018, **RE-451**.

23	Becmen	2/78	206.0	2,290.7
24	Becmen	2/79	151.0	1,679.1
25	Becmen	2/80	95.0	1,056.4
26	Becmen	2/82	1.0	11.1
27	Becmen	2/83	3,088.0	34,338.6
28	Becmen	2/84	3,178.0	35,339.4
29	Novi Becej	21842	40,033.0	19,107.6
30	Novi Becej	22062/2	287.0	570.8
31	Novi Becej	22062/2	86.0	171.0
32	Novi Becej	22062/2	19.0	37.8
33	Novi Becej	22062/2	909.0	1,807.8
34	Novi Becej	22062/2	887.0	1,764.1
35	Novi Becej	22062/2	28.0	55.7
36	Novi Becej	22062/2	49.0	97.5
37	Novi Becej	22062/2	728.0	1,447.8
38	Novi Becej	22062/2	39,955.0	79,462.1
39	Novi Becej	22062/5	1,514.0	3,011.0
40	Novi Becej	22062/5	602.0	1,197.3
41	Novi Becej	22062/5	292.0	580.7
42	Novi Becej	22062/5	300.0	596.6
43	Novi Becej	22062/5	9,162.0	18,221.3
44	Novi Becej	22414/2	3,900.0	1,861.5
45	Novi Becej	22414/3	1,856.0	885.9
46	Novi Becej*	22063/1	40,959.0	81,458.8
	Total land		**216,971.0**	**849,038.6**

60. The Pre-Pack Reorganization Plan states specifically for these parcels, that: "*[t]he Company undertakes to conduct the sale of assets continuously and publicly. In this regard, the Company will take all necessary legal and factual actions directed towards the effective completion of court proceedings that can slow down or stop the sale of assets; the obtaining of retrospective planning approval for illegally built buildings; and the implementation of other measures aimed at resolving any contentious issues relating to property rights or other status of the assets*."[122]

61. The same table of real estate intended for sale and the comment quoted above are replicated in the Amended Pre-pack Reorganization Plan from March 2015.[123] The comment is also reproduced in the Second Pre-pack Reorganization Plan.[124] This indicates that Claimants knew of the contested ownership over these parcels and it is disingenuous of them to pretend otherwise in these proceedings.

[122] Pre-pack Reorganization Plan dated November 2014, p. 32, **CE-321**.
[123] See Amendment to the Pre-Pack Reorganization Plan of BD Agro from March 2015, pp. 27-28, **CE-101**.
[124] See Second pre-pack reorganization plan dated 11 January 2016, **CE-369**.

B. MR. COWAN'S RESPONSE TO DR. HERN'S CRITICISM AND NEW CALCULATION OF THE VALUE OF BD AGRO

62. According to Dr. Hern and Claimants, the fact that Mr. Cowan included the amount of EUR 9.2 million in BD Agro's liabilities in its valuation on the basis of pending court disputes is double-counting since 99% of this provision was already included in the company's liabilities in its 2014 and 2015 financial statements. This primarily relates to Banca Intesa EUR 9 million claim against BD Agro.[125]

63. Mr. Cowan responds that the same liability should not be included as a contingent liability in the notes of the financial statement, if already included on the balance sheet[126] and concludes:

> *"There are two possible reasons for the inclusion of a Banca Intesa loan as a liability and a contingent liability in the notes to both the 31 December 2014 and 2015 Financial Statements, either:*
>
> *1. as Mr Markićević states, the Banca Intesa proceedings were included in error in the notes of the 31 December 2014 and 2015 Financial Statements; or*
>
> *2. there was a separate additional contingent liability in respect of Banca Intesa in the notes of the 31 December 2014 and 2015 Financial Statements."*[127]

64. Further, Mr. Cowan has examined the bankruptcy filing concerning the Intesa court claim and has finally concluded that there was only one liability. Therefore, he concludes that "*the 31 December 2014 and 2015 Financial Statements were prepared incorrectly*" as they included the Banca Intesa loan as both a liability on the balance sheet and a contingent liability in the notes to the financial statements.[128] Accordingly, he adjusted his calculation.

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[125] See Rejoinder on Jurisdiction, paras. 752-753; Third Expert Report of Richard Hern, paras. 110-111. It should be noted that Claimants accept that some liabilities reported in the notes (in the total amount of EUR 46,000) were not included in BD Agro's balance sheet, see Rejoinder on Jurisdiction, para. 758.
[126] See Third Expert report of Sandy Cowan, para. 2.4.
[127] Third Expert report of Sandy Cowan, para. 2.14.
[128] Third Expert report of Sandy Cowan, para. 2.16.

65. However, the Intesa court claim did not consist only of the principal. The final decision of the Belgrade Commercial Court also obliged BD Agro to pay a legal default interest as of 7 November 2013 on this principal.[129] At the time of valuation, the interest accrued to as much as 327,355,000 RSD (EUR 2.7 million). This whole amount however was not fully reported in BD Agro's financial statements. For this reason, Mr. Cowan has included further EUR 1.8 million of liabilities in its calculation.[130]

66. Further, since Ms. Ilic has provided calculation of the value of BD Agro's land that is not legally controversial, i.e. which disregarded the land whose status was controversial from the bankruptcy trustee's list, Mr. Cowan has prepared a new calculation on this basis. Accordingly, he calculates that the value of BD Agro is nil in the bankruptcy scenario, and EUR 3 million in the alternative, going-concern scenario.[131]

C. MS. ILIC'S CRITICISM OF DR. HERN'S LAND VALUATION IS FOUNDED

67. Before entering into details of the discussion of Ms. Ilic's criticism of Dr. Hern's land valuation and his response thereto, one should consider the following. First, Ms. Ilic is a real estate expert and valuator, Dr. Hern is not - he is a financial expert.[132] It is precisely for this reason that Claimants felt they needed to engage Mr. Grzesik, a *real* estate expert, to "review" and "approve" Dr. Hern's work and to provide his own real estate valuation. For some reason, Claimants do not use Mr. Grzesik's valuation to calculate compensation. Instead, they use Dr. Hern's valuation which has serious deficiencies, which cannot be "cured" and "legitimized" by Mr. Grzesik's favorable

[129] The calculation of default interest for non-payment on the aforementioned loan prepared by Banca Intesa in its initial submission in the bankruptcy proceedings was incorrect and it was subsequently amended by Agrounija which bought the claim from Banca Intesa. The amended claim was accepted by the bankruptcy trustee. *See* Agrounija's Registration of Claim with Enclosures dated 13 January 2016, **RE-646**; Conclusion of the list of acknowledged and challenged claims, **CE-551**, p. 2 Here, it should also be noted that Claimants distort the facts when they state that the court proceedings initiated by Banca Intesa ended in 2013, see Rejoinder on Jurisdiction, para. 756. Rather, these enforcement proceedings were continued as ordinary commercial proceedings, which ended by the Commercial Court judgment upholding the initial enforcement order. See Overview of court proceedings No. Iv. 12725/2013, **CE-808**; see also First and Second Instance Judgments in Intesa Court Claim dated 25 March 2014 and 20 August 2015, **RE-605**.

[130] Third Expert report of Sandy Cowan, para. 2.23.

[131] Third Expert report of Sandy Cowan, paras. 4.5-4.7.

[132] Compare curriculum vitae of Dr. Hern, see First Expert Report of Richard Hern, p. 70, with curriculum vitae of Ms. Ilic, see First Expert Report of Danijela Ilic, p. 7.

review. As Ms. Ilic has demonstrated, both Dr. Hern's valuation and Mr. Grzesik's review thereof are flawed, as is Mr. Grzesik's own valuation.[133] Curiously, Claimants have chosen Dr. Hern, a financial expert, to respond to Ms. Ilic's criticism and not Mr. Grzesik, a real estate expert, although the discussion concerns real estate valuation.

68. In addition to the fact that Dr. Hern is not a real estate expert, there is yet another difference between him and Ms. Ilic - he lacks her intimate knowledge of the local Serbian market. Instead, Dr. Hern relies on third party valuations of BD Agro's real estate, as well as on value assessments made by Serbian tax authorities when taxing real estate transactions, which, as will be discussed in detail below, is not in accordance with valuation standards. Here it should be noted that Dr. Hern's reliance on indirect information is also quite surprising and hardly justified in view of the fact that first-class evidence for valuation - information about real life sales of the same or similar land - is available to experts online ("professional access") from the Serbian Geodetic Authority. Why not use it? Dr. Hern and Claimants are conspicuously silent on this point, which was underlined by Ms. Ilic. It seems that the only plausible explanation for Dr. Hern's approach and reliance on indirect information is that an analysis based on actual land sales would yield far lower prices, as demonstrated in Ms. Ilic's valuation.

1. Ms. Ilic correctly points out that Dr. Hern's methodology is inconsistent with international valuation standards

69. Ms. Ilic criticised Dr. Hern's valuation because he "*did not apply market evidence for valuation of BD Agro land in Zone A, B and C, such market evidence being understood as actual sale transactions (and actual rents, if applicable) according to all internationally recognized valuation standards*".[134]

70. Dr. Hern responds by stating that "*[a]ll evidence I relied on in my valuation can be characterized to fall under the broad definition of 'market-derived' evidence, given it relies directly or indirectly on market transactions and other market data (e.g. asking prices)*".[135]

[133] See First Expert Report of Danijela Ilic, para. 4.2.
[134] First Expert Report of Danijela Ilic, para. 4.8.
[135] Third Expert Report of Richard Hern, para. 31.

71. However, this does not answer the point raised by Ms. Ilic, as she specifically pointed to actual sale transactions as market evidence that Dr. Hern did not apply. His pointing to other evidence as falling "under the broad definition of 'market derived' evidence" is clearly inapposite, since he was in the position to consult actual sales transactions but did not do so (with a few exceptions which should be disregarded for other reasons). According to IVS, when applying the market approach one has to start from actual sales transactions:

> *"The market approach provides an indication of value by comparing the subject asset with identical or similar assets for which price information is available.*
>
> *Under this approach the first step is to consider the prices for transactions of identical or similar assets that have occurred recently in the market. If few recent transactions have occurred, it may also be appropriate to consider the prices of identical or similar assets that are listed or offered for sale provided the relevance of this information is clearly established and critically analysed."*[136]

72. In contrast to this, Dr. Hern rarely uses direct evidence of market sale transactions, instead relying on indirect evidence such as third party valuations. This would not be so questionable in the situation where evidence of actual sale transactions is unavailable or dated, but in the present case this is not so. As demonstrated by Ms. Ilic, information about recent sale transactions is available online from the Serbian Republic Geodetic Authority.[137]

73. Dr. Hern points out that evidence he uses "*is consistent with the types of evidence typically used in property valuation discussed in the RICS information paper quoted by Ms. Ilic*".[138] However, the use of such evidence necessitates examination of its reliability and credibility as well as verification of information,[139] which Dr. Hern fails to do.

[136] IVS 2013, paras. 56-57, **CE-516** (emphasis added).
[137] See First Expert Report of Danijela Ilic, para. 9.5.
[138] Third Expert Report of Richard Hern, para. 33.
[139] See Second Expert Report of Danijela Ilic, para. 2.11.

74. Another methodological disagreement between Ms. Ilic and Dr. Hern is whether one should apply a size discount in the valuation of BD Agro's land. According to Dr. Hern and Claimants, applying the size discount when valuing BD Agro's land does not make sense in the context of a fair market valuation, since if higher value can be achieved by selling the land piece by piece this should also be reflected in the fair market valuation.[140]

75. However, this argument does not take into account that the object of valuation in the present case is BD Agro as a whole and the land it owned as a whole on the valuation date. Further, the IVS also indicate that "*it is important to clearly define whether it is the group or portfolio of assets that is to be valued or each of the assets individually.*"[141] Further, the valuator should assess whether there would be a difference between selling individual lots or an estate as a whole. For example, selling of a large number of smaller lots at the same time might flood the market.[142] All that Dr. Hern fails to do. Finally, it should also be noted that, in fact, Dr. Hern himself valuates large estates as a whole, for example the Zones A, B & C, but applies to them prices from individual transactions of smaller lots.[143]

2. Ms. Ilic correctly calculates the size of the construction land in Zones A, B, and C and points out Dr. Hern's errors

76. Claimants and Dr. Hern disagree with Ms. Ilic's calculation of the size of the construction land in Zones A, B, and C.[144] According to Claimants, Ms. Ilic's calculation of the size of this land is further disproved by Mr. Mrgud's valuation.[145] However, Claimants fail to note that Dr. Hern's and Mr. Mrgud's estimate of size of the construction land in Zones A, B, and C differ by 5ha.[146] Moreover, as Ms. Ilic

[140] See Third Expert Report of Richard Hern, paras. 39-40 & Rejoinder on Jurisdiction, para. 765.
[141] See IVS 2013, IVS Framework, p. 16, **CE-516**.
[142] See RICS Valuation Professional Standards (Red Book), January 2014 Valuation of portfolios, collections and groups of properties, p.111, **RE-527**.
[143] See First Expert Report of Richard Hern, paras. 89-90.
[144] See Rejoinder on Jurisdiction, paras. 769-771 & Third Expert Report of Richard Hern, para. 51.
[145] See Rejoinder on Jurisdiction, para. 771.
[146] According to Dr. Hern, the surface area of Zones A, B and C is 290ha, while Mr. Mrgud's sets it at 295ha, see Third Expert Report of Richard Hern, para. 56 & Report on the valuation of the market value of construction land in the BD Agro complex Zones A, B and C in the town of Dobanovci, p. 4, **CE-175**.

demonstrates, Mr. Mrgud's valuation itself provides contradictory figures about the size of the same parcels in Zones A, B, and C, which makes it unreliable.[147]

77. Ms. Ilic also shows that Dr. Hern's determination of the size of Zones A, B, and C, which is based on substraction of the land sold by BD Agro from the total size of Zones A, B, and C reported in the General Regulation Plan,[148] is not reliable, because the remaining land does not belong solely to BD Agro but has several other owners.[149]

78. At the same time, Ms. Ilic has calculated the size of Zones A, B, and C to be 279ha, by using the textual and graphic parts of the General Regulation Plan, as well as RGA (Republic Geodesic Authority) portal GeoSerbia.[150] Claimants and Dr. Hern never take issue with this evidence, rather they focus on her criticism that the size cannot be calculated without taking into account the graphic part of the General Regulation Plan.[151] But, as Dr. Hern states himself, the graphic part of the General Regulation Plan sets the boundaries of the area. As such, it is the relevant source, among others that must be consulted when determining the size of the area.

79. Importantly, neither Claimants nor Dr. Hern refute Ms. Ilic's calculation of the size of Zones A, B and C. Instead, Claimants point to Mr. Mrgud's and Dr. Hern's calculations as a proof of a different size, but these have been showed to be contradictory and flawed.

80. Additionally, Claimants argue that no adjustment in the size should be made due to the fact that a significant part of Zones A, B and C will be used for public infrastructure. They argue that this land would have to be expropriated with compensation to the owner based on the market value.[152] Dr. Hern accepts that this land would amount to as much as 19% of Zones A, B and C, but was instructed by Claimants not to make any adjustments on this basis.[153] However, while compensation for expropriation would be based on the market value, this would not be the value established on the basis of IVS but on the basis of tax assessments. As explained in more detail below, tax assessments cannot be equated with valuation performed by qualified valuators. As

[147] See Second Expert Report of Danijela Ilic, para. 2.62-2.64 & Appendix I.
[148] See Third Expert Report of Richard Hern, para. 44.
[149] See Second Expert Report of Danijela Ilic, paras. 2.50 & 2.54.
[150] See Expert Report of Danijela Ilic, Annex 3.6 & Second Expert Report of Danijela Ilic, para. 2.67.
[151] See Rejoinder on Jurisdiction, paras. 768-769; Third Expert Report of Richard Hern, paras. 46-48.
[152] See Rejoinder on Jurisdiction, para. 772.
[153] See Third Expert Report of Richard Hern, para. 52.

a result, the value of this land must be adjusted when compared to the value of the land not subject to expropriation.

3. Ms. Ilic's rightly criticizes Dr. Hern's comparator evidence related to the construction land in Zones A, B and C

81. Claimants and Dr. Hern take issue with Ms. Ilic's objections concerning Dr. Hern's comparator evidence related to the construction land in Zones A, B and C, specifically: (1) use of two transactions of BD Agro's land, which were outdated; (2) calculation of the price of land bought in Dobanovci by Singidunum-buildings; (3) use of tax assessments as evidence of market transactions. Their objections are without merit and will be dealt with in turn.

3.1. ***Dr. Hern incorrectly uses two BD Agro's outdated transactions in his valuation***

82. Dr. Hern relies on two BD Agro's transactions from 2008 arguing that they represent "the most direct evidence", because they concerned land covered by the same General Regulation Plan as the land he was estimating.[154] At the same time, he admits that they are "somewhat outdated", but does not make any provision for this in his valuation.

83. In her report, Ms. Ilic noted that these transactions were outdated and pointed that the relevant expert authority considers that

> *"Evidence of transactions that have taken place too long ago to provide direct comparable evidence can sometimes be still useful if combined with knowledge of market trends between the date of the comparable transaction and the valuation date".*[155]

84. However, there is no evidence that either Dr. Hern or Mr. Grzesik performed such an exercise. As Ms. Ilic pointed out

> *"There is no evidence in Mr. Grzesik report that he has applied knowledge of local market in period 2008 until 2015 for subject type*

[154] See Third Expert Report of Richard Hern, para. 58; Rejoinder on Jurisdiction, para. 776.
[155] See Comparable evidence in property valuation, RICS information paper, 1st edition (IP 26/2012), Section 4.1.7 - Historic evidence, **RE-325** (emphasis added), quoted in First Expert Report of Danijela Ilic, para. 4.17.

of property and accordingly adjusted the figures from documents submitted..."[156]

85. Consequently, their use of outdated transactions was against professional standards and undermined their valuations.

86. In their response, Dr. Hern and Claimants do not even discuss this point. Rather, contrary to the above quoted professional standard stating that outdated transactions do not constitute "direct comparable evidence", they persist that these BD Agro's transactions "represent the most direct evidence". They are obviously wrong.

87. Instead of dealing with the gist of Ms. Ilic's criticism, they make much of her additional remark that both transactions were "conditional".[157] Obviously, Ms. Ilic is not a lawyer to use the term in legal sense, but it should be noted that one of these transactions was conditional in that sense, as well.[158] The fact that that the condition was never activated, and that both agreements continue to stand, does not necessarily mean that the sales price was the market price *at the time of the transactions*, as Dr. Hern argues.[159]

88. Further, Claimants then engage in a long discussion of whether a detailed regulation plan was needed for the development of the construction land in Zones A, B and C. This is an obvious attempt to avoid dealing with Ms. Ilic's direct criticism that outdated transactions cannot be used as market evidence without insight into market trends between their date and the date of valuation, which Dr. Hern completely fails to appreciate and provide in his reports. In any case, Ms. Ilic deals with the question of whether a detailed regulation plan was necessary in her report.[160] For the present purposes, it suffices to say that local authorities clearly take the position that it is necessary.[161]

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[156] See First Expert Report of Danijela Ilic, para. 4.17.
[157] See Rejoinder on Jurisdiction, paras. 777-778; Third Expert Report of Richard Hern, paras. 60-61.
[158] See Purchase agreement between BD Agro and Trajan, dated 12 November 2009, Article 7, **CE-146** ("*The 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*").
[159] See Third Expert Report of Richard Hern, para. 60.
[160] See Second Expert Report of Danijela Ilic, paras. 2.83-2.92.
[161] See Information about the location for the land in Zone A issued by the Administration of City Municipality Surčin,, No. 350-286/2018 Surčin, dated 30/07/2018, **RE-652**.

3.2. ***Information about the purchase of the land in Dobanovci by Singidunum***

89. In his first report, Dr. Hern refers to the purchase of the land in Dobanovci by Singidunum company in 2008-2009 as evidence of comparable transactions in support of his valuation.[162] Ms. Ilic criticized his calculation because he did not use the information about the actual transaction, rather he extrapolated the price per square meter by dividing the value of the property as reported in the Singidunum financial statement from several years later (2011) with the size of all property owned by the Singidunum as reported by its parent company Lamda in 2008-2009.[163] Dr. Hern responds to her criticism by stating that Lamda reports the same size of the property in 2010 and 2011.[164] But this is beside the point, which is that Dr. Hern relies on indirect information that is insufficiently specific and then extrapolates the price per square meter on this basis. For example, he is unable to verify whether all Singidunum and Lamda documents speak of the same land or there have been changes in the parcels, while the total area remained of similar size. Further, the information about the size is clearly an approximation as it expressly speaks of "approximately 3,400,000 m2".[165] All this undermines Dr. Hern's analysis, but, even more importantly, indicates the fundamental problem with his approach - although he has had the possibility to use direct information about real transactions, he has failed to do so, contrary to professional standards.

3.3. ***Dr. Hern's use of tax assessments***

90. Dr. Hern and Ms. Ilic disagree with respect to the use of tax assessments in the valuation of real property. Dr. Hern uses this indirect evidence instead of direct evidence available online from the Republic Geodetic Authority. Nevertheless, he explains that all the tax assessments he uses indicate that they provide a market valuation of the valued land.[166] Claimants elaborate this further, by providing a review of legal provisions regulating tax assessment.[167]

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[162] See First Expert Report of Richard Hern, para. 189.
[163] See First Expert Report of Danijela Ilic, para. 5.10.
[164] See Third Expert Report of Richard Hern, para. 64; Rejoinder on Jurisdiction, para. 793.
[165] See Lamda Development, Annual Report 2010, Rezoning Project, p. 41, **CE-886**; Lamda Development, Annual Report 2011, Rezoning Project, p. 41, **CE-887**.
[166] See Third Expert Report of Richard Hern, para. 69.
[167] See Rejoinder on Jurisdiction, paras. 797-800. These provisions are already reproduced in Ms. Ilic's reports, see First Expert Report of Danijela Ilic, Appendix 1.2.

91. However, as Ms. Ilic explains, assessments of the tax authorities differ in several fundamental aspects from an expert real estate valuation prepared in accordance with valuation standards. The guidelines on tax assessments provided in the relevant legislation that is reviewed by Claimants do not correspond to internationally recognized valuation standards. For example, inspection of the property is done only exceptionally under the applicable legislation.[168] Further, there is a regulated limitation for adjustments (maximum of 10%) for the location, proximity of roads, availability of infrastructure, proximity to urbanized area, as opposed to professional judgment about adjustments of comparables in a valuation prepared in line with internationally recognized valuation standards.[169] Significantly, the legislation does not explicitly provide for adjustments due to the size, which is an important element in professional valuation.[170] For all these reasons, a summary of best practice has warned that

> *"Statutory valuation are usually required for the purposes of taxation or compulsory purchase and are undertaken in accordance with the specific requirements of the relevant statutes. This frequently means that the approach to the valuation, and hence the result, may differ from a conventional market valuation. An example would be a valuation for a taxing jurisdiction that required the valuer to follow a specific approach or to use a defined methodology."*[171]

92. This clearly indicates that Dr. Hern's uncritical use of tax assessments is not warranted, especially in light of the fact that he has readily available direct evidence of sale transactions.

93. Dr. Hern also takes issues with Ms. Ilic's criticism of his use of specific tax assessments.

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[168] See Second Expert Report of Danijela Ilic, paras. 2.103; 2009 Instruction on the Procedure and Method of Determining Tax on the transfer of absolute rights, para. 17, **RE-645**.

[169] Second Expert Report of Danijela Ilic, para. 2.104; 2009 Instruction on the Procedure and Method of Determining Tax on the transfer of absolute rights, para. 13, **RE-526**.

[170] See Comparable evidence in property valuation, RICS information paper, 1st edition (IP 26/2012) 2012, pp.15-16, **RE-325**.

[171] Comparable evidence in property valuation, RICS information paper, 1st edition (IP 26/2012) 2012, p. 5, **RE-325**.

94. First, Ms. Ilic criticised Dr. Hern for not using tax authorities information on the price of land in Krnjesevci, although such land is comparable to nearby BD Agro land.[172] Dr. Hern responds that the tax authorities themselves considered that this land was not comparable.[173] However, Dr. Hern completely ignores the fact that Ms. Ilic provides a detailed analysis showing that the conclusion of the tax authorities was wrong and that the information on the price of land in Krnjesevci was highly relevant for the valuation of BD Agro's land in Zones A, B and C.[174]

95. Second, while admitting that some of the evidence he uses post-dates the date of valuation, Dr. Hern states that it "remains close" to that date and that he decided to rely on it as well in order to have a wider range of evidence.[175] However, as Ms. Ilic notes, use of the evidence that post-dates valuation date is not in line with international standards.[176] In addition, this was completely unnecessary in light of readily available evidence that Dr. Hern has failed to use.

96. Third, Dr. Hern rejects Ms. Ilic's criticism about his reference to so-called Zemun transactions, which contained tax authorities assessment of the price of land in Zemun. He states that he did not rely on the evidence for Zemun "*as a comparator in my conclusions*",[177] but the truth of the matter is that he reproduced it in his comparator table and then explained that these prices were "less comparable".[178] Therefore, he obviously used this evidence, if only to confirm his assessment. The point is that this use, as well, was unwarranted.

97. Finally, Dr. Hern answers to Ms. Ilic's criticism that he was inconsistent by considering BD Agro's agricultural land as such when, for example, calculating conversion fee, but not when valuing it. He states that Ms. Ilic fails to note the development potential of the land in question, which warrants its valuation with comparable land with similar potential.[179] However, Dr. Hern is again inconsistent since he obviously fails to take into account all circumstances and uncertainties related

[172] See First Expert Report of Danijela Ilic, p. 30.
[173] See Third Expert Report of Richard Hern, para. 75, referring to Tax Administration Branch B Stara Pazova, Number 235-464-08-00090/2016-J2B02, Delivery on Information Request from December 23, 2016, p. 2, **CE-158**; see, also, Rejoinder on Jurisdiction, para. 801.
[174] See First Expert Report of Danijela Ilic, pp. 26-30; Second Expert Report of Danijela Ilic, para. 2.118.
[175] See Third Expert Report of Richard Hern, para. 76.
[176] See Second Expert Report of Danijela Ilic, para. 2.120.
[177] See Third Expert Report of Richard Hern, para. 77.
[178] See First Expert Report of Richard Hern, Table 3.3 on p. 26 & para. 70.
[179] See Third Expert Report of Richard Hern, para. 79; Rejoinder on Jurisdiction, paras. 804-805.

to the land development potential that he mentions. In particular, he fails to take into account uncertainties about availability of infrastructure in the near future and permissibility of development at the valuation date.[180]

3.4. ***Ms. Ilic's remarks regarding valuation of other construction land***

98. With respect to Ms. Ilic's criticism of his valuation of other construction land of BD Agro, Dr. Hern again provided implausible answers.

99. First, Ms. Ilic criticizes Dr. Hern for calculating average and not median price, to which he responds that both represent "*reasonable measures of the central tendency of the comparator evidence from a statistical point of view*", and concludes that the use of average is reasonable.[181] Dr. Hern does not provide any authority in support of this statement, and in any event it does not apply to appraisals, where international standards clearly indicate that the median, being less affected by extreme ratios, "*is the generally preferred measure of central tendency for evaluating overall appraisal level, determining reappraisal priorities, or evaluating the need for appraisal.*"[182]

100. Second, Ms. Ilic criticized Dr. Hern for using an outlier transaction of sale of only 50m2 as evidence of price. He responds that the price of 30 EUR/m2 achieved in that transaction corresponds to another comparator transaction of a large area. But this is not the point - rather the point is that sale of a land plot of 50m2 indicates involvement of a special interest and special value, not market value, so it cannot be used as a comparator.[183]

101. Third, Dr. Hern rejects Ms. Ilic's criticism of his use of Confinex Report, as a third party valuation, by saying that the report was based on market evidence and accepted by BD Agro's stake holders.[184] However, as already noted above, third party reports should not be used as primary market evidence, and must always be checked for their reliability and credibility, and their information verified.[185] However, Confinex Report

[180] See Second Expert Report of Danijela Ilic, para. 2.123.
[181] See Third Expert Report of Richard Hern, para. 84.
[182] IAAO Standard on Ratio Studies, dated April 2013, p. 13, para. 5.3.1, **RE-327** (emphasis added).
[183] See Second Expert Report of Danijela Ilic, paras. 3.4-3.5.
[184] See Third Expert Report of Richard Hern, para. 85.
[185] See Second Expert Report of Danijela Ilic, para. 2.11.

does not provide any evidence of comparable land and no explanation of analytical processes carried out in valuation of BD Agro's land.[186]

*3.5. **Ms. Ilic's remarks regarding valuation of agricultural land***

102. Dr. Hern states that Ms. Ilic misunderstood the expropriation evidence he relied on in his valuation of BD Agro's agricultural land. In particular, he states that Ms. Ilic analyzed only one expropriation from exhibit CE-153, which includes information on 50 different expropriations.[187] However, he fails to answer to her criticism even of his reliance on that one transaction. Moreover, he fails to answer to her main criticism that he relied on tax assessments in this case, although he had primary market evidence as comparables - BD Agro's own land sale transactions.[188]

*3.6. **Ms. Ilic's valuation of BD Agro's land that was not excluded by the bankruptcy trustee***

103. Finally, it should be noted that Ms. Ilic was instructed to provide valuation of BD Agro's land without the land excluded from the sale by the bankruptcy administrator. According to this valuation, the value of BD Agro's land is EUR 27.8 million.[189]

D. SERBIAN TAX SHOULD BE DEDUCTED FROM COMPENSATION

104. The Parties agree that MDH Serbia would be obliged to pay Serbia capital gain tax at the rate of 15% on any amounts MDH Serbia would receive as compensation for its interest in BD Agro. The Parties further agree that MDH Serbia would also be obliged to pay dividend tax on any amounts it distributed to Mr. Rand, at the rate of 15%.[190]

105. The Parties disagree whether any tax would be applicable concerning the compensation for Mr. Obradovic's shares in BD Agro. In its Rejoinder, Respondent submitted that Mr. Obradovic would have to pay capital gain tax on the difference

[186] See First Expert Report of Danijela Ilic, para. 8.1.
[187] See Third Expert Report of Richard Hern, para. 90.
[188] See First Expert Report of Danijela Ilic, p. 43, para. 4.33.
[189] See Second Expert Report of Danijela Ilic, Appendix II, para. 1.7 Summary of valuation.
[190] Compare Rejoinder, paras. 1493-1494, with Rejoinder on Jurisdiction, para. 814.

between the value of compensation for his interest in BD Agro and the purchase price he paid for the shares.[191] Claimants disagree and state that their case is that

> "*but for Serbia's conduct, Mr. Obradovic 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. Obradovic to sell BD Agro's shares to a third party. This means that there would not be any additional proceeds received by Mr. Obradovic that would be subject to Serbian taxes*".[192]

106. Respondent's case is that Mr. Obradovic was the owner of BD Agro shares, that in case of a market sale he would be considered as the owner of shares and that tax would be due on any capital gain he would have acquired on that basis.[193] But even if one would assume that the transfer of the shares would have occurred on the basis of the Sembi Agreement, as Claimants argue, there would be capital tax due. As will be seen below, the Sembi Agreement itself provided that Mr. Obradovic would receive compensation and also acknowledged that he had already invested some money in BD Agro. Therefore, capital gain tax must be due on the difference between the two.

107. According to the Sembi Agreement, Sembi agreed to repay Mr. Obradovic's loan to Sembi of EUR 9 million, further loan from 1875 Finance S.A. of EUR 4.8 million, and to pay the remainder of the purchase price under the Privatization Agreement in the amount of EUR 2,055,000.[194] This amounts to EUR 15,855,000, which is the economic benefit Mr. Obradovic had from the Sembi Agreement. In return, he had the obligation to transfer all his rights under the Privatization Agreement to Sembi.[195] At the same time, the Sembi Agreement notes that Mr. Obradovic owes approximately EUR 2,052,000 as the balance of the purchase price under the Privatization Agreement, from which it follows that at that time (2008) he already paid approximately EUR 3.5 million as the purchase price.[196] This clearly indicates that

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[191] See Rejoinder, para. 1492.
[192] Rejoinder on Jurisdiction, para. 812.
[193] See Rejoinder, para. 1492.
[194] See Agreement between Mr. Obradović and Sembi dated 22 February 2008, Articles 1-3, **CE-29**.
[195] See Agreement between Mr. Obradović and Sembi dated 22 February 2008, Article 4, **CE-29**.
[196] See Agreement between Mr. Obradović and Sembi dated 22 February 2008, Preamble, point B, **CE-29**, stating that Mr. Obradovic owes EUR 2,052,000 under the Privatization Agreement, and Privatization Agreement, Article 1.2, **CE-17**, stipulating the purchase price at EUR 5,548,996.46 (5,548,996.46 - 2,052,000 = 3,496,996.46).

there is a capital gain which would be the difference between what Mr. Obradovic invested in his BD Agro shares and what he received as consideration when he agreed to transfer them to Sembi. The exact amount of capital gain and the tax due would be calculated pursuant to Serbian tax rules.[197]

108. In conclusion, should the Tribunal find that any compensation is due in the present case, it should be reduced for the amount of applicable taxes. Respondent remains at the disposal of the Tribunal to provide such calculation.

E. CLAIMANTS' REQUEST FOR CANADIAN TAX GROSS UP IS UNFOUNDED

109. Claimants' Rejoinder on Jurisdiction misinterprets the provisions of the Federal Act regarding (a) the tax residence of the Ahola Family Trust, and (b) the Canadian tax consequences of distributions to the beneficiaries of the trust if Sembi had sold the shares of BD Agro. As discussed in more detail below, the Ahola Family Trust is a resident of Canada for purposes of the Federal Act (either under general common law principles or by virtue of the deeming rule in subsection 94(3) of the Federal Act). In addition, Canadian tax at the highest marginal rate would apply either on a sale of the shares of BD Agro by Sembi or on a distribution of the proceeds of a sale by Sembi to the Ahola Family Trust.

1. Tax residence of the Ahola Family Trust

110. Under Canadian tax principles the onus is on Claimants to disprove the presumption that the Ahola Family Trust is resident in Canada, either because its central management and control is carried on in Canada or under the deeming rule in subsection 94(3) of the Federal Act.[198] Claimants have not come close to disproving the presumption that the Ahola Family Trust is resident in Canada for tax purposes under either of these rules.

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[197] See Personal Income Tax Law, Article 74, paras. 1 & 8, **RE-564**; 2005-2015 Retail/Consumer Price Indices in Republic of Serbia, **RE-647**; Amendments to Article 74 of the Personal Income Tax Law, **RE-648**.

[198] William Innes and Hemamalini Moorthy, *Onus of proof and ministerial assumptions: The role and evolution of burden of proof in income tax appeals*, 98 CTJ p. 1188, **RE-567**.

111. Claimants have not established that the central management and control of the Ahola Family Trust was carried on outside of Canada. Claimants' Rejoinder on Jurisdiction suggests that Mr. Rand followed professional tax planning advice to participate in high level decision making outside of Canada. However, Claimants have failed to acknowledge that the Canada Revenue Agency would presume in the circumstances that the central management and control of the Ahola Family Trust would be in Canada (being the country in which Mr. Rand and the beneficiaries of the trust are all resident), and the onus would be on Mr. Rand to clearly establish that central management and control of the Ahola Family Trust was not exercised in Canada.[199]

112. The tax residence of a trust, similar to a corporation, is located where "*its real business is carried on.*"[200] Claimants admit in paragraph 817 of Claimants' Rejoinder on Jurisdiction that the Ahola Family Trust was at all relevant times controlled by Mr. Rand.[201] As a result, the controlling question is whether Mr. Rand participated in high level decision making from Canada or outside of Canada. Mr. Rand's witness statement cited by Claimants in their Rejoinder on Jurisdiction suggests that Mr. Rand did not exercise central management and control of the Ahola Family Trust from Canada. This is a bare assertion of Mr. Rand as an interested party, and is clearly insufficient to disprove the presumption that the Ahola Family Trust is resident in Canada at common law.

113. As noted above, Claimants admit that the Ahola Family Trust was at all relevant times controlled by Mr. Rand.[202] The administrator of the Ahola Family Trust followed all instructions from Mr. Rand,[203] and Claimants have not established that Mr. Rand did not provide such instructions from Canada.

114. In addition, it should be noted that the presence of a Canadian resident that controls a trust would be heavily scrutinized by the Canada Revenue Agency and would weigh in

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[199] *Ibid.*
[200] *St. Michael Trust Corp., as Trustee of the Fundy Settlement and St. Michael Trust Corp., as Trustee of the Summersby Settlement v. Her Majesty The Queen*, 2012 SCC 14, aff'g 2010 FCA 309 and 2009 TCC 450 ("*Fundy Settlement*"), **RE-366** at para. 8 citing *De Beers Consolidated Mines, Ltd.* v. Howe, [1906] AC 455 at 458, (p. 10 of pdf document), **RE-568**.
[201] Rejoinder on Jurisdiction, para. 817.
[202] Rejoinder on Jurisdiction, para. 817.
[203] Witness Statement of Mr. Jennings, para. 11.

favour of Canadian residency. [204] The Canada Revenue Agency would presume that the Ahola Family Trust is resident in Canada – and the onus would be on Claimants to disprove that presumption.[205]

115. In any event, even if the Ahola Family Trust is not considered to be resident in Canada at common law it should be deemed to be resident in Canada under subsection 94(3) of the Federal Act.[206] Paragraph 821 of Claimants' Rejoinder on Jurisdiction misstates the conditions for the application of this provision.

116. Subsection 94(3) of the Federal Act provides:

> *"**(3)** If at a specified time in a trust's particular taxation year (other than a trust that is, at that time, an exempt foreign trust) the trust is non-resident (determined without reference to this subsection) and, at that time, there is a resident contributor to the trust or a resident beneficiary under the trust,*
>
> ***(a)** the trust is deemed to be resident in Canada throughout the particular taxation year for the purposes of*
>
> *…*
>
> ***(ii)** computing the trust's income for the particular taxation year..."*[207]

117. The deeming rule in subsection 94(3) of the Federal Act applies in the circumstances because all of the beneficiaries of the Ahola Family Trust would be considered resident beneficiaries. "Resident beneficiary" is defined in subsection 94(1) of the Federal Act to mean a beneficiary under the trust that is resident in Canada provided there is a connected contributor to the trust.[208]

118. The term "contribution" is defined extremely broadly in subsection 94(1) to include most transfers, loans or other direct or indirect contributions of value from a

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[204] William Innes and Hemamalini Moorthy, *Onus of proof and ministerial assumptions: The role and evolution of burden of proof in income tax appeals*, 98 CTJ p. 1188, **RE-567.**
[205] *Ibid*.
[206] Subsection 94(3) of the Federal Act, **RE-566**.
[207] *Ibid*.
[208] Subsection 94(1) of the Federal Act, **RE-566**.

contributor to a trust. Again, the onus under Canadian tax law is on Mr. Rand to show that, as a Canadian resident, Mr. Rand has not directly or indirectly contributed any value to the Ahola Family Trust (including by way of loan or transfer).

119. While the initial contribution to settle the Ahola Family Trust may have been made by a non-resident individual, Claimants have not demonstrated how the remaining value in the trust – including the shares of Sembi – were contributed. For Canadian tax purposes, the presumption is that all or part of the contribution of value to the trust was made by Mr. Rand or another Canadian resident – and the burden of proving otherwise would rest with the Claimants.[209]

120. It should be noted that the rules applicable to non-resident trusts in the Federal Act were significantly amended in 2013 and made applicable to taxation years that end after 2006 – to ensure that non-resident trusts such as the Ahola Family Trust would not escape Canadian taxation.[210] The 2010 Canadian Federal Budget described the purpose for these amendments and the rules that were in place prior to the amendments as follows:

> *"The Income Tax Act includes rules designed to prevent Canadians from using foreign intermediaries to avoid paying their fair share of tax. However, the rules are not fully effective in certain circumstances where aggressive offshore tax-planning schemes are used to circumvent their application.*
>
> *[…]*
>
> *The existing rules in the Income Tax Act deem a non-resident discretionary trust to be resident in Canada if it has a Canadian contributor and a related Canadian beneficiary. Such a trust is required to pay tax on its income in the same manner as other residents of Canada. The Canada Revenue Agency, however, has identified complex tax-planning arrangements that attempt to frustrate the fundamental policy objectives of these rules. The*

[209] William Innes and Hemamalini Moorthy, *Onus of proof and ministerial assumptions: The role and evolution of burden of proof in income tax appeals*, 98 CTJ p. 1188, **RE-567.**

[210] 2013 Statutes of Canada, Chapter 34, s. 7 replaced s. 94 of the Act as a whole applicable to taxation years that end after 2006, **RE-569**.

outstanding proposals were intended to prevent this type of tax avoidance by broadening the scope of non-resident trusts to which deemed residence would apply."[211]

121. The 2010 Federal Budget expressly acknowledges that the new rules were designed (a) to ensure that taxpayers pay their fair share of tax, and (b) to discourage aggressive offshore tax planning schemes. More particularly, this significant expansion to the non-resident trust rules was aimed precisely at the type of aggressive tax planning that Claimants purport to have engaged in (where a Canadian resident parent seeks to control a trust for the benefit of Canadian resident children).

122. Claimants have failed to disprove the presumption that the Ahola Family Trust is resident in Canada and accordingly, as a resident of Canada for purposes of the Federal Act, the Ahola Family Trust should have been filing Canadian tax returns on an annual basis as required under paragraph 150(1)(c) of the Federal Act, and was required to pay taxes in Canada on its world-wide income under section 2 of the Federal Act computed at the highest marginal rate in Canada.[212]

123. Similarly, the Claimants have not led evidence sufficient to disprove the presumption that Sembi was also a resident of Canada for purposes of the Federal Act. Claimants indicate that Mr. Rand attended all Sembi board meetings in person or by teleconference.[213] Mr. Rand's Second Witness Statement states that he did not attend board meetings in Cyprus.[214] If Mr. Rand participated by teleconference, he may have been physically present in Canada. There is ample evidence to suggest that Mr. Rand may have participated in high level decision making from Canada. For example:

(a) Mr. Rand's Second Witness Statement states that he "*had full control over Sembi because Mr. Obradovic had always followed my directions*".[215] The Claimants have not established that this was carried on outside of Canada.

(b) Exhibits CE-671 and CE-672 show a Canadian address under Mr. Rand's signature while conducting Sembi business.

[211] 2010 Federal Budget, Annex 5, pp. 371-372, **RE-570** (emphasis added).
[212] Subsections 104(1) and para 122(1)(a) of the Federal Act, **RE-566**.
[213] Rejoinder on Jurisdiction, para. 818.
[214] Second Witness Statement of Mr. Rand, para. 62.
[215] Second Witness Statement of Mr. Rand, para. 62.

124. Again, the presumption for Canadian tax purposes would be that Mr. Rand exercised control over Sembi from Canada – including through the participation in board meetings by teleconference. The onus would be on Claimants to establish that no control over Sembi was exercised from Canada – which they have not done.[216]

125. As a resident of Canada, Sembi should have been filing tax returns annually in Canada as required under paragraph 150(1)(a) of the Federal Act, and should have been paying tax in Canada on its world-wide income under section 2 of the Federal Act.

2. Canadian Tax Consequences

126. If the Ahola Family Trust or Sembi are determined to be resident in Canada, Canadian tax would apply on a sale of the shares of BD Agro and/or a distribution of the proceeds of the sale by Sembi. Specifically, if Sembi is determined to be resident in Canada, the gain on the sale of the shares of BD Agro would be taxable in Canada and assuming that the shares of BD Agro are held by Sembi as capital property, only 50% of the capital gain would be taxable in Canada. Further, under the *surrogatum* principle, the character of any potential damages payment should be afforded the same tax treatment as what the payment was intended to replace.[217] Here, any damages payment would be intended to replace the investment in BD Agro (a 50% taxable capital gain).

127. If Sembi was not a resident of Canada then Sembi and BD Agro would each have been a "controlled foreign affiliate" of the Ahola Family Trust as defined in subsection 95(1) of the Federal Act for purposes of Canada's controlled foreign corporation rules. In that case, Canadian tax would have applied either (i) on the sale of BD Agro shares (if the shares were not excluded property) under section 91 of the Federal Act, or (ii) on a distribution of the proceeds of the sale to the Ahola Family Trust (if the shares

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[216] Jack Bernstein, *Residence of Trusts and Corporations*, 1997 OC 8: "*if a Canadian resident, who is a shareholder or a director of an off-shore corporation, directs the companies operations from a computer in Toronto by way of e-mail, there is a risk that Revenue Canada would take the position that the company is being managed and controlled in Canada. While there may be a technical argument that the computer message travels to the other jurisdiction, Revenue Canada would likely argue that control was 'in Canada'. The concern should be no different than where an individual resident in Canada participates in Canada in directors meetings or other policy decisions of an off-shore company by way of telephone calls.*", p. 24 of pdf document, **RE-571**.

[217] *Tsiaprailis v. R.*, 2005 SCC 8, para. 15, **RE-428**; *Transocean Offshore Ltd. v. R*, 2005 DTC 5201 (FCA) at para. 50, **RE-429**.

were excluded property) under section 90 of the Federal Act. Whether the share qualify as "excluded property" as defined in subsection 95(1) of the Federal Act depends on whether the assets were held principally for the purpose of gaining or producing income from an active business.[218] In either case, Canadian tax would have been payable by the trust at the highest marginal rate either at the time of the disposition or at the time the proceeds were distributed to the Ahola Family Trust.[219]

128. Moreover, the general anti-avoidance rule in section 245 of the Federal Act allows the re-characterization of transactions and amounts where taxpayers have entered into tax-motivated transactions that result in a misuse or abuse of the Federal Act.[220] Even if the Ahola Family Trust were to somehow technically avoid the application of the broad regimes (including under section 94 of the Federal Act) which are intended to ensure that income earned by this type of trust is fully taxable in Canada, the general anti-avoidance rule could apply to re-characterize the transaction to ensure that it would be subject to Canadian tax.

129. As a result, it is clear that no gross-up should apply with respect to Canadian tax since any resulting income or gain would otherwise have been fully taxable in Canada at the highest marginal tax rate.

[218] Subsection 95(1) of the Federal Act, **RE-566**.
[219] Subsections 104(1) and para 122(1)(a) of the Federal Act, **RE-566**.
[220] Section 245 of the Federal Act, **RE-572**.

III. REQUEST FOR RELIEF

Respondent requests the Arbitral Tribunal to

(1) *dismiss* all Claimants' claims for the lack of jurisdiction,

in eventu, dismiss all Claimants' claims for the lack of merit,

(2) *order* Claimants to reimburse Respondent all its costs of the proceedings, with interest.

Belgrade / Novi Sad, 16 March 2020

Respectfully submitted,

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