INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited

v.

Republic of Serbia

(ICSID Case No. ARB/18/8)

PROCEDURAL ORDER NO. 9

Members of the Tribunal
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

Assistant to the Tribunal
Mr. Rahul Donde

---

12 March 2021

I. PROCEDURAL BACKGROUND

1. On 15 January 2021, the Claimants submitted a request to file new documents into the record (the "Request to File New Evidence") and a request for assistance to acquire certain documents (the "Request for Assistance").

2. On the same day, the Claimants made a request for provisional measures with respect to a criminal investigation allegedly initiated by the Respondent against Mr. Djura (George) Obradović, the former nominal owner of BD Agro and a witness in this arbitration (the "Request for Provisional Measures"). They also sought an order from the Tribunal directing the Respondent not to use documents from the criminal investigation in the arbitration, including in the Respondent's submissions on the Request for Provisional Measures, until the Tribunal decided on the Request.

3. On 19 January 2021, the ICSID Secretariat, at the Tribunal's behest, invited the Respondent to comment on the three Requests. In light of the Claimants' request that the Respondent not use the documents from the criminal investigation in its response to the Request for Provisional Measures, the Respondent was instructed to label the documents obtained through the criminal proceedings appended to its response, if any. The Parties were advised that the Tribunal reserved its decision on the admissibility of such documents for a later stage. Finally, the Parties were requested to reserve a date for a hearing by videoconference on the Request for Provisional Measures in the event the Tribunal found that such a hearing would be useful after reviewing the Parties' submissions.

4. On 5 February 2021, the Respondent submitted its Response to the three Requests (the "Response").

5. On 9 February 2021, the Parties were advised that the Tribunal preferred to hear the Parties orally on the Request for Provisional Measures. A hearing was thus scheduled on 16 February 2021 from 16:15 to 19:15 (CET) via Zoom (the "Hearing").

6. On the same day, the Claimants complained that nine documents submitted by the Respondent along with its Response (Exhs. RE-657, 658, 660-662, 667-670) had not been

labelled in accordance with the Tribunal's ruling of 19 January 2021. The Claimants also requested leave to file one more document into the record being a public announcement published by BD Agro's bankruptcy trustee in respect of the sale of BD Agro's land.

7. On 11 February 2021, the Respondent was invited to comment on the Claimants' communications of 9 February 2021. The Parties were advised that the Tribunal would decide on the admissibility of the nine documents submitted by the Respondent with its Response, along with Exhs. RE-671-673, at a later stage. Further, if the Parties intended to refer to the content of these documents at the forthcoming Hearing, they were requested to advise the Tribunal by 15 February 2021 at 11:00 (CET) to allow the Tribunal to give directions in this respect prior to the Hearing.

8. On 15 February 2021, the Respondent commented on the Claimants' communications of 9 February 2021. The Respondent advised the Tribunal that it intended to rely on the exhibits mentioned above in the course of its oral argument at the Hearing and objected to the Claimants' request for leave to file the public announcement concerning the sale of BD Agro's land.

9. On the same day, the Tribunal ruled that the Respondent had not mislabeled the nine exhibits as alleged by the Claimants. It also determined that the exhibits mentioned above were admissible and that the Parties could refer to them at the Hearing if they wished to do so.

10. On 16 February 2021, at the Hearing the Parties made further submissions and the Tribunal asked questions from counsel.

11. The Parties having thus completed their submissions, the Tribunal now issues its decision on the Request to File New Evidence, the Request for Assistance, and the Request for Provisional Measures.

II. REQUEST TO FILE NEW EVIDENCE

A. Claimants' Position

12. The Claimants seek leave to file the following documents into the record:

i. "Bankruptcy Trustee's Reports"[1], which the Claimants contend are "directly relevant and material" with respect to the bankruptcy costs estimated in one of Mr. Cowan's valuations of BD Agro. These Reports are also relevant – so say the Claimants – to their claim that the expropriation and subsequent sale of BD Agro and its land was conducted to benefit Agrounija and its ultimate owner, Mr. Miodrag Kostić. Finally, the Reports also contain information on whether certain land plots owned by BD Agro should be excluded from BD Agro's valuation because of court disputes;

ii. "[D]ocuments related to the sale of BD Agro's land announced in December 2020", which the Claimants contend are directly relevant and material to assess the Respondent's position that this land should be excluded from BD Agro's valuation;

iii. "List of land plots owned by Serbia in the cadastral area of Dobanovci", which, for the Claimants, is relevant and material with respect to Ms. Ilic's argument that 28 land plots constituting part of the construction land in Zones A, B and C are not owned by BD Agro, as the Claimants insist, but rather by Serbia and other entities;

iv. "Map of certain land plots identified in Ms. Ilic's Second Expert Report", which are relevant and material for the reasons just mentioned; and,

v. "Information about Location' for individual land plots within the Construction land in Zones A, B, and C in Dobanovci", which, the Claimants contend "are directly relevant and material to assess the veracity of Ms. Ilic's argument that the

[1] The report for third quarter of 2019 dated 4 February 2020; the report for fourth quarter of 2019 dated 11 March 2020; the report for first quarter of 2020 dated 3 June 2020; and the report for second quarter of 2020 dated 21 August 2020.

Construction land in Zones A, B and C cannot be developed without adoption of a detailed regulation plan."

13. The Claimants contend that the exceptional circumstances threshold set in Procedural Order No.1 ("PO 1") justifies the admission of these documents into the record at this stage of the arbitration. Indeed, these documents did not exist or were not publicly available at the time of the Claimants' last written submission. Further, some documents had been requested from the Serbian authorities before the Claimants' last submission, but those authorities failed to provide them in time for inclusion in the submission. Finally, some documents respond to new arguments made by the Respondent in its last submission on quantum of 16 March 2020 (the "Submission on Quantum").

B. Respondent's Position

14. The Respondent contends that this Request should be denied as it is "yet another" attempt by the Claimants to reargue their quantum case, something which the Tribunal should also take into account in its decision on costs.

15. For the Respondent, the Claimants have not met the "exceptional circumstances" threshold set in PO 1 for the admission of new documents into the record. For instance, the Claimants have not explained how the New Evidence is important to the case and "would have a significant impact on the resolution of the case and the Tribunal's deliberations."

16. The Respondent submits that the Claimants erroneously equate the "exceptional circumstances" standard with the question of the unavailability of the evidence to the Parties. This goes against the existing arbitral practice. Other arbitral tribunals have held that a party must not only show unavailability but must further establish the presence of exceptional circumstances.

17. For the Respondent, the Claimants equally erroneously contend that the New Evidence sought to be introduced is responsive to new arguments which the Respondent introduced in its Submission on Quantum. The Claimants already complained about the Respondent's

so-called new arguments in April 2020. That complaint was rejected by the Tribunal on 1 June 2020 on the basis that the Respondent's submission contained no new arguments. The Claimants have waited for over 200 days to raise this issue again, asking for leave to submit of evidence which was available to them at the time of their original application on this matter in April 2020, and which they did not seek to file then.

18. The Respondent advances the following specific objections against the admission of the New Evidence:

i. None of the Bankruptcy Trustee's Reports are relevant to the dispute or material to its outcome. Indeed, the Claimants' allegation that the sale was conducted to benefit Agrounija is irrelevant to their claims in this arbitration. Besides, at least one Report pre-dates the Claimants' last submission. Further and in any event, "the reports are either not a reliable source of information on the issues Claimants invoke as justification for their submission, or they contain information that is already established or self-evident";

ii. Equally, the documents related to the sale of BD Agro's land announced in December 2020, are neither relevant nor material. In fact, the sale in question was announced on 25 December 2020, over five years after the Claimants' valuation date of 21 October 2015. As of that latter date, there were existing and ongoing disputes concerning certain land registered in the name of BD Agro that would affect the value of that land and Claimants' ability to sell it. The documents sought to be produced now would not change the position that as of that latter date, there were existing and ongoing disputes concerning certain land registered in the name of BD Agro that would affect the value of that land and the Claimants' ability to sell it;

iii. Similarly, the list of land plots owned by Serbia in the cadastral municipality Dobanovci and the map of land plots identified in Ms. Ilic's Second Expert Report do not respond to new arguments made in the Respondent's Submission on

Quantum and the Claimants have not identified the documents with enough specificity to determine their relevance;

iv. Finally, the "information about location" for individual land plots in Zones A, B and C could have been obtained and filed with earlier submissions, which the Claimants did not do, and neither did they reserve the possibility of future filing.

C. Analysis

19. The Claimants seek to introduce new evidence into the record after their last written submission. Paragraph 17.4 of PO 1 contains the following rule in this respect:

> "Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party."

20. Exceptional circumstances thus must exist for new evidence to be admitted at this stage of the proceedings. The Party seeking to introduce new evidence into the record bears the burden of establishing the existence of such circumstances. It must do so separately for each piece of evidence sought to be admitted.

21. PO 1 does not elaborate on the exceptional circumstances required for a late admission of evidence. It is clear, however, that the circumstances must be "exceptional", i.e. out of the ordinary. Thus, if a Party chose not to submit evidence that was available to it at the time of filing its written submissions, that situation would, in and of itself, not be exceptional. By contrast, if the evidence sought to be admitted responds to a new argument made by the opposing party in its last submission then that situation may well qualify as an exceptional circumstance requiring the admission of that evidence into the record. Further, it goes without saying that the evidence to be introduced should be relevant to the dispute and material to its outcome.

22. The Tribunal now proceeds to determine whether the evidence to be admitted satisfies these requirements.

i. Bankruptcy Trustee's Reports

23. The Tribunal does not consider that the requirements set out above (§§20-21) have been met for these documents. Indeed, the Claimants have not shown that exceptional circumstances exist that would justify the admission of these documents into the record at this stage of the arbitration. Neither have they established that the requested documents sought to be introduced are relevant or material. For instance, it is not obvious that the Reports will, as the Claimants contend, show "the actual bankruptcy costs incurred in the bankruptcy proceedings", as those proceedings are still ongoing. Further, while the Reports might show that the bankruptcy sale of BD Agro was conducted in a manner benefiting Agrounija, it remains that the Claimants have not shown how their allegation that the entire bankruptcy sale was conducted for Agrounija's benefit is related to their claimed violations of the BITs. Indeed, the Claimants mention this issue only in their recital of the factual background of this case, and their present request only points to the recitals.[2] Finally, some of the Reports merely seem to confirm facts that are already on record.[3]

24. The Tribunal notes that on 5 February 2021 the Respondent opposed the admission of these documents into the record on the basis that the Claimants' allegations in respect of Agrounija were irrelevant to their claimed violations of the BITs. On 9 February 2021, the Claimants sought to introduce the public announcement concerning the sale of BD Agro's land into the record, alleging that it was "directly relevant and material for the Claimants' claim that the expropriation and subsequent sale of BD Agro and its land were purposefully conducted in a manner to benefit Agrounija and its ultimate owner, Mr. Miodrag Kostić." Thus, despite being aware of the Respondent's position that documents allegedly showing that the sale of BD Agro and its land were conducted to benefit Agrounija were irrelevant, the Claimants chose not to address it.

[2] The Claimants refer to §§467-476 of their Reply of 4 October 2019. These paragraphs address the factual background of the dispute.

[3] See, for instance, Response, §22.

ii. Documents related to the sale of BD Agro's land announced in December 2020

25. Here again, the Tribunal considers that the applicable requirements (§§20-21) have not been fulfilled. The Claimants have not shown that the documents to be introduced would be relevant or material to the Tribunal's assessment of the Respondent's position that this land should be excluded from BD Agro's valuation. More particularly, they have not convincingly explained how these documents, all dated after 25 December 2020, would be of relevance when the valuation date in question is 21 October 2015.

26. This ruling equally applies in respect of the public announcement concerning the sale of BD Agro's land sought to be filed by the Claimants. Here too, the Claimants have not explained the relevance or materiality of this document. Further, while this document might support the Claimants' allegation that the entire bankruptcy sale was conducted for Agrounija's benefit, as mentioned above, it remains that the Claimants have not explained how this issue is related to the claimed violations of the BITs at issue in this case.

iii. List of land plots owned by Serbia in the cadastral area of Dobanovci, and

iv. Map of certain land plots identified in Ms. Ilic's Second Expert Report

27. Here, the Claimants seek the Tribunal's leave to file an "excel spreadsheet, which was prepared by the City of Belgrade, Secretariat for the Economy, Sector for Agriculture and lists all land plots owned by Serbia in the Surčin municipality, which includes the cadastral area of Dobanovci where the Construction land in Zones A, B and C is located." This document will purportedly demonstrate that Serbia owns the land plots identified by Ms. Ilic and not BD Agro. The Claimants also seek to introduce "a map showing the location of four land plots, with respect to which Ms. Ilic argues that they are not owned by BD Agro [showing] the position of these land plots, as well as the position of the Construction Land in Zones A, B and C."

28. The Tribunal is not convinced that the requirements set out above (§§20-21) are satisfied in this case either. It recalls that, on 1 June 2020, it ruled on the Claimants' request to strike certain submissions made by the Respondent in its Additional Submission on Quantum,

finding that "the Contested Issues [including the issue of the land parcels identified by Ms. Ilic] arise out of submissions made in the Rejoinder. It cannot, therefore, exclude the Issues as the Claimants request", and that "the [Application to Strike] is belated and no cogent reason has been advanced to explain the delay." The Claimants have not cogently explained what exceptional circumstances would now warrant the admission of new evidence supposedly responsive to issues that the Tribunal had refused to strike from the record over nine months ago. Further and in any event, the Tribunal finds that the Claimants have not identified the documents they intend to produce with sufficient specificity. For instance, they have not identified the date of the excel spreadsheet or the author of the map. In the circumstances, the Tribunal is unable to determine if the documents to be introduced would contain relevant and material information.

v. "Information about Location" for individual land plots within the Construction land in Zones A, B and C

29. Contrary to its rulings above, in this case the Tribunal is of the opinion that the applicable requirements (§§20-21) are met. Although the Claimants could have made an effort to obtain these documents at an earlier date, the Tribunal would be assisted by having access to these documents, which might contain relevant information. The Respondent does not appear to contest as much.

III. REQUEST FOR ASSISTANCE

A. Claimants' Position

30. The Claimants allege that they requested certain documents related to the expropriation of land plots owned by BD Agro used for the construction of the "Sremska gazela" road (the "Expropriation Documents") from the relevant Serbian authorities. These requests were rejected on factually and legally incorrect bases. For instance, the Serbian Tax Authority rejected the Claimants' requests without furnishing explanations as required by the Serbian Freedom of Public Interest Information Act. Further, the Claimants' endeavors to obtain the documents directly from the Respondent were "immediately rebuffed."

31. In the circumstances, the Claimants submit that the Tribunal is "fully entitled" to order the Respondent to produce documents that are subject to the Claimants' requests before the Serbian authorities, or to order the Respondent to assist the Claimants in obtaining these documents.

B. Respondent's Position

32. The Respondent submits that the Tribunal should deny this Request as the Expropriation Documents are neither relevant nor material. They would not have a significant impact on the case. The Claimants' allegation that the entire bankruptcy sale was conducted to benefit Agrounija is irrelevant to their claims in this arbitration. Further, a bankruptcy sale and an expropriation are two entirely different processes. The Claimants have not explained how any relevant inferences can be drawn from the former in this arbitration. Moreover, it is not clear that any of the land plots referred to in the Claimants' requests have actually been expropriated as the Claimants contend. In addition, the Claimants could have pursued their requests to obtain the Expropriation Documents before the relevant Serbian authorities but chose not to do so. Instead, they waited six months before bringing this Request. Finally, so says the Respondent, the requested documents are confidential.

33. The Respondent also explains that it did not "immediately rebuff" the Claimants' attempt to seek assistance from the Respondent in procuring the Expropriation Documents. It merely objected to the Claimants' expectation that it would review the request and accompanying documentation and make its decision within a day. In any event, after due consideration, the Respondent opposed the Claimants' request for assistance.

C. Analysis

34. The Claimants seek the Tribunal's assistance in obtaining the Expropriation Documents. The Tribunal has broad powers in evidentiary matters allowing it to order the production of evidence from a Party. Paragraph 17.5 of PO 1 provides in this respect:

> "The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2)."

35. ICSID Arbitration Rule 34(2) in turn provides:

> "(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:
> (a) call upon the parties to produce documents, witnesses and experts."

36. In addition, the IBA Rules for the Taking of Evidence in International Arbitration, to which the Tribunal may turn for guidance, provides:

> "[The Tribunal] may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation."[4]

37. The Tribunal can thus direct a Party to produce evidence if it deems it necessary. It can also direct a Party to use its best efforts and provide assistance in acquiring evidence.

38. On reviewing the Parties' submissions, the Tribunal comes to the conclusion that it is not appropriate to grant the Claimants' request. While the Expropriation Documents might show the difference between the price for which Agrounija acquired BD Agro and the amount it received for the expropriated land (potentially supporting the Claimants' allegation that the entire bankruptcy sale was conducted for Agrounija's benefit), it remains that the Claimants have not substantiated the link between this aspect and the alleged violations of the BITs. Further, the Claimants have not clearly established that the land plots referred to in their requests to the competent Serbian authorities have actually been expropriated.[5] Finally, it appears that the Claimants could have pursued the remedies mentioned in the Law on Freedom of Information to procure the documents in question. Rather than doing so, they chose to wait for several months before raising this request with the Tribunal.

[4] Article 3(10) of the IBA Rules for the Taking of Evidence in International Arbitration.

[5] Response, §38.

39. The Claimants also request the Tribunal to order Serbia to provide "assistance necessary" to allow the Claimants to obtain the Expropriation Documents. The Tribunal denies this request for the reasons just mentioned.

IV. REQUEST FOR PROVISIONAL MEASURES

A. Claimants' Position

40. The Claimants submit that on 22 October 2020, a new criminal investigation was initiated by the Serbian authorities against Mr. Djura Obradović, the former nominal owner of BD Agro and a witness in this arbitration (the "New Investigation"). This Investigation "directly threatens the integrity of this arbitration and aggravates the dispute" because the Respondent is using it for questioning Mr. Obradović on issues that are relevant for the Respondent's defenses in this arbitration and irrelevant to the stated purpose of the Investigation. In the circumstances, the Claimants requested the Tribunal to:

> "a. Take all appropriate measures to end or, alternatively, suspend until the end of this arbitration the New Investigation.
> b. Refrain from using, in the arbitration proceedings, any information, material or documents obtained in the framework of the New Investigation and/or other criminal proceedings against the Claimants and/or their witnesses, which have not been admitted into the record prior to 15 January 2021, other than for the purposes of its argument on the Claimants' request for preliminary measures.
> c. Refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action which may jeopardize the procedural integrity of this arbitration.
> d. Refrain from taking any further measures of intimidation against the Claimants and their witnesses and to refrain from engaging in any conduct that may aggravate the dispute between the Parties, including any steps which might threaten the procedural integrity of the arbitral process, or aggravate or exacerbate the dispute between the Parties."[6]

41. For the Claimants, the timing of the New Investigation "could not be more telling." Indeed, the New Investigation relates to certain transactions between BD Agro, Crveni Signal ad

[6] Claimants' Opening Presentation, Slide 3.

Beograd ("Crveni Signal") and Inex Nova Varos AD ("Inex") involving a RSD 221 million loan (approximately USD 2 million) that took place in 2010, over ten years ago. Neither the Privatization Agency, nor any other Serbian authority has ever claimed that these transactions were criminal in any way, until the Respondent chose to allege their illegality in this arbitration. In addition, the New Investigation started only a few months after the trial court acquitted Mr. Obradović and all other defendants of all charges raised against them in a frivolous criminal case related to a land swap agreement concluded between BD Agro and Serbia in January 2010 (the "Land Swap Case"), on which the Respondent heavily relies in this arbitration.

42. According to the Claimants, the subject matter of the New Investigation is suspicious as well. In the course of the New Investigation, Mr. Obradović was questioned on issues including the privatization of BD Agro, investments into BD Agro, their financing, and his agreements with the investors. These topics have no relevance for the alleged illegality of BD Agro's transactions with Crveni Signal and Inex, but they do form the content of the Respondent's jurisdictional defenses in this arbitration.

43. These factors, so say the Claimants, are indicative of the fact that the New Investigation is "yet another attempt by Serbia to intimidate the Claimants and their witnesses." After all, Mr. Obradović is one of the Claimants' key witnesses in this arbitration. Also relevant is that the Order commencing the New Investigation (the "Order Commencing the New Investigation") expressly mentions the need to interview Mr. Igor Markićević, the former General Manager of BD Agro, who is another witness in this arbitration. This is surprising as Mr. Markićević had no role in any of the transactions at issue in the New Investigation. He began to work in Mr. William Rand's Serbian companies only in 2012, two years after the impugned transactions. For the Claimants, "[i]t is difficult to see any valid reason for the prosecution's decision—other than its continuing effort to intimidate Mr. Markićević."

44. The Claimants submit that the New Investigation threatens the integrity of this arbitration "because it intimidates the Claimants' witnesses and serves as an excuse for Serbia to question any person and gather any documents located in Serbia that may be relevant for this arbitration." For them, the Respondent is using the New Investigation as a mean to

gather information and documents related to this arbitration that it would not be able to get in any other manner. Moreover, the New Investigation threatens the participation of Messrs. Obradović and Markićević, and potentially other witnesses and Serbian experts put forward by the Claimants. They point out that "persons investigated by Serbia, or persons afraid of a possibility of such investigation, will hardly feel free to participate in this arbitration and freely testify before the Tribunal knowing that their testimonies might be used by Serbia for their prosecution."

45. In particular, they contend that "(i) the New Investigation relates to events directly relevant for this arbitration that have been extensively pleaded by the Parties; (ii) Serbia initiated the New Investigation to support its arguments in this arbitration and to further intimidate the Claimants and their witnesses; and (iii) Serbia's previous conduct confirms that it is willing to misuse its sovereign powers to gather material for its submissions in this arbitration."

46. On item (i), the Claimants point out that the New Investigation is based on the claim that Mr. Obradović "abused his position and authorizations, with the intent of obtaining the unlawful material benefit for himself and for others" by participating in or instructing others regarding transactions on which the Respondent "heavily relies" in its submissions. The Serbian authorities in charge of the New Investigation also rely on several documents that have been submitted in this proceeding to question Messrs. Obradović and Markićević, who are key witnesses in this arbitration. In fact, Mr. Obradović has been questioned not only about the allegedly illegal transactions, but also about specific agreements between him and people who provided him with funds invested in Serbia. This issue, namely the relationship between Mr. Rand and Mr. Obradović, is one of the principal topics in these proceedings. Similarly, Mr. Obradović was questioned about his ownership of BD Agro and about the date when BD Agro concluded a guarantee agreement securing a loan taken by Crveni Signal, issues which are also pertinent to the present dispute. It is thus clear that the New Investigation mirrors key elements of Serbia's defense in the arbitration.

47. On item (ii), the Claimants stress that, despite being aware of the impugned transactions for over ten years, the Respondent initiated an official investigation only on 22 October

2020, four months after the trial court acquitted Mr. Obradović and all other defendants in the Land Swap Case, a case on which Serbia relied heavily on its previous submissions in this arbitration Realizing that this "key argument" of its case had fallen apart, "Serbia rushed to initiate the New Investigation in an attempt to find any support at all for its baseless allegations against Mr. Obradović." Indeed, even though the New Investigation was only launched at the end of October 2020, the Respondent has already managed to interview Mr. Obradović twice, with "remarkable speed." The prosecutor also organized an interview with Mr. Milan Majstorović, another suspect in the New Investigation and a current director of Crveni Signal. The Order Commencing the New Investigation announced that the prosecutor would question Mr. Markićević, despite the fact that he was not a director of Crveni Signal or any other company involved in the New Investigation during the time period on which the New Investigation focuses. The Order does not include the names of any other potential witness other than Mr. Markićević, who is also a witness in this arbitration. The only conclusion that can be drawn for the Claimants is that Serbia commenced the New Investigation to support its arguments in this arbitration and to intimidate the Claimants and their witnesses.

48. On item (iii), the Claimants argue that "Serbia has repeatedly demonstrated that it is willing to misuse its sovereign powers to intimidate the Claimants and their witnesses, as well as to gather material for its submissions in this arbitration." This is evident, so say the Claimants, from the following facts:

i. On 8 July 2019, the Serbian Police interviewed Mr. Markićević about the matters related to this arbitration. For the Claimants, the interview "was conducted in a manner carefully designed to intimidate Mr. Markićević." The police asked Mr. Markićević several irrelevant questions including the relationship between Mr. Rand and Mr. Obradović. They also asked him inappropriate questions about his hometown and family home. They refused to document the interview as required under Serbian law. They alluded to the fact that Mr. Markićević would be meeting with the Claimants' counsel right after the interview, which was true and not disclosed by Mr. Markićević to the police.

ii. This harassment continued when on 9 August 2019, the police called Mr. Markićević demanding that he produce the documents mentioned during their initial interview of 8 July 2019, despite the fact that no official demand had been made for these documents. Further, the police ignored the fact that Mr. Markićević engaged an attorney to represent him in his communications with the Police, as well as the fact that Mr. Markićević's attorney had already informed the Police that no documents would be provided without an official request.

iii. On Sunday 11 August 2019, at 4:15 pm, a uniformed Police officer visited Mr. Markićević in his private apartment in Belgrade, where he lived with his wife and young son. The officer delivered a summons for an interview scheduled less than 24 hours later, on Monday 12 August 2019 at 9:00 am. The Police officer made sure that Mr. Markićević's neighbors could hear that he was being summoned for an investigation of a serious economic crime. The Claimants allege that "[t]his was yet another clear example of Serbia's campaign to intimidate and harass Mr. Markićević. There was certainly no justifiable need for the Police to deliver the summons in person and on a Sunday afternoon rather than simply mail it to Mr. Markićević or his lawyer sufficiently in advance of the interview."

iv. On 12 August 2019, Mr. Markićević arrived at the interview together with Mr. Cvejić and Mr. Nenad Stanković, the Claimants' lead Serbian counsel in this arbitration. The Police officers yet again asked Mr. Markićević why he had not delivered the requested documents, even though there still was no official request. They threatened Mr. Markićević with criminal charges for not doing so. After he signed the official minutes of the interview, the conversation once again turned to matters related to the present arbitration. For example, the inspectors noted that the prosecutor's office asked them to perform an investigation of several cases in which the names of Mr. Obradović, Crveni Signal, BD Agro, PIK Pešter, Maple Leaf Investments and MDH Serbia were mentioned. Most of these entities are relevant to the present arbitration. The officers also again questioned Mr. Markićević about the relationship between Mr. Rand, Mr. Obradović and BD Agro. Finally, the

officers asked whether they could receive information about all the investments that Mr. Rand had made in Serbia, as well as information about Mr. Rand's personal presence in Serbia. At the end of the meeting, it was agreed that the inspectors would come to the premises of Crveni Signal to collect the requested documents on 14 August 2019.

v. On that date, when the inspectors arrived at the offices of Crveni Signal, they again asked questions related to the present arbitration. For example, they inquired whether Messrs. Rand and Broshko, as the owners of MDH Serbia and Maple Leaf Investments, were coming to Serbia.

vi. On 3 September 2019, Serbian Police contacted Mr. Obradović and asked him to attend an interview in order to discuss "certain questions related to BD Agro and provide documents related to BD Agro." The interview took place on the next day, and revolved around issues related to BD Agro and Mr. Rand, i.e. issues directly relevant for this arbitration. The Police asked Mr. Obradović how he met Mr. Rand, about his agreement with Mr. Rand that he would become a nominal owner of BD Agro and how he financed the purchase of BD Agro. All these issues have been discussed in detail in these proceedings.

vii. In February 2018, six months after the submission of the Notice of Dispute, the Respondent indicted Mr. Obradović in relation to an assignment and sale of land of BD Agro that took place between 2006 and 2007 (the "Land Sale Case"). In January 2020, the scope of that investigation was extended to cover issues relevant to the present arbitration. The Claimants are unaware of whether and how the investigation has proceeded in 2020.

viii. On 22 October 2020, the Serbian authorities initiated the New Investigation, a few months after Mr. Obradović's acquittal in the Land Swap case. The Serbian authorities also announced their intention to interview Mr. Markićević, despite the fact that he was not a director of Crveni Signal or any other company involved in

the New Investigation during the time period on which the New Investigation focuses.

49. The Claimants are of the view that all the usual criteria for granting provisional measures are satisfied for the following reasons.

i. *Prima facie* jurisdiction

50. For the Claimants, this requirement is clearly met. Canada, Cyprus and Serbia are signatories of the ICSID Convention. The Claimants are nationals of either Canada or Cyprus. The Tribunal therefore has *prima facie* jurisdiction *ratione personae*. Further, the dispute concerns breaches of the Respondent's obligations under the Canada-Serbia BIT and Cyprus-Serbia BIT. The Tribunal therefore has *prima facie* jurisdiction *ratione materiae*. Further still, it is undisputed that the Tribunal has jurisdiction *ratione temporis* under the Cyprus-Serbia BIT. As far as the Canada-Serbia BIT is concerned, the direct expropriation of BD Agro's shares occurred on 21 October 2015, several months after the entry into force of that BIT. Furthermore, the Claimants submitted their Request for Arbitration on 14 February 2018, within the three-year time limit provided in this Treaty for initiating arbitration proceedings. The Tribunal therefore has *prima facie* jurisdiction *ratione temporis* as well. Finally, under the facts alleged by the Claimants, the Tribunal has *prima facie* jurisdiction *ratione voluntatis* over the Claimants' claims.

ii. *Prima facie* case on the merits

51. The Claimants consider that this requirement too is clearly satisfied: "the Claimants have, at minimum, made serious claims that *prima facie* fall within the competence of the Tribunal. Indeed, the Parties have submitted more than 1,600 pages of written briefs, 20 witness statements, 25 expert reports, 1,555 exhibits and 373 legal authorities."

iii. Necessity

52. The Claimants submit that investment tribunals have repeatedly confirmed that provisional measures may be ordered to preserve the Parties' rights, including the general right to the

preservation of the status quo and to the non-aggravation of the dispute. Provisional measures have also been granted to preserve the procedural integrity of ICSID proceedings, in particular the access to and integrity of evidence. The only requirement imposed is that the rights sought to be protected by provisional measures must be related to the dispute. For the reasons already mentioned, this criterion is clearly fulfilled in this case.

53. The Claimants further assert that the measures which they seek are necessary because Mr. Obradović is being investigated and Mr. Markićević will almost surely be questioned by Serbian prosecutors with respect to the very same issues about which they are supposed to testify in this arbitration. Their testimonies in this arbitration will be affected by the knowledge that the Serbian authorities may use their statements before the Tribunal in other proceedings. In the absence of the requested measures, Messrs. Obradović and Markićević would not "feel free" to openly testify in this arbitration. Other witnesses and experts in this arbitration, especially those who live in Serbia, may feel the same way.

54. Yet another reason why the measures sought are necessary, so say the Claimants, is that the Respondent may restrict Mr. Obradović from traveling abroad for the hearing. The Respondent has already done so on a previous occasion when it withheld Mr. Obradović's passport in connection with the Land Swap Case thus preventing him from international travel.

55. Still another reason showing the necessity of the requested measures, according to the Claimants, is that Serbia will use the New Investigation to gather information and documents that it could then use in this arbitration. The Serbian Police and prosecutors and the team representing Serbia here have "an open communication channel." There is a significant overlap between the documents on which the prosecutor relies in the New Investigation and the documents which are on the record of this arbitration. Additionally, if the measures are not granted, the Claimants will have to divert their resources from the preparation of the forthcoming hearing on the merits to deal with issues arising out of the interviews of Mr. Obradović, future interviews of Mr. Markićević, as well as potential seizure of documents related to this arbitration and derivative evidence arising therefrom.

iv. Urgency

56. In the Claimants' view, this requirement is established. Indeed, the measures requested are necessary to prevent the aggravation of the dispute and to safeguard the procedural integrity of this arbitration. As such, they are urgent "by definition" and cannot await the rendering of an award on the merits.

v. Proportionality

57. The Claimants contend that this condition is also fulfilled. The preliminary relief which they seek will not interfere with the Respondent's right to conduct criminal investigations and prosecution. Rather, they are intended to ensure that no such investigation or prosecution is conducted in a manner that would interfere with this arbitration. The Respondent will be able to continue its investigation without limitations after the conclusion of this arbitration if it still so wishes at that time. Having waited over ten years to commence the New Investigation, it is difficult to see how the Respondent would be harmed by postponing it until the arbitration is completed.

B. Respondent's Position

58. The Respondent contends that the Claimants' application is "illogical" as they are complaining about actions undertaken three years after the present arbitration was initiated, almost a year after the last submissions and evidence were filed and after two hearing postponements. Further, all the criminal proceedings mentioned in the Request had been ongoing for years before this arbitration was initiated. According to the Respondent, "[i]f anyone intended to intimidate Claimants' witnesses and misuse the Police to gather additional information and documents, he/she would not wait until now when it is obviously too late – witnesses already gave their multiple written witness statements and were about to give their oral testimonies twice (in March and in October), while any further submission of documents is restricted by the requirement of 'extraordinary circumstances.'" Serbia further emphasizes that the Claimants were the ones who sought to introduce new evidence into the record, not the Respondent. The Respondent could have

filed materials gathered through the New Investigation along with its earlier written submissions but did not do so. It does not intend to submit any new evidence now either. In fact, it was only after the Request for Provisional Measures that Respondent's counsel found out about the developments in the New Investigation.

59. For Serbia, "the Request is an obvious abuse of rights and an attempt to aggravate the dispute and smear Respondent on the eve of the Hearing." The Respondent highlights that provisional measures are exceptional measures which should only be granted in the most necessary and urgent situations. Provisional measures interfering with a State's sovereign right to prosecute criminal acts within its territory are even more extraordinary. The Respondent thus requests the Tribunal to:

> "(i) Dismiss Claimants' Application for Provisional Measures dated 15 January 2021 in its entirety; and
>
> (ii) Order Claimants to reimburse Respondent for all its costs associated with the Application, including interest, as well as the fees and expenses of the Tribunal."

60. The Respondent contends that there is nothing new about the New Investigation. In fact, in this arbitration, Serbia has just repeated the arguments that the Privatization Agency had initially made in 2011. In October 2014, the Privatization Agency informed the Serbian police about the breach of the Privatization Agreement due to BD Agro's loans to Crveni Signal and Inex. The New Investigation was thus not triggered by this arbitration, but by the facts disclosed by the Privatization Agency.

61. The Respondent rejects the Claimants' position that it has waited over ten years to commence the New Investigation. It points out that the Privatization Agreement was terminated in October 2015, after several extensions were given to Mr. Obradović to cure the breach of Article 5.3.4 of that agreement and to return the RSD 221 million loan forming the subject matter of the New Investigation. The criminal aspect of the loan was thus more likely to be prosecuted only after late 2015, and not since 2010. In fact, as the Order Commencing the New Investigation shows, the criminal acts of which Mr. Obradović is suspected occurred in the period from June 2010 to October 2015.

62. The Respondent equally disputes the Claimants' assertion that Serbia initiated the New Investigation to support its case in this arbitration. Soon after the termination of the Privatization Agreement on 1 October 2015, Mr. Radoje Gomilanovic was registered as the president of the Board of Directors of BD Agro. Mr. Gomilanovic had reason to believe that the previous CEO of BD Agro, Mr. Markićević, along with the management of Crveni Signal had committed serious criminal acts during their tenure. Therefore, on 2 June 2016, Mr. Gomilanovic filed a criminal complaint with the First Public Prosecutor's Office and asked the authorities to investigate, *inter alia*, the use of the RSD 221 million loan for the benefit of Crveni Signal. Thus, the criminal prosecution of this matter was at the behest of a private individual, not a state official. Moreover, it was suggested three years before this arbitration started. Based on Mr. Gomilanovic's criminal complaint, the First Public Prosecutor submitted a request for collection of information to the Police Authority on 24 June 2016. According to the Serbian Code of Criminal Procedure, this marked the initiation of criminal prosecution, *i.e.* the pre-investigation of the alleged criminal acts. All of these acts took place almost two years before the notice of dispute in this arbitration. The New Investigation is thus merely a continuation of the earlier proceedings.

63. The Respondent further remarks that the fact that the New Investigation is a continuation of earlier proceedings is also evident from the fact that when submitting the specific criminal complaint with respect to the RSD 221 million loan in August 2020, the Serbian Police explicitly referred to the First Public Prosecutor's case from 2016, initiated by the criminal complaint of Mr. Gomilanovic. Moreover, when interviewing Mr. Obradović on 4 September 2019, the police referred to that same case from 2016 and there is evidence that the police was investigating this same transaction through interviews in other cases that were ongoing since 2014.

64. For the Respondent, the Claimants' assertion that the New Investigation is aimed directly at issues and individuals at the heart of this arbitration is incorrect. Most of the individuals mentioned in the New Investigation are not involved in this arbitration in any capacity. Mr. Obradović is only one out of four suspects and Mr. Markićević is only named as a witness. Further, while Mr. Markićević was named as the prime suspect in the criminal complaint

that lead to the opening of the New Investigation, the pre-investigation ultimately excluded him as an accused, with Messrs. Obradović, Jovanovic and Obucina being included as suspects. According to the Respondent, "[t]his again demonstrates that the prosecutorial authorities acted in good faith, and that they ultimately accused only the persons for which they objectively found sufficient ground for doing so."

65. Serbia contends that the Claimants' insinuation that the prosecutor harassed Mr. Obradović by conducting two interviews in the span of a month is misplaced. The first interview was interrupted at the request of Mr. Obradović's attorney, who had to leave because of another commitment. The second interview was merely the continuation of the first one and made to finish it relatively soon.

66. All other allegations of harassment or intimidation are equally denied by the Respondent. In this context, the Respondent recalls that:

i. In his interview on 10 November 2014, which occurred much before this arbitration commenced, Mr. Obradović did not mention that he was acting as a proxy for Mr. Rand or anyone else. He stated that he was the owner of BD Agro, that he personally made the investments in question, that he personally gave the shareholder loans at issue, and that he personally made relevant business decisions for BD Agro. He made other statements that were aligned with the position the Respondent later took in this arbitration, including that he was the majority owner who made investments and gave out shareholder loans to BD Agro, and that he attempted to transfer the ownership over the company to Coropi in 2013.

ii. In his next interview of 4 September 2019, a year and a half after this arbitration had commenced, Mr. Obradović's testimony changed. For the first time, he mentioned the alleged beneficial ownership arrangement between him and Mr. Rand to the investigative authorities. His statements were aligned with the Claimants' case in the arbitration, not the Respondent's.

iii. In his two interviews in 2020, Mr. Obradović was questioned about his relationship with Mr. Rand because in his previous interview of September 2019, he himself raised the issue of financing from abroad and the beneficial ownership arrangement with Mr. Rand. This issue was not previously discussed, as Mr. Obradović always represented that he was the majority owner and investor in BD Agro. For the Respondent, "even if there was actually a question from the public prosecutor in this regard, such question would be completely expected. If a person accused of serious financial crimes suddenly starts speaking about having an undisclosed and unclear financial arrangement that provided him with multimillion dollar financing from abroad with respect to the companies that are being investigated, that person will likely be asked to further explain these facts." Serbia further points out that the record of the interview shows that the prosecutor's question regarding the source of financing followed up on Mr. Obradović's bringing up the subject.

iv. It is also notable – so says the Respondent – that Mr. Obradović has not alleged any misconduct by the Serbian authorities during his interviews. He has only stated that he felt "uncomfortable", "which is an expected reaction of any person being questioned about a criminal act in the capacity of a suspect." In fact, Mr. Obradović has testified that the police officer that conducted the interview seemed quite courteous.

v. As far as Mr. Markićević is concerned, the Respondent stresses that the Order Commencing the New Investigation states that the period of the criminal acts in question is from 1 June 2010 until 1 October 2015. As Mr. Markićević was the CEO of both BD Agro and Crveni Signal from 2012 to 2015, "his statements seem quite relevant for determining the full factual state of the case." Further, while it is true that the funds from the RSD 221 million loan were misused between 2010-2011, the outstanding obligations towards BD Agro were not settled for the following four years, which includes the period when Mr. Markićević was the CEO of both companies. According to Serbia, "as Mr. Markićević managed both of these companies at the time when the pertinent intercompany loans were unsettled, it

would be very strange not to have at least an interview with him in order to find out whether he possesses any knowledge of these events." Finally, the lack of any bad faith on the part of the Serbian authorities is evident from the fact that the Order starting the New Investigation excluded Mr. Markićević as a suspect, although the initial criminal complaint submitted in 2016 was directed against him as the prime suspect.

vi. Further, for the Respondent, Mr. Markićević's allegations of intimidation are unsustainable. On an earlier occasion in this arbitration, he intentionally misrepresented the police's request for relevant documentation of Crveni Signal as an "intimidating interview", although no such interview took place. What he called an interview was merely his visit to the police station on his own initiative and his refusal to deliver relevant documents. Further, when the police asked him to schedule an appropriate time for the inspection of documents of Crveni Signal, Mr. Markićević stated that he was busy as he had scheduled meetings with Mr. Rand's lawyers. Therefore, the Claimants' accusation that the police was listening to the communications between Mr. Markićević and Claimants' counsel is absurd. Finally, so the Respondent, Mr. Markićević never filed any complaint or other proceedings against the police officers when allegedly harassed or eavesdropped on him. In reality, Mr. Markićević has not behaved like someone who is intimidated or fearful when investigated in other cases, and even avoided summonses from the authorities.

67. The Respondent denies that any events aggravating the dispute have occurred that would warrant the measures sought by the Claimant. The only events that occurred are Mr. Obradović's acquittal in the Land Swap Case and the criminal pre-investigation initiated in 2016 proceeding to an investigation. The first event confirms that there is no organized campaign against Mr. Obradović. There is nothing extraordinary in the second event either as it is a continuation of proceedings commenced before Mr. Obradović's acquittal and before the arbitration. Advancing from a pre-investigation to an investigation often takes several years, as is evident from the timeline of the Land Swap Case.

68. The Respondent equally challenged the Claimants' assertion that the scope of the Land Sale Case was wrongly expanded to include the question of whether the disposal of the land exceeded the permissible limits under Article 5.3.3 of the Privatization Agreement. First, that provision is not the subject matter of the present arbitration. Second, there is nothing strange in how this "addition" to the investigation occurred. It was a judicial authority in Serbia that, having reviewed the indictment and the response to the indictment, ordered the public prosecutor to supplement the investigation in order to clarify the factual situation. In any event, there is nothing new about the Land Sale Case either; criminal complaints against Mr. Obradović in that respect were filed in 2009.

69. The Respondent disputes the Claimants' view that all the criteria for granting provisional measures are met in this case. It points out that an "exceptionally high" threshold is to be met to order the measures requested, and that the Claimants have failed to fulfil their burden of proof in this respect.

i. *Prima facie* jurisdiction

70. The Respondent rejects the Claimants' position that this requirement is met. It contends that the Claimants never owned nor controlled the investments on which they base their claim. The Request for Provisional Measures confirms this "as it shows Claimants' desperation because none of them has been identified as a person making decisions in BD Agro (instead, it was Mr. Obradović), although the prosecutorial authorities have been investigating BD Agro for years." Even if the Claimants' position that they were the beneficial owners of BD Agro were true, "it would obviously be a deceptive arrangement which was not disclosed to the Privatization Agency due to bad faith motives." In the circumstances, the Claimants have not made out their case that this Tribunal has *prima facie* jurisdiction.

ii. *Prima facie* case on the merits

71. For the Respondent, the Claimants' case has "no chance" to succeed on the merits. The Claimants have "failed utterly" to establish that the Privatization Agreement was

terminated unlawfully. Mr. Obradović was a "negligent buyer" who was eventually unable to cure the breach of Article 5.3.4 of the Privatization Agreement for more than four years.

iii. Necessity

72. The Respondent rejects the Claimants' submission that the measures sought are necessary to prevent intimidation or harassment of the Claimants or their witnesses or to prevent the collection of evidence for use in this arbitration. It also disputes that the measures are required to prevent the aggravation of the dispute.

73. For the reasons already mentioned, no case of intimidation of witnesses has been made out and none could be made: Messrs. Obradović and Markićević have already given multiple statements in this arbitration none of which have been used by the police or prosecutors in proceedings against these individuals. Mr. Obradović is only being investigated, and it is uncertain whether he will be indicted at all. Further, had he feared being prosecuted by the Serbian authorities for acting as a witness, he would have withheld his testimony much earlier instead of giving three statements supporting the Claimants' case. In fact, Mr. Obradović was arrested for a high-profile crime in 2015 and criminal proceedings were initiated against him before the arbitration started. In one of those cases, he was acquitted in the court of first instance after he had filed his last witness statement in this arbitration. Mr. Obradović's involvement in the arbitration did not harm him in that criminal proceeding. The same applies to Mr. Markićević. He was allegedly "harassed" by the police in 2019, but still gave a witness statement in favor of the Claimants in March 2020. Finally, there is no evidence that the testimony of these individuals will be affected by the New Investigation. Nor is there reason to believe that they would be prevented from giving their oral testimony at the Hearing.

74. For the Respondent, it is similarly evident that the Claimants' theory of intimidation is baseless from the fact that Mr. Rand is not involved in any of the numerous criminal proceedings concerning the RSD 221 million loan. This demonstrates that "(i) the authorities found no evidence that BD Agro was owned and controlled by anyone other than Mr. Obradović himself; and (ii) assertions of Claimants and their witnesses from this

arbitration have not been used to initiate or aggravate any criminal proceedings whatsoever, even though they could legitimately give sufficient cause for serious suspicions."

75. The Claimants' assertion that the Respondent is using the criminal proceedings to collect evidence for the present arbitration "is equally meritless." At the present time, the Respondent sees no need to file new evidence. If that changes (which is highly unlikely), the Respondent will seek the Tribunal's permission. The Claimants would then have an opportunity to comment and the Tribunal would decide on a case-by-case basis.

76. Finally, the Respondent notes that it is highly improbable that the Claimants' witnesses would not attend the hearing and that their absence would actually affect the position of the Respondent, who would not be able to cross-examine the witnesses.

iv. Urgency

77. The Respondent challenges that this requirement is met. Mr. Obradović was already questioned in 2014 about the acts forming the subject matter of the New Investigation. Both he and Mr. Markićević were questioned again in 2019 on the same matters in the pre-investigation proceedings. A year and a half has passed since and the Claimants and their witnesses suffered no damage. Further, the New Investigation mentions Mr. Markićević only as a witness. There is no indication that his testimony will cause him any harm.

78. Finally, Serbia does not intend to submit new evidence from any criminal proceedings in this arbitration, which means that there is neither a need nor any urgency for directions in that regard.

v. Proportionality

79. The Respondent argues that the requested measures would affect it disproportionately. Indeed, if the measures were granted, the Tribunal would be interfering with Serbia's sovereign right to exercise criminal jurisdiction in its own territory. In addition, the measures would be unworkable according to the Serbian Constitution and relevant laws, as the State Attorney's Office, which represents the Respondent in this arbitration, cannot

interfere in criminal cases. The statute of limitations would also run. On the other hand, the Claimants would incur no harm if the measures were not granted. After all, the Claimants have no connection with the New Investigation or any other investigation known to the Respondent. Moreover, the Claimants' witnesses have already testified and there is no indication that their future oral testimony would result in negative consequences in the criminal proceedings, especially when their existing written witness testimonies did not have such effect.

80. Finally, the Respondent submits that the requested measures are overly broad. Indeed, the direction that the Respondent refrain from using any material or documents obtained in the framework of the New Investigation or other criminal proceedings is premature as the Respondent has not made such an attempt. Neither does it intend to do so. Further, it is unclear why the Respondent should be prevented from using materials from "other criminal proceedings" as the Request focuses solely on the New Investigation. Similarly, the Claimants request the Tribunal to "refrain from initiating any other criminal proceedings directly related to the present arbitration", which is overly broad, especially in circumstances where the Claimants have no information about any other relevant pending proceedings.

C. Analysis

1. Framework

81. The Tribunal's powers in matter of provisional measures arise out of Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

82. Article 47 of the ICSID Convention reads as follows:

> "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

83. Rule 39 of the ICSID Arbitration Rules reads as follows, in relevant part:

> "(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations." […]

84. These provisions thus grant a level of discretion to the Tribunal when it comes to the issuance of provisional measures. Unless the disputing parties "otherwise agree", the Tribunal may recommend provisional measures "if it considers that the circumstances so require" in order "to preserve the respective rights of either party."

85. The Canada-Serbia BIT also provides that the Tribunal has the power to order interim measures. Article 35(1) provides in this respect:

> "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 21. For the purposes of this paragraph, an order includes a recommendation."

86. It is common ground between the Parties that provisional measures can only be granted if the following conditions are fulfilled:[7]

i. *Prima facie* jurisdiction;

ii. Likelihood of success on the merits;

[7] Request, §108; Response §81.

iii. Necessity;

iv. Urgency; and

v. Proportionality.

87. Finally, it is undisputed that the Party seeking provisional measures bears the burden of establishing these conditions, which are cumulative, *i.e*. the Claimants must establish that all of them are met.

2. Discussion

88. At the outset, the Tribunal emphasizes that this decision is made on the basis of the Tribunal's understanding of the record as it presently stands. Nothing contained herein shall pre-empt any later finding of fact or conclusion of law. Further, the Tribunal's decision could be revisited if relevant circumstances were to change.

89. As a further preliminary comment, the Tribunal recalls that the Claimants have mentioned the subject-matter of the present Request for Provisional Measures at earlier stages of this arbitration:

i. On 11 July 2019, the Claimants requested the Tribunal to remind the Respondent of its obligations not to exacerbate the dispute and not to jeopardize the integrity of the present proceedings, including by using the Serbian investigative authorities to (i) intimidate the Claimants and their witnesses; (ii) question the Claimants' representatives and their witnesses about factual issues relevant to the arbitration; and/or (iii) keep track of the meetings of the Claimants' representatives and witnesses with counsel. The Claimants did not request any other relief, but reserved their right to do so;

ii. On 22 July 2019, the Respondent objected to the Claimants' request and set out its position on the underlying facts;

iii. On 25 July 2019, the Tribunal advised the Parties that it "trust[ed] that they [would] refrain from taking actions contrary to their ongoing duty of good faith not to aggravate the dispute and not to affect the integrity of the arbitration";

iv. In October 2019, in their Reply, the Claimants summarized the Respondent's alleged misconduct and "continued efforts to threaten the Claimants and their witnesses." They also invited the Respondent to explain why the Serbian authorities had suddenly started to investigate matters that were over ten years old, but without seeking provisional measures.

90. The Claimants now request provisional measures directing Serbia to (i) terminate or suspend the New Investigation; (ii) refrain from using in this arbitration any material obtained through the New Investigation and/or other criminal proceedings against the Claimants and/or their witnesses; (iii) refrain from initiating any other criminal proceeding directly related to the present arbitration or engaging in "any other course of action" that would jeopardize the integrity of this arbitration; and (iv) refrain from taking measures that would intimidate the Claimants or their witnesses.

91. The Tribunal notes that a State has a sovereign right to investigate allegedly criminal conduct occurring within its territory. The pendency of an international arbitration does not shield a claimant from State investigation into alleged breaches of that State's criminal law. At the same time, however, a State's power to conduct criminal investigations must be exercised in good faith. As observed by the tribunal in *Quiborax v. Bolivia*:

> "Bolivia has the sovereign power to prosecute conduct that may constitute a crime on its own territory, if it has sufficient elements justifying prosecution. Bolivia also has the power to investigate whether Claimants have made their investments in Bolivia in accordance with Bolivian law and to present evidence in that respect. But such powers must be exercised in good faith and respecting Claimants' rights, including their *prima facie* right to pursue this arbitration."[8]

[8] Exh. CLA-174, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, §123.

92. Other tribunals have held that an order that restricts the investigation or prosecution of suspected criminal conduct should only be ordered if it is "absolutely" necessary.[9] Still others have found that only specific circumstances warrant provisional measures aiming at preventing or discontinuing criminal proceedings initiated by the State, such as where the criminal proceedings impair a claimant's right to present its case[10] or where the State's conduct amounts to "abusive behavior [to be] able to exert such a chilling effect on the Claimants' witnesses […] so as to prevent them from testifying against the Respondent."[11]

93. The Claimants insist that the facts and circumstances of this case justify the provisional measures which they seek. They argue that if the requested measures are not granted (i) their witnesses will be intimidated at the hearing or altogether prevented from testifying; and (ii) the Respondent may seek to introduce material obtained through the New Investigation and/or other criminal proceedings into this arbitration. In support of their Request for Provisional Measures, they point principally to three acts of the Serbian authorities since their Reply: (i) the Order Commencing the New Investigation of October 2020; (ii) Mr. Obradović's interviews with the Serbian authorities in November and December 2020; and (iii) potential future interview(s) of Mr. Markićević and possibly Mr. Obradović.[12]

94. In the Tribunal's assessment, the Claimants have not sufficiently established the facts on which they rely:

i. They have not cogently established that the Respondent commenced the New Investigation to intimidate or harass the Claimants or their witnesses:

[9] See, for instance, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures of 3 March 2016, §3.16.

[10] Exh. CLA-174, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures of 26 February 2010, §142.

[11] Exh. RLA-131, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, §87.

[12] The Claimants stated at the hearing that they were not basing their Request on the order expanding the scope of the Land Sale Case. See Tr. 43:25-44:3 ("[W]e do not claim to justify the requested preliminary measures by the fact that in January 2020 the land investigation was expanded.").

a. The Serbian authorities began examining the issues mentioned in the New Investigation in 2016 prompted by Mr. Gomilanovic's criminal complaint filed in June of that year.[13] This was well before the Claimants commenced this arbitration in 2019. As a consequence of their enquiries, including interviews with Messrs. Obradović and Markićević in 2019, the Serbian police submitted a criminal complaint against Mr. Obradović in August 2020,[14] after which the prosecutor directed the commencement of the New Investigation in October 2020. In other words, the criminal investigation initiated through Mr. Gomilanovic's complaint evolved in such a manner that it resulted in the New Investigation. Consequently, the Tribunal cannot follow the Claimants' argument that Serbia commenced the New Investigation as a result of Mr. Obradović's acquittal in the Land Swap Case. The Serbian authorities were already investigating the facts underlying the New Investigation prior to that acquittal. While one may question why it took the Serbian authorities four years after Mr. Gomilanovic's complaint to formally commence an investigation in October 2020, the Claimants do not dispute the Respondent's representation that this is the normal time taken for such investigations in Serbia. The time frame of the Land Swap Case seems to confirm this duration: the prosecution commenced in 2009 but the police submitted a criminal complaint only five years later in 2014;

b. The New Investigation is not centered on Mr. Obradović, who is only one out of four suspects, and Mr. Markićević is not named as a suspect, only as a witness. This seems in line with the fact that the New Investigation covers acts from June 2010 until October 2015 when Mr. Markićević was the CEO of both BD Agro and Crveni Signal from 2012 to 2015. In fact, Mr. Markićević was initially named as a suspect in the New Investigation but was later summoned as a

[13] Exh. RE-669. In June 2016, the prosecutor submitted a request for collection of information to the Serbian police (Exh. RE-671).

[14] Exh. RE-671.

witness. This change too speaks against the New Investigation being used to harass the Claimants' witnesses as it is alleged;

c. Mr. Obradović has not complained of any misconduct by the Serbian police during his interviews in November and December 2020. He only stated that he felt "uncomfortable" during his interview in 2019, which is not surprising for someone who is being subject to a criminal investigation. While Mr. Markićević has stated that he did feel intimidated when interrogated in 2019, there is no evidence besides his own statement to support this conclusion. Mr. Markićević has filed no complaint or other proceedings against the police officers who allegedly harassed him, which one could expect knowing that he had retained a criminal lawyer to assist him before the Serbian police and had past experiences with Serbian investigative authorities. Further, Mr. Markićević's last witness statement was filed in March 2020, *i.e.*, after he was allegedly intimidated by the police in 2019, meaning that the alleged intimidation did not prevent him from giving evidence in this arbitration. It is also noteworthy that he raised no such concern in his last witness statement. Considering these facts, there appears to be no reason to fear that Mr. Obradović or Mr. Markićević would be prevented from testifying at the hearing;

ii. Similarly, there is no indication in the record that the Claimants' witnesses would feel pressured when testifying at the hearing and that their oral evidence may thus be unduly influenced, unless the requested measures are granted. Neither Mr. Obradović nor Mr. Markićević have stated that they are fearful of giving testimony at the forthcoming hearing in this arbitration. No other witness has done so either. Further, none of the witnesses have indicated that they wish to modify or withdraw their testimonies in this arbitration;

iii. Even if the Claimants' allegations of witness intimidation or interference were proven correct, *quod non*, the applicable procedural rules would adequately safeguard the Claimants' rights:

a. As provided in PO 1, a written witness statement stands as direct testimony (§19.2). Direct examination at the hearing is thus to be limited to introductory questions and addressing matters that have arisen after a witness' last statement. The primary purpose of a witness' presence at the hearing is to provide an opportunity for the opposing party to cross-examine him/her. If the Claimants' witnesses were prevented from appearing at the hearing, this would primarily be detrimental to Serbia as it would be deprived from testing the veracity of these witnesses' fact statements;

b. Assuming that the Respondent was nevertheless impeding the appearance of Messrs. Obradović and Markićević, under the applicable procedural rules, the Tribunal would be authorized to consider their witness statements as they would have a valid reason for not appearing (§19.13 of PO 1). In this instance too, the Tribunal could give due weight to these witnesses' evidence;

iv. The Respondent has not sought to introduce into the record any materials obtained through the New Investigation and/or other criminal proceedings. To the contrary, it has indicated that it does not need or intend to do so as it "has all the evidence that it needs."[15] Moreover, should the Respondent nevertheless wish to file new documents, it would have to make an application to that effect, following the requirements of paragraph 17.4 of PO 1. The Claimants could then draw the Tribunal's attention to the fact that the new documents were obtained through the New Investigation and/or other criminal proceedings. If this were so, the Tribunal could then refuse the new documents. At this stage, this is a hypothetical scenario that could never arise.

95. For these reasons, the Tribunal concludes that the requested measures are neither necessary nor urgent. This conclusion suffices to deny the Request as the conditions for provisional

[15] Response, §§74, 115.

remedies are cumulative. As a consequence, the Tribunal can dispense with reviewing the other requirements.

96. While the conditions to grant interim relief are not satisfied, it is true that the Tribunal remains concerned about the overlap between the matters presently being investigated in Serbia and those before the Tribunal. This concern is compounded by the pace of the investigation. While it took four years between Mr. Gomilanovic's criminal complaint and the police's complaint in August 2020, from the time of the formal commencement of the New Investigation in October 2020, the Serbian authorities moved swiftly, interviewing Mr. Obradović twice: once on 17 November 2020, only 26 days after the commencement of the New Investigation, and again on 22 December 2020.[16] Against this background, the Tribunal restates that it expects the Parties to refrain from taking actions that, contrary to their ongoing duty of good faith, could aggravate the dispute or affect the integrity of the arbitration.

V. DECISION

97. For the reasons set forth above, considering the present state of the record, the Tribunal:

(i) Denies the Claimants' request to admit the "Bankruptcy Trustee's Reports", "[d]ocuments related to the sale of BD Agro's land announced in December 2020", "[l]ist of land plots owned by Serbia in the cadastral area of Dobanovci" and "[m]ap of certain land plots identified in Ms. Ilic's Second Expert Report";

(ii) Grants the Claimants' request to admit the documents containing ""Information about Location" for individual land plots within the Construction land in Zones A, B, and C in Dobanovci." The Claimants should file these documents with appropriate exhibit numbers by **19 March 2021**. By **2 April 2021**, the Respondent may comment on the documents if it so wishes;

[16] Even if the second interview was a continuation of the first as was stated (Response, §36), it remains that it was scheduled rather promptly.

(iii) Denies the Claimants' request to order the Respondent to produce the Expropriation Documents or to provide assistance necessary to allow the Claimants to obtain these documents;

(iv) Denies the Claimants' request for the provisional measures reproduced at paragraph 40 above;

(v) Reserves costs for a later decision.

On behalf of the Tribunal,

[signed]

_____

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal