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, ROBERT GARRY LEANDER RAND (CANADA) AND SEMBI INVESTMENT LIMITED (CYPRUS)

("**Claimants**")

– and –

THE REPUBLIC OF SERBIA

("**Respondent**")

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# RESPONDENT'S POST-HEARING BRIEF

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28 September 2021

BEFORE:

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Mr. Baiju S. Vasani, Arbitrator

Prof. Marcelo Kohen, Arbitrator

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*Secretary of the Tribunal*

Ms. Marisa Planells-Valero

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# I. INTRODUCTION

1. The Hearing has revealed what was all along deep at the bottom of the present dispute and what has in fact motivated Claimants: Mr. Obradovic's EUR 2.7 million debt to Mr. Rand and tangled past relationships between these two individuals that Respondent is now asked to pay for. Had Mr. Rand tried to collect his claims directly from his erstwhile business partner Mr. Obradovic, he would get nothing. So instead Mr. Rand has decided to go after Respondent in what also could be yet another of his business adventures. In this one, he finances the pursuit of the grossly inflated claims and hopes to end up with some profit.

2. Claimants' case remains persistently haunted by the lack of evidence that would support their narrative. They are unable to provide documents with details of their alleged arrangement with Mr. Obradovic or with persons and entities that supposedly financed the acquisition of BD Agro. Those documents that they were actually able to present, work against their assertions and not in their favor. As notably did Mr. Obradovic's admission of his EUR 2.7 million debt to Mr. Rand.

3. Claimants attempt to overcome this obstacle by relying on a series of alleged verbal agreements. The proof of their existence, however, are testimonies of individuals crucially interested in the outcome of the dispute - Claimants themselves or persons they employ. As will be demonstrated in this submission, those testimonies are in stark contradiction to documents on record.

4. Indeed, evidence on record has exposed fatal deficiencies in Claimants' jurisdictional case: none of Claimants was an owner of BD Agro. Instead, the owner was a Serbian citizen – Mr. Obradovic. However, Claimants advance an exotic legal theory saying that they were the "beneficial owners" of BD Agro by way of absolute control over an individual, Mr. Obradovic.

5. As a consequence of the glaring lack of highly relevant documentary evidence, which paradoxically cannot be replaced by hundreds of other documents submitted by Claimants, it still remains unclear (i) who actually financed the investment, (ii) what was the amount of funds actually invested and (iii) whether the financiers are still holding claims against persons involved in BD Agro's acquisition.

6. Just as they are unable to prove their beneficial ownership of BD Agro's capital, Claimants cannot find solace in the alternative proposition – that they indirectly controlled the way in which Mr. Obradovic used his position as a majority owner of the company, in accordance with Article 1 of the Canada-Serbia BIT. For Mr. Obradovic was not only the owner of BD Agro, but he consistently acted as one (albeit not a good one) - he misused the company's assets, extracted its funds, got involved in a number of criminal proceedings, over-indebted the company, got its bank accounts blocked. Claimants are unable to marshal any evidence that Mr. Rand has ever issued any instruction or order addressed to Mr. Obradovic over the period of almost ten years. At the same time, Mr. Rand admitted that some of the acts that were crucial for the misfortune of BD Agro were taken by Mr. Obradovic unbeknownst to

him. This proves without a shred of doubt that Claimants' argument about Mr. Rand's supposed control of BD Agro is unsustainable.

7. As for the merits of Claimants' claim, their contention that the Agency unlawfully terminated the Privatization Agreement inspired by some unexplained hidden agenda is a pure conjecture, for which they do not provide any evidence. The history of the relationship between Mr. Obradovic and the Agency demonstrates that the Agency patiently waited for Mr. Obradovic to remedy various breaches of the Privatization Agreement and gave him plenty of second chances – 30 to be precise.[1] After Mr. Obradovic failed to remedy the same breach of Article 5.3.4 for as long as four years, and after he tried to deceive the Agency into believing that he did remedy it, the Agency did not have any other option but to terminate the Privatization Agreement.

8. The breach in question was nothing new to Mr. Obradovic – he did not dispute its existence and even remedied similar breaches in the past. The breach and the reaction to it was also not new to the Privatization Agency, as its conduct was completely in line with its past practice and interpretation of the law, as well as in line with Serbian court practice. All of this Respondent has proven by documentary evidence. On their part, Claimants have been unable to provide a single example showing otherwise. Indeed, they have frequently just skirted over the evidence that does not suit them. At the Hearing, Claimants for the first time raised a novel argument – that they could have remedied the breach, had they simply known what the main problem was. However, this assertion collapses under the weight of documentary evidence showing otherwise.

9. Similarly, Claimants have come up with a novel international law argument as late as at the Hearing, arguing that the termination violated the proportionality principle under international law, which they say is relevant for all their treaty claims. The fact that Claimants had to reconstruct their legal case at the very end of the proceedings is a clear indication of their realization that their treaty claims otherwise would not be able to succeed. However, as will be seen, the new proportionality argument also collapses under the weight of evidence and legal authority.

10. Finally, Claimants' case on quantum is equally untenable. It is based on an inflated land valuation provided by Dr. Hern which has not withstood scrutiny even of Claimants' real estate expert Mr. Grzesik. Here, Claimants have also come up with a novel argument, as they now base their inflated valuation of BD Agro's land on the value of the land in Batajnica which has different infrastructure and location. In any case, even a cursory examination of Claimants' compensation claim shows how overinflated and absurd it is. A company which was acquired for EUR 5.5 million, and then disastrously managed for ten years into a EUR 40 million debt, blocked accounts, most valuable assets pledged and brought to the verge of imminent bankruptcy, is said to be in fact worth EUR 80 million at the valuation date.

11. Respondent continues to maintain all its arguments made in the written submissions and at the Hearing, but in order to better focus on the most important remaining issues, this post-

[1] Ninety second chances when taking into account other companies he privatized. *See* Respondent's Rejoinder, paras. 83-94.

hearing brief will deal with the following: (I) Tribunal has no jurisdiction in the present case; (II) Breaches and termination of the privatization agreement; (III) Serbia is not responsible for alleged treaty breaches; (IV) Quantum; (V) Probative Value of testimonies offered by Claimants' witnesses.

## II. THE TRIBUNAL HAS NO JURISDICTION IN THE PRESENT CASE

12. Respondent maintains that the Tribunal lacks jurisdiction to entertain Claimants' claims for reasons explained in its Counter-Memorial, Rejoinder and during the Opening statement at the Hearing. In accordance with the instruction from the Tribunal, the following part of Respondent's submission concentrates on jurisdictional issues in the light of evidence presented at the Hearing. In particular, Respondent will again demonstrate that: (A) Tribunal does not have jurisdiction *ratione materiae* under the BITs; (B) Article 2 of the Canada-Serbia BIT prevents the Tribunal from entering into the merits of claims submitted by the Canadian Claimants; (C) Requirements for establishing jurisdiction *ratione voluntatis* under the BITs are not fulfilled; (D) Tribunal lacks jurisdiction under the ICSID Convention; and (E) Claimants' claims represent an abuse of process. With regard to the rest of jurisdictional objections, Respondent respectfully directs the Tribunal to its previous submissions.

### A. NO JURISDICTION *RATIONE MATERIAE* UNDER THE CANADA-SERBIA BIT AND THE CYPRUS-SERBIA BIT

13. In this section, Respondent will explain that both from the perspective of facts and law, Claimants did not own Mr. Obradovic's shares in BD Agro. Afterwards, it will be explained that Claimants did not control these shares.

#### 1. Claimants did not own Mr. Obradovic' shares in BD Agro

14. Claimants' main jurisdictional argument rests upon the premise that they acquired beneficial ownership of shares in BD Agro, nominally owned by Mr. Obradovic. Two contracts are central for Claimants' jurisdictional case: the Share Purchase Agreement (referred to by Claimants as the MDH Agreement)[2] and the Sembi Agreement.[3] Neither of the two contracts could lead to acquisition of ownership on the side of Claimants. Before elaborating on these agreements, Respondent will show that even if every argument of Claimants pertaining to law would be accepted as correct, Claimants have still failed to prove the existence of their supposed beneficial ownership on the facts of the case.

##### *1.1. Claimants failed to prove their beneficial ownership*

15. Evidence presented at the Hearing have only reinforced the conclusion about Claimants' inability to meet the burden of proof with regard to crucial elements of their jurisdictional

[2] Share Purchase Agreement of 19 September 2005, **CE-15**.
[3] Agreement between Mr. Obradovic and Sembi of 22 February 2008, **CE-29**.

case. Claimants are unable to offer persuasive reasons for the way in which their investment was structured or to explain the precise role of individuals involved. There are several aspects of Claimants' case that are highly problematic: Mr. Obradovic's role; the Lundin family's role; existence of other unknown financiers; general lack of documents that would support Claimants' contention and unreliability of documents that were actually provided.

*1.1.1. Mr. Obradovic's role*

16. It is important to note first that Claimants are incapable of offering any credible explanation of Mr. Rand's motives not to appear as the nominal owner. Since the onset of this arbitration, Claimants have struggled to provide a reasonable explanation as to why would their alleged beneficial ownership arrangement with Mr. Obradovic be organized in such a manner, i.e. by placing Mr. Obradovic to be the nominal owner of BD Agro, if Mr. Obradovic was nothing more than Mr. Rand's representative, holding no rights of his own.

17. According to Mr. Rand's testimony, reasons for Mr. Obradovic's position of nominal owner vary from matters of convenience and flexibility[4] to the intention to indulge Mr. Obradovic and nurture his sense of self-importance.[5]

18. In his third witness statement, Mr. Rand tried to explain this and said that "*[t]he reason for that arrangement was flexibility and convenience*" as the business required "*the owner's local attention, such as attending and voting at shareholder meetings and sometimes attending meetings and addressing communications with the Privatization Agency and other representatives of the central and local government in Serbia*."[6] He continued to explain that the Serbian practice was very formalistic, and that Mr. Obradovic would need to have a special power of attorney for each shareholder meeting of BD Agro in case he bought not a nominal owner but merely his representative.[7] So, according to Mr. Rand, "*the easiest solution was to make him the nominal owner because in that capacity, he would have the authority to vote at the shareholder meetings and to communicate with the Serbian Government and any third parties*."[8]

19. Naturally, this is unpersuasive explanation, easily disproved when looking at the structure of the investment after changes introduced in 2013. As pointed out by the Tribunal at the Hearing, Mr. Markicevic and Mr. Broshko assumed Mr. Obradovic's functions between 2013 and 2015, although they were not the nominal owners.[9] This meant, effectively, that one did not have to be a nominal owner to do what Mr. Rand explained to be the main reason for Mr. Obradovic becoming the nominal owner. Mr. Rand admitted that this does make sense, but that even in that case his presence would nevertheless be required from time to time.[10] After all, Mr. Rand testified that he visited Belgrade "*quite often*" anyway,[11] so his

[4] Third Witness Statement of Mr. William Rand, para. 11.
[5] *Ibid*, para. 14.
[6] *Ibid*, para. 11.
[7] *Ibid*, para. 12.
[8] *Ibid*, para. 13.
[9] Transcript, Day 2, 53:16-55:3 (Rand).
[10] Transcript, Day 2, 55:4-20 (Rand).
[11] Transcript, Day 2, 12:05-11 (Rand).

explanation that the arrangement with Mr. Obradovic was to release him from the need to be present personally on the ground is plainly unconvincing. Simply put, all reasons of "*flexibility and convenience*" would be covered had Mr. Obradovic been appointed as the CEO of the company, just as was the case with Mr. Markicevic.

20. Claimants are also incapable of offering any credible explanation of Mr. Obradovic's motives to participate in the affair. Claimants are struggling to find justification for Mr. Obradovic's ten years long involvement with BD Agro, since there is no evidence that Mr. Obradovic has ever received any salary for his efforts. Mr. Rand testified that he would pay "*some money*" to Mr. Obradovic from time to time.[12] After being confronted with the question of why he failed to provide any evidence of his alleged payments in this regard, Mr. Rand simply stated: "*Nobody asked me to*."[13] He was likewise unable to confirm even an approximate amount of money that he had allegedly paid to Mr. Obradovic.[14] Furthermore, contrary to how Mr. Rand presented these occasional payments, Mr. Obradovic stated that Mr. Rand did not "*donate*" any money to him, but that Mr. Rand e.g. "*lend [him] $80,000 when [he] was short for the purchase of [his] apartment*".[15] In other words, Mr. Obradovic confirmed that the highest amount that Mr. Rand and Mr. Obradovic specifically mentioned in this regard was not a one-way payment for Mr. Obradovic's alleged services, but in fact a loan.

21. Moreover, it is also worth noting that during the Hearing it was revealed that Mr. Obradovic even today still owes approximately EUR 2.7 million to Sembi.[16] Apart from completely destroying any credibility of Mr. Obradovic's testimony, since he testified at the Hearing that he did not owe that money,[17] this fact does not fit in the Claimants' description of the relationship between Mr. Rand and Mr. Obradovic. If Mr. Obradovic indeed just worked for Mr. Rand as his representative in BD Agro for more than a decade, it does not make any sense that Mr. Obradovic would owe anything, let alone almost three million euros, to Mr. Rand or any of his companies. This debt, coupled with the fact that Mr. Rand and Mr. Obradovic were unable to provide any specific detail about Mr. Obradovic's remuneration, completely defeats the narrative that Mr. Obradovic was merely a representative/employee of Mr. Rand.

*1.1.2. The Lundin family's role*

22. The precise role of the Lundin family has also never been fully elucidated. At the Hearing, Mr. Rand again testified that he became the beneficial owner, and that he controlled BD Agro from day one since its privatization.[18] On the other hand, he stated that the Lundin family was nothing more than mere lenders and his friends who did not care much about

[12] Transcript, Day 2, 14:08-22 (Rand).
[13] Transcript, Day 2, 16:25 (Rand).
[14] Transcript, Day 2, 15:5 (Rand).
[15] Transcript, Day 2, 86:5-9 (Obradovic).
[16] Transcript, Day 2, 7:3-12 (Markicevic).
[17] Transcript, Day 2, 82:13-83:14 (Obradovic).
[18] Transcript, Day 2, 45:17-20 (Rand).

potentially losing millions of euros - simply because they were billionaires.[19]

23. Although one could have already concluded by reviewing the case files[20] that the Lundins had a rather different role than what Claimants tried to represent, the Hearing definitely confirmed these conclusions.

24. It should be underlined that not a single cent of the Lundin family's money, and the money of *other institutions from Geneva*[21], was transferred directly to BD Agro. The question is whether that money ended up in BD Agro at all.[22] All that we can see from the case files is that the vast majority of the funds - 10.5 million was paid directly to Mr. Obradovic's personal bank accounts[23] (also not entirely clear in which country[24]) while EUR 3.3 million was paid to the account of Marine Drive Holding in an unknown country[25] (which was then allegedly transferred to Mr. Obradovic – albeit no evidence of this exists[26]). It would appear as peculiar to any reasonable person that the Lundin family (and other people behind *other institutions from Geneva*[27]) would be giving out EUR 13.8 million of their money to an unknown individual[28] without any: (i) form of security;[29] (ii) written agreement;[30] (iii) control over that money *i.e.* the investment itself;[31] or (iv) apparent commercial motives. What stuck out even more was that this family suddenly decided to completely abandon this "project" and agreed to be repaid just around 40% of the investment they made.

25. According to Mr. Rand, the reason for which the Lundins decided to participate in the BD Agro project as the (only) financier was quite vague: "*they were going to put up the **initial money**, and then we would **see how it goes**. I will say it was left **fairly casual**, they would have an option to back in at some stage, **we didn't have a time limit or the amount of money**, because we **didn't have any idea what sort of investment it was going to take** to clear up the farm, so it was, I will say, **left quite loose**, because we had done dozens and dozens of agreements together, we knew each other extremely well, we didn't need to spell everything out in detail*."[32]

26. In other words, Mr. Rand attempted to persuade the Tribunal that the Lundins gave millions of euros to Mr. Obradovic, without even knowing: (i) how much money will they ultimately need to give; (ii) what sort of investments will actually be needed; (iii) what options will they have exactly based on their investments; and (iv) in what time period will all of this occur. Furthermore, while the Lundins were giving all these millions to Mr. Obradovic without a clear purpose and justification, Mr. Rand was allegedly the person who was

[19] Transcript, Day 2, 34:4-35:13 (Rand).
[20] *See e.g.* Exhibits: **CE-385** to **CE-411**, **CE-416**, **CE-584**, **CE-585**, **CE-586**, **CE-631**.
[21] Agreement between Mr. Obradovic and Sembi of 22 February 2008, **CE-29**.
[22] Transcript, Day 1, 127:12-129:5 (Mihaj).
[23] Exhibits **CE-385** to **CE-390**, **CE-392** to **CE-397**, **CE-399** to **CE-411**.
[24] Transcript, Day 2, 75:6-8 (Azrac).
[25] Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to MDH, 15 September 2005, **CE-384**.
[26] Claimants' Reply on Jurisdiction, para. 476.
[27] Transcript, Day 2, 74:3-6, 76:23-77:13 (Azrac).
[28] Transcript, Day 2, 65:16-18 (Azrac) ("*they don't know Mr. Obradovic*").
[29] Transcript, Day 2, 67:20-68:6 (Azrac).
[30] Transcript, Day 2, 13:16-14:2 (Rand).
[31] Transcript, Day 2, 45:17-20 (Rand).
[32] Transcript, Day 2, 13:6-15 (Rand) (emphasis added).

running the show and controlling this investment (though not investing a single cent, nor being the "*nominal*" owner of the shares in question).

27. Interestingly enough, the person who actually held the title to the shares in BD Agro, Mr. Obradovic, directly defeated this contention at the Hearing and testified that actually the Lundins were the beneficial owners. Namely, answering the Tribunal's questions at the Hearing why was there a Swiss and Swedish flag in front of BD Agro if Lundins were not beneficial owners, Mr. Obradovic replied: "*That was at the beginning, when we have Mr Rand and Sembi made agreement with the Lundins in 2008, this was before 2008,* ***so we kept the Swedish flag, the Swiss flag and Canadian flag, the way the investors worked. The beneficial owners actually worked***."[33]

28. Unfortunately, although the Lundins were central figures in Mr. Rand's alleged acquisition of BD Agro, they were nowhere to be seen in this arbitration. Claimants failed to present either Lukas or Ian Lundin as witnesses. Mr. Rand explained at the Hearing that the reason for absence of Lukas Lundin was Mr. Lundin's health condition.[34] Apart from the fact that information available in public domain do not support Mr. Rand's assertion about Mr. Lukas Lundin's inability to testify, this, even if accepted as correct, still does not explain why Mr. Ian Lundin did not appear as a witness.

29. According to Mr. Rand, the reason for Mr. Ian Lundin's absence was the fact that he "*was never really involved too much*".[35] Yet again, this contention does not hold water as it goes against documents on the record.

30. Documentary evidence show that Mr. Rand sent specifically to Mr. Ian Lundin emails with income and cash flow statements for BD Agro,[36] as well as reports on the business of BD Agro.[37] Mr. Lukas Lundin was not even copied in any of these emails, and there is absolutely no evidence on record that Mr. Lukas Lundin sent or received any information regarding BD Agro. It was also Mr. Ian Lundin that talked to Mr. Rand and notified him that he will be sending financial controllers to BD Agro.[38] Mr. Ian Lundin was also the sole representative of the Lundin Family who signed the 2008 Lundin Agreement with Sembi, Mr. Rand and Mr. Obradovic.[39] It was Mr. Ian Lundin, not Lukas, who received EUR 1.2 million from Sembi as alleged part of the repayments under the Lundin Agreement.[40] Even Mr. Rand himself confirmed at the Hearing that Mr. Ian Lundin personally visited BD Agro.[41] Therefore, all available evidence point to the conclusion that Mr. Ian Lundin was much more involved with the affairs of BD Agro than his brother Lukas. All of this evidence also point to the conclusion that the real reasons for Claimants' failure to present a crucial witness are

[33] Transcript, Day 2, 112:14-22 (Obradovic).
[34] Transcript, Day 2, 9:6-7 (Rand).
[35] Transcript, Day 2, 9:9-11 (Rand).
[36] Email from W. Rand to I. Lundin, 7 July 2006, **CE-586**.
[37] Email from W. Rand to I. Lundin, 11 May 2006, **CE-584**; Email from W. Rand to I. Lundin and A. Azrac, 11 August 2006, **CE-585**; Email communication between W. Rand and I. Lundin, 28 July 2006, **CE-587**.
[38] Email from W. Rand to Lj. Jovanovic, 5 July 2006, **CE-607**.
[39] Agreement between Mr. Obradović, The Lundin Family, Mr. Rand and Sembi, 22 February 2008, **CE-28**.
[40] Confirmation of wire transfer from Sembi to Mr. Ian Lundin for EUR 1,200,000.00, 16 July 2008, **CE-57**.
[41] Transcript, Day 2, 45:3-5 (Rand)

undisclosed.

31. Instead of providing Respondent and the Tribunal with an opportunity to examine the Lundin brothers, Claimants offered as a witness Mr. Axel Azrac, a Swiss investment banker who was not able to share any details about the exact arrangement between Messrs. Rand, Lundins and Obradovic.[42] He did not even know the total amount of financing that was agreed.[43] Essentially, Mr. Azrac could provide very little information in addition to bank excerpts that were provided by Claimants.[44] However, what Mr. Azrac could confirm is that Mr. Ian Lundin was always substantially involved in this particular financial arrangement,[45] thereby again emphasizing unpersuasive character of Mr. Rand's explanation for his absence.

*1.1.3. Other financiers*

32. Mr. Azrac also confirmed that it was not just the Lundins who financed Mr. Obradovic, but that there were other individuals whose money was used in that regard.[46] This was the first time that it was revealed that there were third parties in the entire transaction surrounding BD Agro. Yet, there are no documents showing the identity of these other individuals, the exact amount of money that they transferred to Mr. Obradovic nor do we have any document showing what was the precise nature of the relationship between them and Mr. Obradovic. In other words, some unidentified third parties apparently financed the purchase of BD Agro – but we have no details about this arrangement. Most importantly, there is absolutely no evidence that they have waived any of their rights towards Mr. Obradovic.

*1.1.4. The lack of documents is striking*

33. Finally, the lack of documentary evidence about the precise arrangement between the Lundins, Mr. Rand and Mr. Obradovic is presumably the most striking aspect of the case at hand. Apparently, all of their agreements were informal.[47]

34. According to Claimants' version of events, Mr. Rand, an experienced businessman and lawyer by training, agreed to finance the purchase of seven companies in Serbia, by providing multimillion euro funds to an individual who would personally buy these companies and register them in his own name. Mr. Rand requested no security from Mr. Obradovic and sought no advice on Serbian law regarding whether he can establish any rights

[42] Transcript, Day 2, 64:21-23 (Azrac) ("*It was a discussion between Mr. Rand and Mr. Lundin, so they just told me that they would like to provide financing*"), 65:2-4 (Azrac) ("*At my remembering they didn't told me the number […]*"), 68:2-4 (Azrac) ("*Again, the discussion was between the Lundins and Bill Rand so they have the discussion amongst themselves, and the way that they have to do the deal*"), 69:2-3 (Azrac) ("*For sure we give to the bank but I can't remember what we have to the bank as a document*").

[43] Transcript, Day 2, 65:2-4 (Azrac) ("*At my remembering they didn't told me the number […]*").

[44] *See e.g.* Transcript, Day 2, 69:2-3 (Azrac) ("*For sure we give to the bank but I can't remember what we have to the bank as a document*"), 70:1-9 (Azrac) (Q. […] *Tell me please, what was the precise balance outstanding that the Lundins said they want to waive?* A. *I cannot answer precisely this question. I can imagine that it was the difference between the payment and the amount that we didn't receive*. Q. *So they didn't precisely say, "We want to waive that much"?* A. *I don't remember precisely, I cannot answer your question*").

[45] Transcript, Day 2, 67:4-5, 69:13-14 (Azrac).

[46] Transcript, Day 2, 73:11-74:6, 76:16-77:1 (Azrac).

[47] Transcript, Day 1, 125:13-127:11, 142:22-143:25 (Mihaj).

to these Serbian companies through such an arrangement.[48] For all but one of these companies, Mr. Rand allegedly did not even have any kind of a written agreement.[49] The only piece of paper signed by Mr. Rand and Mr. Obradovic was the MDH Agreement, concluded regarding the privatization of BD Agro – the fourth company that they decided to privatize.

35. Likewise, the Lundins, a billionaire family with extensive experience in international investments, gave out over EUR 15 million to a person whom they allegedly never met, without signing any agreement with that person, nor having any form of security. They allegedly did so by an (oral) agreement with Mr. Rand – with whom they also had no written document evidencing such an arrangement. Likewise, the Lundins allegedly decided to abandon the project by being repaid around 40% of their funds, and waiving the remaining 60%. Again, there was no piece of paper nor even any reasonable explanation for doing so. Claimants' justification of this peculiar way of doing business did not go further than saying that the Lundins were friends with Mr. Rand, and that the millions that they lost were insignificant to them because they are billionaires.[50]

*1.1.5. Unreliability of Sembi's Financial Statements*

36. While Sembi's financial statements from 2009 to 2017 were all filed in 2019, which was well after the initiation of this arbitration, Claimants insisted on the fact that at least the financial statements for 2008 "*were filed in 2009*".[51] However, this line of argumentation has recently collapsed - first at the Hearing,[52] and afterwards due to the Claimants' letter from 21 September 2021, where they directly admitted that "*Sembi's financial statements for the year 2008* ***were filed with the Cyprus Commercial Registry on 5 August 2014***".[53] Yet, Claimants kept insisting that the statements were actually prepared and audited in December 2009[54] (albeit this date is contradicted by Sembi's board minutes[55]).

37. What remains unclear is why would Sembi choose not to submit these fully prepared statements for five years. What is especially interesting is that the belated registration of 2008 financial statements came after Mr. Obradovic was already deep in the dispute with the Privatization Agency, and after he already expressed his clear desire and consent to transfer the Privatization Agreement and shares in BD Agro to Claimants.

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[48] Transcript, Day 2, 9:13-18 (Rand).
[49] Transcript, Day 2, 13:16-14:2, 44:23-45:10 (Rand).
[50] Transcript, Day 2, 34:4-35:8 (Rand).
[51] Letter from Claimants, 21 September 2021, p. 5. *Cf.* Rejoinder on Jurisdiction, para. 705; Second Witness Statement of Mr. Djura Obradovic, para. 46; Third Witness Statement of Mr. Djura Obradovic, paras. 36; Second Witness Statement of Mr. William Rand, para. 61.
[52] Hearing Transcript, Day 2, 88:19-20 (Obradovic) ("*Q. How do you know that they were filed in 2009? A. I assume.* ***I don't know***."). *Cf.* Second Witness Statement of Mr. Djura Obradovic, para. 46 ("*In accordance with Cyprus accounting rules, Sembi recorded its beneficial ownership of the Beneficially Owned Shares in its financial statements for year 2008, which were* ***filed in 2009***.").
[53] Claimants' Letter dated 21 September 2021, p. 5.
[54] Claimants' Letter dated 6 September 2021, p. 8; Claimants' Letter dated 21 September 2021, pp. 3-5.
[55] Minutes of meeting of Sembi's board of directors apparently showed that the board gave its approval of these *audited* statements already on 27 November 2009. *See* Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 27 November 2009, **CE-426.**

38. The reliability of the financial statements is also hindered by their content. The 2008 financial statements stipulate that Sembi's shareholding in BD Agro was 70%. However, had Sembi's shareholding reflected Mr. Obradovic's shareholding – the percentage had to be 75,87% already in 2008.[56] Furthermore, the 2008 financial statements stipulate that "*[p]ayment for purchase of investments in subsidiaries*" amounted to EUR 15,599,727. This contradicts Claimants' story, as they never stated that Sembi paid that much for BD Agro's shares.[57] In fact, this amount does not conform not only to the value of investment Claimants alleged they made but also to the value of the shares in BD Agro.

39. Furthermore, even financial statements filed in 2019 are not in line with testimony of Claimants' witnesses. The 2009 and 2010 financial statements (both filed in 2019) stipulate that debt of EUR 11,710,602 was waived in 2010.[58] This number contradicts Claimants' witnesses,[59] as it is EUR 3.5 million higher than the debt that according to their testimonies the Lundins waived (they claim it was EUR 8.2 million[60]). When it comes to the 2009 financial statements, Sembi's minutes of meeting of its board of directors stipulated that these financial statements were already audited by auditors and even approved by the board in May 2010 *i.e.* they were finalized back then.[61] On the other hand, according to Mr. Rand, the 2009 financial statements were not submitted until April 2019 because they *"simply did not find time to finalize them*".[62] Again, Mr. Rand's testimony contradicts Claimants' own evidence.

40. In conclusion, having in mind the above described prevarications, inconsistencies and suspicions regarding Sembi's financial statements and board minutes, it is evident that the Tribunal should give no evidentiary value to Sembi's documentation on the record at all. This even more so having in mind that these documents contradict other documentary evidence in the files.[63]

*1.1.6. Suspicious nature of the investment's structure*

41. Although Respondent does not intend to drive any specific conclusions in that regard, it must note that based on the evidence collected in these proceedings and according to the authoritative publication of OECD, most of the indicators of money laundering can actually be identified in the present case.[64] Some of those are: (i) money flows through a third party

[56] *See* Claimants' Reply, para. 97.

[57] According to Claimants, this amount was "corrected" in the 2009 financial statements by reducing the acquisition price for the value of Mr. Obradović's receivables from shareholder loans to BD Agro that were assigned to Sembi under the Sembi Agreement". However, when summing up these divided amounts (acquisition price + receivables), the result still does not correspond to the amount listed in the 2008 FS – it is EUR 16,085,268.

[58] Report and financial statements of Sembi Investment Limited as of 31 December 2009, p. 16, **CE-656**; Report and financial statements of Sembi Investment Limited as of 31 December 2010, p. 16, **CE-657**.

[59] Transcript, Day 2, 70:1-5 (Azrac).

[60] Transcript, Day 2, 49:5-17 (Rand), 70:1-5 (Azrac).

[61] Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 7 May 2009, **CE-427.**

[62] Second Witness Statement of Mr. William Rand, para. 61 (emphasis added).

[63] See, for example, Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited, 6 August 2013, **CE-35**.

[64] These include: transactions without an evident commercial basis; transactions, money flows or agreements without relevant supporting documentation; transactions with offshore companies; transaction with

trust account for no apparent reason;[65] (ii) the lender is from a country with an offshore financial centre or a country with strict banking secrecy laws;[66] (iii) there is non-transparent ownership of the lender;[67] (iv) identity of lender is unknown;[68] (v) lender is a non-financial institution (not related to borrower);[69] (vi) unusual contracting partner/no business or family ties with country of origin;[70] (vii) absence of supporting documentation between contracting parties;[71] (viii) no written loan agreement;[72] (ix) absence or lack of sufficient collateral;[73] (x) no realistic repayment schedule;[74] (xi) interest payments and repayments do not occur or schedules are not being respected;[75] (xii) no measures for debt collection are taken; (xiii) repayment is made without an actual flow of money to the lender; (xiv) large write-off by the lender either shortly after granting the loan or after years and the security provided was insufficient.[76]

42. Having this in mind, one cannot shake the impression that the motive behind the hardly comprehendible and "*fairly casual*" financial and business arrangements in the present case in fact has an illicit nature. While Respondent of course may not draw any definitive conclusions in this respect (nor does it wish to do so at this point), it simply wishes to draw the Tribunal's attention to a possible explanation of a story which otherwise defeats all logic,

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suspected criminals or their); non-transparent / non-identifiable customers, creditors or lenders; transactions identified as asset sales but assets cannot be substantiated; payments to or from third parties who are not involved in the transaction; payments to or from unrelated offshore companies or accounts, non-transparent or non-verifiable origin of the money, unusual use of debt instruments, large cash payments received for goods never delivered (fictitious buyer), general description on invoices relating to large cost items. *See* Money Laundering Awareness Handbook for Tax Examiners and Tax Auditors, OECD, 2009, pp. 27-28, **RE-664**.

[65] The money under the Lundins Agreement was mostly repaid to FBT Avocats (**CE-58**) and Tacll. Asset Corp. (**CE-59**), while the minority of these funds were paid to Ian Lundin (**CE-57**).

[66] Switzerland (Lundins).

[67] The bank transcripts do not show sufficient data to determine the lender *i.e.* ownership of the lender. *See* CE-384 to CE-411. Furthermore, Mr. Azrac confirmed at the Hearing that there were some other, unknown people, whose money was used to loan EUR 4.8 million to Mr. Obradovic. *See* Transcript, Day 2, 74:3-6, 76:23-77:13 (Azrac).

[68] *Ibid.*

[69] Neither Mr. Obradovic nor the Lundins were a financial institution. Likewise, they were obviously not related.

[70] The Lundins were obviously not a financial institution. The Lundins did not know Mr. Obradovic. *See* Transcript, Day 2, 65:16-18 (Azrac) ("*they don't know Mr. Obradovic*"). Likewise, Mr. Rand was apparently neither a close friend nor a close business partner of Mr. Obradovic prior to the pertinent privatizations.

[71] No contract between Mr. Obradovic and the Lundins, nor between Mr. Rand and the Lundins, prior to the transfer of over EUR 15 million. No documentation showing the Lundins' waiver of the debt towards Mr. Rand, Sembi nor Mr. Obradovic.

[72] No loan agreement between Mr. Obradovic and the Lundins, nor between Mr. Rand and the Lundins, prior to the transfer of over EUR 15 million (13.8 million + 1.4 million (for Inex)).

[73] The Lundins obviously had no form of collateral *i.e.* security in place. *See* Transcript, Day 2, 67:23-68:6 (Azrac).

[74] Article 1 of the Lundin Agreement (**CE-28**) stipulated that EUR 3.6 million will be repaid by Sembi within 6 days after the conclusion of the agreement, while the remaining EUR 6.4 million will be repaid by the end of 2008. This payment schedule was obviously unrealistic, as the belated and partial payments also confirmed (*See* **CE-57, CE-58, CE-59**).

[75] According to Mr. Rand, no interest was charged even though it was prescribed by the Lundin Agreement. *See* Transcript, Day 2, 28:2-6 (Rand). Needless to say, the schedules for interest payments were consequently not respected either.

[76] Points (xiii), (xiv) and (xv) are all fulfilled due to the fact that the Lundins inexplicably wrote off the vast majority of the funds that they borrowed to Mr. Obradovic.

to say the least.

*1.1.7. Questions unanswered and fact established*

43. Respondent respectfully submits that the Tribunal cannot accept jurisdiction as long as it is unable to explain how the following fit into Claimants' story about their beneficial ownership: (i) Mr. Obradovic personally bought the shares in BD Agro; (ii) there is not a single piece of evidence showing that Mr. Obradovic ever claimed *i.e.* disclosed that he was allegedly only acting as Mr. Rand's representative, and not the actual owner; (iii) Mr. Obradovic held full powers and independently decided upon both everyday business and crucial decisions regarding BD Agro's business; (iv) Mr. Obradovic never received a single cent from Mr. Rand, but instead owes him *i.e.* Sembi EUR 2.7 million; and (v) Mr. Rand's representatives started appearing before the Privatization Agency only after and in connection with Mr. Obradovic's request for the assignment of the Privatization Agreement to Coropi.

44. The facts that also do not fit into Claimants' story are the following: (i) the Lundins gave 13.8 million EUR to Mr. Obradovic for BD Agro plus another EUR 1.4 million for the acquisition of BD Agro's debt by Inex,[77] (ii) they were regularly informed about BD Agro business, (iii) they were in the Board of Directors of BD Agro (even after the alleged waiver of their claims), (iv) the flags of their nationalities stood in front of BD Agro for years, (v) the legal owner of the shares in BD Agro referred to them as "*beneficial owners*", and (vi) they eventually signed an agreement with Mr. Obradovic and Mr. Rand for the repayment of EUR 9 million by which they held the latter two jointly and severely liable for this entire claim, together with a monthly interest rate of 1%.

45. On the other hand, crucial questions that remain unanswered are: (i) why Mr. Rand did not purchase the shares in BD Agro through one of his companies and simply appointed Mr. Obradovic as the CEO of that company (thereby satisfying absolutely all reasons that he provided as an explanation for the beneficial ownership arrangement); (ii) why Claimants were unable to provide a single document showing instructions from Mr. Rand to Mr. Obradovic; (iii) why Claimants were unable to provide a single document showing a single payment from Mr. Rand to Mr. Obradovic for the provision of his services; (iv) why do we see Mr. Rand's representatives before the Privatization Agency only after the request for assignment was submitted in 2013 – but never before; (v) whether the Lundins indeed waived the rest of their EUR 9 million claim (plus interest) held against both Mr. Rand and Mr. Obradovic; (vi) what happened to the EUR 1.4 million that they gave to Mr. Obradovic for purchase of BD Agro's debt by Inex;[78] (vii) who exactly gave EUR 4.8 million to Mr. Obradovic and what happened with these loans (were they waived or not); (viii) who received payments made by Sembi in connection with settling of Mr. Obradovic's debt

[77] Transcript, Day 2, 90:10-18 (Obradovic).

[78] Third Witness Statement of Mr. Djura Obradovic, para. 17. However, the payment of these EUR 1.4 million was obviously not included in the EUR 13.8 million that should have been covered by the Sembi Agreements. This much is already seen from the fact that the first payments from the Lundins to Mr. Obradovic (and even MDH for that matter) occurred *after* the pertinent assignment of debts. *See* Agreements on assignment of debt to Inex, **CE-444**.

towards the Lundins[79] and (ix) why would the Lundins remain in the Board of Directors of BD Agro after the alleged waiver of their claims.

*1.1.8. Conclusion*

46. Based on the evidence marshaled by Claimants, it is perfectly plausible that Mr. Obradovic was both nominal and beneficial owner of BD Agro, or that the beneficial ownership of BD Agro's capital was in the hands of the Lundin family, or even certain unidentified financial institutions in Geneva. There is absolutely no way for the Tribunal to establish what are the facts concerning the alleged beneficial ownership in BD Agro's shares and whether there are other informal agreements undisclosed by Claimants.

47. Claimants are naturally free to build their EUR 81 million claim relying on assertions unsupported by written evidence. However, the probative value of such evidence is dubious, especially when the existence of informal arrangements representing bedrock of the claim remains unconfirmed by any other individuals apart from those materially interested in the outcome of the proceeding.

48. In *Eurogas v. Slovakia*, the investor who initiated the arbitration (Eurogas II) was also not the same company as the one which actually owned the investment in question (Eurogas I).[80] However, Eurogas II claimed that it obtained the investment from Eurogas I. It *inter alia* claimed that Eurogas I sold its interest in the relevant investment to a third party company from the UK (McCallan) and that Eurogas II thereafter acquired the entirety of McCallan's shares, and ultimately caused McCallan to transfer its interest in the investment.[81] Respondent in that case pointed out multiple deficiencies of this theory, including the fact that claimants, for example, "*do not even mention the date of this alleged transaction*" or that "*they offer no information or evidence about this transaction, making it impossible to assess its impact on the Tribunal's jurisdiction*".[82]

49. In the present case, Claimants also do not even mention the date of the Lundins' agreement to finance the privatization of BD Agro, or the date of the waiver of their claims. They offer no information or evidence about the way the Lundins entered this particular project, or the way they abandoned it. They do not submit documentation about various other crucial facts, as explained in this and other Respondent's submissions. Claimants thus must bear the consequences of this situation, as: "*The documents on file do not enable the Tribunal to have a complete picture of those (complex) transactions involving third parties*". [83] This was one of the crucial reasons why the *Eurogas* tribunal "*[was] compelled to conclude that it lacks jurisdiction over the claims raised by EuroGas (EuroGas II) in these proceedings*".[84] And

[79] Mr. Rand submitted evidence that Indonesian Developments Ltd. (a company which transferred the funds to Sembi for the repayment of the Lundin debt) was a company in his ownership, but failed to deliver any evidence showing the link between Tacll Asset Corp. and FBT Avocats (who received the repayments), on the one hand, and the Lundins on the other.

[80] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, paras. 204-206, **RLA-43**.

[81] *Ibid*, para. 246.

[82] *Ibid*, para. 228.

[83] *Ibid*, paras. 422.

[84] *Ibid*, para. 423.

that is why in this particular case the Tribunal must conclude the same.

50. The onus of proof that the requirements for jurisdiction of the Tribunal are present rests upon Claimants, in accordance with the general rule *actori incumbit probatio*.[85] For all of the reasons listed above, the only possible conclusion is that Claimants have failed to discharge it.

### *1.2. MDH Agreement did not result in the acquisition of ownership in shares by the Canadian Claimants*

51. Respondent has already explained in considerable detail why the MDH Agreement was neither able to create ownership in shares for Canadian Claimants nor was it intended to do so.[86] Evidence presented at the Hearing do not change but rather confirm the conclusion.

52. *First*, the contract itself stipulated that Mr. Obradovic has acquired certain debt of BD Agro and that he, and not Mr. Rand, is or may become the beneficial owner of the company's shares.[87] It also envisaged that the Seller (Mr. Obradovic) will become *sole and beneficial owner* of shares in BD Agro after the auction[88] and that, only after exercise of the call option by the Purchaser (MDH), it would become the registered *and beneficial owner* of shares.[89] Claimants continue to argue that MDH's beneficial ownership follows from Articles 4 and 5 of the MDH Agreement.[90] This ignores the fact that the contract does not give MDH the most fundamental right of a shareholder – the right to obtain dividends and participate in division of profits of the company. It is also crucial that the MDH Agreement was drafted by Mr. Rand who is an experienced lawyer.[91] In such circumstances decision to include certain provisions (the ones that noted Mr. Obradovic's beneficial ownership) and to leave out others (e.g. the rights to dividends and profit) cannot be regarded as an oversight or a coincidence.

53. Claimants' assertion that the contract established MDH's (and, indirectly, Mr. Rand's) beneficial ownership was also refuted by other documents that Claimants are relying on. For instance, Claimants interpret the Sembi Agreement (concluded some two and a half years after the MDH Agreement) as transferring beneficial ownership in shares from Mr. Obradovic (and not from MDH, as would be expected) to Sembi,[92] while the Lundin Agreement also stipulated that the funds Mr. Obradovic borrowed from the Lundins were secured by his (Mr. Obradovic's) interest in the Privatization Agreement.[93]

54. *Second*, Claimants failed to marshal evidence that MDH paid anything apart from the sum

[85] *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, **RLA-16**, para. 268; *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, **RLA-31**, para. 239.
[86] Respondent's Rejoinder, paras. 562-631.
[87] Share Purchase Agreement, Recital C, **CE-15**.
[88] *Ibid*, Article 3.
[89] *Ibid*, Article 2.
[90] Claimants' Rejoinder on Jurisdiction, paras. 369, 370.
[91] Second Witness Statement of Mr. William Rand, para. 16.
[92] Agreement between Mr. Obradovic and Sembi of 22 February 2008, **CE-29.**
[93] Agreement between Mr. Obradović, Lundins, Mr. Rand and Sembi, 22 February 2008, Recital B, **CE-28**.

of 10 Canadian dollars for the purported acquisition of beneficial ownership in BD Agro. Various investment tribunals have held that gratuitous acquisition of property or acquisition of property as a result of negligible payments cannot place an investment under the scope of protection of an investment treaty.[94] This alone is enough to disprove Claimants' assertion about MDH's (and consequently, Canadian Claimants') beneficial ownership under the MDH Agreement.

55. *Third*, according to Serbian choice of law rules the MDH Agreement was governed by Serbian law and under Serbian law, the MDH Agreement could not result in Claimants obtaining Mr. Obradovic's shares.[95]

56. Relaying on the expert opinion of Dr. Grusic, Claimants argue that the law applicable to the MDH Agreement is the law of British Columbia, based on the alleged tacit choice made by MDH and Mr. Obradovic at the time the MDH Agreement was concluded.[96] Serbian courts and doctrine insist that the indications of tacit choice of law must be clear and unequivocal.[97] In the case of the MDH Agreement those indications are anything but clear. In fact, factors relied on by Dr. Grusic point equally towards Serbian and law of British Columbia.[98] Dr. Grusic asserts that Serbian courts would apply "*holistic approach*" and consider all relevant circumstances when determining the law applicable to the contract,[99] although he admitted that Serbian law does not subscribe to a common law doctrine of the proper law of the contract.[100] Under Serbian Private International Law Act, if contractual parties have not chosen the applicable law, the contract on sale is governed by the law of the place where the seller was domiciled.[101] It is undisputed that Mr. Obradovic (designated as the "Seller" in the MDH Agreement[102]) was and still is domiciled in Belgrade. Under Serbian law as applicable, the MDH Agreement could not result in transfer of ownership to MDH.[103]

57. Finally, not only that the MDH Agreement could not create beneficial ownership in shares

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[94] Respondent's Rejoinder, paras. 627-631; *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, para. 206, **RLA-95**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 232, **RLA-24**; *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, February 7, 2019, para. 245, **RLA-7**.

[95] Respondent's Rejoinder, paras. 562-603.

[96] Claimants' Rejoinder on Jurisdiction, paras. 105-107; First Expert Report of Dr Ugljesa Grusic, para. 25.

[97] Decision of the Higher Commercial Court, Pž. 865/2005(2) dated 1 September 2006, p. 1, (emphasis added) **CE-446**: "*It is, therefore, necessary that the* ***indications of a tacit agreement by the parties are beyond any doubt****, that they can convince the court that the parties have reached an agreement*."; Answers to questions from commercial courts given at the session of the Commercial Litigation Department of the Higher Commercial Court, held on 26 November 2008, and at the session of the Department for Commercial Offences and Administrative-Financial Disputes, held on 25 November 2008, p. 1 (emphasis added) **CE-448**: "*It is essential that* ***the indications used to draw a conclusion as to the parties' tacit consent are infallible****, and convince the court that an agreement was reached*." Answers to questions from commercial courts given at the session of the Commercial Litigation Department of the Higher Commercial Court, held on 26 November 2008, and at the session of the Department for Commercial Offences and Administrative-Financial Disputes, held on 25 November 2008, p. 1, **CE-448**.

[98] Transcript, Day 5, 100:23-106:09 (Grusic).

[99] Transcript, Day 5, 106:10-20 (Grusic).

[100] Transcript, Day 5, 111:05-22 (Grusic).

[101] The Law on Resolution of Conflict of Laws with Regulations of Other Countries, Article 20(1), **CE-315**.

[102] Share Purchase Agreement of 19 September 2005, **CE-15**.

[103] Respondent's Rejoinder, paras. 562-603.

for Canadian Claimants, but the issues of the MDH Agreement's validity and potential effects on Claimants' ownership rights are moot, since Claimants have repeatedly acknowledged that the contract at stake was terminated and replaced by the Sembi Agreement.[104]

### *1.3. Sembi Agreement did not result in the acquisition of ownership in shares by Claimants*

58. The Sembi Agreement itself could not and did not lead to acquisition of ownership of Mr. Obradovic's shares for Sembi and, consequently, it did not result in the indirect ownership of the Canadian Claimants. This was all elaborated in Respondent's previous submissions[105] and only confirmed based on evidence presented at the Hearing. There are several reasons why the Sembi Agreement could not have effects that Claimants are ascribing to it.

#### *1.3.1. Whether an investor acquired property rights enjoying protection under a treaty depends exclusively on the law of the host state*

59. As explained in Respondent's submissions, whether an investor acquired property rights enjoying protection under a treaty in the host state depends exclusively on the law of that state.[106] This is a consistent line of reasoning adopted by various investment tribunals and stubbornly ignored by Claimants.

60. The proposition was explained in simple terms, for example, by the tribunal in *Vestey v. Venezuela*[107] as well as in *Magyar Farming v. Hungary*, in the context of expropriation.[108] Although *Vestey* and *Magyar Farming* deal with different kind of property (ownership of land in Venezuela and the existence of statutory pre-lease right of land in Hungary), the same reasoning is applicable when it comes to the ownership of shares in a Serbian public joint stock company: Claimants must marshal evidence that the Sembi Agreement enabled them to hold shares in accordance with the applicable rules of Serbian law. They are however unable to do so.

#### *1.3.2. Sembi Agreement could not result in Claimants holding shares in accordance with the applicable rules of Serbian law*

61. Under the 2006 Securities Law, the transfer of ownership in shares of joint stock companies was possible only through the registration of a new owner in the Central Securities Registry.[109] Most of the rights pertaining to shares that were listed in the 2004 Law on

[104] Claimants' Rejoinder on Jurisdiction, para. 368.
[105] Respondent's Counter Memorial, paras. 293-304; Respondent's Rejoinder, paras. 632-684.
[106] Respondent's Rejoinder, paras.
[107] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April, 2016, para. 257, **CLA-32**.
[108] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, Award, 13 November 2019, para. 341, **CLA-156** (Footnotes omitted): "*[T]he Parties made it clear in their answers to the Tribunal's questions that international law governs the question whether a particular right can be expropriated. By contrast, the existence and content of the right is subject to national law*."
[109] 2006 Law on Market in Securities and Other Financial Instruments, Article 19(3), **RE-111**.

Companies[110] were incapable of being transferred by contracts.[111] In limited circumstances in which a third party could acquire certain rights in shares owned by another entity, the 2006 Securities Law also stipulated that the third parties' rights arising from securities were obtained and transferred through their registration in the account of the owner held by the Central Securities Registry.[112]

62. Separation of nominal and beneficial title in shares was and still is impossible under Serbian law.[113] All of the examples of statutes that allegedly introduce the notion in Serbian legal system are inapposite.[114] In fact, Claimants' legal experts on issues of Serbian law were unable, when prompted during the cross-examination, to identify any Serbian case law that would accept the existence of beneficial ownership of a person or entity in shares registered in the name of another natural person.[115]

*1.3.3. Sembi Agreement was concluded in breach of the imperative rule of Serbian law contained in Article 41ž of the Law on Privatization*

63. Dr. Grusic confirmed that Article 41ž represents an overriding mandatory rule of Serbian law.[116] It allows for the assignment of the Privatization Agreement "*subject to prior consent of the Agency*."[117] The question is, therefore, whether the Sembi Agreement represented an attempted assignment which would warrant application of the said provision.

64. Professor Radovic has classified the Sembi Agreement as an assignment under Serbian law.[118] Claimants' expert Mr. Georgiades, is of the opinion that the Sembi Agreement represents an assignment under Cypriot law as well.[119] Claimants, however, rely on reports of Mr. Milosevic[120] and Dr. Grusic[121] in order to prove that the Sembi Agreement is not an assignment under the rules of Serbian law and, consequently, that it does not come under the scope of prohibition of Article 41ž of the Law on Privatization.[122]

65. The main argument offered by Claimants and their legal expert for the proposition that the Sembi Agreement was not an attempted assignment of the Privatization Agreement is the fact that Serbian Law on Obligations defines assignment as a tripartite relationship (the relationship whose parties are the assignor, the other party to the assigned contract and the assignee). Claimants assert that since the Sembi Agreement does not include the Agency as

[110] 2004 Law on Companies, Article 208(1), **RE-320**.
[111] *Ibid*, Article 208(3).
[112] Article 19(4) of the 2006 Law on Market in Securities and Other Financial Instruments, **RE-111**: "*Third party rights arising from securities shall be acquired and transferred by subscription of such rights and their beneficiaries into legal title holders' securities account kept with the Central Registry*."
[113] Second Expert Report of Professor Mirjana Radovic, paras. 58, 59.
[114] Respondent's Rejoinder, paras. 573-581; Second Expert Report of Prof. Mirjana Radovic, paras. 60-70.
[115] Transcript, Day 4, 178:01-13 (Tomic Brkusanin); Transcript, Day 5, 4:13-21 (Milosevic).
[116] First Expert Report of Dr Ugljesa Grusic, para. 76.
[117] Article 41ž(1) of the 2001 Law on Privatization, **CE-220**.
[118] Transcript, Day 6, 6:08-20 (Radovic).
[119] Second Expert Report of Agis Georgiades, para. 3.18.
[120] Second Expert Report of Mr. Milosevic, paras. 188, 203; Third Expert Report of Mr. Milosevic, para. 37.
[121] Second Expert Report of Dr Ugljesa Grusic, para. 78.
[122] Claimants' Rejoinder on Jurisdiction, paras. 156, 159-162.

a contracting party, it cannot be deemed as an attempted assignment.[123] While it is certainly true that the Sembi Agreement was not a valid assignment, it defies legal logic to argue that the application of a mandatory rule prohibiting unauthorized assignment depends solely on the decision of an assignor and an assignee whether to include the party to the original contract in their assignment agreement. In other words, if one would follow the logic employed by Claimants, any assignment is safe from the prohibition in Article 41ž, as long as the contract on assignment does not mention the Agency or the requirement to obtain prior authorization from the Agency. This is plainly absurd.

66. According to Mr. Milosevic: "*Article 145(1) of the Law on Obligations defines assignment of a contract as transaction where "each party in a bilateral agreement may, if agreed to by the other party, assign the contract to a third person who thus becomes holder of all of its rights and obligations arising from that contract*." Accordingly, upon assignment of a contract, the assignee becomes holder of "*all rights and obligations" and party to the assigned contract, whereas the assignor will no longer hold any rights and will cease to be a party to the assigned contract*."[124]

67. What Mr. Milosevic describes was precisely the intended effect of the Sembi Agreement – Mr. Obradovic assigns all his "*right, title and interest*" in the Privatization Agreement to Sembi,[125] continuous to hold no rights under the Privatization Agreement, while Sembi accepts Mr. Obradovic's remaining obligation: to pay to the Agency the balance of the purchase price for BD Agro.[126] This was also the effect of the assignment envisaged by Article 41ž of the Law on Privatization: "*After the assignment of agreement on sale of the capital or property, the assignee shall attain all the rights and obligations from the agreement on sale*."[127]

68. The interpretation Claimants are offering – that any right and obligation from the contract is freely assignable as long as the nominal position of a contracting party remains unchanged – is not only excessively formalistic but downright preposterous. It effectively makes a mockery of the provision: if only an assignment of a nominal title in the Privatization Agreement would be prohibited under Article 41ž, this provision would be virtually meaningless.

69. As can be seen from the above, Claimants' argument about the nature of the Sembi Agreement conveniently changes with the needs of their case: it represents an equitable assignment under Cypriot law when it is supposed to result in acquisition of property rights for Claimants,[128] and, at the same time, it changes its nature in order to avoid the prohibition contained in Serbian statute. Contrary to Claimants' assertions, Article 41ž prohibits every unauthorized assignment of rights and obligations from the Privatization Agreement, regardless of whether it is only partial or beneficial.

[123] Claimants' Rejoinder on Jurisdiction, para. 162; Second Expert Report of Dr Ugljesa Grusic, para. 78.
[124] Third Expert Report of Mr. Milos Milosevic, para. 37. Footnotes omitted.
[125] Article 4 of the Agreement between Mr. Obradovic and Sembi of 22 February 2008, **CE-29**.
[126] Article 3 of the Agreement between Mr. Obradovic and Sembi of 22 February 2008, **CE-29**.
[127] Article 41ž(4) of the 2001 Law on Privatization.
[128] Claimants' Reply, para. 541.

*1.3.4. Designation of Cypriot law as the law applicable to the Sembi Agreement is immaterial*

70. Since the Sembi Agreement was concluded in breach of an imperative rule contained in Article 41ž, designation of Cypriot law as the law applicable to the Sembi Agreement is immaterial.[129] Cypriot private international law recognizes the notion of overriding mandatory rules,[130] which serve the purpose of, *inter alia*, restricting parties' choice of applicable law.[131] The same notion is accepted in Serbian law, as acknowledged by Dr. Grusic.[132]

71. As already noted, Dr. Grusic also confirmed that Article 41ž represents an overriding mandatory rule of Serbian law.[133] He accepted as well that in circumstances when there is a conflict between the law governing a contract and an overriding mandatory rule of Serbian law, the latter must be applied by the forum.[134] The proposition is undisputed in Serbian legal doctrine.[135] Thus, the only possible conclusion is that the alleged validity of the Sembi Agreement under Cypriot law is irrelevant since the contract is null and void by virtue of Article 41ž of the Law on Privatization.

*1.3.5. Even if classified as a contract on sale, the Sembi Agreement could not result in transfer of beneficial ownership to Sembi*

72. During the Hearing, Mr. Georgiades opined that the Sembi Agreement can be classified both as an assignment and sale of shares simultaneously.[136] However, even the alternative classification of the contract cannot save the Sembi Agreement.

73. Under Cypriot law, the law applicable to a contract of sale does not govern proprietary aspects of the transaction, i.e. it does not govern the effects that the contract might have on property, which is the issue that comes under the scope of *lex situs*.[137] Mr. Georgiades recognized the distinction,[138] but asserted that proprietary effects of the law of situs of shares was confined to their "*transferability*" which, in turn, he defined as "*formalities*" required for shares to be legally transferred.[139] In the opinion of Mr. Georgiades, ownership in shares was transferred according to Cypriot law.[140] Restrictive interpretation of "*proprietary effects*" offered by Mr. Georgiades is refuted by the very same authority Mr. Georgiades

[129] Article 9 of the Agreement between Mr. Obradovic and Sembi of 22 February 2008, **CE-29**.
[130] Convention on the Law Applicable to Contractual Obligations of 1980, Article 7, **CE-835**.
[131] Transcript, Day 6, 181:16-23 (Emilianides).
[132] First Expert Report of Dr Ugljesa Grusic, para. 63.
[133] *Ibid*, para. 76.
[134] Transcript, Day 5, 122:06-25, 123:01-09 (Grusic).
[135] Maja Stanivukovic and Mirko Zivkovic, *International Encyclopaedia of Private International Law (Serbia)*, Wolters Kluwer, 2018, paras. 309, 310, **RE-512**: "*There are, furthermore, certain mandatory rules that cannot be excluded by party autonomy even if sufficient international element is present. These are the rules that 'demand to be applied to the issue before the court regardless of any choice of law by the parties or any reference by a local choice-of-law rule to another legal system' (overriding mandatory rules)*."
[136] Transcript, Day 6, p. 140, lines 19-25, p. 141, lines 01-05.
[137] Lord Collins of Mapesbury, Professor Jonathan Harris, *Dicey, Morris & Collins, The Conflict of Laws* (London: 15th ed., 2012, Sweet & Maxwell), pp. 1893, 1894, **CE-836**.
[138] Transcript, Day 6, 153:18-25, 154:01-06 (Georgiades).
[139] Transcript, Day 6, 155:22-25, 156:01-03 (Georgiades).
[140] Transcript, Day 6, 156:04-07.

relied on in his reports. According to *Dicey, Morris & Collins on the Conflict of Laws*, law of the *situs* of shares governs the issue of "*whether a contract to sell operates as a sale*."[141] Thus, Serbian law regulates not only "*formalities*" of transfer, but also the issue of whether the Sembi Agreement could have resulted in sale of shares, which implies the change of ownership. The scope of the applicable law is exactly the same in Serbian private international law.[142] Professor Emilianides explained at the Hearing that Serbian law applies to the transfer of ownership of shares: to the issues of mode of transfer, of the moment in which transfer takes place and if particular transaction could be considered to give title to shares,[143] regardless of whether the title is legal or beneficial.[144]

74. As previously explained, under the relevant rules of Serbian law, ownership in shares is acquired and transferred through the registration of a new owner at the Central Securities Registry.[145] Separate transfer of beneficial title is impossible under Serbian law and the Sembi Agreement simply could not have resulted in the change of ownership. What is more, the Sembi Agreement classified as contract for sale of shares would be in obvious contradiction with another imperative rule of the Serbian legislation on securities – prohibition on trade of shares in public joint stock companies outside the stock exchange.[146] This is another overriding mandatory rule of Serbian law recognized as such by the Claimants' legal expert.[147] There are absolutely no authorities that would even suggest that a Serbian court would uphold as valid a contract for sale of shares such as the Sembi Agreement.

*1.3.6. Even under the substantive rules of Cypriot law the Sembi Agreement is not an assignment that would be effective between Sembi and Mr. Obradovic*

75. Claimants' main argument is that under Cypriot law an assignment which is prohibited or restricted can still produce valid effects as between the assignee and the assignor, if the assignment is not void for reasons of illegality or public policy.[148] The rule was described by Mr. Georgiades, based on the authorities that explain equitable assignment in the context of prohibition contained **in a contract**.[149] However, rules governing the validity of an assignment are different where, as it is the case here, the prohibition on assignment is contained **in the statute**.

76. Professor Emilianides explained that, under Section 23 of Cypriot Contract Law, any contract that has an object forbidden by law or an object of such nature that would, if

[141] Lord Collins of Mapesbury, Professor Jonathan Harris, *Dicey, Morris & Collins, The Conflict of Laws* (London: 15th ed., 2012, Sweet & Maxwell), p. 1894, **CE-836**.
[142] Maja Stanivukovic and Mirko Zivkovic, International Encyclopaedia of Private International Law (Serbia), Wolters Kluwer, 2018, paras. 314, 315: "*[T]he law chosen by the parties applies to rights and obligations of the parties under the contract (the substance of the contract),* ***but it does not apply to the capacity of the parties, form and to the effects that the contract may have on the property***." Emphasis added, **RE-512**.
[143] Transcript, Day 6, 170:08-24 (Emilianides).
[144] Transcript, Day 6, 194:08-19 (Emilianides).
[145] 2006 Law on Market in Securities and Other Financial Instruments, Article 19(4), **RE-111**.
[146] *Ibid,* Article 52(2).
[147] First Expert Report of Dr Ugljesa Grusic, para. 76.
[148] Claimants' Rejoinder on Jurisdiction, para. 166.
[149] Transcript, Day 6, 142:13-146:14 (Georgiades).

permitted, defeat the provisions of any law, is null and void and cannot create any effect, neither in law nor in equity.[150] Since the assignment was prohibited by the provision of Serbian law governing assignability, the Sembi Agreement was concluded contrary to that provision and would defeat its purpose, resulting in the Sembi Agreement being null and void.[151]

77. Mr. Georgiades further relied on the Supreme Court of Cyprus' decision in *Arsiotis*[152] in order to explain that if entering into contract is not prohibited by a statute, a contract is not void *ab initio* if it requires meeting a precondition before it can be performed.[153] Professor Emilianides clarified that this reasoning would be applicable in the present case only if the relevant rule of Serbian law required consent of the Agency **for the performance of the Sembi Agreement and not for its conclusion**.[154]

78. However, the text of Article 41ž of the Law on Privatization leaves no room for different interpretations: the buyer (assignor) may assign the agreement to a third party (assignee), subject to prior consent of the Agency.[155] Clearly, this provision unequivocally prohibits and invalidates any contract on assignment concluded without prior authorization by the Agency.

79. In any event, rights from a contract are assignable in equity under Cypriot law only in "*…cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it*."[156] Mr. Georgiades interprets the rule as prohibiting assignment, *inter alia*, in cases of contracts involving personal skill of a party.[157] This is an overly restrictive interpretation unsupported by authorities Mr. Georgiades cited to prove the proposition. The authorities indicate that there are other reasons, save from personal skills, making the identity of other contracting party important and preventing assignment[158] and that any contractual right involving "*personal qualifications*" on the part of the creditor is incapable of assignment.[159]

80. The identity of Mr. Obradovic and his personal qualifications were of outmost importance to the Agency when it entered the Privatization Agreement. The fact that the contract could have been concluded only with Mr. Obradovic as the winner of the public auction and that Mr. Obradovic, based on his Serbian citizenship, was given the option unavailable to the assignee (Sembi) – to pay the purchase price in annual installments - demonstrate, according to Professor Emilianides, that personal characteristics of the Agency's counterparty were so

[150] Expert Report of Achilles C. Emilianides, para. 30.
[151] Transcript, Day 6, 170:25-171:18 (Emilianides).
[152] *Arsiotis and others v. Highway Gardens*, Civil Appeal No.106/12, Judgment dated 18/04/2018, p. 11, **CE-841**.
[153] Third Expert Report of Agis Georgiades, para. 2.9.
[154] Transcript, Day 6, 210:14-212:20 (Emilianides).
[155] Article 41ž(1) of the 2001 Law on Privatization, **CE-220**: "**Subject to prior consent of the Agency**, the buyer of the capital (hereinafter: assignor) may assign the agreement on sale of the capital or property to a third party (hereinafter: assignee) under the conditions stipulated by this law and the law on obligations."
[156] Hugh Bale, *Chitty on Contracts* (London: 30th ed., 2008, Sweet & Maxwell), 19-054, **CE-840**.
[157] First Expert Report of Agis Georgiades, para. 2.16; Transcript, Day 6, 150:01-152:10 (Georgiades).
[158] John McGhee, *Snell's Equity* (London: 33rd ed., 2015, Thompson Reuters), para. 3-049, **CE-507**.
[159] Hugh Bale, *Chitty on Contracts* (London: 30th ed., 2008, Sweet & Maxwell), 19-055, **CE-840**.

important to the Agency as to prevent the assignment without its consent.[160]

*1.3.7. Claimants misinterpret the text of the Sembi Agreement*

81. Claimants argue that the Sembi Agreement, in Article 4, contemplates various transfers which were intended to take place independently.[161] According to them, the intention of the parties was to transfer to Sembi legal title in rights and assets that could be transferred on the date of the agreement, while rights and assets whose transfer required additional steps or a third party consent were transferred to Sembi beneficially.[162]

82. The problem with this argument is that it cannot be reconciled with the text of the contract. There is no provision in the Sembi Agreement that would stipulate a separate transfer of beneficial ownership of shares to Sembi, independently from the transfer of "*all right, title and interest*" of Mr. Obradovic in and to the Privatization Agreement and from the transfer of the Privatization Agreement itself.[163]

83. Claimants rely on the opinion of Mr. Georgiades for the proposition that the "*plain text" of the Sembi Agreement contemplates various transfers to take place independently*."[164] However, Mr. Georgiades himself admitted that such interpretation was, in fact, the result of Claimants' instructions.[165]

84. Claimants' legal expert also relies on subsequent conduct of Sembi and Mr. Obradovic to demonstrate that Sembi and Mr. Obradovic intended for the beneficial interest in shares to pass to Sembi immediately after the conclusion of the contract, even though he recognizes that Cypriot law does not generally allow for such means of interpretation.[166] Professor Emilianides also testified that contracts are not interpreted on the basis of subsequent conduct by contractual parties under Cypriot law.[167] In fact, the only authority Mr. Georgiades invoked in support of his contention refers to the subsequent conduct of parties as an instrument to determine the existence of implied agreement about the law applicable to a contract, in the context of the Rome Convention, and not as a rule of Cypriot contract law.[168]

85. In any event, Mr. Georgiades' interpretation of the Sembi Agreement heavily relies on the "*affirmation of the Sembi Agreement*" by the parties, i.e. on the fact that Sembi immediately started to treat the shares as its own and recorded the ownership in the 2008 Financial Statements, in accordance with Cypriot Companies Law.[169] However, as explained above, the probative value of the document that Claimants submitted[170] was seriously put in

[160] Transcript, Day 6, 172:17-172:20 (Emilianides).
[161] Claimants' Rejoinder on Jurisdiction, para. 151.
[162] *Ibid*, para. 147.
[163] Agreement between Mr. Obradovic and Sembi of 22 February 2008, Article 4, **CE-29**.
[164] Claimants' Rejoinder on Jurisdiction, para. 151.
[165] Transcript, Day 6, 157:25-158:06 (Georgaides).
[166] Third Expert Report of Agis Georgiades, para. 2.25.
[167] Transcript, Day 6, 173:21-174:18 (Georgiades).
[168] Hugh Bale, *Chitty on Contracts* (London: 30th ed., 2008, Sweet & Maxwell), 30-054, **CE-840**; Transcript, Day 6, 159:4-160:19 (Georgiades).
[169] Second Expert Report of A. Georgiades, paras. 3.26-27; Third Expert Report of Georgiades, para. 2.25.
[170] Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, **CE-420**.

question by the latest developments.

86. The argument about "*affirmation*" must fail also because Claimants and Mr. Obradovic treated the Sembi Agreement as nonexistent, just as they did earlier with the MDH Agreement. In August 2013, Mr. Obradovic and Coropi agreed on the assignment of the Privatization Agreement to the Cypriot company.[171] The Coropi Agreement stipulates that Mr. Obradovic's shares in BD Agro would be transferred to Coropi,[172] thus entirely ignoring the fact that Sembi (and not Mr. Obradovic) was the purported owner of those shares. Under the Coropi Agreement, Mr. Obradovic agreed to transfer to Coropi all the rights and obligations arising out of the Privatization Agreement,[173] thus including also "*the right of management, participation in profit and the right to a part of the liquidation mass, proportionately to the amount of purchased capital*", as well as "*[t]he right to free disposal of purchased capital […]*".[174] In other words, Mr. Obradovic agreed to transfer to Coropi the rights that represent the essence of the beneficial ownership which, as Claimants allege, was previously transferred to Sembi.

87. Sembi did not act in accordance with its obligations under the contract. The Sembi Agreement stipulated that Mr. Rand would either pay additional EUR 4.8 million to Mr. Obradovic or assume his debt towards "*other institutions in Geneva represented by 1875 Finance S.A.*"[175] Even after evidence presented at the Hearing, there is no proof that Sembi has ever assumed Mr. Obradovic's debt under the contract or that "*other institutions from Geneva*" ever consented to the assumption of debt or agreed to waive claims against Mr. Obradovic. Likewise, Claimants have never even claimed that Sembi paid EUR 4.8 million directly to Mr. Obradovic.

88. On the other hand, wording of the Sembi Agreement is clear. Article 4 stipulates that "*[M]r. Obradovic… has agreed to transfer to the Purchaser all his right, title and interest in and to the Contract. Mr. Obradovic agrees to sign any such documents and do all such things as may be necessary to effect the transfer to the Purchaser of the Contract together with any other assets whatsoever held by Mr. Obradovic which are related to the business of BD Agro*."

89. Clearly, the provision envisages that the transfer of "*any other assets*" (that Claimants are now identifying as shares in BD Agro) is meant to ensue together with and as a consequence of the transfer of the Contract (the Privatization Agreement). Any other interpretation is simply a construct invented by Claimants in order to save their case. The only way in which provision of Article 4 could have led to the acquisition of shares by Claimants was through a valid assignment of the Privatization Agreement. The only way that the assignment could have been valid was with the prior consent of the Agency. Since the consent has never been obtained, the Sembi Agreement did not produce effects Claimants now wish it did.

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[171] Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited, 6 August 2013, **CE-35**.
[172] *Ibid*, Article 1(2).
[173] *Ibid*, Article 1(1).
[174] *See* Privatization Agreement, Article 2(1), **CE-17**.
[175] Agreement between Mr. Obradovic and Sembi of 22 February 2008, Article 2 and Recital C, **CE-29**.

90. Based on the above, the Sembi Agreement did not result in acquisition of ownership of shares for Claimants, nominal or beneficial, regardless of whether the effects of the agreement are judged under Serbian or Cypriot law.

### *1.4. Distinction between contractual and rights in rem*

91. In their latest submission, Claimants argue that the term "*owned*" from Article 1 of the Canada-Serbia BIT has an autonomous meaning under the BIT.[176] They offer virtually no authority for such proposition. On the other hand, Respondent has already demonstrated that international law protects property rights created under municipal law,[177] *i.e.* that the role of international law is to recognize property created and defined by national law.[178]

92. Based on this assertion, Claimants contend that to own shares under the BIT does not only mean to hold rights *in rem* but includes purely *in personam* rights as well[179] and that their supposed beneficial ownership enjoys protection even if recognized as *purely contractual right*.[180]

93. The argument again misses the point. Ownership of movable property, such as shares, cannot be regarded as purely contractual right under Serbian law. It is beyond dispute that contractual rights are protected under international law. However, to hold contractual claims pertaining to shares against the other contacting party is different from actually *owning* the shares.

94. Requirements for liability of the state are different as well. While liability for taking of property does not hinge upon the knowledge that the property is owned by someone else, liability of a third party for interference with contractual rights demands actual notice of such rights, *i.e*. knowledge that such rights exist.[181]

95. Claimants submit that contractual rights can be expropriated without actual knowledge of their existence.[182] They rely on cases in which either actual knowledge was present – because the contract was concluded between an investor and a state (state entity)[183] – or it was not necessary – because the contractual right was created through statute.[184] Claimants' reliance

[176] Claimants' Rejoinder on Jurisdiction, para. 340.
[177] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 162, **RLA-110**; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018, para. 231, **RLA-183**.
[178] *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017, paras. 168, 170, **RLA-2**.
[179] Claimants' Rejoinder on Jurisdiction, para. 341.
[180] *Ibid*, para. 345.
[181] *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, paras. 149-152, **RLA-148**.
[182] Claimants' Rejoinder on Jurisdiction, para. 403.
[183] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **CLA-067**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CLA-117.**
[184] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, Award, 13 November 2019, **CLA-156**.

on the award rendered by the *Krederi* tribunal in an attempt to show that international law does not require specific knowledge of the foreign character of an investment/investor is also inapposite for similar reasons.[185] There the dispute arose because of the alleged expropriation of land-plots owned by the claimant,[186] and not for a reason of Ukraine's interference with the claimant's contractual rights arising from a contract with a third party.

96. Circumstances of the case at hand are entirely different: purported contractual rights of Claimants were created by virtue of two contracts concluded between private parties (MDH and Mr. Obradovic/Sembi and Mr. Obradovic). Should the Tribunal find that Claimants' investment comprises of their contractual rights from the two agreements they concluded with Mr. Obradovic, Respondent's liability would be contingent upon Claimants' ability to prove that the Agency – by terminating the Privatization Agreement with the domestic investor in an attempt to protect its rights under the contract – expropriated contractual rights of third parties (Claimants) under the MDH/Sembi Agreement. All this in circumstances in which, as the record shows, the Agency was entirely unaware of contracts concluded between Mr. Obradovic and MDH/Sembi.

97. Position of Serbian law is the same, as explained by Claimants' legal expert, Mr. Milosevic, in the context of the Sembi Agreement – the Agency had a duty not to interfere in contractual relationship between Sembi and Mr. Obradovic, under the condition that it was "*acknowledged of the existence of such relationship*."[187]

98. To summarize: what it means to own "*share, stock or other form of equity participation in an enterprise*" under the Canada-Serbia BIT[188] or "*shares*" under Cyprus BIT[189] depends on Serbian law. Under Serbian law ownership of shares cannot be deemed as a contractual right. Even if the Tribunal finds that Claimants' investment comprises of their contractual rights under the two contracts, requirements for Respondent's liability are not met.

### 2. Canadian Claimants did not control Mr. Obradovic's shares in BD Agro

99. Respondent has already explained that the notion of control under the Canada-Serbia BIT necessarily implies the existence of legal control under the applicable law. Factual control of an investment must exist in addition to legal control.[190]

100. The Canadian Claimants (and in particular Mr. Rand) were unable to legally control Mr. Obradovic's shares in BD Agro at the time of the alleged breach since the text of the Sembi Agreement did not refer to any elements of control.[191] Furthermore, it was unable to create

[185] Claimants' Rejoinder on Jurisdiction, para. 406.
[186] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 2, **CLA-157**.
[187] Transcript, Day 5, 10:24, 25, 11:01-09 (Milosevic).
[188] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1(b), **CLA-1**.
[189] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 1(1)(b**)**, **CLA-2**.
[190] Respondent's Rejoinder, paras. 705-707; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, paras, 252, 255, **CLA-16**.
[191] Respondent's Rejoinder, paras. 708, 709.

the right to control under the definition contained in the only relevant statute – Serbian Law on Companies.[192] Claimants' reliance on other statutes to prove that Mr. Rand could have exercised control in accordance with Serbian law is inapposite, since those statutes define control only for the purpose of their own provisions[193] and are, as such, without significance.

101. Claimants contend that *de facto* control of an investment is all that it is required under the BIT. However, even if this contention would be accepted, Claimants' case has obviously failed to reach the stringent evidentiary threshold connected with the notion of *de facto* control.

102. Claimants rely, *inter alia*, on the award of the *Thunderbird* tribunal in support of their assertion.[194] The very same tribunal opined that, in the absence of legal control, *de facto* control must be established **beyond any reasonable doubt**.[195] Such standard of proof is particularly warranted in cases such as this – where the record indicates that the factual control of investment could very well be vested in persons or entities not enjoying protection under the BIT.

103. There are quite a few facts that cast serious doubts about Claimants' contention that Mr. Rand has always controlled the way in which Mr. Obradovic used his position as the nominal owner of BD Agro's shares. Some of those were raised during the Hearing:

104. **Mr. Obradovic made crucial decisions with regard to BD Agro's business without consulting Mr. Rand** - This was confirmed by Mr. Rand's testimony at the Hearing. For example, Mr. Rand confirmed that Mr. Obradovic on his own motion effected the Land Assignment through which he personally benefited over EUR 1 million by reselling BD Agro's land.[196] Needless to say, this transaction was quite significant, as it amounted to approximately 60% of the entire purchase price for the shares in BD Agro. Hence, one cannot seriously claim that this was an everyday affair that did not require the owner's attention.

105. Another example is the 221 Million Breach itself and the loan of EUR 1 million to Inex and Crveni Signal. Mr. Rand again confirmed that this transaction was something that Mr. Obradovic did on his own motion, which he found out only subsequently.[197] Again, this transaction was not some minor everyday action that did not require the owner's attention. It amounted to almost 20% of the total Purchase Price for BD Agro, and it created a severe breach of the Privatization Agreement.

106. Although Mr. Obradovic claims that, from 2013 onward, he would not do anything

[192] *Ibid*, paras. 712, 713; Second Expert Report of Professor Mirjana Radovic, paras. 75, 94, 95.
[193] Transcript, Day 4, 190:06-192:23 (Tomic Brkusanin).
[194] Claimants' Rejoinder on Jurisdiction, paras. 420-422.
[195] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 106, **CLA-95**. The tribunal in B-Mex v Mexico also opined that "*de facto control will typically, and logically, present a greater evidentiary challenge*." *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, para. 220, **CLA-83**.
[196] The complete lack of control in this regard was best evidenced by the fact that Mr. Rand stated that he was not happy with this situation.
[197] Transcript, Day 2, 42:15-25 (Rand).

concerning BD Agro without Mr. Rand's express instructions,[198] the record reveals that this statement is not true. By his own admission, Mr. Obradovic in 2015 submitted a lawsuit challenging the termination of the Privatization Agreement without any consultations or instructions from his alleged "employer" – Mr. Rand.[199]

107. There also seems to be a contradiction between Mr. Obradovic's testimony and what Claimants argue with regards to the level of control that Mr. Rand supposedly enjoyed. According to Claimants, Mr. Rand instructed Mr. Obradovic on all important matters of BD Agro and he always followed those instructions,[200] However, according to Mr. Obradovic: *"I had **a lot of leeway** from Mr. Rand that I could make some decision on my own, I didn't have to ask him for everything*[201] *[…] **Mr. Rand didn't know what we were doing most of the time**. […]*"[202]

108. **Mr. Rand never issued any orders to Mr. Obradovic** - During the Hearing, Respondent once again pointed to the fact that the record does not contain a single piece of paper proving that Mr. Rand ever issued any orders or instructions to Mr. Obradovic, the person he allegedly controlled.[203] The following day, Claimants came up with what appears to be their strongest evidence in response to this – exhibit CE-428. Claimants' counsel asked Mr. Rand what this exhibit was, and he stated: "*It's an email I sent to Mr Obradovic as President, BD Agro, and to Ljuba Jovanovic and to Igor Markicevic. **It had instructions as to certain things I wanted done***."[204]

109. Yet, when one actually reads this short email, one will find nothing more than a reminder that Mr. Rand sent as a member of the Board of Directors of BD Agro to other board members, saying: "*This will confirm **our discussions** of this morning that a BD Agro board meeting will be held at the offices of Crveni Signal tomorrow at 10 am local time. The **agreed agenda** is as follows: 1. David Wood is appointed a director to fill the vacancy. 2. Igor Markicevic is appointed Chairman of the Board of Directors. 3. Discussion of the proposed sale of land to Galenika. 4. Any other business.*"[205]

110. Evidently, this was not an instruction, only a reminder of a meeting agenda that was "*agreed*" after joint discussions between Mr. Rand and other board members.

111. **Mr. Rand did not control Ahola Familly Trust** - Claimants assert that Mr. Rand's indirect control of BD Agro, through Sembi, was based on his control agreement with Mr. Jennings - the trustee of the Ahola Family Trust, another shareholder of Sembi.[206] Unsurprisingly, Mr. Jennings' testimony at the Hearing revealed that the purported control agreement was, once again, verbal.[207] The only piece of paper which shows how this trust was established, to

[198] Transcript, Day 2, 102:20-24 (Obradovic).
[199] First Witness Statement of Mr. Obradovic, para. 30.
[200] Claimants' Reply, para. 610.
[201] Transcript, Day 2, 102:17-19 (Obradovic) [emphasis added].
[202] Transcript, Day 2, 103:13-14 (Obradovic) [emphasis added].
[203]Transcript, Day 1, 144:14-16 (Mihaj).
[204] Transcript, Day 2, 7:7-9 (Rand).
[205] Email from Mr. Rand, 10 April 2013 (**CE-428**).
[206] Claimants' Reply, paras. 490-492.
[207] Transcript, Day 2, 123:01-05 (Jennings).

whose benefit and under whose control (Trust Indenture) – makes absolutely no mention of Mr. Rand.[208] In other words, from the aspect of the Trust Indenture, Mr. Rand is a third party. Yet, Mr. Jennings testified that he allegedly considers himself bound to follow Mr. Rand's instructions based on an oral agreement between the two. When asked to explain the nature and basis of Mr. Rand's role, the trustee gave an answer which he then withdrew, and essentially had nothing more to say apart from the contention that the management of the trust was completely flexible.[209]

112. **Money flows reveal that Mr. Obradovic effectively controlled the investment** - Mr. Rand confirmed, during the examination, that he had never received any dividends from BD Agro's operations.[210] On the other hand, and crucially, the flow of money from BD Agro to Mr. Obradovic's coffers is a strong indication that he was the individual who effectively controlled the investment. For example, BD Agro borrowed funds from Agrobanka and lent them to Crveni Signal, only for Crveni Signal to transfer the money immediately to Mr. Obradovic.[211] The same happened with the money gathered from the sale of the BD Agro's real estate that Mr. Obradovic acquired through the Land Assignment transactions.[212] In all these cases, the trail of money stops with Mr. Obradovic. In what appears to be a pattern, the funds originating from BD Agro could always be followed to Mr. Obradovic and no further. In the absence of any evidence that would prove otherwise, the only possible conclusion is that the money coming from BD Agro was in fact kept by Mr. Obradovic. This alone is sufficient to disprove Claimants' narrative about *de facto* control by Mr. Rand.

## B. MEASURES COMPLAINED OF WERE NOT RELATING TO THE CANADIAN CLAIMANTS UNDER ARTICLE 2 OF THE CANADA-SERBIA BIT

### 1. Provisions of the BIT do not apply to measures taken by the Agency

113. The Canada-Serbia BIT, by virtue of Article 2, applies only to measures adopted by a Party relating to an investor of the other Party and a covered investment. Even if the termination of the Privatization Agreement and subsequent taking of shares in BD Agro by the Agency could be attributed to Respondent, *quod non*, those measures were not relating to the Canadian Claimants.

114. In interpreting the corresponding provision from Article 1101(1) of NAFTA, tribunals have opined that it requires legally significant connection between the measure and the investor for the application of the treaty.[213]

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[208] The Ahola Family Trust Indenture, 6 March 2015, **CE-008**.
[209] Transcript, Day 2, 124:25-127:14 (Jennings).
[210] Transcript, Day 2, 14:03-05 (Rand).
[211] Crveni Signal Bank Statement from Agrobanka, 2 June 2010, **RE-372**.
[212] Respondent's Rejoinder, para. 346.
[213] *Methanex Corporation v. United States of America* (UNCITRAL), Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, para. 139, **RLA-187;** *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, para. 240**, RLA-169.**

115. Claimants argue now, based on Article 1 of the BIT, that legal significance of the connection between them and "*Beneficially Owned Shares*" stems from the fact that the BIT protects investments owned or controlled directly or indirectly.[214] The argument is off point. Article 2 demands connection between the measure and an investor, not between an investor and the investment. As explained by the *Methanex* tribunal, the provision such as this was meant to limit responsibility of state parties for indirect consequences of their measures. [215]

116. As was the case in *Methanex* where US measures were not expressly directed at the investor,[216] the measures taken by the Agency – termination of the Privatization Agreement with Mr. Obradovic and consequential taking of shares, in accordance with the contractual provision[217] and the applicable law[218] - were not directed at Sembi as Mr. Obradovic's contractual counterparty, let alone at the Canadian Claimants. Just as it was unreasonable to assume that the US in *Methanex* gave its consent to arbitrate disputes with any investors indirectly impacted by the measures, it is equally unreasonable to conclude that Respondent agreed to arbitrate the dispute stemming from the contractual relationship between the Agency and Mr. Obradovic with Mr. Obradovic's business partners or creditors.

117. The Agency concluded the Privatization Agreement with Mr. Obradovic, a domestic investor. Shares in BD Agro were transferred and registered in the name of Mr. Obradovic, in accordance with that agreement. The entire communication about obligations under the Privatization Agreement was taking place between the Agency and Mr. Obradovic. The Agency sent notices of breach to Mr. Obradovic. Letters from BD Agro in response to those notices were signed by Mr. Obradovic. Finally, the Agency terminated the Privatization Agreement by notifying Mr. Obradovic about the termination.

118. The Agency had absolutely no reason to believe that its measures could relate to the Canadian Claimants. Quite to the contrary, it was given every reason to believe that Mr. Rand was merely a potential investor in BD Agro. This follows from contemporaneous documents and it was also confirmed at the Hearing.

### 2. The alleged beneficial ownership of Mr. Rand was never disclosed to the Agency

119. Respondent has already pointed to numerous documents created by Mr. Rand, Mr. Obradovic and Mr. Markicevic during 2013, 2014 and 2015, introducing Mr. Rand as reputable Canadian investor interested in investing in BD Agro.[219] Even what was supposed to be an internal communication exchanged between Rand Investments and BD Agro (Mr. Markicevic) reveals discussions about potential financial support of Rand Investments to the

[214] Claimants' Rejoinder on Jurisdiction, para. 396.
[215] *Methanex Corporation v. United States of America* (UNCITRAL), Partial Award, 7 August 2002, para. 138, **RLA-187**.
[216] *Ibid*, para. 128.
[217] Privatization Agreement with Annexes, Article 7.2., **CE-17**.
[218] 2001 Law on Privatization, Article 41a(2), **CE-220**.
[219] Respondent's Rejoinder, paras. 692-696; E mail from Mr. Jakovljevic to the Privatization Agency of 16 April 2013, **RE-108**; Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, **CE-38**. Letter from BD Agro to the Ministry of Economy and Privatization Agency dated 5 November 2014, p. 1, **CE-320**; Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, p. 5, **CE-48**;

company.[220] None of these communications reveal that Mr. Rand is the owner of BD Agro.

120. Undisturbed by the fact that their assertions cannot be reconciled with documents on record, Claimants once again at the Hearing insisted that the Agency knew that the real owner of BD Agro was Mr. Rand.[221] This effort came down to pointing to the fact that Mr. Rand's representative started appearing at meetings with the Agency and the Ministry in the period from 2013 to 2015. Indicatively, this was the period when Mr. Rand and Mr. Obradovic were trying to transfer ownership over the shares in BD Agro to Coropi.

121. Yet, Claimants have not found any example of such "*disclosure*" before that point in time. They have likewise made no effort to present Mr. Ljubisa Jovanovic (the CEO of BD Agro from 2005-2013, and assistant of minister Bubalo before that) to testify in this arbitration, although he was the person who arguably could confirm Claimants' contentions. The only statement from Mr. Jovanovic on record is his testimony in the criminal proceedings given before this arbitration in which he explicitly confirmed that Mr. Obradovic "*was the owner [of BD Agro] who was permanent and who dealt with key issues, some other acquisitions and relationships with banks, all that should be done by a majority owner*".[222]

122. Claimants likewise made no effort in presenting ex-minister Bubalo as a witness, although Mr. Rand remained in contact with him even after he left public service more than 10 years ago.[223] Thus, Claimants themselves should explain why Mr. Bubalo did not testify in these proceedings, instead of calling out Respondent on that issue.[224]

### 3. The Agency consistently treated Mr. Obradovic as the majority owner of BD Agro

123. Claimants assert that Mr. Obradovic's absence from certain meetings between Mr. Markicevic and Mr. Brosko, on the one side, and representatives of the Agency, on the other, about possible assignment of the Privatization Agreement could somehow be interpreted as the Agency's acceptance of Mr. Rand's status as the beneficial owner. What should be noted however is that, in August 2013, Mr. Obradovic submitted to the Agency a request for prior consent to the assignment of the Privatization Agreement to Coropi.[225] At that time, Mr. Obradovic expressly informed the Agency about his intention to cease to be the owner of BD Agro and explicitly gave his consent to the assignment.

124. In this regard, the context of discussions about the assignment between 2013 and 2015 is of crucial importance. Claimants have particularly emphasized two meetings: (i) of 30 January 2014, when Mr. Broshko stated that Mr. Rand financed the privatization;[226] and (ii) of 15 December 2014, when Mr. Obradovic was asked to leave the meeting.[227]

125. As Mrs. Vuckovic explained at the Hearing, representatives of the Agency were presented

[220] Letter from Rand Investments to I. Markićević dated 7 May 2015, **CE-350**.
[221] Claimants' Opening Statement, slide 77.
[222] Indictment of Prosecutor for Organized Crime, no. KTI 65/16 dated 15 December 2016, p. 12, **RE-399**.
[223] Email from A. Janičić to W. Rand dated 16 July 2008, **CE-704**; Predrag Bubalo, Wikipedia, **RE-296**.
[224] Respondent's Rejoinder, para. 28.
[225] Letter from D. Obradović to the Privatization Agency, 1 August 2013, **CE-273**.
[226] Minutes from meeting held at the Privatization Agency on 30 January 2014, **RE-28.**
[227] Transcript, Day 3, 120:15-19 (Jankovic); Transcript, Day 4, 9:3-8 (Vuckovic), 163:10-23 (Stevanovic).

during the January 2014 meeting with the information about Mr. Rand's financing of Mr. Obradovic, but were given no details about the supposed arrangement nor supporting evidence.[228] They simply heard this at the meeting, but made no particular conclusions based on this information. Furthermore, the identity of the owner of the shares in BD Agro was never questioned – it was always Mr. Obradovic, who was not only the registered owner, but also acted as the owner and never indicated that he was in fact not the owner of the shares.[229] The representatives of the Agency never even met Mr. Rand.[230]

126. The other meeting that Claimants insist upon was held on 15 December 2014, when Mr. Obradovic was asked to leave after the insistence of Mr. Broshko. As was confirmed at the Hearing, although this meeting was organized at the request of the Canadian Embassy, following the initiative of Mr. Brohsko, the Ministry, *i.e.* Mr. Stevanovic, also decided to invite Mr. Obradovic by default as they considered him to be the owner of BD Agro.[231] Mr. Stevanovic testified that while he found it strange that Mr. Broshko would object to Mr. Obradovic's presence at the meeting, he felt he had no choice but to ask Mr. Obradovic to leave.[232] Mr. Stevanovic further explained that he considered this move would be only detrimental to the assignment request, as Mr. Obradovic could have helped to move things forward.[233] However, Mr. Obradovic's presence was not necessary, having in mind that BD Agro's CEO was also present.[234]

127. Mrs. Vuckovic likewise explained that this situation was strange,[235] but that Mr. Obradovic's absence was irrelevant, since he already submitted the request for assignment indicating *Coropi* as the assignee.[236]

128. Claimants, on the other hand, are still unable to explain the subsequent letter sent to the Agency by Mr. Obradovic. The letter was sent in September 2015, well after the two meetings were held and only weeks before the Privatization Agreement was to be terminated.[237] In that letter Mr. Obradovic clearly acted as the Buyer that he was and (i) requested the Agency to issue a certificate of successful completion of the privatization, (ii) requested the Agency to release the pledge on shares, (iii) referred once again to his request for assignment of the Privatization Agreement to Coropi and (iv) warned the Agency about consequences of refusing his requests and about possible legal actions. In this regard, Mr. Broshko testified that both the Agency and the Ministry were well aware of Mr. Rand's beneficial ownership and that there was no need to repeat the fact in the letter.[238] This is wholly unconvincing. However, the absence of reference to Mr. Rand as the real owner is not the only issue with the letter. The most important question here is: if Claimants were indeed so direct and open about Mr. Rand's ownership and considered themselves to be the

[228] Transcript, Day 4, 17:17-27:2 (Vuckovic).
[229] *Ibid.*
[230] Transcript, Day 4, 21:25-22:4 (Vuckovic).
[231] Transcript, Day 4, 170:7-9, 171:12-18 (Stevanovic).
[232] Transcript, Day 4, 164:2-7, 170:14-16, 171:20-23 (Stevanovic).
[233] Transcript, Day 4, 170:9-171:9 (Stevanovic).
[234] Transcript, Day 4, 160:3-20 (Stevanovic).
[235] Transcript, Day 4, 18:5-19:2 (Vuckovic).
[236] Transcript, Day 4, 15:10-19 (Vuckovic).
[237] Letter from Mr. Djura Obradović to Privatization Agency, 8 September 2015, **CE-48**.
[238] Fourth Witness Statement of Mr. Erinn Broshko, para. 37.

only persons with whom the fate of BD Agro should be discussed, why was the letter not signed by Mr. Rand? The answer is self-evident: even if Claimants were indeed beneficial owners of BD Agro, they were knowingly attempting to hide this from the Agency.

### 4. The Sembi Agreement could not establish a legally significant connection between the Agency's measures and the Canadian Claimants

129. Claimants argue that the Sembi Agreement constituted a legally significant connection between them and Respondent's conduct.[239] They rely on *Clayton v. Canada* in support of this proposition.[240] However, the *Clayton* award does not help Claimants' argument.

130. In *Clayton*, the tribunal did find that there was a legally significant connection between Canada's actions and omission in the process of issuing a permit for operating a quarry to a local enterprise (*Nova Stone*) and US investors, based on a partnership agreement between Nova Stone and investors' wholly owned Canadian subsidiary (*Bilcon*).[241] However, although investors were not a party to the approval process, their involvement in the project was disclosed at the onset and Canadian officials were communicating with *Bilcon* and the partnership of *Bilcon* and *Nova Stone* (*Global Quarry Products - GQP*) about the requirements for issuance of the permit.[242]

131. In the case at hand, the Sembi Agreement was concluded in breach of imperative rules of Serbian law and purposely kept secret from the Agency and Respondent until the commencement of this arbitration. The Agency never communicated with Claimants about issues related to the Privatization Agreement (except in their role of potential assignees) and has never recognized them as owners of shares in BD Agro. As a result, termination of the Privatization Agreement and consequential taking of the shares were not measures relating to Claimants, leaving the Tribunal without jurisdiction under the Canada-Serbia BIT.

## C. NO JURISDICTION RATIONE VOLUNTATIS

### 1. Illegality of Claimants' investment

132. It is undisputed between the Parties that investments acquired in breach of the host state's law do not enjoy protection under the BITs.[243] As a consequence, should the Tribunal accept Claimants' contention – that the existence and substance of rights protected by the Treaties depends on law of British Columbia and Cyprus and not Serbian law – the fact still remains that those rights would be obtained in breach of imperative rules of Serbian law. Illegality of Claimants' investment stems from the illegality of contracts that are meant to serve as a legal basis for Claimants' ownership and control, as well as from Claimants' (and Mr.

[239] Claimants' Rejoinder on Jurisdiction, para. 401.
[240] *Ibid*, para. 400.
[241] *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, para. 241, **CLA-139**.
[242] *Ibid*, paras. 143, 144, **CLA-139**.
[243] Respondent's Rejoinder, paras. 774, 775; Claimants' Rejoinder on Jurisdiction, para. 521.

Obradovic's) conduct during the acquisition of the investment and afterwards.

### *1.1. MDH and Sembi Agreements*

133. *First*, the MDH Agreement was a contract that contemplated transfer of shares in a joint stock company outside the stock exchange, in contravention to the 2002 Securities Law.[244] The importance of this provision in Serbian legal order was acknowledged by both Professor Radovic[245] and Dr. Grusic who opined that the provision at stake was an overriding mandatory rule of Serbian law.[246] Another Claimants' legal expert, Ms. Tomic Brkusanin, accepted that Serbian Supreme Court considers as null and void contracts that provide for transfer of shares in public joint stock companies outside stock exchange,[247] and that the MDH Agreement belonged in this category.[248]

134. Ms. Tomic Brkusanin however opined that only Article 2 of the MDH Agreement could be considered null under Serbian law, and that the nullity of the provision would not invalidate the entire contact, under the doctrine of severability.[249] This, however, does not follow from the 2008 decision of the Supreme Court of Serbia analyzed by the expert. There, the Court held that the entire contract, including its annex, was null and void because it provided for transfer of shares outside the stock exchange, in breach of Article 52 of the 2002 Securities Law.[250]

135. *Second*, as already explained above, the Sembi Agreement, as a contract by which Mr. Obradovic's rights and obligations from the Privatization Agreement were transferred to Sembi as a third party unbeknownst to the Agency, was concluded in clear contravention of Article 41ž of the Law on Privatization.

136. In addition, to accept that Claimants have obtained shares in BD Agro based on the Sembi Agreement would, in effect, award them for breaching Article 52(2) of the 2006 Securities Law which prohibits trade in securities outside organized market.[251] Claimants argue that the Sembi Agreement was consistent with said provision since beneficially owned shares could be transferred through a block trade transaction at the stock exchange, by an in-kind contribution to the capital of a limited liability company and by delisting BD Agro's shares from the BSE.[252]

137. However, the delisting option was not even theoretically available to Claimants, since shares of BD Agro were never delisted from the BSE[253] and the in-kind contribution would require

[244] The 2002 Law on Market in Securities and other Financial Instruments, Article 52(1), **RE-119**: "*Trade in securities is only allowed through a public offer on an organized market, unless this law provides otherwise*."
[245] First Expert Report of Professor Mirjana Radovic, paras. 79-81.
[246] First Expert Report of Professor Ugljesa Grusic, para. 76.
[247] Transcript, Day 4, 183:01-184:02 (Tomic Brkusanin).
[248] Transcript, Day 4, 182:19-183:04 (Tomic Brkusanin).
[249] First Expert Report of Mrs. Bojana Tomic Brkusanin, paras. 56, 57.
[250] Decision of the Supreme Court of Serbia, Prev. 438/2007, March 19, 2008, **RE-2**.
[251] 2006 Law on Market in Securities and Other Financial Instruments, Article 52(2), **RE-111**.
[252] Claimants' Reply, paras. 123, 124.
[253] Transcript, Day 4, 182:13-18 (Tomic Brkusanin).

Sembi and Mr. Obradovic to conclude subsequent contracts.[254] With regard to the block trade transaction as a way to effectuate transfer of ownership, Professor Radovic explained at the Hearing that the Sembi Agreement was incapable of meeting the basic requirement for the block trade mechanism: it did not stipulate the price for shares and the Central Securities Registry could execute the block trade transaction only on the DVP (Delivery Versus Payment) basis. Simply put, Mr. Obradovic would need to receive the payment for his shares and could not just agree to transfer shares because Sembi had previously undertook to settle his debt towards third parties.[255]

### *1.2. Deceitful conduct connected to the acquisition of capital*

138. The way in which the capital of BD Agro was supposedly obtained at the public auction in 2005 represents, in itself, a deceitful conduct. Claimants contend that it was Mr. Rand who submitted the winning bid "*through Mr. Obradovic*."[256] Claimants' legal expert, Mr. Dean, also opined that the MDH Agreement created, under the law of British Columbia, a principal-agent relationship between MDH and Mr. Obradovic.[257]

139. Serbian legislation at the time allowed for a person or an entity to enter the public auction in privatization through an agent (representative of the buyer).[258] However, in such case, a participant in the auction was under the obligation to submit to the Agency proper authorization (power of attorney) that needed to be certified by a court.[259] The list of documents that needed to be submitted with the application for the auction also contained a certified copy of authorization, in case the auction was attended by the representative of a buyer.[260] This demonstrates quite obviously that Messrs. Rand and Obradovic were obliged to disclose their arrangement to the Agency. Mr. Obradovic entered the auction in his name and on his own behalf. As a result, Mr. Obradovic and not Mr. Rand or MDH was considered to be the winner of the auction and received an incentive that was reserved for Serbian natural persons – an option to pay the purchase price for the capital in six installments.[261]

140. The ability to pay purchase price in installments was instrumental for the business venture - Mr. Obradovic had difficulties in obtaining capital for payment of the price even in installments. He was given 10 extensions as he was unable to meet the deadlines for payment of the installments of the purchase price between November 2006 and March 2011.[262] Had it not been for this possibility, it is highly doubtful that he would have obtained BD Agro's capital in the first place. The business model he used was also structured around the option of delayed payments – BD Agro would borrow money from banks and transfer it to Mr. Obradovic who would then settle the payment obligation towards the Agency using the same

[254] Transcript, Day 4, 181:19-182:12 (Tomic Brkusanin).
[255] Transcript, Day 6, 13:15-14:21 (Radovic).
[256] Claimants' Opening Statement, slide 10; Claimants' Reply, para. 34: "*The investment would follow the usual arrangement: Mr. Obradović would attend the auction of the Privatized Shares* ***and submit the bid in the auction on Mr. Rand's behalf***." (emphasis added).
[257] Expert Report of Mr. Robert J.C. Deane , para. 101.
[258] Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Article 19(1), **RE-218**.
[259] *Ibid*, Article 19(3).
[260] Application for the participation at the auction for BD Agro, **RE-211**.
[261] Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Article 39(1), **RE-218**.
[262] Respondent's Rejoinder, para. 72.

funds. This was the case with as many as four out of six installments of the purchase price.[263] If one accepts Claimants' argument, all this was possible only because the Agency was tricked into believing that it provided the option of payments in installments to the person who was entitled to this incentive.

### *1.3. Mr. Obradovic extracted funds from BD Agro*

141. The record also reveals the way in which Mr. Obradovic used his position as a majority owner to drain funds from BD Agro, to the detriment of minority shareholders and the company itself. It was the money transferred from BD Agro to Mr. Obradovic that was later used for payments of installments of the purchase price for the company.[264] Under the calculations of Respondent's expert, Mr. Cowan, the total net loss of BD Agro in these bank transactions amounts to RSD 135,824,838.[265] According to Claimants' expert, the loss on the side of BD Agro was somewhat lower, RSD 88,056,468, when looking at bank accounts alone.[266] In any case, it is now undisputed between the financial experts that Mr. Obradovic directly extracted between EUR 0.5 million[267] and 1 million[268] from BD Agro on account of shareholder loans alone (*i.e.* between 10-25% of the purchase price for BD Agro's shares). As Dr Hern's calculation *i.e.* lower bound was shown to be utterly wrong at the Hearing,[269] it is clear that the actual amount of the extracted money is closer to the 25% upper bound *i.e.* Mr. Cowan's calculation.

142. What also must be taken into account is the fact that the land which was nominally assigned to Mr. Obradovic for EUR 400,000 was resold by him in the matter of months for EUR 1,417,000 (and was then suspiciously resold for another EUR 3,3 million). Hence, the value of the land assigned was 3.5 to 8 times higher than the amount of the shareholder loan which it was supposed to settle (*i.e.* Mr. Obradovic directly benefited EUR 1,017,000 and indirectly, with the further sale, EUR 2.9 million[270]). The land assignment thus increases the amount of the extracted money from shareholder loans to anywhere between EUR 2.3 million and 4.2 million *i.e.* between 45% and 75% of the purchase price for BD Agro's shares.

143. In addition, Mr. Obradovic's associated companies remain indebted towards BD Agro for another EUR 0.8 million[271] (15% of the purchase price for BD Agro's shares) – which will never be collected as these companies are bankrupt or their bank accounts have been blocked for many years.

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[263] *Ibid*, paras. 374-387.
[264] *Ibid*.
[265] RDE-7; Power Point Presentation of Mr. Sandy Cowan, p. 16.
[266] Third Expert Report of Dr Hern, table 3.3, row 1; Power Point Presentation of Dr Richard Hern, slide 28.
[267] Dr Hern's calculation (RSD 44,796,891). *See Ibid*, rows 1-4. According to the average annual exchange rate for the period of 2005-2013 (**RE-365**), this would amount to approximately EUR 472,000.
[268] Mr. Cowan's calculation (RSD 96,283,382). *See* Power Point Presentation of Mr. Sandy Cowan, slides 16-17 (bank transactions + land assignment – payments to suppliers). According to the average annual exchange rate for the period of 2005-2013 (**RE-365**), this would amount to approximately EUR 1,015,000.
[269] Transcript, Day 8, 92:13-23, 93:12-95:1, 98:11-25, 102:3-104:7 (Hern).
[270] Respondent's Rejoinder, para. 346.
[271] *Ibid*, para. 341.

144. Finally, it is important to note that the lack of written evidence, as the recurring feature of Claimants' case, is also present when it comes to their analysis of the appropriateness of transactions between BD Agro and Mr. Obradovic. Claimants were unable to provide any documentary evidence on shareholder payments and repayments conducted between Mr. Obradovic and BD Agro. Not only was Mr. Obradovic allegedly unable to obtain his own banking statements, but Claimants apparently had no other record or a single shareholder loan agreement that they could present to the Tribunal. As Mr. Cowan confirmed, it is quite unusual to have no documentation with respect to such transactions.[272] Thus, the only reasonable inference is that Claimants are withholding documentation which may confirm their money extraction scheme.

145. To conclude, Claimants conduct in making of the investment is evidently tainted with illegality and bad faith. Consequently, they should not be allowed to benefit from the protection offered under the BITs.[273]

### 2. Claims with regards MDH Serbia's shareholding in BD Agro

146. Claimants' claim includes the value of "Mr. Rand's indirect shareholding", *i.e.* of shares in BD Agro held indirectly through MDH Serbia.[274] According to Claimants, Respondent allegedly expropriated 3.9% of shares in BD Agro owned by MDH Serbia. Under Article 21(2) of the Canada-Serbia BIT, when an enterprise of the respondent Party has incurred loss or damage as a result of the breach by the same Party, an investor may submit to arbitration a claim on behalf of the enterprise.[275] Claimants argue that "permissive language" of Article 21(1) allows Mr. Rand to submit a claim for his own loss,[276] even though the shares in BD Agro were owned by the local enterprise. According to such reading of the BIT, a loss of any asset defined as "investment" under the Canada-Serbia BIT and owned by a local enterprise would allow Claimants to opt for the use of avenue from Article 21(1). This is allegedly for the simple fact that such asset comes under the scope of "investment" under the BIT and because the BIT protects investments owned or controlled *indirectly*.[277]

147. Claimants' interpretation would render Article 21(2) virtually meaningless. It naturally begs the following question: if an investor could always treat the loss incurred by a local company as his own loss and submit a claim under Article 21(1), why would the BIT provide a separate avenue in Article 21(2) for claiming damages based on a loss suffered by a local enterprise if an investor could always treat such loss as his own?

148. As already submitted by Respondent, the very same question was put forward by the Government of Canada in the NAFTA context and answered by the tribunal in a way that supports the interpretation of the relationship between Article 21(1) and 21(2) evidently shared by the both parties of the Canada-Serbia BIT: the inclusion of both provisions was

[272] Transcript, Day 8, 167:14-18 (Cowan).
[273] Respondent's Rejoinder, paras. 774-798.
[274] Claimants' Reply, para. 631.
[275] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 21, **CLA-001**.
[276] Claimants' Rejoinder on Jurisdiction, para. 560.
[277] *Ibid*, para. 559.

deliberate. If an investor could always submit a claim on its own behalf for loss suffered by a local company, then the other provision – contemplating a claim on behalf of a company – would be made redundant.[278] Such reading would go against Article 31 of the Vienna Convention and the principle of effective interpretation.

149. Claimants assert that the *Bilcon* tribunal "*de facto awarded compensation for reflective loss under Article 1116 of the NAFTA on the theory that the claimants' Canadian company was a mere conduit to facilitate the claimants' operations*."[279] This is a misrepresentation. The *Bilcon* tribunal simply concluded that the loss of opportunity to develop a quarry was not a reflective loss, i.e. that the opportunity in question has never belonged to the local subsidiary (*Bilcon of Nova Scotia*), but that it was "*entirely an opportunity of the Clayton Group in New Jersey, which is owned and run by the individual claimants in this case*."[280] The analogy with the case at hand is impossible – it is nonsensical to say that shares owned by MDH Serbia were never owned by the company.

150. Claimants also attempt to counter Respondent's argument by submitting that the customary international law rule barring shareholder reflective loss claims does not apply in investment arbitration.[281] The argument misses the point entirely – whether or not certain customary international law rules are relevant in investment arbitration could be debated only if particular issue was not regulated by the applicable international treaty. This is not the case here: the Canada-Serbia BIT itself stipulates that there are two different avenues for the recovery of damages subject to the nature of loss and depending on the identity of the person who suffered loss or damage.

151. Finally, it is important to note that the reasoning of the *Bilcon* tribunal was influenced by the award in *Mondev v. United States*,[282] an earlier NAFTA case also relied on by Claimants.[283] There, the tribunal warned against allowing recovery under NAFTA Article 1116 if a claim should have been brought under Article 1117 (claim on behalf of an enterprise).[284] Damages owed to the enterprise and recovered under Article 1117 should be paid to the enterprise, allowing its creditors to satisfy their claims against the amount of damages.[285] The reasoning is highly relevant for the case at hand. The record shows that MDH Serbia owes around 9 million RSD to BD Agro alone, not counting any other potential creditors.[286] If compensation for damage arising out of the alleged expropriation of MDH Serbia's shareholding in BD Agro would be paid to Mr. Rand and not to the company, claims of MDH's creditors could not be satisfied against the compensation. In essence, Mr. Rand would be allowed to ignore

[278] *Bilcon of Delaware et al. v. The Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 371, 372, **RLA-154**.
[279] Claimants' Rejoinder on Jurisdiction, para. 557.
[280] *Bilcon of Delaware et al v. Government of Canada,* PCA Case No. 2009-04, Award on Damages, 10 January 2019 , para. 392, **RLA-154**.
[281] Claimants' Rejoinder on Jurisdiction, paras. 550-552.
[282] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **RLA-039**.
[283] Claimants' Rejoinder on Jurisdiction, para. 556.
[284] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 86, **RLA-039**.
[285] *Ibid*, para. 84.
[286] Analytical card of debts owed by MDH on 1 January 2019, **RE-376**.

separate legal personality of his company when it comes to recovery of damages while, at same time, he would be protected against any claims of the company's creditors precisely because of the corporate veil.

152. Claimants have many times throughout the proceedings repeated that they did not submit any claim on behalf of MDH Serbia in accordance with Article 21(2) of the Canada-Serbia BIT.[287] Since they have no standing to pursue, on their own behalf, claims for loss or damage suffered by MDH Serbia under Article 21(1) of the BIT and the Tribunal cannot decide *ultra petita*, the issue of waiver by the Serbian enterprise becomes moot. Should the Tribunal, nevertheless, decide to classify Claimants' claim concerning MDH Serbia's shareholding in BD Agro as a claim under Article 21(2) of the BIT, Respondent reiterates its argument that the lack of proper waiver by MDH Serbia prevents the Tribunal from exercising jurisdiction over the claim in question.[288]

## D. NO JURISDICTION UNDER THE ICSID CONVENTION

### 1. No substantial contribution under Article 25 ICSID Convention

153. Respondent reiterates its position that Claimants' purported investment lacks essential elements of "an investment" under Article 25 of the ICSDID convention, as defined in *Salini v Morocco*.[289] Most significantly, the requirement of substantial contribution is absent.[290] Claimants continue to argue that expenditures arguably made by Mr. Rand should be counted as contribution of each and every Claimant under two different international treaties. There are several other problems that persistently follow Claimants' case, all of them stemming from the obscure way in which the acquisition of BD Agro was financed.

154. *First*, Claimants again submit that Mr. Rand should be given credit for the payment of the purchase price for BD Agro, simply because he had "*arranged*" loans that Mr. Obradovic received from the Lundins.[291] Yet again, the Tribunal and Respondent are still deprived of the explanation of what "*arranging*" precisely means in this context. No documents containing details about the arrangement between the Lundins and Mr. Rand were submitted by Claimants, although Respondent has requested their submission.[292] Funds that the Lundins extended to Mr. Obradovic were not funds of Mr. Rand. He evidently did not even guarantee repayment of the loan, since it was only the 2008 Lundin Agreement that made Mr. Rand and Mr. Obradovic jointly liable for borrowed funds.[293]

155. *Second*, the initial installment for the acquisition of BD Agro, just as every other installment, was paid by Mr. Obradovic. The problem with the initial payment of EUR 2,124,451.01 is also the fact that it was made in October 2005, before Mr. Obradovic started receiving funds

[287] Claimants' Rejoinder on Jurisdiction, para. 549; Claimants' Reply, para. 700.
[288] Respondent's Rejoinder, paras. 867-889.
[289] Respondent's Rejoinder, para. 1010.
[290] *Ibid*, paras. 1013-1032.
[291] Claimants' Rejoinder on Jurisdiction, para. 474.
[292] Respondent's Redfern Schedule, point 4(a).
[293] Agreement between D. Obradović, Lundins, W. Rand and Sembi, 22 February 2008, Article 1, **CE-28**.

from the Lundins.[294] The only reasonable conclusion is that Mr. Obradovic used his own funds to effectuate the payment.

156. Claimants apparently assert that the initial payment was made from funds transferred by the Lundins to MDH's bank account in Serbia, in September 2005.[295] They offer no proof that the money was paid to a Serbian bank account, since this does not follow from the evidence they rely on.[296] Far more importantly, they offer no evidence in support of the contention that Mr. Obradovic had an access to the MDH's account and was authorized to use it, let alone that he has actually ever withdrawn funds from the account.[297] Claimants obviously once again believe that the Tribunal should accept their assertions as true on their face.

157. *Third*, repayment of certain Mr. Obradovic's debts under the 2008 Lundin Agreement cannot be treated as payment of the purchase price for BD Agro. Transfers that Mr. Rand effectuated through Sembi were the result of his assumption of Mr. Obradovic's debt under Article 1 of the 2008 Lundin Agreement.[298] The purchase price was paid by Mr. Obradovic, using funds apparently originating from the Lundins. Repayment of funds previously borrowed by Mr. Obradovic also did not lead to the injection of new capital in BD Agro or serve to further its business in any way.

158. *Fourth*, some of Claimants' alleged expenditures still remain undocumented and unproven. This is, for example, the case with the remainder of the purchase price after the Sembi Agreement was concluded,[299] or with the price of EUR 200,000 allegedly paid for MDH Serbia's 3.9 % stock in BD Agro.[300]

159. Finally, Claimants apparently argue that contribution supposedly made by Mr. Rand can be treated as contribution of all other Claimants in the proceeding. As it has been explained by Respondent,[301] this is impossible and it is particularly unsound when it comes to the relationship between Mr. Rand and Sembi.

160. Under Claimants' admission, funds used for the repayment of Mr. Obradovic's debt to the Lundins were *ultimately committed* by Mr. Rand, although they were transferred by Sembi.[302] This, as Claimants see it, enables Mr. Rand to act as a claimant under the Canada-Serbia BIT and the ICSID convention. The very same contribution, however, miraculously becomes the contribution of Sembi in the framework of the Cyprus-Serbia BIT. In paraphrasing words of the *KT Asia* tribunal – Mr. Rand cannot treat assets held by his companies or other natural persons as his own personal property and, at the same time, rely on Sembi's separate legal personality in order to gain protection under a different treaty.[303]

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[294] Respondent's Rejoinder, para. 1015.
[295] Claimants' Rejoinder, para. 476.
[296] Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, **CE-384**.
[297] Claimants' Rejoinder on Jurisdiction, para. 476.
[298] Agreement between D. Obradović, Lundins, W. Rand and Sembi, 22 February 2008, Article 1, **CE-28**.
[299] Respondent's Rejoinder, paras. 1022, 1015.
[300] *Ibid*, para. 1028.
[301] *Ibid*, paras. 1019-1025.
[302] Claimants' Reply, para. 625.
[303] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 205, **RLA-95.**

Sembi has not made any contribution, which leaves it without standing both under the ICSID Convention and the Cyprus-Serbia BIT.[304] The strategy of double counting employed here by Claimants is not only impermissible but abusive as well, since it forced Respondent to allocate time and recourses in order to defend itself from identical claims raised under two different treaties.

161. In summary: Claimants have not made substantial contribution of capital necessary under the objective definition of an investment in accordance of Article 25 of the ICSID Convention. In any event, expenditures allegedly made by one of the Claimants should not be accepted as a contribution of others.

### 2. Claimants have no standing under the ICSID Convention

162. The dispute at hand arises directly out of the allegedly unlawful termination of the Privatization Agreement and consequential taking of shares that were the object of the contract. As non-signatories of the Privatization Agreement, Claimants lack standing to bring claims that are based on it.[305]

163. Claimants continue to insist on the analogy between the position of Mr. Obradovic and a local subsidiary owned by an investor.[306] The analogy remains untenable.

164. Claimants do not own, directly or indirectly, Mr. Obradovic in the sense in which proprietary interest of a shareholder in a local company could allow the shareholder to claim damages stemming from the breach of a contract concluded by his company. The Agency concluded the Privatization Agreement with Serbian natural person, not with a foreign-owned local company and it certainly did not undertake to guarantee Claimants their contractual rights from their agreements with Mr. Obradovic.

165. Claimants argue that their contractual rights, arising from their contracts with Mr. Obradovic, give them the basis to bring a claim in relation to a contract signed by Mr. Obradovic.[307] This is clearly wrong, not only because it would go against the privity of contract, but more importantly, because the Agency (and under the Claimants' understanding – Respondent) did not accept Claimants as entities to whom it would owe any duties under the Privatization Agreement.

166. Claimants' argument, in its essence, denies Mr. Obradovic the benefit of a separate legal personality. It is not just unsustainable but disingenuous as well: Claimants were perfectly content to accept Mr. Obradovic's ability to enter the Privatization Agreement in his personal capacity when it allowed them to delay the payment of the purchase price under the Privatization Agreement for almost six years. Yet, it is for the sake of Claimants' case in this proceeding that such capacity became irrelevant.

[304] Respondent's Rejoinder, paras. 759-770.
[305] *Ibid*, paras. 1038-1043.
[306] Claimants' Rejoinder on Jurisdiction, para. 497.
[307] Claimants' Rejoinder on Jurisdiction, para. 499.

## E. CLAIMANTS' CLAIMS AMOUNT TO ABUSE OF PROCESS

167. As previously explained, the present proceeding is essentially an attempt of Claimants to manipulate ICSID mechanism and to use it contrary to its intended purpose.[308] Information that came to light during the Hearing and immediately after its conclusion work only to confirm this conclusion.

168. *First*, it has transpired during the Hearing that Mr. Obradovic still owes EUR 2.7 million to Sembi.[309] This fact squarely fits into description of the relationship between Messrs. Obradovic and Rand that Mr. Obradovic shared with the Agency during the February 2014 meeting: the intended transfer of shares in BD Agro was part of the deal which would have resulted in the exchange of those shares for property arguably held by Mr. Rand.[310] Since the transfer never occurred, Claimants are now using the proceeding initiated against Respondent to collect their claim against Mr. Obradovic. Bering in mind that Messrs. Obradovic and Rand obviously share a habit of entering into verbal business arrangements, there is no way of telling what does the Claimants' key witness stand to gain in the event Claimants are successful in the arbitration. One can safely assume, however, that at the very least his debt towards Sembi would be waived. What follows is that (i) Mr. Rand was not a beneficial owner of BD Agro's shares in February 2014, (ii) the precise details of the arrangement between Mr. Rand and Mr. Obradovic were purposefully kept from the Tribunal so that Claimants could gain standing under the BITs and the ICSID Convention and (iii) Mr. Obradovic's testimony in this arbitration does not have any credibility what so ever.

169. *Second*, in their latest written submission on jurisdiction, Claimants attempted to refute the Respondent's argument that the beneficial ownership theory was fabricated in order to circumvent jurisdictional obstacles, by specifically referring to the Sembi's 2008 Financial Statement and the fact that the document was filed in 2009.[311] It has now been revealed that the document was in fact filed with the Cypriot Registry of Companies only in August 2014.[312] This shows not only the Claimants' intention to deceive Respondent and to manipulate the Tribunal, but also that Claimants attempted to obtain and register their ownership in BD Agro during the time in which the dispute was at the very least foreseeable,[313] if not unavoidable. Consequently, Claimants' conduct represents an abuse of the arbitration mechanism and their putative investment should be denied protection under the ICSID Convention.[314]

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[308] Respondent's Rejoinder, paras. 1044-1059; Transcript, Day 1, 187:01-188:17 (Djundic),
[309] Transcript, Day 3, 7:03-12 (Markicevic).
[310] Minutes of the meeting at the Privatization Agency held on 4 February 2014, p. 1, **RE-36**.
[311] Claimants' Rejoinder on Jurisdiction, para. 705.
[312] Letter from the Cyprus Department of the Commercial Registry of Companies and Official Receiver, 11 August 2021**, RE-674**.
[313] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 554, **RLA-188**.
[314] Respondent's Rejoinder, para. 1057.

## III. BREACHES AND TERMINATION OF THE PRIVATIZATION AGREEMENT

170. The present case to a large extent revolves around issues of interpretation of the Privatization Agreement, in particular, the scope of the Buyer's obligations under Article 5.3.4, whether these obligations were breached, and whether the Privatization Agreement could be terminated due to a breach of Article 5.3.4 in the circumstances of the present case.

171. The present chapter will deal with (i) the purpose of Article 5.3.4; (ii) the breach of Article 5.3.4; (iii) why did the Agency request evidence with respect to other breaches; and (iv) whether the termination due to the breach of Article 5.3.4 was valid under Serbian law.

### A. PURPOSE OF ARTICLE 5.3.4

172. With reference to Article 2 of Law on Privatization,[315] which sets the principles of privatization, the Serbian Supreme Court of Cassation has consistently been emphasizing that: "*[t]he primary objective of privatization is not the sale of the subject of privatization by itself, but the investment in the development of the subject in order to promote the overall economic development of the society and the creation of stable business and social security conditions*".[316] Privatization agreements were one of the principal instruments for implementation of these goals, and this is also accepted by Claimants' expert, Mr. Milosevic.[317] This means that the purpose of the privatization agreements was not solely to collect money from selling privatized companies.[318]

173. Importantly, the Supreme Court of Cassation held that *all* contractual obligations from a privatization agreement are equally relevant for the achievement of the goal of privatization expressed in Article 2 of the Law on Privatization: "*[t]he goal of privatization defined by Article 2 Par. 1 item 1 of the Law on privatization can be achieved only through* ***full realization of all contractual obligations. Failure to perform any of the contractual obligations obstructs the very purpose of privatization***. *The above legal provision stipulates that privatization is based on creating conditions for development of the economy and social*

[315] Article 2 of the Law on Privatization and the goals it enunciates have remained the same throughout the privatization process. See Comparison between Article 2 of the 2001 Law on Privatization before the 2005 amendments and Article 2 of the 2001 Law on Privatization after the 2005 amendments, **RE-520**. This is also confirmed by Claimants' expert Mr. Milosevic, Transcript, Day 5, 35:1-7 (Milosevic).

[316] See Judgment of the Supreme Court of Cassation of the Republic Serbia, Prev 129/2013, dated 19 June 2014, p. 2, **RE-165**; see, also Judgment of the Supreme Court of Cassation of the Republic Serbia, Prev. 104/2013, dated 19 June 2014, p. 3, **CE-253**.

[317] Transcript, Day 5, 12:25-13:1 (Milosevic).

[318] "*Q. Having in mind the purposes of the privatization that we just mentioned, could we say that the purpose of privatization agreements was not solely or exclusively and simply to get the money from selling the socially-owned companies, would you agree? A. Yes I would agree with that.*" Transcript, Day 5, 13:2-7 (Milosevic). See, also, First Expert Report of Mr. Milos Milosevic, para. 59(a).

*stability.*"[319] Conversely, the privatization agreement may be terminated for Buyer's failure to perform any of the obligations stipulated therein.[320]

174. Obligation stipulated in Article 5.3.4 is thus no exception.

175. Article 5.3.4. precluded the Buyer from encumbering with pledge the fixed assets of BD Agro during the term of the agreement, "*except for the purpose of securing claims towards the subject stemming from the regular business activities of the subject, or except for the purpose of acquiring of the funds to be used by the subject.*"[321] With reference to Serbian court practice, Professor Radovic states that the ultimate purpose of this article was to ensure that BD Agro would be "*a stable company with a continuous, viable business activity*".[322] She also stated that the purpose of Article 5.3.4 was not only to secure the full payment of the purchase price, as argued by Mr. Milosevic, but also: "*a) to secure fulfillment of other obligations of the Buyer (some of which continue to exist even after the payment of the purchase price); and b) to secure a general public interest in the well-being of privatized companies*."[323]

176. At the Hearing, Mr. Milosevic agreed that purpose of Article 5.3.4 was to *support other provisions of the Privatization Agreement* (not only the payment of the price) but disagreed that purpose of Article 5.3.4 was the achievement of economic and social stability, as it was an accessory provision.[324] However, his attempt to differentiate among provisions of privatization agreements in this way is unconvincing, especially having in mind the above mentioned practice of Serbian courts which unequivocally stated that *all* contractual provisions are of equal importance for achieving the goals of privatization. Equally unconvincing is his attempt to picture this case law as irrelevant, by saying that it related to termination of privatization agreements concluded before the Law on Privatization was amended in 2005, and not to the Privatization Agreement in the present case.[325] As explained

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[319] Judgment of the Supreme Court of Cassation nos. Prev1 12/2013 & Pzz12 59/2013 dated 14 November 2013, pp. 5-6, **RE-62** (emphasis added). In this case, the Supreme Court of Cassation found that contracts on sale of certain real estate concluded by the subject of privatization were null and void because even if they were concluded after the full payment of the purchase price, which essentially made the privatization buyer the majority owner of the privatized company for purposes of the then applicable Law on Companies, they were concluded at the time when the privatization agreement was not fulfilled in its entirety (i.e. the investment obligation remained unfulfilled despite various notices from the Agency), and with the intention to circumvent and thwart the principal goals of privatization. See, also, Judgment of the Supreme Court of Serbia, Prev. 410/2005 dated 1 March 2006, p. 2, **RE-166** ("… *the objective of privatization can be achieved only by the full realization of all obligations established by the contract on the sale of the socially-owned capital*.").

[320] See Judgment of the Supreme Court of Serbia, Prev. 410/2005 dated 1 March 2006, p. 2, **RE-166**. ("… *a contract on the sale of the socially owned capital can be legally terminated due to non-fulfillment of only one of the contracted commitments"*) and Judgment of the Supreme Court of Cassation no. Prev-104/2013 dated 19 June 2014, p. 3, **CE-253** ("…*the contract can be terminated even in the situation of partial fulfilment.*").

[321] Article 5.3.4. of the Privatization Agreement, **RE-12**.

[322] Second Expert Report of Mirjana Radovic, para. 27.

[323] See Second Expert Report of Mirjana Radovic, para. 27; see, also, Judgment of the Commercial Appellate Court No. Pž 8687/2011, dated 18 December 2012, p. 5, **CE-722**.

[324] See Transcript, Day 5, p. 41:18-21 (Milosevic) ("*Well, as it is accessory obligation, I would not go that far. Its purpose is to support other provisions of the Privatization Agreement, which provides the purpose of privatization*").

[325] See Second Expert Report of Milos Milosevic, paras. 28-30, Transcript Day 5, 30:18-31:11.

by Prof. Radovic, the courts made these pronouncements on the basis of unchanged Article 2(1) of the Law on Privatization stating goals of the privatization, and not in relation to Article 41 which was amended in 2005.[326] Therefore, the pronouncements that *all* contractual provisions are of equal importance convey the principled stance of the highest Serbian court and are not restricted, and cannot be restricted, to the specific situation of terminations of pre-2005 privatization agreements. Indeed, many of these pronouncements were made years after the 2005 amendments were adopted.[327]

177. Accordingly, it is misleading to state that the above cited court practice is irrelevant for analysis of the obligations from the privatization agreements concluded after 2005 amendments of the Law on Privatization. Tellingly enough, Claimants and their expert were unable to provide a single court decision (referring to the Law on Privatization before or after its amendments in 2005) that would deviate from the above practice that *all* obligations from the privatization agreements are of equal importance.

178. In conclusion, this court practice fatally undermines Mr. Milosevic's testimony that Article 5.3.4 is "*… an accessory obligation, which does not have purpose of its own…*"[328] Since the adopted position in Serbian law is that all obligations under privatization agreement are equally important and must be performed in full, there are no obligations of lesser importance that need not be fulfilled once other "main" or "essential" obligations have been performed.[329] As a consequence, a breach of Article 5.3.4 does not cease to exist at the moment the purchase price is paid in full, as argued by Claimants.[330]

179. There were only two situations in which the property of BD Agro could have been pledged in accordance with Article 5.3.4: (1) in order to secure receivables against BD Agro resulting from its regular business operations, and (2) in order to acquire money to be used by BD Agro. Claimants argue that the second exception from the prohibition to constitute a pledge under Article 5.3.4 should be interpreted so that the words "to be used by the subject" (in Serbian: "*čiji će korisnik biti subjekt*") encompass also lending of the funds secured by the pledge to third persons, because seemingly these funds are also "used" by the privatized company in the lending. Accordingly, there was no violation of Article 5.3.4. when BD Agro loaned part of the funds from the 221 Loan to Crveni Signal and Inex.[331]

180. Claimants' interpretation is wrong considering the wording and purpose of Article 5.3.4, as well as Serbian court practice. As far as the wording of this provision is concerned,

[326] Second Expert Report of Mirjana Radovic, para. 22.

[327] See, e.g., Judgment of the Supreme Court of Cassation nos. Prev1 12/2013 & Pzz12 59/2013 dated 14 November 2013, pp. 5-6, **RE-62**; Judgment of the Supreme Court of Cassation no. Prev-104/2013 dated 19 June 2014, p. 3, **CE-253**.

[328] See Transcript, Day 5, 16:21-23 (Milosevic). See, also, Rejoinder, paras. 219-221.

[329] "Essential" obligations, one of Mr. Milosevic's inventions, are discussed in the part dealing with termination, see III. D. 3 below.

[330] See Claimants' Opening Statement ppt, slide 112; Transcript, Day 1, 44:9- 45:23; First Expert Report of Milos Milosevic, paras. 76-77. For more, *see* III. D. 2, below.

[331] "*There was no breach of Article 5.3.4 at all, because the entirety of the EUR 2.2 million loan was used by BD Agro*", Claimants' Opening Statement ppt, slide 112. See, also, Second Expert Report of Milos Milosevic, para. 46 ("When BD Agro provides a loan to another entity, the funds are used by BD Agro (to grant the loan)". Therefore, Article 5.3.4… does not prevent BD Agro from loaning funds acquired by BD Agro from loans secured by BD Agro's assets.").

Respondent considers that the Serbian original puts a clear emphasis on the end-use of the funds by the subject of privatization itself, i.e. BD Agro. According to Prof. Radovic, "… *this could only mean that the pledges could have secured BD Agro's acquisition of funds* ***for the benefit of BD Agro*** *…*"[332] When asked about the meaning of the provision at the Hearing, the interpreters, who were obviously not lawyers, allowed that both these understandings fit with the text.[333]

181. However, if one considers the role and purposes of Article 5.3.4, it is immediately clear that Claimants' interpretation makes a mockery of this provision. One of its purposes is precisely to safeguard the property of the privatized company and to prevent its use for the benefit of third persons.[334] While it is true that the privatized company could make loans to third persons, the effect of Article 5.3.4 is different as it prohibits that the loans are given from the funds obtained by pledging the company's property. The impact on the company's well-being and its property is quite different in these two cases: in the first one, the company loans cash that is at its disposal, in the second it *also* has to pledge its fixed assets for that purpose, thereby endangering its very substance.

### B. BREACH OF ARTICLE 5.3.4.

182. In principle, breach of Article 5.3.4 could take two forms: **the first scenario** was that some third party takes a loan from the bank while property of the subject of privatization is pledged as security for the loan; the **second scenario** was that the subject of privatization itself borrows money from the bank and pledges its property as security for the loan, while, at the same time, it transfers the funds from the loan to a third party.

183. In both scenarios there is **(1)** a pledge in favour of the lender bank on the property of subject of privatization, while **(2)** the user of the loaned funds secured by the pledge is a third party. If these two factors obtain, there is a breach of Article 5.3.4.

184. This breach could be remedied in two ways, either **(1)** by deleting the pledge existing on the property of subject of privatization or **(2)** by having the money transferred to third parties repaid to the subject of privatization (in case of the second scenario).

#### 1. There were several breaches of Article 5.3.4

185. After the conclusion of the Privatization Agreement Mr. Obradovic repeatedly breached Article 5.3.4. All these breaches were eventually remedied apart from the breach that concerned the money given to Inex and Crveni Signal from 221 Million Loan, (the loan taken by BD Agro from Agrobanka and secured by the pledges over BD Agro's property).[335]

186. The Agency began giving notices of breach that ultimately led to the termination of the

[332] See, also, Second Expert Report of Mirjana Radovic, para. 24 (emphasis added).
[333] See Transcript, Day 5, 65:18-21 (Interpreter) ("*So we do not see any difference in the intended meaning of the provision*").
[334] See previous subsection.
[335] Respondent's Counter-Memorial, paras. 19-134; Respondent's Rejoinder, paras. 78-132.

Privatization Agreement starting with the notice of 25 February 2011.[336] This notice came after the control of fulfilment of the obligations from the Privatization Agreement conducted in the period from June 2010 to January 2011.[337] During that control the Agency determined existence of several breaches of Article 5.3.4:

a) BD Agro pledged its property as a security for repayment of the loan that company Vihor took from Erste bank in 2010, the repayment of which was subsequently undertaken by BD Agro;[338]

b) BD Agro pledged its property as a security for the loans taken by companies Maring and Vihor from Privredna banka in 2010;[339]

c) BD Agro pledged its property as a security for the RSD 65 million loan taken in June 2010 from Agrobanka by Crveni Signal;[340]

d) BD Agro lent the funds obtained from the bank loans to various other companies;[341]

e) BD Agro took 221 Million Loan and pledged its property while the borrowed funds were then transferred to Inex and Crveni Signal.[342]

187. In other words, during control, the Agency determined that the Buyer breached Article 5.3.4 in two ways: **first,** that BD Agro established pledges over its property as a security for the bank loans taken by third parties,[343] and **second,** that BD Agro lent to various companies the funds that it obtained from the bank loans secured by the pledges on its property.[344] In its notice to Mr. Obradovic from 25 February 2011, the Agency thus wrote:

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[336] Notice of the Privatization Agency on Additional Time Period dated 25 February 2011, **CE-31** and **RE-388**.

[337] Proposal of the Center for Control for the session of the Commission for Control of 24 February 2011, p. 93, point SUMMARY, **RE-68.1**.

[338] On 28 June 2010, Vihor, as the assignor, BD Agro, as the assignee, and Erste bank, as creditor, concluded the Debt Takeover Agreement. The loan that BD Agro undertook from Vihor in this manner amounted to EUR 474,379.40. *See Ibid*, p. 94, point 2.2); p. 95, point 3.3) and point NOTE; p. 96, point LOANS TAKEN BETWEEN TWO CONTROLS – last bullet; pp. 104-105, point 2.1).

[339] BD Agro established the pledge on its land in the amount of EUR 650,000 as a security for receivables that Privredna bank had towards Vihor and Maring. These receivables arose from several prior loan agreements that these companies had concluded with Privredna bank (Short-term Loan Agreement dated 3 February 2010 in the amount of RSD 17 million, Short-term Loan Agreement dated 28 June 2010 in the amount of EUR 417,000, and the Agreement on Securing Liabilities of Privredna bank dated 28 June 2010). *See* Proposal of the Center for Control of 24 February 2011, **RE-68.1**, p. 94, point 1); p. 104, point 1).

[340] At the time of preparation of this Proposal, the Agency did not have all the necessary documentation to determine that it was the loan taken by Crveni Signal that BD Agro was securing by establishing the pledge on its property. Nevertheless, the Agency found that BD Agro's property was pledged in favour of Agrobanka on the basis of the Loan Agreement no. K-181/10-00 concluded on 2 June 2010 in the amount of RSD 65 million. After Mr. Obradovic delivered the first audit report in April 2011, it became clear that this Loan Agreement no. K-181/10-00 related to RSD 65 million loan that Crveni Signal took from Agrobanka on 2 June 2010. *See* Proposal of the Center for Control of 24 February 2011, **RE-68.1**, p. 95, point 3); p. 106, point 3) – first bullet; Audit report by Auditor doo of 29 April 2011, **RE-13**, p. 8.

[341] Proposal of the Center for Control of 24 February 2011, **RE-68.1**, p. 96, last paragraph; p. 122, third paragraph between Table 3 and Table 4.

[342] Proposal of the Center for Control of 24 February 2011, **RE-68.1**, p. 94, point 2.1); p. 105-106, point 2.2).

[343] *See* para. 186 above, points a), b) and c).

[344] See para. 186 above, points d) and e).

*"[…] the Buyer is given additionally granted term of 60 days from the day of the receipt of this Decision for fulfilment of obligations referred to in items 5.3.3 and 5.3.4 of the Agreement and submission of a report (previously approved by the Agency in writing), which will be prepared, at the expense of the Buyer, by a reputable audit firm, containing the findings on actions of the Buyer undertaken in the additionally granted term, stating whether the Buyer has fulfilled the obligations referred to in items 5.3.3. and 5.3.4 of the Agreement, as well as the statement relating to the following circumstances: […]*

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

*- whether all the **loans given to third parties** by the Subject of privatization **from loan amounts secured by encumbrances** on the property of the Subject have been **returned**; […]"*[345]

188. Therefore, the Agency clearly determined how the said breaches of Article 5.3.4 should be remedied. Depending on the circumstances of the particular breach, it could have been done either (i) by deleting the pledges established in favour of the banks for the obligations of third parties, or (ii) by returning the money given by BD Agro to third parties from the loans secured by the pledges on BD Agro's property.

189. Auditors engaged by Mr. Obradovic understood quite well what circumstances the Agency expected to be analysed with respect to the question of the fulfilment of the obligations from Article 5.3.4.[346] In particular, the first audit report, which was delivered by Mr. Obradovic in April 2011, noted the following:

*"By the said Notice, the Buyer was granted an additional time limit for the submission of an Extraordinary Auditor's Report related to the fulfilment of the obligations envisaged by Items 5.3.3 and 5.3.4, as well as a declaration to be included in this Report related to the following circumstances:*

- *That all **encumbrances** have been deleted and that all other security instruments for the obligations of third parties have been returned, as well that the encumbrances registered with no grounds have been deleted (the debt has been repaid, new mortgages and possessory liens have been registered, while the old ones have not been deleted), legal part;*
- *That all the **borrowings** granted by the Entity to third parties, from credit funds secured by encumbrances over the property of the Entity, have been repaid;"*[347]

[345] Notice of the Privatization Agency on Additional Time Period dated 25 February 2011, pp. 2-3, **CE-31** (emphasis added).

[346] Audit report by Auditor doo of 29 April 2011, **RE-13-additional translation**, pp. 5-18; Audit report by Auditor doo of 22 November 2011, **RE-18-additional translation**, pp. 5, 7-15; Audit report by Auditor doo of 2 February 2012, **RE-223-additional translation**, pp. 6-8, 12-39; Audit report by Auditor doo of 13 December 2012, **RE-19-additional translation**, pp. 6-20; Audit report by Prva revizija of 15 January 2015, **RE-105**, pp. 1, 3-4.

[347] Audit report by Auditor doo of 29 April 2011, **RE-13**, pp. 2 and 3.

190. Having in mind the above task, the auditor stated that it was able to declare the existence of: **(i)** pledges mentioned in points a), b) and c) above,[348] as well as **(ii)** unpaid loans mentioned in points d) and e) above.[349] In other words, already in the first audit report the unreturned loans given to Inex and Crveni Signal were noted as the circumstances relevant for the breach of Article 5.3.4. Subsequent audit reports from November 2011 and February 2012 also dealt with the above breaches of article 5.3.4.[350]

191. Finally, the audit report from December 2012 confirmed that: **(i)** the only pledge established for the obligations of third parties that was not deleted was the pledge given for Crveni Signal's RSD 65 million loan, mentioned in point c) above,[351] and that **(ii)** the only loans granted to third parties from the money acquired on the basis of the bank loans secured by pledges over BD Agro's property that were not yet returned were the loans given to Inex and Crveni Signal from 221 Million Loan mentioned in point e) above.[352]

### 2. The 65 Million Breach and the 221 Million Breach

192. First, Respondent finds it important to shortly repeat the sequence of events that caused the 65 Million Breach and 221 Million Breach.

193. On 2 June 2010, Crveni Signal concluded the Short Term Loan Agreement with Agrobanka in the amount of RSD 65 million.[353] As a security for repayment of that loan BD Agro established the pledge on its property by Court Decision from 7 June 2010 (65 Million Pledge[354]). That is how **65 Million Breach** occurred.

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[348] Audit report by Auditor doo of 29 April 2011, **RE-13-additional translation, pp. 9-18.**

[349] Audit report by Auditor doo of 29 April 2011, **RE-13**, pp. 7 and 8.

[350] Audit report by Auditor doo of 22 November 2011, **RE-18**, p. 2; Audit report by Auditor doo of 2 February 2012, **RE-223**, p. 2.

[351] Auditor's Report from December 2012, **RE-19-additional translation,** pp. 17-18: "*With respect to the review of pledges established on the property of the entity in favour of third parties given in the Auditor's Report from February 2012, only the mortgage as follows remains:*
*1. In LFR number 3229 CM Ugrinovci, on the Entity's real estate:*
*- By the Decision of the First Basic Court in Belgrade Dn. 7084/10 of 7 June 2010, and on the basis of the Pledge statement certified before the Second Basic Court in Belgrade, Auth. no. 12436/2010 dated 7 June 2010, it is allowed to register pledge right - an executive out-of-court mortgage in order to secure the Creditor's monetary claim against the company CRVENI SIGNAL - BEOGRAD AD Belgrade, based on the Short-term Loan Agreement K-181/10-00 dated 2 June 2010 in the amount of 65,000,000.00 dinars, with a repayment period of 60 days from the date of first use, with interest on the used part of the loan at a nominal interest rate that is variable and which, at the time of concluding the agreement, amounts to 1.60% per month, which is calculated every first day in the current month for the previous month, by applying the compound method of calculation to the debt balance, concluding with the book-keeping day of the month and all other provisions from the specified contract in favor of the Creditor*."

[352] Audit report by Auditor doo of 13 December 2012, **RE-19**, p. 6 ("*Based on the specification of the loans granted to third parties from loans secured to the assets of the Entity, as well as by an insight into the analytical records from the Entity's bookkeeping, we have determined that until the date of this Report, the balance remained unchanged in relation to the previous Auditor's Report and amounts to* ***RSD 18,170,690.00*****. [Inex]** […] *Furthermore […] the Entity appears as a guarantor to the [Agrobanka], based on a short-term loan which a company* ***Crveni signal a.d.*** *Beograd concluded with the aforementioned bank […]. On the basis of the accounting data of the Entity, the balance on the stated basis until the date of the Report is* ***RSD 65,904,569.84****. The payment on the above basis was made by the Entity out of the [Agrobanka] […] of 29 December 2010*."; emphasis added).

[353] Short Term Loan Agreement no. 181/10-00 of 2 June 2010, **RE-4**.

[354] Decision of the First Basic Court in Belgrade no. Dn-7084/10 of 7 June 2010, **RE-3**.

194. On 22 December 2011 BD Agro took 221 Million Loan from Agrobanka[355] and established the pledge on its property by Court Decision from 14 January 2011 (221 Million Pledge[356]). On 28 December, BD Agro assumed the 65 million debt of Crveni Signal towards Agrobanka mentioned in the previous paragraph.[357] On 29 December 2011, Agrobanka transferred 221 million to BD Agro's account, and on the same day BD Agro paid to Agrobanka the 65 million debt plus interest (app RSD 71 million).[358] At the same time, also on 29 December 2010, BD Agro and Inex concluded an Agreement on Interest-Free Loan to Inex by which BD Agro undertook to provide to Inex a cash loan in the amount of RSD 32 million.[359] The pertinent amount was also transferred to Inex on 29 December from the funds obtained from the 221 Million Loan.[360] That is how **221 Million Breach** occurred (in fact there were two "221 Million" breaches, one related to the loan to Crveni Signal and another one related to the loan to Inex).

195. As consequence of these transactions, Agrobanka held two pledges over BD Agro's property[361] – 65 Million Pledge that was subsequently deleted and 221 Million Pledge that has never been deleted.

196. What is also very important to note is what was the motive that led to these breaches – it was nothing else but Mr. Obradovic's personal benefit. Namely, on 2 June 2010, Crveni Signal also concluded a loan agreement by which it loaned RSD 65 million to Mr. Obradovic.[362] On that same day, immediately after receiving the loan from Agrobanka, Crveni Signal transferred RSD 65,000,000 to the personal bank account of Mr. Obradovic (as a loan).[363] Thus, the money that Crveni Signal received from Agrobanka, which was secured by BD Agro's property (the 65 Million Breach), was actually used for the benefit of Mr. Obradovic.[364] The same goes for the funds that BD Agro transferred to Inex (as part of the 221 Million Breach), which eventually also ended up on Mr. Obradovic's personal bank account.[365]

197. At the Hearing, Ms. Vuckovic confirmed the existence of these two breaches in particular:

"*The first one had to do with the third party taking the loan, and having a*

[355] Short Term Loan Agreement no, K-571/10-00 of 22 December 2010, **RE-6**.;
[356] Decision of the First Basic Court in Belgrade no. Dn-14124/10 of 14 January 2011, **RE-9**; Statement of pledge no. Ov-37246/2010 of 28 December 2010, **RE-8**.
[357] Agreement on Assumption of Debt of 28 December 2010, **RE-11**.
[358] BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.
[359] Agreement on Interest-Free Loan of 29 December 2010, Articles 1 and 4, **RE-10**. At the time the Agreement on Interest-Free Loan to Inex was concluded, on 29 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 105.88 (32,000,000 ÷ 105.88 = 302,228.94). National Bank of Serbia RSD Exchange Rate on 29 December 2010, **RE-82.**
[360] BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.
[361]There were actually many resulting pledges on many different cadastral parcels *i.e.* lots. While the 65 Million Pledge indeed related to the pledge over only one cadastral parcel (lot no. 3999/1), the 221 Million Pledge related to numerous parcels (lots no. 4670, 4673, 4674, 4675 etc.). *See* Decision of the First Basic Court in Belgrade no. Dn-7084/10 of 7 June 2010, **RE-3**; Decision of the First Basic Court in Belgrade no. Dn-14124/10 of 14 January 2011, **RE-9**.
[362] Loan Agreement between Crveni Signal and D. Obradović, 2 June 2010, **CE-831**.
[363] Crveni Signal Bank Statement, 2 June 2010, **RE-372**.
[364] Respondent's Rejoinder, paras. 121-122.
[365] Bank Statement of Mr. Obradovic's, 14 February 2011, **RE-437**; Respondent's Rejoinder, para. 123.

*mortgage for that loan on the assets of the entity undergoing privatization. This was the loan that Crveni Signal took from Agrobanka, that was RSD 65 million for which a mortgage was established on the assets of the entity undergoing privatization*."[366]

and

*"The other way of breaching this contractual obligation had to do with the fact that the entity undergoing privatization took a loan of 221 million from the bank, which was the subject of this question, and registered a mortgage on the assets of the entity while the loan was again used by third parties, more specifically, loans were given to the legal persons Crveni Signal and Inex Nova Varos*."[367]

198. The last audit report provided by Mr. Obradovic in January 2015, stated that: "*Until the Report date issuance, not all the* ***[loans]***[368] ***given by BD Agro to third persons*** [Crveni Signal and Inex] *from loan assets secured by burdens on property of BD Agro have been returned on 8 April 2011* [221 Million Breach]. ***The encumbrances based on the security instruments for the obligations of third parties*** [65 Million Loan] *have not been deleted, but these obligations have been settled and the conditions have been created for the deletion of the mortgage on this basis* [65 Million Breach]."[369]

199. In other words, Mr. Obradovic's auditor confirmed that the 221 Million Breach was not remedied, while the 65 Million Breach was on its way to being remedied, because the debt had been repaid but the related pledge had not yet been deleted from the register. For this reason, in its last notice from July 2015, the Agency requested from Mr. Obradovic to: "*Provide a statement on performance of the obligations [...] referred to in [...] 5.3.4 [...] and confirm [1] that all* ***encumbrances were deleted*** *and all other security instruments for the obligations of third persons were returned, burdens registered without basis were deleted, as well as that [2] all the* ***loans*** *given by the Subject to third persons from the loan assets secured by the encumbrances on the property of the Subject are* ***returned***."[370]

200. Here, it should be noted that Claimants asked Ms. Radovic Jankovic at the Hearing whether the above citation "*meant all of those things had to be done in order to be in compliance with the agreement from the Agency's perspective*".[371] Naturally, Ms. Radovic Jankovic replied affirmatively. Simply, the 65 Million Breach could be remedied by deleting the pledge that was established on BD Agro's property for securing the 65 million bank loan granted to Crveni Signal, while the 221 Million Breach could be remedied by returning the funds loaned by BD Agro to Inex and Crveni Signal. For this reason, the Agency requested both (1) deleting the **pledges** established in favour of the bank for the obligations of third

[366] Transcript, Day 3, 4:25-5:2 (Vuckovic).
[367] Transcript, Day 3, 5:2-12 (Vuckovic).
[368] Serbian version of the document states "*pozajmice*". Thus, Respondent corrects its translation of **RE-105** (Audit report by Prva revizija of 15 January 2015) by replacing the word "*borrowings*" with the word "*loans*".
[369] Audit report by Prva revizija of 15 January 2015, **RE-105**, p. 4 (emphasis added).
[370] Letter from the Agency to D. Obradović and BD Agro, 23 June 2015, point 7, **CE-351** (emphasis added).
[371] Transcript, Day 3, 182:2-18 (Radovic Jankovic).

persons and (2) return of the **loans** given by BD Agro to third persons from the bank loans BD Agro took and secured by the pledges on its property.

201. As also confirmed by Ms. Vuckovic at the Hearing,[372] Mr. Obradovic remedied the 65 Million Breach by eventually deleting the pledge given by BD Agro as a security for the 65 million loan taken by Crveni Signal in June 2010 from Agrobanka, but he failed to remedy the 221 Million Breach.

### 3. How Mr. Obradovic remedied the 65 Million Breach

202. On 10 September 2015, Mr. Obradovic sent a letter to the Agency and said that he delivers "*evidence that BD Agro is in possession of all the documents needed for deletion of pledges registered on its immovable property as security instruments for the loans BD Agro received from Nova Agrobanka […], which were partially used to finance loans approved to related parties — Inex — Nova Varos a.d. Nova Varos and Crveni Signal a.d. Beograd."*[373]

203. In other words, Mr. Obradovic claimed that he has obtained documentation necessary for deletion of the 221 Million Pledge. However, even a cursory look at these documents is sufficient to conclude that they in fact related to the 65 Million Loan, *i.e.* 65 Million Pledge.[374] The same goes for the documents delivered by Mr. Obradovic on 11 September 2015, which proved removal of the pledge established by court decision of 7 June 2010, i.e. removal of the 65 Million Pledge. [375] Mr. Obradovic thus remedied only the 65 Million Breach, not the 221 Million Breach.[376]

204. On the other hand, the pledge established by court decision of 14 January 2011, *i.e.* the 221 Million Pledge, remained even after this arbitration was well underway in March 2019.[377] The same goes for the loans given to Crveni Signal and Inex from the 221 Million Loan that BD Agro borrowed from Agrobanka. Crveni Signal still owes RSD 44 million that BD Agro loaned to it from the 221 Million Loan (which was one part of 221 Million Breach) for settling the 65 Million Loan to Agrobanka, while Inex still owes RSD 27 million that BD Agro lent to that company from the 221 Million Loan (which was another part of 221 Million Breach).[378] In conclusion, all the breaches of Article 5.3.4. determined in January 2011 were subsequently remedied by Mr. Obradovic, except the 221 Million Breach, which has not

[372] Transcript, Day 4, 4:16-6:2 (Vuckovic).
[373] Letter from Mr. Djura Obradović to Privatization Agency, 8 September 2015, p. 3, **CE-48.**
[374] Confirmation by Nova Agrobanka on fulfillment of obligations from the Short Term Loan Agreement K-181/10-00 of 4 September 2015, **RE-53**; BD Agro's request for deletion of pledge registered in excerpt from the Land Register no. 2258, cadastral municipality Ugrinovci of 7 September 2015, **RE-54**. *Cf.* Decision of the First Basic Court in Belgrade no. Dn-7084/10 of 7 June 2010, **RE-3**.
[375] Decision of the Land Register, 7 September 2015, **CE-87**; *Cf.* Decision of the First Basic Court in Belgrade no. Dn-7084/10 of 7 June 2010, **RE-3**.
[376] Respondent's Counter-Memorial, para. 75; *See also* Respondent's Rejoinder, paras. 126-132.
[377] *See* Statement of pledge no. Ov-37246/2010 of 28 December 2010, **RE-8**; Decision of the First Basic Court in Belgrade no. Dn-14124/10 of 14 January 2011, **RE-9**; *Cf.* Excerpt from the Land Register no. 4031, cadastral municipality Dobanovci of 13 March 2019, **RE-45**.
[378] Analytical card of debts owed by Inex on 25 March 2019, **RE-1** (RSD 26.539.008,45); Analytical card of debts owed by Crveni Signal on 25 March 2019, **RE-190** (RSD 43.847.213,56); Respondent's Rejoinder, paras. 226, 361; *See also* Transcript, Day 3, 47:19-48:8 (Markicevic). BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**.

been remedied until the present day.[379]

### 4. The Buyer knew what constituted the breach of Article 5.3.4

205. At the Hearing, Claimants have introduced a new narrative according to which the loans given by BD Agro to Crveni Signal and Inex could have been easily repaid by Claimants had they known or had they been told that this would remedy the breach of Article 5.3.4 and solve Mr. Obradovic's issues with the Privatization Agency. Instead, they say, they did not know what constituted the breach of Article 5.3.4 and how to remedy it, and also did not know whether any such remedy would have been sufficient considering other breaches invoked by the Agency.[380] This alleged lack of knowledge is however in clear contradiction to the evidence on record.

206. Throughout the period of 2011-2015 there was a lot of communication between the Agency and Mr. Obradovic/BD Agro regarding the breach of Article 5.3.4. And yet, none of these communications show that Mr. Obradovic (or Mr. Markicevic or Mr. Brosko and Mr. Rand) ever approached the Agency and requested clarification as to what represented the breach of Article 5.3.4 and how the breach could be remedied. In fact, as explained above, Mr. Obradovic duly remedied all other breaches of Article 5.3.4 established during Agency's control performed from December 2010 to January 2011.[381] This clearly shows that he understood very well what the breaches were and how they should be remedied.

207. When it comes to the 221 Million Breach, the situation was also more than clear to Mr. Obradovic (and also to Mr. Markicevic who was BD Agro's general manager, and to Messrs. Rand, and Broshko since the fulfilment of the Privatization Agreement was also disused in the context of the assignment of the agreement to Coropi). There is a plethora of evidence revealing that Mr. Obradovic and Mr. Markicevic liaised with the Agency and were reporting to it about the repayment of debts of Crveni Signal and Inex towards BD Agro, which were at the core of the 221 Million Breach.

208. On 9 November 2011, Mr. Obradovic reported on the status of these debts by attaching a statement from the CEO and CFO of BD Agro explicitly confirming that the loans to Crveni Signal and Inex (along with other loans in breach of Article 5.3.4) have remained unsettled.[382] In his next letter sent on 23 July 2012, Mr. Obradovic was also explaining the reasons behind difficulties in settling these loans.[383] In that same letter, Mr. Obradovic

[379] Respondent's Counter-Memorial, para. 75; Respondent's Rejoinder, paras. 126-132.

[380] See Transcript, Day 2, 37:9-16 (Rand) & 43:9-24 (Rand); Day 3, 9:10-17 (Markicevic).

[381] Proposal of the Center for Control of 24 February 2011, **RE-68.1**, pp. 94-96, 104-106, 122; Audit report by Auditor doo of 29 April 2011, **RE-13**, pp. 64-65. *Cf.* Letter from Mr. Obradovic to the Privatization Agency attaching the statement from BD Agro's director of 9 November 2011, points 2-3 and p. 3, **RE-60**; Audit Report, February 2012, pp. 57-58, **RE-223**; Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, point 2, **RE-21**.

[382] Letter from Mr. Obradovic to the Privatization Agency attaching the statement from BD Agro's director of 9 November 2011, p. 3, **RE-60**.

[383] Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, point 1, **RE-21** ("*Repayment of loans provided to third persons from credit funds took place with Crveni signal, by return of a part of the loan to BD AGRO in the amount of 5,039,853.23 dinars. The current debt of Crveni signal on this basis is 65,904,569.04 dinars (enclosure: bookkeeping sheet for 19 July 2012). […] The debt of Inex to BD AGRO has not changed and it amounts to 18,170,690.00 dinars. Within the period of a year, Inex was*

further explicitly asked "*for an additional period during which the contractual obligations may be realized*".[384] Likewise, when providing relevant information to his auditors, Mr. Obradovic again himself explicitly referred to the status of these debts.[385] Even when complaining to the Ministry in 2012, Mr. Obradovic was explicitly reporting that the loans to Crveni Signal and Inex were the only relevant loans that remained unsettled.[386]

209. All of this is also in line with Mrs. Vuckovic's testimony at the Hearing – that Mr. Obradovic knew quite well what needed to be done.[387]

210. Mr. Markicevic's letters were no different. In preparation for a meeting with the representatives of the Agency and the Ministry in December 2014, Mr. Markicevic specifically informed both the Agency and the Ministry on the status of the debts of Crveni Signal and Inex.[388] Likewise, at the meeting itself, this was one of the principal topics of discussion. In that regard, Mr. Markicevic, together with Mr. Broshko, informed the Agency that: "*in their opinion, **the biggest problems** in execution of obligations of the […] were claims which the Entity had towards the company Crveni Signal Beograd and Inex Nova Varos.*"[389]

211. Furthermore, on 2 July 2015, Mr. Markicevic wrote to the Agency that the auditor confirmed that all contractual obligations were fulfilled, except for the lending to Crveni Signal and Inex.[390]

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*336 days blocked, which prevented the settlement of obligation based on the received loan. And also with Inex, selling of a part of property out of which amount the obligation to BD Agro will be returned is under way*.").

[384] *Ibid*, p. 2.

[385] Letter from Mr. Obradovic and BD Agro to Auditor doo of 5 November 2012, point 2, **RE-20** ("[regarding] *the loans which the privatization subject granted to third persons from credit funds secured by encumbrances on property are repaid, we supply you with bookkeeping sheets k-ta 23240 – other domestic short-term loans for companies Inex ad Nova Varoš and Crveni signal ad Beograd, from which it can be seen that the loans are not returned from Inex ad N. Varoš (18,170,690.00 dinars), while the balance for loan for Crveni signal in the meanwhile decreased from 70,944,422.27 dinars to 65,904,569.84 dinars*").

[386] Letter from Mr. Djura Obradović to the Ministry of Economy, 2 April 2012, point 4, **CE-77** ("*Return of the loans BD AGRO gave to third parties from the loan assets has been partially implemented. The loans which have not been returned are the loans given to the company Crveni signal (70 million dinars) and Inex, N. Varos (18 million dinars).*")

[387] Transcript, Day 4, 3:22-4:5 (Vuckovic).

[388] Letter from BD Agro to the Privatization Agency, 16 December 2014, **CE-323**; Letter from BD Agro to the Ministry of Economy, 16 December 2014, **CE-324** (the two letters were virtually identical, both stipulating: "*[…] please find attached […] Accounts receivable of debtors Crveni Signal a.d. Beograd and Inex – Nova Varoš a.d. Nova Varoš, on the day of 8 April 2011 (date of payment of the final instalment in accordance with the Agreement)*").

[389] Minutes of the meeting dated 17 December 2014, **RE-22** (emphasis added). While Messrs. Markicevic and Broshko now deny that they ever said anything like that (*See* Transcript, Day 3, 74:8-76:13, 89:5-90:15 (Broshko); Third Witness Statement of Mr. Igor Markicevic, paras. 66-67; Third Witness Statement of Mr. Erinn Brohsko, paras. 19-21), the fact of the matter is that these minutes absolutely fit in with other documentary evidence – while their story simply does not.

[390] Letter from BD Agro to Privatization Agency, 2 July 2015, p. 2, **CE-46** ("*On April 30, 2015, the buyer from the Agreement on sale of socially owned capital through the method of public auction submitted to the Agency the reports of auditor companies "Auditor" and "Prva revizija", in which it is clearly and unequivocally stated that the buyer fulfilled all contractual obligations as of the date of payment of the last instalment of the purchase price (April 8, 2011), except in relation to lending to third parties, namely Inex Nova Varos ad Nova Varos and Crveni signal a.d. Beograd.*").

212. Why would they keep the Agency informed about the repayment of these debts if they were unaware that this was the way for remedying the 221 Million Breach of Article 5.3.4?

213. Likewise, all audit reports commissioned by Mr. Obradovic and BD Agro (and even the one commissioned by MDH) that dealt with the breach of Article 5.3.4 also specifically dealt with debts of Crveni Signal and Inex. Time and again, the auditors noted that the loans given to Crveni Signal and Inex were unreturned.[391] Importantly, in all the reports, the auditors noted what Ms. Vuckovic mentioned at the Hearing – it was Mr. Obradovic who commissioned the reports and it was him (or BD Agro) who provided the auditors with documentation he considered relevant for the report.[392] In other words, the auditors dealt with the loans given to Inex and Crveni Signal only because Mr. Obradovic asked them to and provided them with the documentation that concerned these loans.[393]

214. On the other hand, the Agency's stance was always the same. It consistently requested remedying of the breach of Article 5.3.4, and stipulated in which manner this provision was breached.[394] As can be seen, all parties concerned were aware of and discussed with the Agency the repayment of loans given to Inex and Crveni Signal as sufficient to cure the breach of Article 5.3.4. Importantly, deleting of the 221 Million Pledge was not mentioned, which shows that everyone understood that this was not cumulatively required.

215. Yet, at the Hearing, Claimants' witnesses had a different view of things. For instance, Mr. Markicevic stated that he heard for the first time from Respondent's opening statement that curing the breach of the Privatization Agreement was as simple as having Crveni Signal and Inex return the loaned money to BD Agro.[395] He also confirmed that this could have been resolved very simply by Mr. Rand – had they known that this was the case.[396] Mr. Broshko

[391] Audit Report, April 2011, pp. 64-65, **RE-13**; Audit Report, November 2011, **RE-18**, p. 5; Audit Report, February 2012, pp. 57-58, **RE-223**; Audit report, December 2012, **RE-19**, p. 6; Audit Report, 12 January 2015, pp. 4-6, **CE-327**; Audit Report, 15 January 2015, **RE-105**, pp. 3-4; Audit Report, April 2011, pp. 64-65, **RE-13**; Audit report, December 2012, **RE-19**, p. 6.

[392] Transcript, Day 4, 3:7-24 (Vuckovic); Audit report by Auditor doo of 29 April 2011, **RE-13**, p. 2; Audit report by Auditor doo of 22 November 2011, **RE-18**, p. 2; Audit report by Auditor doo of 2 February 2012, **RE-223**, p. 2; Audit report by Auditor doo of 13 December 2012, **RE-19**, p. 2; Report on Factual Findings from Prva Revizija dated 12 January 2015, **CE-327**, p. 3.

[393] *See e.g.* Letter from Mr. Obradovic and BD Agro to Auditor doo of 5 November 2012, point 2, **RE-20** ("[regarding] *the loans which the privatization subject granted to third persons from credit funds secured by encumbrances on property are repaid, we supply you with bookkeeping sheets k-ta 23240 – other domestic short-term loans for companies Inex ad Nova Varoš and Crveni signal ad Beograd, from which it can be seen that the loans are not returned from Inex ad N. Varoš (18,170,690.00 dinars), while the balance for loan for Crveni signal in the meanwhile decreased from 70,944,422.27 dinars to 65,904,569.84 dinars*").

[394] Letter from the Agency, 25 February 2011, pp. 1-2, **RE-388** ("*By Clause 5.3.4 of the Agreement, the Buyer obliges not to mortgage Subject's fixed assets without the prior consent of the Privatization Agency during the period of validity of the Agreement, except for securing claims against the Subject arising from the regular business operations of the Subject, i.e. except acquiring funds of which the beneficiary will be the Subject. […] based on the insight into the excerpts from the real estate registers submitted by the Subject of privatization on 27 January 2011 it was noted that over the fixed assets of the Subject of privatization, pledge for securing the obligations of third parties were registered, pledge securing the funds (loans) of which the beneficiaries are (partly or fully) third parties […]*"). *See also* Exhibits **CE-96, CE-97, CE-348, CE-351, CE-47**.

[395] Transcript, Day 3, 9:2-10 (Markicevic).

[396] Transcript, Day 3, 9:10-17 (Markicevic).

also gave virtually the same statement at the Hearing.[397] Yet, these testimonies go squarely against the documentation on file.

216. The most illustrative example of this contradiction might be Mr. Markicevic's letter that he sent as general manager of BD Agro on 2 July 2015, just a couple of months before the termination, in which he clearly identified wherein lied the problem with the fulfilment of the Privatization Agreement: *"[…] the buyer […] submitted to the Agency [audit reports] in which it is clearly and unequivocally stated that the buyer fulfilled all contractual obligations […],* ***except in relation to lending to third parties, namely Inex Nova Varos ad Nova Varos and Crveni signal a.d. Beograd****."*[398]

217. Mr. Markicevic was asked at the Hearing about this letter and the fact that he admitted that part of the obligations had not been met. He struggled to find some way to distort a very clear and obvious content of the letter.[399] However, he was unable to change the fact that back then he personally confirmed that it was well understood what represented the breach, as well as how that breach could have been remedied.

218. Mr. Broshko was also evasive and untruthful when confronted with a letter in which he himself acknowledged the breaches of the Privatization Agreement.[400] Likewise, Mr. Broshko casually avoided to explain Mr. Obradovic's communication with the Agency from July 2012,[401] where Mr. Obradovic acknowledged that he was struggling with repayment of the loans given to Inex and Crveni Signal.[402]

219. Based on all of the above evidence, it is literally impossible to accept Claimants' new narrative that Mr. Obradovic, as well as Messrs. Markicevic who was the general manager of BD Agro, and Messrs. Broshko and Rand, who were interested in assignment of the Privatization Agreement, were unaware that the breach of Article 5.3.4. of the Privatization Agreement could have been remedied by simply repaying the outstanding loans given to Crveni Signal and Inex.

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[397] Transcript, Day 3, 75:4-13 (Broshko) ("*I would never have stated that the biggest problems in the execution of obligations of the buyer were the repayment of these loans. Logistically speaking, because there was no restriction on BD Agro in terms of making loans to third parties, I could have simply cured the issue even through my Serbian company by giving a loan to Inex and Crveni Signal, having them repay BD Agro, and then BD Agro just in turn reloaning the money back to Crveni Signal, and then repaying my loans to Inex and Crveni Signal […]*"), 73:17-24 (Broshko) (*"Q. Do you recall Serbia's counsel stating that the alleged breach of the Privatization Agreement would have been cured very simply by having Crveni Signal and Inex return certain amounts to BD Agro? A. I did hear that. Q. Did the Privatization Agency or the Ministry of Economy ever advise you of this? A. Never."*).

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

[399] Transcript, Day 3, 60:18-20 (Markicevic).

[400] Transcript, Day 3, 78:13-73:10 (Broshko) (commenting on his letter dated 26 January 2015, **CE-328** (the letter stated, *inter alia*, that: "*The shares of BD Agro will continue to be pledged in favour of the Republic of Serbia and such pledge will be released* ***only upon us satisfying within an agreed upon time period all conditions required to be met in order to successfully complete the privatization process of BD Agro***."; emphasis added)).

[401] Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

[402] Mr. Broshko could say nothing more than "*So I was advised this, but I was not involved at all in drafting this letter, and I have only seen it in the arbitration, so I can't comment on this letter*". *See* Transcript, Day 3, 90:2-4 (Broshko).

### 5. The 221 Million Breach could have been easily remedied

220. Mr. Rand stated at the Hearing that the breach of Article 5.3.4 "*probably could have been resolved*".[403] Mr. Markicevic also confirmed that this could have been resolved very easily by Mr. Rand,[404] as did Mr. Broshko (who even claimed that he could have repaid the loans given to Inex and Crveni Signal through his own company).[405] Thus it is undisputed that the loans in question could have been repaid. Claimants' witnesses however failed to provide any substantial explanation as to why did they choose *not* to return the debts of Crveni Signal and Inex, the debts whose existence has never been disputed. It is both a matter of common knowledge and a legal obligation that when one company borrows the money from another, it has to pay the money back.[406] This, however, has been completely ignored by Claimants.

221. The evidence shows that although Mr. Rand was quite aware at the time that debts of Inex and Crveni Signal to BD Agro should be paid in order to cure the breach of Article 5.3.4, he was conditioning the repayment with the prior assignment of the Privatization Agreement to Coropi. As Mr. Markicevic confirmed in his letter dated 2 July 2015: *"the Canadian investor has repeatedly expressed his readiness to* ***resolve the issue of claims of BD Agro towards third parties for the given loans***, ***if the Agency positively decided*** *on the request for assignment of the agreement on sale of socially owned capital through the method of public auction".*[407]

222. Therefore, it is clear that Claimants deliberately chose not to return these undisputed debts. The fact that BD Agro was overly indebted at the time and had blocked bank accounts[408] (due to its management's own fault) was likely a factor that strengthened this decision, as it was evident that creditors would collect any repayments that would end up on BD Agro's accounts.[409]

223. In conclusion, the termination did not take place because the buyer or Claimants somehow misunderstood the Agency and for this reason failed to remedy the breach of the Privatization Agreement. The termination occurred after repeated notices made by the Agency, inviting the buyer to remedy the breach, because Mr. Obradovic and Claimants made a deliberate decision that debts of Crveni Signal and Inex would not be repaid. While there might be many reasons why one does not perform an obligation,[410] this situation is nothing else but a manifestation of bad faith. For Claimants to assert now that they did not know that the repayment of debt to BD Agro was the way to cure the contractual breach is simply disingenuous.

224. It seems that the motive for such behaviour would not have existed if Mr. Rand was the real

[403] Transcript, Day 2, 43:21-24 (Rand).
[404] Transcript, Day 3, 9:10-17 (Markicevic).
[405] Transcript, Day 3, 73:17-24, 75:4-13 (Broshko).
[406] Mr. Obradovic confirmed that he is aware of this. *See* Transcript, Day 4, 96:08-10 (Mr. Obradovic).
[407] Letter from BD Agro to Privatization Agency, 2 July 2015, p. 3, **CE-46** (emphasis added).
[408] Report on illiquidity days for BD Agro, 11 December 2019, **RE-563**.
[409] What is also interesting is that the fact that in reality the basic "precondition" for Crveni Signal to return the money to BD Agro should have been that Mr. Obradovic returns the money that he owed to Crveni Signal (see above under para. 196).
[410] Transcript, Day 4, 96:12-14 (President).

owner of BD Agro, with Mr. Obradovic being nothing else but his representative. If that was really the case, Mr. Rand would not have conditioned the repayment of the undisputed debt with the assignment of the Privatization Agreement from Mr. Obradovic to Coropi. But, apparently, Mr. Rand did not wish to give any more money to a company owned by someone else.

### C. BREACHES OF ARTICLES 5.2.1 AND 5.3.3.

225. As part of their narrative that it was not clear what the Agency invoked as a breach of the Privatization Agreement and what should have been remedied, Claimants attempt to present the Agency's notices between 2011-2015 as being overly broad, and encompassing breaches of obligations that were already fulfilled in the past.[411] However, the truth of the matter is quite different.[412]

226. In addition to breach of Article 5.3.4, the first notice of 25 February 2011 also concerned fulfilment of obligations from articles 5.2.1 (mandatory investment obligation) and 5.3.3 (alienation of fixed assets). Namely, in the control that was completed in January 2011, the Agency reacted to new information that it had established and thus asked for explanations in that regard. Specifically, as Mrs. Vuckovic explained: "*In 2011, I can claim responsibly […] **we got some new information in the control**, **we got the information on disposal of land**, **and the buyer, that is the entity, did not submit documentation on this**. The control also found that part of the assets had been given as a gift. We also got the information that part of the assets had been donated. We got the information that assets had been sold and the price had never been paid. So by engaging this auditor, we precisely requested that the auditor confirms the percentage of disposal, both annually […] and globally […].*"[413]

227. That is why the Agency in its notice from February 2011 (as well as in the subsequent notices) noted several irregularities concerning mandatory investment obligation from Article 5.2.1[414] and requested from the buyer to provide an auditor report on several different topics concerning obligations from Article 5.3.3 and 5.3.4.[415] On 29 April 2011, Mr. Obradovic provided an audit report with respect to Articles 5.3.3 and 5.3.4.[416] However, the Agency noticed that the audit report was incomplete and unclear (and indeed confirmed

[411] *See e.g.* Transcript, Day 1, 30:3-33:12 (Anway); Transcript, Day 3, 9:17-22 (Markicevic), 76:12-77:14 (Broshko).

[412] The Tribunal will recall that Respondent has already noted that Mr. Obradovic committed many more breaches of the Privatization Agreement than just Article 5.3.4. (including in particular Articles 5.2.1. and 5.3.3.) *See e.g.* Respondent's Rejoinder, paras. 92-93, 154-155, 391.

[413] Transcript, Day 4, 35:13-36:1 (Vuckovic).

[414] With respect to obligation from Article 5.2.1. The Agency noted: "*On the day of the last inspection, and based on the submitted documentation, it was determined that certain fixed assets that were the subject of the investment were given to other legal entities for use: Lada Niva 1.7, van Renault Kangoo, while the equipment for the hens was sold. The total value of the said equipment at the time of investing is: RSD 648,444.00 and EUR 19,330.96*." Letter from the Agency, 25 February 2011, p. 2, **RE-388.** Later notices also included an explicit reference to "Article 5.2.1." *See e.g.* Notice of the Privatization Agency on Additional Time Period, 22 June 2011, **CE-96**.

[415] Letter from the Agency, 25 February 2011, **RE-388.**

[416] Audit report by Auditor doo of 29 April 2011, **RE-13**.

certain violations of the Privatization Agreement),[417] so it asked for further clarifications and confirmations.[418]

228. Accordingly, Mr. Obradovic delivered another audit report from July 2011, this time focusing solely on Article 5.3.3.[419] Again, the auditor's report had several substantial flaws due to which it could not have been accepted at the time.[420] And again, these flaws were very clearly indicated in the Agency's notice.[421] Instead of denying these allegations, Mr. Obradovic did just the opposite. On 9 November 2011, Mr. Obradovic stated that he delivered to the auditor documentation regarding Article 5.3.3 (and that he will deliver some other documentation subsequently) and that "*it is a rather sizeable documentation*" due to which it is probable that the "*auditor will need several days for preparing of the report*".[422]

229. In the same letter, Mr. Obradovic also referred to obligation from Article 5.2.1 by explicitly confirming that he was currently remedying these breaches, saying *e.g.* that the repayment of loans is in progress for the purpose of removal of pledge on equipment which is the subject of mandatory investment.[423]

230. The subsequent audit report from November 2011 was likewise unable to confirm that obligations from Articles 5.2.1 and 5.3.3 (as well as from Article 5.3.4) were fulfilled.[424] Having this in mind, the Agency simply acknowledged the undisputed fact that the buyer consequently did not act upon the previous notice[425] – and granted an additional deadline to Mr. Obradovic to provide a new audit report.[426] In February 2012, Mr. Obradovic delivered a further audit report which was still unable to confirm the fulfilment of obligations from Articles 5.2.1[427] and 5.3.4.[428] With respect to obligations from Article 5.3.3[429] the auditor confirmed its stance with respect to the 10% disposal allowed by this provision, but it failed to provide a clear statement *i.e.* final stance regarding disposal of the 30% of the property.[430] In any event, in July 2012, Mr. Obradovic likewise confirmed that the pertinent obligations were not fully fulfilled and that he would need additional time to cure all outstanding

[417] Proposal of the Center for Control for the session of the Commission for Control of 21 June 2011, pp. 3-14, **RE-69**.
[418] Notice of the Privatization Agency on Additional Time Period, 22 June 2011, **CE-96**.
[419] Audit report by Auditor doo of 19 July 2011, **RE-14**.
[420] Proposal of the Center for Control for the session of the Commission for Control of 4 October 2011, pp. 3-6, 7-11, **RE-70**.
[421] Notice of the Privatization Agency on Additional Time Period, 6 October 2011, pp. 2-3, **CE-97.**
[422] Letter from Mr. Obradović and BD Agro to the Privatization Agency, 9 November 2011, **CE-380**, point 1.
[423] *Ibid*, **CE-380**, point 6. Mr. Obradovic also explicitly stipulated that he was returning two Lada Niva vehicles from Inex and PIK Pester that were the subject of mandatory investment *See Ibid*, point 5.
[424] Audit report by Auditor doo of 22 November 2011, **RE-18-additional translation**, pp. 4-7.
[425] Proposal of the Center for Control for the session of the Commission for Control of 21 December 2011, pp. 3-4, **RE-71**.
[426] Notice of the Privatization Agency on Additional Time Period, 22 December 2011, **CE-32.**
[427] Audit report by Auditor doo of 2 February 2012, **RE-223-additional translation,** pp. 10-11.
[428] Audit report by Auditor doo of 2 February 2012, **RE-223**, pp. 6-8.
[429] Audit report by Auditor doo of 2 February 2012, **RE-223-additional translation,** p. 9.
[430] Audit report by Auditor doo of 2 February 2012, **RE-223-additional translation,** p. 9.

issues,[431] so the Agency sent notices on giving out further extensions accordingly.[432] Consequently, Mr. Obradovic delivered one more audit report, before the Supervision Proceeding was initiated.[433]

231. The Agency ceased providing the notices pending the outcome of the Supervision Proceedings before the Ministry.[434] Following the completion of the Supervision Proceedings, on 27 April 2015, the Agency requested an audit report that would confirm that the breaches and inconsistencies that the Agency found out about in its previous control were remedied *i.e.* non-existent.[435] Yet, requesting an audit report regarding such issues obviously did not mean that the Agency was claiming some new breaches. As Ms. Vuckovic explained at the Hearing: *"We asked the buyer to submit certain evidence, given that, as you know, the last additional deadline for the performance of obligations was given in 2012, and that the buyer's conduct was not considered. This was the first occasion when we discussed and analysed all the obligations that he was given back in 2012. […] So the Privatization Agency never stated its opinion on these obligations, and it was logical for the Agency to repeat all this when it made its final decision on its actions towards the buyer, namely to say that the buyer has or has not performed on the obligations from the agreement.*"[436]

232. All this was again perfectly clear to Mr. Obradovic. On 30 April 2015, Mr. Obradovic delivered to the Agency all of the audit reports that he previously commissioned, including the new audit report from January 2015,[437] that also dealt with Articles 5.2.1 and 5.3.3. This new audit report confirmed that some of the breaches of Article 5.2.1. were remedied,[438] while for the other breaches of these two articles it only briefly restated what the previous audit reports said.[439]

233. The Agency reviewed the audit reports and, on 23 June 2015, sent a notice to Mr. Obradovic whereby it accepted most of the conclusions from the submitted reports,[440] but requested a

[431] Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21;** Even when complaining to the Ministry of Economy at the time, Mr. Obradovic was unable to state that he fulfilled all of his obligations, but that *e.g.* the breaches of Article 5.3.4. "*did not directly cause the damage to the company*" and that with respect to Article 5.2.1 "*it is obvious that major portion of the debt has been returned, and the remaining part will also be returned within the shortest period of time and the pledge on mentioned assets will be removed*.". *See* Letter from Mr. Djura Obradović to the Ministry of Economy, 2 April 2012, pp. 4-6, **CE-77**.

[432] Proposal of the Center for Control for the session of the Commission for undertaking measures of 13 June 2012, pp. 10-11, **RE-73**; Notice on Additional Time Period of 22 June 2012, **RE-15**; Proposal of the Center for Control for the session of the Commission for undertaking measures of 30 July 2012, pp. 11-12, **RE-74**; Notice of the Privatization Agency on Additional Time Period, 31 July 2012, **CE-78**; Proposal of the Center for Control for the session of the Commission for undertaking measures of 7 November 2012, pp. 4-7 **RE-75**; Notice of the Privatization Agency on Additional Time Period, **CE-79**.

[433] Letter from BD Agro to the Privatization Agency, 12 December 2012, **CE-269**; Audit report by Auditor doo of 13 December 2012, **RE-19.**

[434] Decision of the Ministry of Economy, 23 December 2013, **CE-206**. Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

[435] Letter from the Privatization Agency to D. Obradović, 27 April 2015, p. 2, **CE-348**.

[436] Transcript, Day 4, 84:1-13 (Vuckovic).

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

[438] Report on Factual Findings from Prva Revizija, 12 January 2015, point IV (conclusion regarding item II/2), **CE-327**.

[439] *Ibid*, point II.

[440] Letter from the Privatization Agency to D. Obradović and BD Agro, 23 June 2015, points 1-6, **CE-351**.

new audit report which would clarify certain limited issues that were either left unclear by the auditors or the auditors confirmed that there was an outstanding breach.[441] However, on 2 July 2015, Mr. Markicevic sent a letter (on behalf of BD Agro but apparently also conveying Mr. Rand's views) whereby for the first time he disputed the Agency's notice, and explained that the audit reports addressed all of the issues that the Agency advanced in that regard (albeit admitting that the issue of loans to third parties was still outstanding.)[442]

234. On 20 July 2015, the Agency replied to Mr. Markicevic's letter, and explained in detail why it needed additional information and a new audit report for each of the remaining issues.[443] Claimants tried to insinuate at the Hearing that this letter was some kind of an unreasonable request by which the Agency claimed that Mr. Obradovic needed to remedy multiple breaches at once.[444] However, as it is clear when one actually reads this document, the Agency did not request remedy of the breach of Article 5.3.3 or 5.2.1 at that point. It simply asked for a correct and unequivocal statement from the auditor that there were no breaches, *i.e.* that these obligations were performed.

235. Specifically, the Agency explicitly stated that the issue with Article 5.3.3 was simply that the auditor "*gave a statement only on a percentage of alienation of fixed assets of the Subject on annual basis, that is, on annual transactions in the amount not exceeding 10%, yet not on the total disposal percentage which is limited by the Agreement to not more than 30% in total; it did not confirm fulfillment of the entire obligation referred to in Article 5.3.3 of the Agreement.*"[445] Therefore, the Agency evidently did not require that the Buyer should retroactively cure this breach, but simply asked for an appropriate document – audit report – which would contain a clear and unequivocal statement in this regard. This was also confirmed by Mrs. Vuckovic at the Hearing.[446]

236. With this in mind, one must reject Mr. Rand's statement that: "*I don't think there was any cure. There was* ***no way I could satisfy their allegations about the violation of 5.3.3****. 5.3.4. probably could have been resolved, but* ***5.3.3. couldn't be fixed***." [447] In other words, what Mr. Rand is saying is that, for some inexplicable reason, he was unable to provide a clear statement from the auditor on the fulfilment of Article 5.3.3 – since that is all that the Agency essentially requested.

237. Similarly, few other remaining issues (except Article 5.3.4) needed to be clarified due to inaccuracies that the audit reports contained. For them, the Agency stipulated that it requested a new audit report "*keeping in mind that auditing company "Prva Revizija d.o.o."*

[441] *Ibid*, point 7.
[442] Letter from BD Agro to Privatization Agency, 2 July 2015, **CE-46**, p. 3, see, also, p. 2 ("*reports of auditor companies […] clearly and unequivocally stated that the buyer fulfilled all contractual obligations […] except in relation to lending to third parties, namely Inex Nova Varos ad Nova Varos and Crveni signal a.d. Beograd*"), 3 ("*the Canadian investor has repeatedly expressed his readiness to resolve the issue of claims of BD Agro towards third parties for the given loans, if the Agency positively decided on the request for the assignment*").
[443] Letter from the Privatization Agency to BD Agro, 20 July 2015, **CE-47**.
[444] *See e.g.* Transcript, Day 4, 80:13-84:14 (Vuckovic).
[445] Letter from the Privatization Agency to BD Agro, 20 July 2015, pp. 7-8, **CE-47.**
[446] Transcript, Day 4, 58:18-59:17 (Vuckovic)
[447] Transcript, Day 2, 43:21-24 (Rand) (emphasis added).

*Belgrade did not correctly state the facts from the other auditor's report it referred to*" – and then went on to explain what facts were incorrectly stated and referred to.[448]

238. In contrast to that, what the Agency stated with respect to Article 5.3.4 was that the auditor should take position on the fulfilment of the buyer's obligations under that provision, because the auditor "*confirm[ed] there was* ***a failure to fulfill obligations*** *referred to […]"* and that *"[…] up to date of the [auditors] Report, not all of the loans were returned which were given by BD Agro AD to third parties from loan amounts secured by encumbrances on BD Agro AD property on April 8, 2011*".[449] Therefore, it was clear that with respect to Article 5.3.4 auditors should re-examine whether the buyer remedied the breach that was determined to *still exist* at the time of their last report. Ironically, it is exactly for this breach that Mr. Rand said that it "*probably could have been resolved*".[450] But, as has already been discussed, it deliberately was not resolved by Mr. Obradovic and Claimants.

## D. TERMINATION OF THE PRIVATIZATION AGREEMENT WAS VALID

239. The Agency's termination of the Privatization Agreement due to Mr. Obradovic's breach of Article 5.3.4 was in accordance with Serbian law.[451] This breach was clear and accepted by the Buyer, as was discussed in the previous section. A breach of Article 5.3.4 could be a reason for termination of the Privatization Agreement, even after the purchase price was paid in full. This is confirmed by consistent practice of the Agency,[452] as well as by decisions of Serbian courts.[453]

240. At the Hearing, Claimants failed to squarely address these facts but insisted on several points which, in their view, lead to the conclusion that the termination was unlawful: 1) the Agency could not rely on Article 41a of the Law on Privatization because it simply refers back to Article 7 of the Privatization Agreement, which does not stipulate breach of Article 5.3.4 as a termination reason; (2) obligation under Article 5.3.4 ceased to exists after the purchase price was paid in full, so the Privatization Agreement could not be terminated on this ground, and (3) Article 5.3.4 is not an essential term of the Privatization Agreement, and the alleged breach was minor.[454] These points will be refuted *seriatim* below and followed by discussion of additional topics: (4) whether the Agency had any other remedy apart from termination; (5) what was the purpose of termination; and (6) how the Agency relied on the Buyer's

[448] Letter from the Privatization Agency to BD Agro, 20 July 2015, pp. 3-4, **CE-47.**
[449] *Ibid*, p. 8.
[450] Transcript, Day 2, 43:21-24 (Rand).
[451] For a detailed discussion, see Rejoinder, paras. 199-238.
[452] See Notice on Termination from the Privatization Agency to Jugotehnika, 20 November 2009, p. 1, **RE-562**, & Agreement on sale of socially-owned capital by public auction method – Rasadnici (Jugotehnika), 31 July 2007, Articles 1.2 & 3.1 *(Rasadnici (Jugotehnika))*, **RE-362-additional translation**; Notice on termination of privatization agreement for subject of privatization Betonjerka of 30 December 2008, **RE-97**.
[453] See Judgment of the Commercial Court in Belgrade, No. 4.P 1744/10, dated 3 June 2011, pp. 11-12, **RE-370**; Judgment of the Commercial Appellate Court, No. Pž 8687/2011 dated 18 December 2012, pp. 5-6, **CE-722**.
[454] See Transcript, Day 1, 74:6-77:18 (Pekar) & Claimants' Opening Statement ppt, slides 158-164.

conduct, not the other way around.

### 1. Termination on the basis of Article 41a(1)(3) of the Law on Privatization

241. The first Claimants' point is that "*Article 7 of the Privatization Agreement expressly enumerates grounds for termination, and Article 5.3.4 is not included*", while the Agency "*could not rely on Article 41(a)(1)(3) of the Law on Privatization because it simply refers back to the Privatization Agreement*".[455] It must be said that by this Claimants simply repeat a point they made in the Reply,[456] but did not even try to address its detailed rebuttal in Respondent's Rejoinder to which the Tribunal is respectfully directed.[457]

242. Further, according to Claimants' expert, Mr. Milosevic, the parties to the Privatization Agreement could not replace or avoid Article 41a(1)(3), but they could "*stipulate specific meaning to this provision, which they did…*" by including only Article 5.3.3 and not Article 5.3.4 among the Article 7 grounds for termination.[458]

243. Respondent would first like to note that Claimants' interpretation presupposes that when Article 41a(1)(3) refers to the Privatization Agreement, it refers to its Article 7 only. Such interpretation is not borne by the wording of Article 41a(1)(3). This provision states that a privatization agreement may be terminated if the buyer "*disposes of the property of the subject of privatization contrary to the provisions of the agreement*". In other words, in order to apply Article 41a(1)(3) one must determine what kind of *disposal* of the property[459] is *contrary to the privatization agreement* and not which disposal represents the reason for termination according to privatization agreement itself. Examination of *the reasons for termination* listed in the privatization agreement is required for application of a different provision, *i.e.* Article 41a(1)(7) which provides for termination "*in other cases provided for by the agreement*".

244. Claimants' interpretation that Article 41a(1)(3) needs to be specified by termination reasons stipulated in the agreement would make Article 41a(1)(3) redundant by limiting it to cases that are already covered by Article 41a(1)(7). Instead, the only way in which the parties could specify the operation of Article 41a(1)(3) was to prohibit (or to choose not to prohibit) certain dispositions of property in the privatization agreement. But once the parties stipulated a prohibition of certain disposition in the agreement, the breach thereof automatically became a reason for termination of the agreement by force of law under Article 41a(1)(3).[460] This is different from the parties' stipulating additional termination reasons (cases) in the privatization agreement itself, which would fall under Article 41a(1)(7).

245. Finally, it should be again emphasized that Serbian court practice supports Respondent's interpretation that a privatization agreement may be terminated under Article 41a(1)(3) due

[455] See Claimants' Opening Statement ppt, slides 112(3) & 159-160; Transcript Day 1, 74:8-21 (Pekar
[456] See Reply, paras. 413-414.
[457] See Rejoinder, paras. 201-210.
[458] See Transcript, Day 5, 18:1-14 (Milosevic).
[459] Mr. Milosevic accepted that Article 5.3.4 deals with disposition of property. See Transcript, Day 5, 19:14-16 (Milosevic).
[460] See Second Expert Report of Mirjana Radovic, para. 23.

to a breach of Article 5.3.4, although this provision is not expressly listed as a ground for termination in the privatization agreement. This is precisely the lesson of *Betonjerka* case, where such termination was upheld by two court instances.[461]

### 2. Termination due to breach of Article 5.3.4 after the payment of the price

246. The fact that the Agency in other cases also terminated privatization agreements after the full payment of the purchase price, which practice has never been regarded as unlawful by any Serbian court,[462] did not prevent Claimants from continuing to maintain at the Hearing that the termination in the present case was illegal because the obligation under Article 5.3.4 ceased to exist upon the payment of the purchase price.[463] Claimants however failed to offer any response to the evidence of this uniform practice.

### 3. "Essential obligations" are unknown in Serbian law

247. At the Hearing, Claimants also maintained that the termination was illegal because Article 5.3.4 is not an "essential term" of the Privatization Agreement. For this, they rely on their expert, Mr. Milosevic.[464] What is however important to note is that Serbian law does not even recognize the concept of essential obligations.[465] As noted by Prof. Radovic: "*Serbian law does not differentiate between essential and nonessential obligations. Therefore, a contract can be terminated for breach of any obligation*".[466]

248. In addition, in the specific context of privatization, the very idea of essential and non-essential obligations would contradict the constant practice of the highest Serbian courts that all contractual obligations are equally relevant and important for achievement of the purpose of privatization and that they must all be performed in full.[467]

249. All this does not stop Mr. Milosevic from singlehandedly advancing his theory of "essential obligations" in Serbian law. Indeed, Mr. Milosevic's first expert report does not even

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[461] See Rejoinder, para. 207, referring to Judgment of the Commercial Appellate Court, No. Pž 8687/2011, 18 December 2012, pp. 5-6, **CE-722**.

[462] See Rejoinder, para 215-6, referring to Notice on Termination from the Privatization Agency to Jugotehnika, 20 November 2009, p. 1, **RE-562**, & Agreement on sale of socially-owned capital by public auction method – Rasadnici (Jugotehnika), 31 July 2007, Articles 1.2 & 3.1 *(Rasadnici (Jugotehnika))*, **RE-362-additional translation**; Termination of Trayal Korporacija privatization agreement, 6 December 2013, pp. 2 & 4 (*Trayal*), **RE-24**; Termination of Geodetski biro privatization agreement, 27 March 2013, pp. 2-5, *(Geodetski biro)* **RE-31**; Termination of Zastava PES privatization agreement, 9 April 2013, pp. 3-4 (*Zastava PES*), **RE-59**. For practice of Serbian courts on this point, see Counter-Memorial, paras. 100-104.

[463] Claimants' Opening Statement ppt, slides 161 & 112(2); Transcript, Day 1, 74:22-76:1 (Pekar); see, also, Reply, paras. 393-410.

[464] See Claimants' Opening Statement ppt, slide 162; Transcript, Day 1, 43:4-44:8 (Amway) & 76:8-77:13 (Pekar).

[465] It should be recalled that this is not the only novel theory that Mr. Milosevic has introduced in his expert reports. Another is that termination of privatization agreements by the Agency and decision to transfer shares are administrative acts, for which Mr. Milosevic squarely admits is against Serbian court practice. See First Expert Report of Milos Milosevic, paras. 111-118.

[466] Second Expert Report of Mirjana Radovic, para. 20, referring to Mirko Vasiljević, *Trgovinsko pravo*, 14th edition, Belgrade 2014, paras. 103-104, **RE-345**.

[467] See above III. A. . See also Judgment of the Supreme Court of Cassation of 14 November 2013, pp. 5-6, **RE-62**; Judgment of the Higher Commercial Court, Pž. 3206/2006(2) from 28 December 2006, p. 1, **RE-162**; and Judgment of the Supreme Court of Serbia, Prev. 410/2005 from 1 March 2006, p. 2, **RE-166.**

mention the idea of “essential obligations”. Only in his second expert report he floats this idea, and looks for support in Article 131 of the Law on Obligations.[468] However, it is easy to see that the text of Article 131, which Mr. Milosevic quotes, does not mention "essential obligations" at all. Rather, this provision does not allow termination of contracts in cases of performance of an **insignificant part of the obligation**, which is a different matter. Accordingly, Article 131 does not provide support to Mr. Milosevic's theory.

250. At the Hearing, in response to counsel question about the fact that his expert reports provided no authority in support of the idea of "essential obligations" in Serbian law, Mr. Milosevic however referred to Prof. Vizner's commentary.[469] Interestingly, in his second expert report, Mr. Milosevic already cited the same part of Prof. Vizner's commentary of the Law on Obligations, but in a different context, that of minor breaches, not in support of his point about “essential obligations”.[470]

251. However, nowhere in the exhibited part of Prof. Vizner’s commentary one can find discussion of "essential obligations" or even the word "essential". Even Mr. Milosevic, after an extended explanation of what he thinks should be "essential obligations", accepted that neither Prof. Vizner nor any other authority in Serbian law supports his theory:

> *"Dr. Djeric: Mr. Milosevic, I understand your explanation but I would like to ask you, do you have any other authority in Serbian law that supports this theory of yours? Because we see that Professor Vizner is not using the word "essential" or, as you said in Serbian, remind me, bitna.*
>
> *A. No, I do not have it. "* [471]

252. As can be seen from the foregoing, Mr. Milosevic's theory of essential obligations is an invention made up in his second expert report for which he is unable to provide any legal authority in support.

### 4. The breach of Article 5.3.4 was not minor

253. In the alternative to "essential obligations", Claimants argue that the breach of Article 5.3.4 was minor, so that the Privatization Agreement could not be terminated because Article 131 of the Law on Obligations provides that an agreement cannot be terminated due to non-performance of an insignificant part of the obligation.[472] In their Reply, Claimants argue that the violation was minor because (1) the funds borrowed under the 221 Million Loan Agreement represented an insignificant part of the value of BD Agro’s assets,[473] and (2) the alleged violation did not threaten the achievement of the main goal and purpose of the Privatization Agreement, because the purchase price was paid several months later.[474] As

[468] Second Expert Report of Milos Milosevic, para. 94 ("*[t]he rule that an agreement can be terminated only for a violation of an essential obligation is set forth in Article 131 of the Law on Obligations, which provides that* 'an agreement cannot be terminated due to non-performance of an insignificant part of the obligation.'").
[469] Transcript, Day 5, 23:20-24:2 (Milosevic).
[470] See Second Expert Report of Milos Milosevic, para. 96.
[471] Transcript, Day 5, 28:9-16.
[472] See Claimants’ Opening Statement, slide 162; Transcript, Day 1, 77:8-13 (Pekar); Reply, paras. 419-420.
[473] See Reply, para. 419.
[474] See Reply, para. 420.

demonstrated already in the Rejoinder, Claimants are wrong on both counts.[475]

254. For the present purposes, Respondent will show that Claimants' position is also untenable in light of Prof. Vizner's commentary of Article 131 of the Law on Obligations, invoked by their expert Mr. Milosevic.[476] According to Prof. Vizner,

> *"It follows that in cases of failure to fulfil a negligible part of an obligation, the court's assessment takes a two-pronged approach: a subjective assessment - in relation to safeguarding the objective, **purpose** of the concluded contract, and an objective assessment - in relation to obtaining the more significant benefit that is usually obtained, having in mind, in particular, the **interrelation** between the scope of the fulfilled and unfulfilled part of the contractual obligation."*[477]

255. Following this commentary, the first part of the analysis should consider connection between a breach ("unfulfilled part of the obligation") and the goal of the contract. As has been mentioned above, there is constant practice of highest Serbian courts that all obligations under privatization agreements are *equally* important for achievement of the goals of privatization, so all must be performed in full.[478] Accordingly, the Buyer's breach of Article 5.3.4 in the present case is connected to the purpose of the Privatization Agreement and to the goals of privatization, so it cannot be regarded as insignificant under the first leg of the analysis suggested by Prof. Vizner.

256. His commentary also suggests that the second leg of the analysis must be an objective comparison between the performed and unperformed parts of the obligation ("*the interrelation between the scope of the fulfilled and unfulfilled part of the contractual obligation*"). What is important to note here is that assessment of what is "non-performance of an insignificant part of the obligation" is made by comparing the value of the breach with the whole value of the obligation that was breached. It is not assessed with reference to the value of the object of the contract ten years later, as Claimants suggest.[479] In the context of Article 5.3.4 which *inter alia* secures fulfilment of the Buyer's obligations under the Privatization Agreement, the scope and value of this obligation and what constitutes unfulfilled part thereof must be assessed with reference to the amount of the price paid, *i.e.* the value of the Privatization Agreement, which was around EUR 5.5 million. At the same time, the value of the funds used for the benefit of Crveni Signal and Inex in breach of Article 5.3.4 was almost EUR 1 million. These funds also exceeded the value of each installment of the purchase price.[480] Even if one would add the value of the investments in BD Agro, which

[475] See Rejoinder, paras. 220-222.
[476] See Second Expert Report of Milos Milosevic, paras. 96-97 & Reply, para. 419.
[477] See B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima* [in English: Commentary on the Law on Contracts and Torts] (1978, Zagreb), p. 3, **CE-714.**
[478] See above III. A. See also Judgment of the Supreme Court of Cassation of 14 November 2013, pp. 5-6, **RE-62**; Judgment of the Higher Commercial Court, Pž. 3206/2006(2) from 28 December 2006, p. 1, **RE-162**; and Judgment of the Supreme Court of Serbia, Prev. 410/2005 from 1 March 2006, p. 2, **RE-166.**
[479] See Reply, para. 419.
[480] For more, see Rejoinder, para. 222.

amounted to approximately EUR 2 million[481], the breach of Article 5.3.4 still cannot be considered insignificant.

257. In conclusion, the Buyer's breach of Article 5.3.4 in the present case cannot be considered as insignificant under each of the prongs of Prof. Vizner's analysis of Article 131 of the Law on Obligations.

### 5. Agency had no other remedy at its disposal apart from termination

258. It should also be considered whether the Agency had any other remedy to rectify the Buyer's breach of Article 5.3.4, apart from termination.[482]

259. As noted by Prof. Radovic at the Hearing, there are 3 possible remedies for contract breach under general contract law: (1) to seek specific performance; (2) to terminate the contract if conditions for termination were met; and (3) to claim damages.[483] However, it should be immediately noted that it was not a viable option for the Agency to sue Mr. Obradovic for damages due to the breach of the Privatization Agreement. Even Claimants' expert Mr. Milosevic mentioned the possibility of a claim for damages only in passing without any explanation how this would have been a viable option.[484] It is downright unimaginable that the Agency would suffer any damages due to breach of Article 5.3.4, which serves to protect the assets of the company and whose breach did not affect Agency's but BD Agro's property. According to Prof. Radovic: "*I cannot think of a situation where the Agency could prove that it suffered any specific damages because of that…*"[485]

260. The Agency was also not legally permitted to waive the breach. As noted by Prof. Radovic: "*No there was no possibility to waive – either the privatization was successful, and all obligations have been completed, or not.*"[486] This is confirmed by Serbian court practice, according to which the goals of privatization require fulfillment of all obligations from privatization agreements.[487]

261. The Agency therefore had two options in the present case, either to prolong the time-limit for compliance or to terminate. However, after so many deadlines passed without Mr. Obradovic remedying the breach, yet another deadline for compliance would be pointless. This even more so having in mind that in September 2015 it became clear that Mr. Obradovic will never remedy his breach of Article 5.3.4.

262. On 8 September 2015, Mr. Obradovic, who previously accepted that he was in default with respect to Article 5.3.4 (as did Claimants),[488] wrote a letter to the Agency in which he

[481] Privatization Agreement with Annexes, 4 October 2005, Article 5.2.1, **RE-17**.
[482] See, e.g., Transcript, Day 5, 74:2-4 (Vasani).
[483] Transcript, Day 6, 3:4-9 (Radovic).
[484] See First Expert Report of Milos Milosevic, para. 97; Transcript, Day 5, 74:14-16 (Milosevic).
[485] Transcript, Day 6, 3:22-24 (Radovic); for full explanation, see 3:16-4:25 (Radovic).
[486] See Transcript, Day 6, 131:2-12 (Radovic).
[487] See, e.g., Judgment of the Supreme Court of Serbia, Prev. 410/2005 dated 1 March 2006, p. 2, **RE-166** ("*… the objective of privatization can be achieved only by the full realization of all obligations established by the contract on the sale of the socially-owned capital.*").
[488] See Rejoinder, paras. 157-174.

claimed that he now complied.[489] However, Mr. Obradovic was actually trying to deceive the Agency, because the evidence of compliance he provided did not relate to the 221 Million Pledge.[490] In addition, Mr. Obradovic's letter of 8 September 2015 clearly indicated that he did not have any intention to comply with Article 5.3.4 in the future, as he voiced his disagreement with the Agency's interpretation of this provision and threatened to sue. In such situation, it was obviously pointless and unreasonable to grant him additional time to comply with Article 5.3.4. Under Article 41a(1)(3) of the Law on Privatization, the Agency had a legal obligation to terminate the Privatization Agreement if it did not provide an additional time for compliance to the buyer. Therefore, after almost 5 years of Mr. Obradovic's non-compliance, stalling and deceiving, and after repeated warnings, explanations and deadlines for compliance given by the Agency, the latter was left with only one option – to terminate the Privatization Agreement.

### 6. What was the purpose of termination due to a breach of Article 5.3.4?

263. Termination of the Privatization Agreement due to a breach of Article 5.3.4 was the measure of last resort in response to the Buyer's failure to remedy the breach after repeated notices of the Agency. The immediate purpose of the termination was to safeguard the well-being of the company, which is one of the purposes behind Article 5.3.4.[491] BD Agro was for years mismanaged and in a dire financial situation[492] and violation of Article 5.3.4 was one of manifestations of this mismanagement. When it became clear that Mr. Obradovic would not remedy the breach, termination was the only option left to the Agency. That BD Agro eventually ended in bankruptcy, which was inevitable considering its financial situation and the position taken by some of its creditors, does not change the fact that the purpose behind the termination had been to safeguard its well-being.

264. Another, equally important, purpose behind the termination was to strengthen general compliance with privatization agreements. When the Buyer is asked to remedy an already existing violation of Article 5.3.4, this sends a message to thousands of other buyers that non-compliance has not been and will not be tolerated.

265. This is especially important in the situation where the Agency had to deal with large scale non-compliance, as can be seen from the fact that around 20-30% of privatization agreements had to be terminated.[493] Obviously, had the Agency waived non-compliance in such situation, this would have had an effect on other buyers' contract discipline and would have encouraged their non-compliance. It could also have raised concerns or even claims of discrimination, because in other cases the Agency regularly terminated privatization

[489] See Letter from Mr. Djura Obradović to Privatization Agency, 8 September 2015, pp. 1-2 & 6, **CE-48**.
[490] See Rejoinder, para. 176.
[491] See Second Expert Report of Mirjana Radovic, para. 27 (*The ultimate purpose of Article 5.3.4 was to ensure that BD Agro would be a stable company with a continuous, viable business activity, i.e. to secure the economic well-being of the company, the continuity of its business operations and to safeguard the material base of its business"*).
[492] See Rejoinder, paras. 329-372.
[493] See Transcript, Day 3, 196:6-13 (Radovic Jankovic) & Day 4, 155:10-20 (Cvetkovic).

agreements for non-compliance, including with Article 5.3.4.[494]

266. Last but certainly not the least, under Article 41a(1)(3) of the Law on Privatization, the Agency had a legal obligation to terminate the Privatization Agreement if it did not provide an additional time for compliance to the buyer. As discussed, after so many deadlines passed without Mr. Obradovic remedying the breach, yet another deadline for compliance would be pointless.

### 7. The Agency relied on the Buyer's conduct, not the other way around

267. At the Hearing, the President of the Tribunal raised the issue of whether there is "*some kind of good faith principle that means that at some point you need to say what you want to do with this contract, because you have, on the other side, your contract partner, who relies on your behavior*".[495] Prof. Radovic answered that there was no such rule in Serbian law.[496]

268. Respondent submits that even if such rule were to exist in Serbian law (*quod non*), the factual record of the present case reveals that additional deadlines for compliance that the Agency gave to the Buyer were in large part result of his repeated representations and assurances that he would comply, as well as of his occasional partial (but never complete) remedying of various breaches of the Privatization Agreement.[497]In other words, it was the Agency that had reasons to believe that the Buyer was willing to remedy the breach of Article 5.3.4 until September 2015 when it became clear that he did not have the intention to do so.

269. For example: on 9 November 2011, Mr. Obradovic wrote to the Agency and promised to repay the funds given to Inex and Crveni Signal in breach of Article 5.3.4.[498] In his letter of 23 July 2012, Mr. Obradovic admitted that there were obligations that had not been fulfilled and asked for an additional period to comply.[499] On 2 November 2012 the Agency held a meeting with the Buyer,[500] and in accordance with the conclusion of the meeting it forwarded the relevant documentation to the Ministry for assessment.[501] In December 2013, the Ministry opened supervision procedure in the case of BD Agro privatization[502] so the Agency

[494] See Notice on Termination from the Privatization Agency to Jugotehnika, 20 November 2009, p. 1, **RE-562**, & Agreement on sale of socially-owned capital by public auction method – Rasadnici (Jugotehnika), 31 July 2007, Articles 1.2 & 3.1 *(Rasadnici (Jugotehnika))*, **RE-362-additional translation**; Termination of Trayal Korporacija privatization agreement, 6 December 2013, pp. 2 & 4 (*Trayal*), **RE-24**; Termination of Geodetski biro privatization agreement, 27 March 2013, pp. 2-5, *(Geodetski biro)* **RE-31**; Termination of Zastava PES privatization agreement, 9 April 2013, pp. 3-4 (*Zastava PES*), **RE-59**. See, also, Rejoinder, para. 215.

[495] Transcript, Day 6, 128:1-6; see, also, *ibid.*, 129:7-16 (Kaufmann-Kohler).

[496] See Transcript, Day 6, 129:17-24 (Radovic).

[497] See Rejoinder, paras. 156-174.

[498] See Letter from Mr. Obradovic to the Privatization Agency attaching the statement from BD Agro's director of 9 November 2011, **RE-60**.

[499] See Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

[500] See Minutes from the session of the Commission for Control held on 25 October 2012, **RE-88**. See also Minutes from the session of the Commission for Undertaking of Measures of 8 November 2012, **RE-50**: Notice of the Privatization Agency on Additional Time Period, dated 8 November 2012, **CE-79**.

[501] Minutes from the session of the Commission for Control held on 18 January 2013, **RE-89**; Letter from the Privatization Agency to the Ministry of Economy of 22 January 2013, **RE-90**.

[502] See Report of Ministry of Economy on the Control over the Privatization Agency, dated 7 April 2015, p. 1, **CE-98**.

had to wait for its outcome, which would provide opinion on implementation of Article 5.3.4 remedies. Finally, upon the conclusion of the supervision on 7 April 2015,[503] the Agency acted in accordance with the Ministry's opinion and without much delay concluded the matter, as the Buyer expressly refused to comply in September 2015.[504]

270. Also, on 16 December 2014, Mr. Markicevic sent a letter to the Agency submitting, *inter alia*, a supplemented audit report regarding the fulfilment of obligations from the Privatization Agreement and certain documentation concerning the status of the debts of Crveni Signal and Inex to BD Agro.[505] On 2 July 2015, Mr. Markcevic wrote to the Agency that Mr. Obradovic submitted auditor reports confirming his compliance, "*except in relation to lending to third parties, namely Inex Nova Varos ad Nova Varos and Crveni signal a.d. Beograd*".[506] This is yet another confirmation that the Buyer and Claimants recognized the breach of Article 5.3.4, were aware that they had to remedy it and actually considered to do that.

271. The above summary of communications suggests that the Agency's postponements of decision to terminate and additional time for compliance were given to the Buyer as the result of what the Agency presumed were good faith representations by the Buyer that he was intended on remedying the breach. Another factor is the involvement of the Ministry – it was more than reasonable for the Agency to wait and see what would be the position of the Ministry who initiated the supervision procedure. Finally, the Agency was discussing assignment of the Privatization Agreement which also made it reasonable to postpone decision to terminate. Nevertheless, what is important to note is that behavior of the Agency cannot be considered as giving Claimants any reliance or the impression that if the breach were not remedied the Agency might ultimately find it too minor to actually terminate the contract.

## IV. SERBIA IS NOT RESPONSIBLE FOR ALLEGED TREATY BREACHES

272. Claimants' opening statement at the Hearing did not address liability, except briefly the questions of attribution and exercise of sovereign powers.[507] Claimants' power point presentation was also brief on liability, and by and large outlined their arguments from the Reply, without answering Respondent's arguments set out in the Rejoinder.[508] However, there was an important exception to this approach, as Claimants also came up with a completely novel argument that the termination of the Privatization Agreement breached the standard of proportionality *under general international law applicable to all treaty standards*.[509] Respondent will first address procedural and substantive aspects of this new argument below. With this exception, Respondent will discuss how the evidence from the

[503] *Ibid*.
[504] See Letter from Mr. Djura Obradović to Privatization Agency, 8 September 2015, pp. 1-2 & 6, **CE-48**.
[505] See Letter from BD Agro to the Privatization Agency, 16 December 2014, **CE-323.**
[506] Letter from BD Agro to Privatization Agency, 2 July 2015, **CE-46**.
[507] See Transcript, Day 1, 104:12-106:21 (Pekar).
[508] See Claimants' Opening Statement ppt, slides 222-247.
[509] See Transcript, Day 1, 7:2-14 & 226:14-228:6 (Anway) & 228:12-25 (Pekar).

Hearing supplements its Rejoinder which is the rebuttal of Claimant's latest case on merits set out in the Reply. Accordingly, Respondent will address the issues of (1) proportionality under international law (2) expropriation; (3) impairment; (4) fair and equal treatment; (5) umbrella clause.

## A. CLAIMANTS' NEW PROPORTIONALITY CLAIM

### 1. The new proportionality claim is a gross violation of procedural rules and should be disregarded

273. In their previous written submissions, Claimants argued that the termination of the Privatization Agreement was a breach of the principle of proportionality under the Constitution of Serbia.[510] They also argued that since the exercise of the right to terminate was disproportionate and unlawful under Serbian law, it was therefore expropriatory.[511] However, Claimants never made a claim that the termination breached proportionality *under general international law applicable to all treaty standards*, which they did for the first time at the Hearing.[512] Even then, Claimants failed to provide any substantial analysis to support their new proportionality claim, which prompted questions from the Tribunal.[513]

274. Introduction of a completely new claim practically at the very end of the proceedings is an unfair surprise of the most serious kind. It is also a breach of procedural rules to which the Tribunal must react.

275. According to paragraphs 15.2 and 15.3 of Procedural Order No. 1, if Claimants wished to make a claim that Serbia violated the proportionality standard under general international law, they should have done so in the first round of submissions. Instead, they made this claim only at the Hearing, by which they violated paragraphs 15.2 and 15.3 of Procedural Order No. 1. It is respectfully submitted that the Tribunal should not tolerate this blatant breach of Procedural Order No. 1 for at least two reasons: (1) as a matter of procedural discipline and basic fairness; and (2) because this breach puts Respondent in the position of gross inequality, which cannot be remedied.

276. The unequal position of the Parties which is the result of Claimants' belated claim is more than obvious. While Claimants had ample time (more than a year) to prepare their proportionality claim, Respondent will have to respond to it in short time assigned for preparation of post-hearing briefs. Further, since they did not bother to come with a more detailed argument in support of the claim even at the Hearing, Respondent's answer in the present submission can only deal with its brief outline provided by Claimants. Presumably,

[510] See Memorial, para. 255-256; Reply, paras. 429-436, 1095-1101.
[511] See Memorial, paras. 409-410 & Reply, para. 1102, referring to *Ampal v. Egypt* and arguing that the tribunal in that case held the termination unlawful not only because of the absence of any legitimate reason, but also based on its disproportionality.
[512] See Transcript, Day 1, 7:2-14 & 226:14-228:6 (Anway) & 228:12-25 (Pekar).
[513] See Transcript, Day 1, 7:2-14 (Anway) & 226:14-228:25 (Vasani, Anway & Pekar).

they will provide a full argument on proportionality only in their parallel post-hearing brief, to which Respondent will have even less time to respond.

277. For all these reasons, Respondent respectfully urges the Tribunal to refuse to consider Claimants' new claim. In any case, Respondent reserves the right to submit a further submission on proportionality and to seek introduction of new evidence in support.

### 2. Claimants' argument on proportionality *prima facie* fails

278. At the Hearing, Claimants' counsel briefly outlined what he alleged were undisputed facts and then concluded that "*undisputed facts that I just described could not possibly survive the proportionality test under public international law*". He also argued that the Tribunal could decide the case on this basis alone, "*on undisputed facts and proportionality*". [514] At the end of the day, when urged by the Tribunal, Claimants' counsel also referred to *Occidental v. Ecuador* and briefly argued that that Respondent's measures did not pass elements of the proportionality test adopted by the tribunal in that case.[515] Claimants are wrong both (1) in their allegation about "undisputed facts" and (2) their application of the *Occidental* test, as will be discussed below.

#### *2.1. Claimant's proportionality claim is based on wrong factual assumptions*

279. Claimants' argument is based on the premise that there are certain "undisputed facts", namely: that purpose of Article 5.3.4 was to ensure that Serbia would be paid full purchase price; that upon the payment of the purchase price, the contract was completed and Article 5.3.4 no longer had any purpose; that Serbia did not suffer any economic harm, and, finally, that Serbia took the most severe action it possibly could.[516]

280. However, as has been extensively discussed in this and previous Serbia's submissions, these allegations are wrong:

- The purpose of Article 5.3.4 *was not* limited to ensuring that Serbia would be paid full purchase price. Rather it was to ensure that BD Agro would be "*a stable company with a continuous, viable business activity*",[517] in order to secure fulfilment of all obligations under the Privatization Agreement (not only the payment of the purchase price);[518] and "*to secure a general public interest in the well-being of privatized companies*".[519]
- Accordingly, it is also inaccurate that after the payment of the purchase price Article 5.3.4 had no longer any purpose. The remedy of its breach would protect the well-being of BD Agro, which was endangered by the mismanagement of the Buyer. The pledging of the property in violation of Article 5.3.4. was one of manifestations of the mismanagement. Further, the remedy of Article 5.3.4 breach had a further purpose

[514] See Transcript, Day 1, 6:12-7:14 (Anway).
[515] See Transcript, Day 1, 226-1-228:6 (Vasani & Anway).
[516] Transcript, Day 1, 5:25-7:1 (Anway).
[517] Second Expert Report of Mirjana Radovic, para. 27.
[518] See Second Expert Report of Mirjana Radovic, para. 27; see, also, Judgment of the Commercial Appellate Court No. Pž 8687/2011, dated 18 December 2012, p. 5, **CE-722**.
[519] Second Expert Report of Mirjana Radovic, para. 27. See also III. A.

which, as discussed above, is related to the goals of privatization enunciated in Article 2(1) of the Law on Privatization (creation of conditions for economic development and social stability). This required full compliance with all obligations under privatization agreements, as confirmed by constant practice of highest Serbian courts.[520] In addition, the Agency's insistence on the Buyer's remedying Article 5.3.4 breach was also for the purpose of strengthening general compliance with privatization agreements. In the situation where there was a widespread non-compliance as evidenced by the fact that 20-30% of privatization agreements had to be terminated, it was particularly important not to turn a blind eye on the breach as this would have had effect on other buyers' contract discipline and could have encouraged their non-compliance.[521] Finally, the Agency also could not tolerate contract breaches on the basis of their alleged minor significance, as Claimants imply, because such differentiation would be difficult, if not impossible, in the situation of widespread non-compliance, which would have been only exacerbated in this way.

- Claimants also argue that Respondent did not suffer any economic harm, which is *prima facie* inaccurate because it was the Agency, and not Respondent, who terminated the Privatization Agreement. In addition to that, it should be noted that direct economic harm to the Agency is irrelevant in the analysis. Considering purposes of Article 5.3.4, what is economically relevant is the well-being of the company, which was clearly endangered, including by the pledges. In any case, economic harm should not be a decisive consideration with regard to termination of privatization agreements, since this measure serves to enforce individual and general buyers' compliance with all their provisions which, as already discussed, is important for fulfillment of the goals of privatization.

- Finally, Claimants allege that Respondent took the most severe action it possibly could and "*took entirety of the company and paid nothing for it*". However, as already discussed, in reality the Agency had only two options before it, either to set another deadline for compliance, or to terminate. As for other alternatives, it obviously could not issue a certificate of compliance, because there was no compliance, and it could not sue for damages, because the damage was not inflicted to the Agency but to BD Agro.[522] In view of the Buyer's bad faith, as he attempted to deceive the Agency, as well as the fact that the Buyer openly disagreed with the Agency's interpretation of Article 5.3.4 and threaten to sue, providing him with yet another deadline to remedy the breach was pointless and unreasonable.[523] Accordingly, the *only viable and reasonable option* available to the Agency was to terminate the Privatization Agreement. The termination was a measure of last resort, when no other viable measures for achieving the Buyer's compliance remained, and was used after the Agency attempted to achieve the compliance with other means. It should be recalled that prior to the termination the Agency sent numerous notices to the Buyer, had meetings with him (and with Claimants in the context of potential assignment) and had

[520] See above III. A.
[521] See above III. D. 6.
[522] See above III. D. 5
[523] See above III. D. 5

generally showed quite a bit of patience with Mr. Obradovic's recalcitrant ways and bad faith.[524] Finally, the fact that after the termination the Buyer's shares were transferred to the Agency without compensation was an automatic legal consequence of the termination, which the Buyer knew and accepted as a consequence of the breach.[525]

281. In conclusion, there is nothing undisputed about the "facts" on which Claimants rely in support of their proportionality claim. In fact, Claimants' factual assumption is wrong, which should be fatal for their claim.

### *2.2.* **Occidental** *is distinguishable on facts and, in any case, the termination meets the* **Occidental** *test of proportionality*

282. As a matter of international law, Claimants rely on the principle of proportionality as enunciated by the tribunal in *Occidental v. Ecuador*. Claimants seem to argue that the present case presents an even harsher breach of proportionality in comparison to *Occidental*, because unlike respondent in the latter case, Serbia violated the contract.[526] The last observation is inaccurate, because the Agency (not Respondent) terminated the Privatization Agreement lawfully.[527] However, there is a number of additional, fundamental differences between *Occidental* and the present case, which make the *Occidental* rationale inapplicable here. Respondent will mention just a few.

283. First, as observed by the *Occidental* annulment committee, the principle of proportionality applies only to administrative acts, not to contractual behavior.[528] Therefore, Claimants would have to demonstrate that the termination in the present case was an administrative act. They have patently failed to do so, having introduced no evidence in this regard, except the word of their legal expert, Mr. Milosevic, who supplies no authorities in support of his position and admits that it goes against the practice of Serbian courts.[529]

284. Second, the Agency had no other measures at its disposal, which is also a fundamental difference between the present case and *Occidental*. In the latter case, the minister who terminated the contract by *caducidad* had under the applicable law discretion to do so or to choose other options that were at his disposal (insistence on payment of transfer fees; renegotiation of the original contract; negotiation of settlement).[530] He chose the most severe measure, while there were viable alternatives. In the present case, as already discussed, the Agency was left only with the possibility to terminate, since the Buyer failed to comply with additional deadline for remedying the breach which had been issued following the Ministry

[524] See Rejoinder, paras. 133-177.
[525] See First Expert Report of Mirjana Radovic, para. 43.
[526] Transcript, Day 1, 226:14-228:6 (Anway).
[527] See above III. D. & Rejoinder, paras. 199-238.
[528] See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, November 2, 2015, para. 323, **CLA-05**.
[529] Transcript, First Expert Report of Milos Milosevic, paras. 111-118.
[530] See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 434, **CLA-75**.

supervision, just as he had failed to comply with all the previous deadlines.[531] He also stated, in no uncertain terms, that he had no intention of curing the breach in the future, thereby leaving the Agency without the option to set yet another deadline.[532]

285. Finally, if one considers the proportionality standard as defined by the tribunal in *Occidental*, it is clear that Respondent has already demonstrated what that tribunal considered a state ought to demonstrate to satisfy the standard:

> "*In cases where the administration wishes to impose a severe penalty, then it appears to the Tribunal that the State must be able to demonstrate (i) that sufficiently serious harm was caused by the offender; and/or (ii) that there had been a flagrant or persistent breach of the relevant contract/law, sufficient to warrant the sanction imposed; and/or (iii) that for reasons of deterrence and good governance it is appropriate that a significant penalty be imposed, even though the harm suffered in the particular instance may not have been serious*."[533]

286. Respondent has provided sufficient evidence to meet the standard under all these alternatives:

- There was "sufficient serious harm" caused by the offender as the value of the funds used for the benefit of Crveni Signal and Inex in breach of Article 5.3.4 was almost EUR 1 million. These funds amount to approximately 17% of the value of the Privatization Agreement and also exceeded the value of each installment of the purchase price.[534] From the point of BD Agro's financial situation in 2015, these funds amounted to almost 5% of the company's secured debt, which is also not negligible.[535] Considering that one of the purposes of Article 5.3.4 was to ensure the well-being of privatized companies, it is clear that the Buyer's violation of this provision caused sufficient harm. In this context, one should also recall the following remark of the tribunal in *Awdi*: "*… proportionality must be considered not merely from an economic point of view but in light of all the circumstances of the case"*.[536] In particular, the tribunal took into account claimants' "overall conduct" which did not consist of minor infractions but involved initial refusal to comply with obligations and then highly suspicious attempt to prove their fulfillment.[537] The parallel with the present case and Mr. Obradovic's conduct is striking.[538]

[531] See e.g., Rejoinder, para. 905.
[532] Letter from Mr. Djura Obradović to Privatization Agency of 8 September 2015 pp. 1-2 & 6, **CE-48**.
[533] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the Annulment Committee, 2 November 2015, para. 325, **CLA-05**.
[534] For more, see Rejoinder, para. 222.
[535] The amount of debt in Class A was EUR 21.2 million (RSD 2,565,983,972), see Amendment to the Pre-pack Reorganization Plan of BD Agro, 6 March 2015, p. 32, **CE-101**. For the exchange rate, see Exchange rates from 2004 to 2019 sourced from Thompson One data, **RE-194**.
[536] *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 382, **CLA-26**.
[537] See *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, paras. 379-383, **CLA-26**.
[538] See Rejoinder, paras. 175-177.

- The breach of Article 5.3.4 was both "flagrant or persistent" and "sufficient to warrant the sanction imposed", as the Buyer failed to remedy it for four and half years, from 2011 to 2015, while at the same time trying to deceive the Agency that it actually complied with his obligations.[539]
- It was also "appropriate" to terminate the Privatization Agreement for "reasons of deterrence and good governance", having in mind the already existing high rate (20-30%) of non-compliance[540] and the Agency's consistent practice to terminate privatization agreements in similar cases. Such terminations had a legitimate aim to enforce future compliance. Obviously, the Agency's waiver of the Buyer's obligation to remedy Article 5.3.4 breach would have had a negative effect on other buyers' contract discipline. It would also be questionable from the point of equal treatment, because in other cases the Agency regularly terminated privatization agreements for non-compliance, including with Article 5.3.4.[541]

287. In conclusion, Respondent complied with the proportionality standard as enunciated in the *Occidental* case.

## B. THERE WAS NO EXPROPRIATION

288. Claimants base their expropriation claim on several lines of arguments, all of which were comprehensively refuted in the Rejoinder.[542] Some of Claimants' contentions will again be addressed in this submission, in light of the Hearing.

289. *First*, Respondent's written submissions have demonstrated that Claimants had no property or contractual rights that could be expropriated to start with.[543] This conclusion has been fortified by the testimonies at the Hearing, as is in detail discussed in the part dealing with jurisdiction to which the Tribunal is respectfully referred to.[544]

290. *Second*, another requirement for expropriation is that the measure complained of was undertaken in the exercise of sovereign powers. As discussed in the Rejoinder[545] and Respondent's opening statement,[546] the measures in question were undertaken in purely contractual capacity by the Privatization Agency. Nothing at the Hearing changed this conclusion. In particular, the testimonies of the witnesses confirmed what already transpired from the transcripts of the sessions of the Commission for Control – that the Agency behaved as a contractual party trying to extract performance from the other side, willing to wait for such performance and then terminating the Privatization Agreement only when no other

[539] Rejoinder, paras. 133-177.
[540] See Transcript, Day 3, 196:6-13 (Radovic Jankovic) & Day 4, 155:10-20 (Cvetkovic).
[541] See Notice on Termination from the Privatization Agency to Jugotehnika, 20 November 2009, p. 1, **RE-562** & Agreement on sale of socially-owned capital by public auction method – *Rasadnici Jugotehnika*, Articles 1.2 & 3.1, **RE-362-additional translation**, Termination of Trayal Korporacija privatization agreement, 6 December 2013, pp. 2 & 4 (*Trayal*), **RE-24**; see, also, Rejoinder, para. 215.
[542] See Rejoinder, paras. 1167-1265.
[543] See Rejoinder, paras. 1171-1179 & Counter-Memorial, Section V.C.2.
[544] See above II.
[545] See Rejoinder, paras. 1183-1207.
[546] See Transcript, Day 1, 203:16-207:17.

option was left to it. The same goes for the Agency's refusal to release the pledge over the shares. Both the termination and refusal to release the pledge are *contractual law* methods to extract contract discipline from the other side which are taken from the position of equality, and not as an exercise of governmental power to authoritatively resolve the matter.

291. *Third*, the termination was lawful under Serbian law, as was already discussed extensively in this and other submissions.[547]

292. *Fourth*, aware that their illegality argument fails, Claimants tried to argue that the Agency acted in bad faith because it knew that violation of Article 5.3.4 could not constitute valid ground for termination under Article 7 of the Privatization Agreement.[548] This contention is refuted by the transcript from the session of Commission for Control which reveals that the Agency was aware that it could terminate on the basis of Article 41a of the Law on Privatization.[549] This awareness is further confirmed by the existence of practice of the Agency to terminate privatization agreements on the basis of Article 41a alone, even when the breach was not listed among termination grounds in the agreement itself.[550]

293. The testimonies at the Hearing confirmed *in vivo* and under Claimants' counsel cross-examination that the Agency's staff working on BD Agro's case acted in good faith and diligently. As Ms. Radovic-Jankovic testified, the Agency considered different opinions about terminations, but in good faith made its own decision that it was justified under Article 41 of the Law on Privatization: "*It is a fact that these things existed, the unresolved legal issue is a fact, because there were two opinions not to terminate the contract, then we had the opinion that it should be terminated, there were different points of view. There were a lot of discussions and considerations regarding this matter… but the Agency had a uniform practice towards all entities undergoing privatization, therefore we treated this entity the same as the other ones.*"[551]

294. *Sixth*, turning to the issue of proportionality in the expropriation context, Claimants' written submissions considered it only under national, Serbian law, not as a principle of international law. They argued that the lack of proportionality under Serbian law was one of the reasons why the termination of the Privatization Agreement was unlawful and therefore expropriatory.[552] However, as Prof. Radovic testifies, the principle of proportionality in the Constitution of Serbia applies to restrictions of human and minority rights, and has no place in contractual relationships,[553] so it is irrelevant in the present case. At the same time, the idea of proportionality in the contractual context is reflected in Article 131 of the Law on Obligations, which prevents termination of contract in cases where only an insignificant part

[547] See above, III. D. & Rejoinder, 199-238.
[548] See Reply, paras. 1090-1091.
[549] See Rejoinder, para. 1225, referring to Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, p. 2, **CE-768**.
[550] See above III. D. 1
[551] Transcript, Day 3, 156:16-25 (Radovic-Jankovic).
[552] See Memorial, paras. 409-410 & Reply, para. 1102, referring to *Ampal v. Egypt* and arguing that the tribunal in that case held the termination unlawful not only because of the absence of any legitimate reason, but also based on its disproportionality.
[553] First Expert Report of Mirjana Radovic, para. 34 & Second Expert Report of Mirjana Radovic, para. 29. See, also, Rejoinder, paras. 1228-1231.

of the obligation remains unfulfilled.[554] As has been demonstrated above, violation of Article 5.3.4 was not a minor breach in the sense of Article 131, which confirms that the Agency's termination was proportional in the sense of contract law.[555]

295. In their proportionality argument under Serbian law, Claimants specifically point to "three consequential questions": (1) whether a measure was taken for legitimate reasons, (2) whether less obstructive alternatives were available, and (3) whether the benefits of the measure outweigh the costs.[556] For this test, however, neither Claimants nor their expert Mr. Milosevic provide any source or authority.[557] In any case, the Agency's termination met these requirements as well. As discussed in the previous section, the termination had legitimate aims, and it was the only viable remedy available to the Agency. Furthermore, in contrast to Claimants submission, the question of balance between the purpose to be achieved and the means employed should not be considered merely from an economic point of view,[558] but one should also take into account the Buyer's bad faith and recalcitrant attitude, as well as the general purpose of privatization that is served by enforcing compliance with privatization agreements. From this perspective, the termination was clearly proportional.[559] One should just recall that the money that was the subject of the 221 Million Breach of Article 5.3.4 eventually ended in Mr. Obradovic's pockets, while later on he tried to deceive the Agency that he remedied the breach.[560] It is also not without importance that Claimants' witnesses confirmed at the Hearing that the breach could have easily be remedied, but it never was.[561]

296. *Seventh*, Claimants make a claim that that the termination of the Privatization Agreement and the transfer of BD Agro's shares to the Agency amounted to *indirect expropriation* of Mr. Rand's indirect shareholding *via* MDH, because it thwarted the pre-pack reorganization plan and forced BD Agro into bankruptcy. However, it was Mr. Obradovic's and Claimants' mismanagement that financially destroyed BD Agro, not the termination of the Privatization Agreement by the Agency. While not in a formal bankruptcy, BD Agro was *de facto* bankrupt as of March 2013, that is more than two years before the termination.[562] In addition, it was highly unlikely that the pre-pack reorganization plan would have worked, as demonstrated by Mr. Cowan.[563]

297. An important factor was also that BD Agro's major secured creditor, Banca Intesa, was adamantly pushing for bankruptcy. Its intentions were temporarily brought to a halt due to

[554] It seems that experts agree on this, see Transcript, Day 5, 88:6-13 (Kaufmann-Kohler & Milosevic); see, also, Second Expert Report of Mirjana Radovic, para. 29.
[555] Rejoinder, paras. 224-230.
[556] See Reply, para. 1097 referring to Second Expert Report of Milos Milosevic, para. 69 & First Expert Report of Milos Milosevic, paras. 92-97. Interestingly, Second Expert Report of Milos Milosevic, discuss only proportionality of the *remedies* that the Agency requested from the Buyer, not the proportionality of the termination, as he did in his first report.
[557] *Ibid*.
[558] See *Hassan Awdi, Enterprise Business Consultants, Inc. And Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 382, **CLA-26**.
[559] See above III. D. 6.
[560] See above III. B.
[561] See Transcript, Day 2, 43:21-24 (Rand); Day 3, 9:10-17 (Markicevic) & 75:4-14 (Broshko).
[562] See Pre-pack Reorganization Plan from November 2014, p.8, **CE-321**.
[563] See Respondent's Opening Statement ppt, slide 110. See also Presentation of Sandy Cowan ppt, slide 8.

manipulations of land valuations by BD Agro's management, with the purpose to prevent Banca Intesa from having the majority of votes in the Class A of creditors.[564] However, when the decision on Amended pre-pack restructuring plan was quashed and returned to the lower court for reconsideration on 30 September 2015, all options were open, including the prospect of Banca Intesa's majority in the Class A of creditors, regardless of the termination of the Privatization Agreement. The reason for this is that the lower court was directed to double-check the data from the Amended plan because there was a substantial difference between Adventis's and Mr. Mrgud's valuations of BD Agro.[565] This would likely require a new valuation of the company.[566] As Claimants' expert Mr. Hern agreed, there was a possibility that the new valuation would favor the position of Banca Intesa,[567] with the result that the bank will have the majority in the Class A group of creditors. In this scenario, BD Agro's bankruptcy would be inevitable.

## C. NO IMPAIRMENT OF THE INVESTMENT BY ARBITRARY AND UNREASONABLE MEASURES

298. Claimants argue that Respondent's refusal to release the pledge, consent to assignment of the Privatization Agreement and, finally, its termination were arbitrary and unreasonable measures. It seems that Claimants use the terms arbitrary and unreasonable interchangeably.[568]

299. At the outset, Respondent recalls that international law standard of arbitrariness sets a very high threshold. As is well-known, the conduct must entail something more than mere illegality of conduct, because, as the ICJ put in a widely accepted pronouncement "*[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law… It is a wilful disregard of due process of law, an act which shock or at*

[564] For the bankruptcy proceedings, see Rejoinder, paras. 437-464; Transcript, Day 1, 216:20-218:25 (Djeric).
[565] See Rejoinder, para. 462, referring to Decision of the Appellate Court dated 30 September 2015, p. 9, **CE-358**.
[566] This is clear from the following excerpt from the appeals judgment: *"Provision of Art. 159 para. 9 of the Law on Bankruptcy prescribes that during the preliminary procedure the bankruptcy* ***judge may****, at the request of an interested party or ex officio, appoint not only the temporary bankruptcy trustee, but also* ***hire other experts for the purpose of determining accuracy of information from the pre-pack plan****. Expenses for hiring the temporary bankruptcy trustee and other experts are borne by the applicant.* ***Therefore, in the present situation, where there is a significant difference between asset valuation submitted with the request to initiate bankruptcy in accordance with the pre-pack reorganization plan and valuation submitted by the applicant for the purpose of voting of secured creditors and classification of creditors classes, depending whether their claims are secured, it is necessary to verify information from the pre-pack reorganization plan concerning valuation of the applicant's assets, which will be used both as valuation prescribed by Art.155 para.1 of the Law on Bankruptcy, but also the valuation in accordance with Art. 165 para. 5 of the Law on Bankruptcy,*** *whereby the judge needs to provide reasons for his/her decision based on a conscientious and reasoned evaluation of all valuations and statements of the temporary bankruptcy trustee."* Decision of the Appellate Court dated 30 September 2015, p. 9, **CE-358.**
[567] See Transcript, Day 8, 67:1-6 (Hern).
[568] See Reply, para. 1159.

*least surprises, a sense of judicial propriety*".[569] Claimants agree on this standard,[570] but fail to appreciate its high threshold.

### 1. Refusal to release the pledge

300. Claimants argue that the refusal to release the pledge was both unlawful and arbitrary.[571] As far as Claimants' unlawfulness argument is concerned, it seems that they actually argued that the refusal to release the pledge was contrary to the Privatization Agreement and the share pledge agreement attached to it, and not in violation of any imperative provision of Serbian law.[572]

301. In any case, as Respondent demonstrated in the Rejoinder, with reference to expert opinion of Prof. Radovic, the refusal to release the pledge was allowed under the rules of Serbian contract law.[573] The purpose of the pledge was to secure fulfilment of all obligations under the Privatization Agreement, so it was not exhausted by the payment of the full purchase price. Also, Article 122 of the Law on Obligations entitled the Agency to refuse to perform its obligation to release the pledge until the Buyer complied with its obligation under Article 5.3.4. At the Hearing, Prof. Radovic confirmed that "*as long as contract termination is possible, there is a ground for contract termination, the pledge can be retained, yes.*"[574]

302. On the other hand, Claimants argue that the refusal to release the pledge was arbitrary and unreasonable solely on the basis of the transcripts from the Commission for Control. They claim that these transcripts show that the Agency acted in willful disregard of the law and in bad faith, and that it was motived by outside public pressure and not by rational decision making.[575] At the Hearing, Claimants made yet another attempt to portray the transcripts from the Commission as some sort of smoking-gun but in effect repeated their assertions from the Reply, without responding to their rebuttal in the Respondent's Rejoinder.[576] Here, again, the Tribunal is invited to read the transcripts and see for itself how Claimants manipulate them.[577]

303. But, as has been in detail discussed in the Rejoinder, the Commission for Control decided to retain the pledge over the shares for the same reason that the Agency continuously cited since the very beginning – to be able to ensure the Buyer's compliance with his outstanding obligations under the Privatization Agreement. There was nothing new or extraordinary in this stance which had been previously communicated to the Buyer of BD Agro.[578] This was

[569] *Case Concerning Elettronica Sicula S.p.A (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, I.C.J Reports 1989, para. 128, **RLA-89**. For more on the legal standard of arbitrary conduct and different pronouncements, which, in essence do not depart much from the ICJ standard, see Rejoinder, paras. 1273-1281.
[570] See Reply, para. 1159.
[571] See Reply, para. 1162.
[572] See Reply, paras. 1163-1167.
[573] See Rejoinder, paras. 1283-1287; Second Expert Report of Mirjana Radovic, paras. 47-50.
[574] See Transcript, Day 6, 106:25-107:2 (Radovic).
[575] See Reply, paras. 1168-1176.
[576] See Transcript, Day 1, 57:8-66:20 (Misetic) & Claimants' Opening Statement ppt, slides 134-140.
[577] See, also, Transcript, Day 1, 196:21-25 (Djeric).
[578] See Rejoinder, paras. 283-285.

also in line with the position the Agency took in other privatizations.[579]

304. Claimants also interpret the transcript from the Commission of Control as showing that members of the Commission decided to delay the release of the pledge because they knew the Buyer could not remedy the violations within the additional deadline, so the Agency would be able to expropriate the pledged shares after the termination.[580] These conjectures are not borne by the transcript.

305. First, Claimants' argument is based on the assumption that the Commission knew that the Buyer would not be able to comply. However, Claimants fail to note that the source of this information are actually the Buyer and/or the Claimants-controlled management of BD Agro, as is clear from the transcript: "*That is, **they have already stated** publically that **they… cannot fulfil some of these obligations***".[581] However, the Hearing revealed that, in fact, the outstanding breach of Article 5.3.4 could have been easily remedied by Mr. Rand, or even Mr. Broshko.[582] This shows that, once again, Claimants were deceiving the Agency.

306. Second, as already demonstrated in the Rejoinder, Claimants deliberately fail to consider the parts of the transcript showing that the Agency actually hoped that the Buyer would comply with his obligations and even discussed at that time possibility of granting him yet another additional deadline to remedy the breach.[583] This is the context of Ms. Radovic-Jankovic's saying at the time "*Okay, we have 90 days, afterwards we will see what we will do*".[584] And this sentence clearly shows that the Commission at that time did not make a final decision on the termination, but decided to wait for compliance, as is stated in its communication to the Buyer.[585] Clearly, Claimants' theory about the Commission for Compliance acting in bad faith and refusing to release the pledge as part of its plan to retain the shares after the termination is simply a conjecture. Further, this and other evidence also shows that the Commission for Compliance did not act arbitrarily or unreasonably, but engaged in rational decision making, carefully weighing issues before it and then took a rational decision not to release the pledge. As Ms. Vuckovic testified: "*Precisely this means that we discussed this issue in detail, and I have to admit a broad discussion regarding this, deeply aware of what the agreement said, and deeply aware of the consequences of the performance of the Privatization Agreement, and creation of bad practice for all future buyers who could behave this way.*"[586]

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[579] See Rejoinder, paras. 286-289.

[580] See Transcript, Day 1, 65:1-8 (Misetic); Claimants' Opening Statement ppt, slide 137. Claimants even insinuated that the Agency's refusal to release the pledge already in 2012, when the purchase price was paid, was motivated by the wish to be able to "expropriate" the shares through the termination of the Privatization Agreement three years later, see Transcript, Day 1, 40:2-9 (Anway). This is preposterous.

[581] See Claimants' Opening Statement ppt, slide 136, quoting Transcript of the audio recording from the meeting of the Commission for Control, 23 April 2015, p. 9, **CE-768** ("*... since Juliana already said that there is no chance they will fulfil all of these contractual obligations. **That is, they have already stated publically that they… cannot fulfil some of these obligations***") (emphasis added).

[582] See Transcript, Day 2, 43:21-24 (Rand); Day 3, 9:10-17 (Markicevic) & 75:4-14 (Broshko).

[583] See Rejoinder, paras. 277-280.

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

[585] Letter from the Privatization Agency to D. Obradović, p. 2, 27 April 2015, **CE-348**.

[586] Transcript, Day 4, 70:18-24 (Vuckovic); see, also, Transcript, Day 3, p.177:1-7 (Radovic-Jankovic).

307. Claimants also argue that the decision not to remove the pledge from the shares was the result of public pressure and therefore not a result of rational decision-making.[587] They continued to pursue this point in the cross-examinations at the Hearing, but to no avail. As Ms. Radovic-Jankovic testified, outside scrutiny from labor unions, police and prosecutor's office did not affect the decision-making of the Commission for Control: "*Q. Yes, that's what that meant, being between a rock and a hard place and only God could cleanse you? A. No. That's not what it meant. We took our decisions independently, after a lot of analysis, and from different angles, what would happen if, and that's how we established our practice.*"[588] The outside scrutiny obviously meant that the Agency was taking its decision even more consciously, but there is no evidence that it influenced decisions in any particular direction. As Ms. Vuckovic testified, "*That was a time when there were many criminal complains filed against the Agency for privatization* ***by buyers or trade unions, regardless of whether we had terminated an agreement or not***."[589]

308. In conclusion, there is no evidence that the Agency acted in bad faith and with ulterior motives when refusing to release the pledge, or that this decision was the result of outside pressure. On the contrary, it was made after careful deliberations and with the hope that the Buyer will remedy the breach, which would enable release of the pledge. Accordingly, refusal to release the pledge was not arbitrary or unreasonable.

### 2. Termination of the Privatization Agreement

309. Claimants argue that the termination of the Privatization Agreement was arbitrary and unreasonable, as well.[590] In this context, they point to (i) the Agency's decision to disregard the opinions of the Ministry and external legal advisors; (ii) decision to leave 90 days deadline which was unrealistic and discretionary; (iii) the intervention of the Ombudsman; (iv) public pressure on the Agency to terminate. All this was already refuted in the Rejoinder,[591] and will now be assessed once again in the light of the evidence that transpired at the Hearing.

310. *First*, concerning the Agency's decision to continue to seek compliance from the Buyer, despite the opinions of the Ministry and external legal advisors, Respondent already pointed out that the Ministry opinion did not address the legal aspect of the issue, while the Agency had been on the position that there was a contractual breach.[592] This is what Ms. Radovic-Jankovic stated in her witness statement, which she confirmed at the Hearing.[593] On the other hand, the Agency was not in any way bound by the opinion of external legal advisors, which it considered wrong.[594] The Agency "*simply wanted to have several different opinions, several different perspectives, and then the Commission eventually took a decision based on*

[587] See Reply, para. 1174-1175.
[588] Transcript, Day 3, p.177:1-7 (Radovic-Jankovic).
[589] Transcript, Day 4, 73:9-13 (Vuckovic) (emphasis added).
[590] See Reply, paras. 1181-1203.
[591] See Rejoinder, paras. 1304-1317.
[592] See Rejoinder, para. 1305.
[593] See Transcript, Day 3, 145:19 (Radovic-Jankovic). See, also, Transcript, Day 4, 43:3-10 (Vuckovic).
[594] As Ms. Vuckovic testified: "*The Privatization Agency disagreed with the opinion, seeing that it was first of all contrary to all of the previous actions taken…*" Transcript, Day 4, 45:8-10 (Vuckovic)

*its conscience and the law*".[595] This approach can hardly be considered unreasonable and arbitrary.

311. *Second*, Claimants argue that the 90 days deadline given to the Buyer in May in accordance with the opinion of the Ministry of 7 April 2015 was unrealistic and discretionary.[596] However, as already noted in the Rejoinder, the deadline corresponded to previous additional time periods that Mr. Obradovic was given to remedy the breach.[597] The deadline also corresponded to deadlines usually given in other cases. Mr. Obradovic, did not request prolongation of the deadline which is also telling enough. What is more, the testimony of Claimants' witnesses at the Hearing definitively disposed with this contention, as they stated that the breach of Article 5.3.4 could have been easily remedied by Mr. Rand.[598]

312. *Third*, Claimants point to "shocking intervention" by the Ombudsman, before which the Agency was hesitant to terminate the Privatization Agreement but then resolved to do so.[599] However, as is obvious already from the transcripts of the Commission for Control, on which Claimants put so much (unwarranted) reliance, Ombudsman's supervision did not play any role whatsoever in its deliberations.[600] According to the testimony of Ms. Radovic-Jankovic at the Hearing, she understood that the Ombudsman asked the Agency to take *a decision* concerning the compliance with the Privatization Agreement, but he "*did not suggest as to whether we should issue a positive or a negative decision, he just wanted to have a decision."*[601] Further, she said that "*the opinion of the Ombudsman does not have a binding nature on us.*"[602] It is submitted that the record actually does not show that the Ombudsman's involvement played any role in the deliberations and ultimate decision of the Agency, contrary to what Claimants submit.

313. Finally, Claimants are desperate to prove that external factors, not rational decision-making, played a decisive role in the Agency's decision to terminate the Privatization Contract.[603] As already mentioned, Claimants tested their allegation about the role of external pressures during cross-examinations of Ms. Radovic-Jankovic and Ms. Vuckovic, but with abysmal results for their case. Both witnesses confirmed there were trade union protests and increased scrutiny of the Agency's work, but that this resulted only in the decisions being taken more scrupulously and consciously, not that they were influenced in any way.[604]

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[595] See Transcript, Day 3, 146:16-20 (Radovic-Jankovic)
[596] See Reply, paras. 1185-1186.
[597] See Rejoinder, para. 1308.
[598] See Transcript, Day 2, 43:21-24 (Rand); Day 3, 9:10-17 (Markicevic) & 75:4-14 (Broshko).
[599] See Reply, paras. 1189-1198.
[600] See Transcript of the audio recording from the meeting of the Commission for Control, 23 April 2015, **CE-768** & Transcript of the audio recording from the meeting of the Commission for Control, 19 June 2015, **CE-770.**
[601] Transcript, Day 3, 152:10-12 (Radovic-Jankovic).
[602] See Transcript, Day 3, 153:13-15 (Radovic-Jankovic).
[603] See Reply, paras. 1200-1201.
[604] Transcript, Day 3, p.177:1-7 (Radovic-Jankovic) & Transcript, Day 4, 73:9-13 (Vuckovic).

314. In conclusion, the Agency's decision to terminate the Privatization Agreement was neither arbitrary nor irrational. It was taken independently by the Agency and after careful deliberations.

### 3. Refusal to consent to assignment

315. In their Reply, Claimants argued that the Agency's refusal to consent to assignment of the Privatization Agreement was an arbitrary and unreasonable measure, which was refuted in the Rejoinder. At the Hearing, Claimants did not discuss this issue in the context of the alleged arbitrary and unreasonable treatment,[605] so the Tribunal is respectfully directed to the Rejoinder.[606]

## D. NO VIOLATION OF THE FET STANDARD

316. Claimants allege a number of violations of the FET standard.[607] *First*, they contend that the Agency and Ombudsman acted arbitrarily, which is also violation of the FET standard. As discussed in the preceding section on impairment, Claimants' allegations of arbitrary conduct are without merit in light of the witness testimony at the Hearing.

317. *Second*, Claimants allege that Ombudsman's "interference" lacked due process. But, as was discussed in the Rejoinder, the Ombudsman simply did not conduct any proceedings that would result in a final determination of Claimants' rights, so there is no room to apply due process guarantees with respect to Claimants.[608] The Hearing did not add anything new to that conclusion, except that the witness testimony confirmed what could be concluded from the transcripts from the Commission for Control – that the Ombudsman's activity did not influence the Agency's decision to terminate (or not) the Privatization Agreement. This was discussed in detail in the previous section on impairment.

318. *Third*, Claimants allege that Respondent breached the FET standard by acting in bad faith, which is based on two contentions. On the one hand, the Agency allegedly acted in bad faith when it refused to release the pledge over the BD Agro shares and to allow for the assignment of the Privatization Agreement, which is supposedly evidenced by the transcripts of the Commission for Control.[609] This has already been discussed in detail in the preceding section on impairment, which has demonstrated that Claimants' allegations are completely baseless.[610] On the other hand, Claimants argue that the Agency acted in bad faith as it terminated the Privatization Agreement although it knew that the violation of Article 5.3.4 was not a ground for violation under Article 7.1.[611] This has also been addressed in detail above and the Tribunal is respectfully directed to this discussion.[612] In sum, Claimants have

[605] See Claimants' Opening Statement ppt, slides 233-235.
[606] See Reply, paras. 1177-1180 & Rejoinder, paras. 1296-1303.
[607] Claimants' Opening Statement ppt, slide 237 & Reply, paras. 1230 *et seq.*
[608] See Rejoinder, para. 1259; Counter-Memorial, para. 689.
[609] See Reply, paras. 1237-1240.
[610] See, also, Rejoinder, paras. 1341-1345.
[611] See Reply, paras. 1241-1243.
[612] See above III. B. 4 & Rejoinder, paras. 201-210.

obviously not met "a demanding" standard of proof of allegations of bad faith.[613]

319. *Fourth*, Claimants also allege that there was a pattern of orchestrated wrongful conduct aimed at destroyed their investment.[614] As noted in the Rejoinder, the case law on which Claimants rely in this context reveals state conduct that is fundamentally different from the case of BD Agro.[615] Moreover, this case law confirms that international law imposes a very stringent standard of proof in this context, which Claimants do not even begin to meet. In contrast to the *Yukos* cases, BD Agro was in no way singled out in its treatment – on the contrary, the Agency treated it in accordance with its consistent practice, as has been confirmed at the Hearing.[616]

320. As for specific allegations Claimants make in this context, the Hearing has confirmed that they are without any merit. For instance, Claimants argue that the sole purpose of Serbia's intervention was to destroy their investment.[617] However, it has been confirmed time and again that the Agency acted with the view to remedying the breach of Article 5.3.4 and ensuring compliance of Mr. Obradovic, in particular, and other buyers, in general.[618]

321. Claimants further allege that the Ministry gave its instruction to the Agency to seek the Buyer's compliance within 90 days although it was "*obvious that Mr. Obradovic would not be able to conceivably fulfil this task.*"[619] However, as already mentioned, it has transpired at the Hearing that the outstanding breach of Article 5.3.4 could have been easily remedied by Mr. Rand or even Mr. Broshko.[620]

322. In this context, Claimants also allege that Respondent failed to pay any regard to the protection of Claimants' interests,[621] which is clearly preposterous in light of the record. Numerous extensions granted to the Buyer to remedy his breaches of the Privatization Agreement speak for themselves in this regard. Also, the transcript of the sessions of the Commission for Control shows that the Agency hoped that the Buyer would comply with his obligations and even discussed at that time possibility of granting him yet another additional deadline to remedy the breach.[622] As Ms. Radovic-Jankovic testified: "*... we tried to keep the agreement going. We did not want to see the agreement terminated. We kept giving them additional deadlines, we were trying to keep the agreement effective all the way up until the end…*"[623] Therefore, Claimants' allegations of conspiracy and orchestrated campaign to

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[613] See *Chemtura Corporation v. Government of Canada*, para. 137, **RLA-141**; see, also, *Bayindir v. Pakistan*, para. 143, **RLA-84**.
[614] See Reply, paras. 1244-1254 & Claimants' Opening Statement ppt, slide 237, point (4).
[615] See Rejoinder, paras. 1350-1355.
[616] See Transcript, Day 3, 156:16-25 (Radovic-Jankovic) ("*... the Agency had a uniform practice towards all entities undergoing privatization, therefore we treated this entity the same as the other ones.*").
[617] See Reply, para. 1248.
[618] See above III. D. 6.
[619] Reply, para. 1251.
[620] See Transcript, Day 2, 43:21-24 (Rand); Day 3, 9:10-17 (Markicevic) & 75:4-14 (Broshko).
[621] See Reply, para. 1253.
[622] See Rejoinder, paras. 277-280; see, also, Transcript of the audio recording from the meeting of the Commission for Control, 23 April 2015, p. 10, **CE-768** ("*Okay, we have 90 days, afterwards we will see what we will do*").
[623] Transcript, Day 3, 151:16-19 (Radovic-Jankovic).

destroy their investment are nothing short of ludicrous.

323. *Fifth*, Claimants allege that their legitimate expectations were frustrated by the conduct of the Agency and Ombudsman.[624] They allege to have had the following legitimate expectations: (i) that the pledge over BD Agro shares would be released after full payment of the purchase price and that they would be free to dispose of them; (ii) that the Privatization Agreement would not be terminated for reasons not stipulated therein; (iii) that their business would be conducted in a stable regulatory framework, without undue government influence.

324. As a matter of law, Respondent reiterates that the minimum standard of treatment under FET provision of the Canada-Serbia BIT does not entail protection of legitimate expectations as a stand-alone element of the FET.[625] In addition, it should be recalled that mere contract breaches, without more, such as denial of justice or discrimination, do not suffice to establish a breach of the FET standard.[626] As far as expectation of stable regulatory framework is concerned, it is also not encompassed by the minimum standard of treatment.[627]

325. Further, Claimants could not possibly harbor *reasonable* legitimate expectations with respect to the release of pledge and termination, because neither Mr. Obradovic nor Mr. Rand sought professional legal advice with respect to these legal matters.[628] In any case, Mr. Obradovic accepted that he was in breach of the Privatization Agreement,[629] as was also accepted by Mr. Markicevic,[630] so it is absurd and double-faced that now Claimants assert to have had an expectation that was quite the opposite from what he accepted.

326. As for the substance of Claimants' allegations about the content of so-called legitimate expectations arising from the Privatization Agreement (concerning the pledge and termination), it has already been demonstrated in the preceding section dealing with impairment that Claimants' interpretation of the Privatization Agreement is wrong, while the Agency's conduct was in accordance with Serbian law and the Privatization Agreement.[631] Therefore, neither there were legitimate expectations having substance alleged by Claimant, nor had there been their violation by the Agency.

327. Finally, Claimants allege they had the expectation that their business would be conducted in a stable regulatory framework, without undue government influence, which was breached by the Agency's and Ombudsman's conduct. However, it is obvious that the regulatory framework was not changed to the detriment of Claimants. In fact, they allege that the

[624] See Reply, paras. 1255-1272.
[625] See Rejoinder, para. 1363 and cases referred to therein.
[626] See Rejoinder, para. 1379-1380 and cases referred to therein.
[627] See Rejoinder, para. 1368.
[628] See Transcript, Day 2, 11:11-17 (Rand) & 90:2-9 (Obradovic). However, even if Claimants had acquired professional legal advice which had been wrong, there would have been no legitimate expectations, because they would have arisen on the basis of the legal advice received and not Respondent's representations, see *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 189, **CLA-138**.
[629] See Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**. On this, see, also, Transcript, Day 2, 108:12-112:3 (Obradovic).
[630] See Letter from BD Agro to the Privatization Agency, 26 February 2015, p. 5, **CE-334**.
[631] See preceding section IV. C. on the refusal to release the pledge and the termination in the context of violation of impairment clause.

Agency and Ombudsman acted unlawfully or in breach of their competence, but this may only be relevant in the context of other investors' rights.[632]

328. In conclusion, Claimants' legitimate expectations claims, as well as their FET claim in its entirety, must fail.

### E. NO VIOLATION OF THE UMBRELLA CLAUSE

329. In an unlikely case that the Tribunal rules that the umbrella clause from the UK-Serbia BIT is applicable in the present case (*quod non*), it is submitted that the Agency's refusal to release the pledge and termination of the Privatization Agreement were in accordance with Serbian law, as has been again demonstrated above in this submission. In any case, all these actions were not attributable to Serbia or performed in sovereign capacity. For these reasons, there is no violation of the umbrella clause.[633]

## V. QUANTUM

330. In this part, Respondent will focus on the land valuation proposed by Claimants, and will deal in particular with two topics that transpired at the Hearing[634]: (1) the major flaws of Dr. Hern's land valuation; (2) the so-called Batajnica transactions[635] as comparator for valuation of BD Agro's Zone ABC land.

### A. MAJOR FLAWS OF THE LAND VALUATION IN DR. HERN'S REPORTS

331. The Hearing has exposed a number of major flaws in the land valuation contained in Dr. Hern's expert reports. To start with, Claimants and Dr. Hern accepted Ms. Ilic's position that the size of Zone ABC is 279ha and not 290ha as had been strenuously argued by Dr. Hern.[636] While the difference may not be enormous, its very existence is the result of Mr. Hern's failure to deploy appropriate methods to calculate the size of the land. This is just one among many examples of his failure to follow the appropriate methods of real estate valuation, which have not only been identified by Ms. Ilic,[637] but also transpired during cross-examination of Claimants' own real estate expert, Mr. Grzesik.

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[632] See Rejoinder, paras. 1369-1374.
[633] See, also, Rejoinder, paras. 1390-1404.
[634] For Respondent's quantum arguments, see Rejoinder, Section V; Counter-Memorial, Section VI.
[635] The "Batajnica Transactions" or "Batajnica market value assessment" are assessments of the value of the land in Batajnica made by the Serbian Tax Administration in 2016, see Tax Administration Zemun Branch, Number 021-464-08-00029/2016-I1A02, Delivery of Information dated 12 February 2016, **CE-159**, Tax Administration Zemun Branch, Number 021-464-08-00029-1/2016- I1A02, Delivery of Information dated 25 May 2016, **CE-160** & Tax Administration Zemun Branch, Number 021-464-08-00125/2016-I1A02, Delivery of information dated 28 July 2016, **CE-161.** See, also Batajnica expropriation screenshot from Belgrade Land Development Public Agency website, **CE-888.**
[636] See Third Expert Report of Richard Hern, paras. 43-49 & 93(C).
[637] See First Expert Report of Danijela Ilic, paras. 5.1-5.24 & Second Expert Report of Danijela Ilic, paras. 2.1-5.9.

332. Already in his report Mr. Grzesik identified at least one major exception that Dr. Hern's valuation makes to internationally recognized standards, since "*it has expressed a range of market values instead of opinion on a single market value*."[638] But Dr. Grzesik's report and cross-examination have further revealed how flawed Dr. Hern's approach was. It transpired that virtually none of the sources he uses for either his lower or upper bound estimated price for Zone ABC land is reliable.

333. As far Dr. Hern's lower bound price of 22 EUR/m2 is concerned, he states that it "*reflects the valuation of BD Agro's as determined by Serbian tax authorities for calculating property taxes*".[639] However, according to Mr. Grzesik, this main source of Dr. Hern's lower bound price actually falls into category of mass appraisals, which "*carry little evidentiary weight when valuing specific individual properties*".[640]

334. Further, Dr. Hern states that his lower bound price "*is also broadly consistent with the Dec 2015 Confineks valuation report valuation of 24 EUR/m2…, and the evidence from BD Agro's transactions of 20 to 23 EUR/m2*".[641] However, Mr. Grzesik chose not to rely on Confineks report and treated it as "secondary evidence" because it did not refer to evidence of comparable transactions in support of its conclusions.[642] With respect to the BD Agro's transactions of 20 to 23 EUR/m2, Mr. Grzesik disregarded them because they were from 2008/2009, i.e. too old, and for this reason carried "*little evidentiary weight*".[643]

335. Dr. Hern's upper bound price of 30 EUR/m2 is "*is based on weighted average price used in Mr. Mrgud's valuation*".[644] However, Mr. Grzesik agreed during cross-examination that Mr. Mrgud's valuation, which had been based on asking prices, was flawed, because it provides no information about the sources of these prices or when they were published.[645] As Mr. Grzesik testified: "*if you are relying on asking prices, then as much information as possible is needed, because asking prices are the lowest level of evidence that you can use in a valuation*".[646] But Mr. Mrgud failed to do so. Further, this also means that one cannot be certain that his valuation reflects prices at the valuation date.[647]

336. In addition, Dr. Hern stated that "*the upper bound is also consistent with the comparable transactions evidence, which ranges from 20 to 37 EUR/m2*".[648] However, such an extremely wide price range of "comparable transactions" makes Dr. Hern's confirmation evidence

[638] Expert Report of Krzystof Grzesik, para. 5.11. There were others, see his criticism of Dr. Hern's use of mass tax appraisals, *ibid*, para. 6.13.
[639] See First Expert Report of Richard Hern, para. 89(A), see, also, discussion at *ibid.* paras. 71-73.
[640] See Expert Report of Krzystof Grzesik, para. 6.13, with reference to First Expert Report of Richard Hern, paras. 71-72; Transcript, Day 7, 73:19-75:10 (Grzesik) (tax assessments irrelevant for valuation).
[641] See First Expert Report of Richard Hern, para. 89(A) and discussion at *ibid*. paras. 65 (comparable transactions, lower bound) & 75-79 (Confinex); see, also, Transcript, Day 7, 72:4-6 & 73:13-17 (Grzesik).
[642] See Expert Report of Krzystof Grzesik, para. 6.6 & 8.1.
[643] See Expert Report of Krzystof Grzesik, paras. 6.5 & 6.8; see, also, Transcript, Day 7, 72:14-73:1 (Grzesik) (transactions too old to be used in his valuation).
[644] First Expert Report of Richard Hern, para. 89(B).
[645] See Transcript, Day 7, 80:4-:23 (Grzesik).
[646] Transcript, Day 7, 80:20-23 (Grzesik).
[647] See Transcript, Day 7,79:18-80:11 (Grzesik).
[648] First Expert Report of Richard Hern, para. 89(B), see, also, *ibid*, paras. 66-70.

rather useless.[649] According to Mr. Grzesik, "*[i]t's a wide range*".[650]

337. In conclusion, Mr. Grzesik's report and cross-examination have showed that virtually all of the sources that Dr. Hern's uses for his lower bound and upper bound prices for Zone ABC land are either inadequate or flawed. This fatally undermines Dr. Hern's valuation of this land.

338. Probably aware that the sources for his valuation are flawed, at the Hearing Dr. Hern zeroed in on Batajnica transactions as the main source of evidence for his upper bound price of 30 EUR/m2. It should be noted that neither of his three expert reports used Batajnica transactions as a direct source of his upper bound range. Instead, they were part of "comparable transactions" used to confirm Mr. Mrgud's valuation on which Dr. Hern relied.[651] Only at the Hearing, Batajnica transactions became what he called "*amongst the best, if not the best evidence*" for valuation of Zone ABC.[652]

339. Dr. Hern unconvincingly defended his change of position by the fact that only by his third report he became aware that these were actual transactions, but failed to explain why he did not point out at that time that the direct source for his upper bound were Batajnica transactions and not Mr. Mrgud.[653] Further, as a matter of fact, none of the evidence indicates that these assessments reflected actual transactions at the time of the exhibited documents,[654] as Dr. Hern claims. According to his third report, the Tax Authority assessment of land in Batajnica of 28-37 EUR/m2 from 2016 "*was used for the purpose of expropriation of land in Batajnica, as reported on the Belgrade Land Development Public Agency website, and hence the price range of 28-37 EUR/m2 itself represents a direct market transaction (an expropriation)*".[655] However, Dr. Hern in fact only assumes that an actual transaction (expropriation) took place, but none of the exhibits he relies upon states that an actual

[649] Dr. Hern considered the following to be "comparable transactions" for his upper bound price: "Dobanovci" transactions which were close to BD Agro and had an average price of 20 EUR/m2; "Stara Pazova" transactions which had an average of 20 to 27 EUR/m2; and "Batajnica" transactions of between 28 to 37 EUR/m2. See First Expert Report of Richard Hern, paras. 67-69 & 89(B) (upper bound between 20 and 37 EUR, therefore did not include Zemun transactions which had significantly higher price (43-88 EUR/m2).

[650] "*Q. It is not much of a consistency because it's such a wide range, would you agree? A. It's a wide range"*, Transcript, Day 7, 83:4-7 (Grzesik).

[651] See First Expert Report of Richard Hern, paras. 64-70, Second Expert Report of Richard Hern, paras. 13 & 116 (D) & Third Expert Report of Richard Hern paras. 31 (D) & 33.

[652] Transcript, Day 8, 11:2-4 (Hern). Dr. Hern's last-minute discoveries do not end here. He now also claims that one of the transactions that were disregarded by Ms. Ilic gives support to his upper bound valuation price, see Transcript, Day 8, 15:13-16:1 (Hern); see, also, Presentation of Dr. Richard Hern, ppt, slide 17. The transaction in question was publicly available, so Dr. Hern was able to inform himself about it already at the time of his first report, see RGA records on transaction KO Dobanovci - construction land, **RE-540**. However, as can be seen from the relevant exhibit showing the exact location of the land that was the subject of this transaction, it is on a street and practically part of Dobanovci village, so it is not comparable to the land in Zone ABC which is away from any road and lacks infrastructure. The fact that it may be at some proximity from the Zone ABC land, does not by itself make it comparable to it.

[653] See Transcript, Day 8, 29:3-34:19 (Hern).

[654] Exhibits Tax Administration Zemun Branch, Number 021-464-08-00029/2016-I1A02, Delivery of Information dated 12 February 2016, **CE-159**, Tax Administration Zemun Branch, Number 021-464-08-00029-1/2016- I1A02, Delivery of Information dated 25 May 2016, **CE-160** & Tax Administration Zemun Branch, Number 021-464-08-00125/2016-I1A02, Delivery of information dated 28 July 2016, **CE-161** originate from 2016, while the date of exhibit Batajnica expropriation screenshot from Belgrade Land Development Public Agency website, **CE-888** is not indicated.

[655] Third Expert Report of Richard Hern, para. 70. See, also, Transcript, Day 8, p:8-16 (Hern).

expropriation took place. Rather, they indicate that the assessed prices were provided *for the purpose* of expropriation.[656]

## B. BATAJNICA TRANSACTIONS ARE NOT AN APPROPRIATE COMPARATOR

340. Dr. Hern's and Mr. Grzesik's reliance on Batajnica transactions is based on the theory that, by its characteristics, this land is comparable to the land in Zone ABC, while its prices are based on the transactions from 2015. As will be demonstrated, neither is accurate or proven.

341. *First*, it should be recalled that the price assessments for the purpose of expropriation are based on value assessments made by the Tax Administration for the purpose of determining tax on transfer of property, which are fundamentally different from property valuations based on international standards.[657] This, by itself, should preclude the use of Batajnica transactions in valuation of Zone ABC land.

342. *Second*, It should be recalled that all international valuation standards require that the information used for valuation should originate on or before the valuation date.[658] This is obviously not the case with Batajnica assessments issued between March and August 2016, that is between 5 and 10 months after the valuation date in the present case.[659] Mr. Grzesik stated in his report that these assessments were completed in November 2015,[660] but retracted this at the Hearing.[661] He admitted that he actually was not sure when the assessments took place: "*Q. And you don't know actual time of the transactions that they used for their assessment. A. No.*"[662] As a matter of fact, it is likely that Batajnica assessments, which are from 2016, are based on Tax Administration's previous assessments that took place also in 2016, not in 2015, because the Tax Administration is required to base its assessment of the property value on its *most recent* tax decisions concerning real estate sales.[663]

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[656] See Batajnica expropriation screenshot from Belgrade Land Development Public Agency website, **CE-888**. See, also,Tax Administration Zemun Branch, Number 021-464-08-00029/2016-I1A02, Delivery of Information dated 12 February 2016, **CE-159**, Tax Administration Zemun Branch, Number 021-464-08-00029-1/2016- I1A02, Delivery of Information dated 25 May 2016, **CE-160** & Tax Administration Zemun Branch, Number 021-464-08-00125/2016-I1A02, Delivery of information dated 28 July 2016, **CE-161**. For easier referencing only, Respondent nevertheless uses the expression "Batajnica transactions", although the accurate title would be "Batajnica market value assessment" used in Dr. Hern's first expert report, see First Expert Report of Richard Hern, para. 69.

[657] See Comparable evidence in property valuation, RICS information paper, 1st edition (IP 26/2012), Statutory valuations, p. 5, **RE-325**. See, also, Second Expert Report of Danijela Ilic, paras. 2.97-2.118.

[658] See European Valuation Standards 2012, pp. 26-27, para. 5.6.1, **CE-512**; Comparable evidence in property valuation, RICS information paper, 1st edition (IP 26/2012), Statutory valuations, pp. 6-7, paras. 4.1 & 4.17, **RE-325**. See, also, International Valuation Standards 2013, July 2013, IVS Framework, para. 57, **CE-516.**

[659] See Tax Administration Zemun Branch, Number 021-464-08-00029/2016-I1A02, Delivery of Information dated 12 February 2016, **CE-159**, Tax Administration Zemun Branch, Number 021-464-08-00029-1/2016-I1A02, Delivery of Information dated 25 May 2016, **CE-160** & Tax Administration Zemun Branch, Number 021-464-08-00125/2016-I1A02, Delivery of information dated 28 July 2016, **CE-161**.

[660] See Expert Report of Krzystof Grzesik, para. 6.15.

[661] See Transcript, Day 7, 97:23-98:6 (Grzesik).

[662] See Transcript, Day 7, 98:15-20 (Grzesik).

[663] See Instruction on the Procedure and Method of Determining Tax on the transfer of absolute rights, Sections 6,8,9,10,13,15, 2009, para. 13, **RE-526**.

343. *Third*, it is submitted that the Batajnica transactions are not appropriate as a comparator for valuation of the land in Zone ABC for a number of reasons, particularly due to differences in location and development potential.

344. As far as *location* is concerned, it should be noted that Dr. Hern's initially made a reservation about the Batajnica transactions as a comparator for Zone ABC land, saying that the two tracts of land were "*broadly comparable… however, while the Batajnica region lies next to the E75 road…, BD Agro would have to rely on the Sremska Gazela for a connection to the E70…*"[664]

345. As a matter of fact, the difference in the location of the Batajnica land and Zone ABC is even bigger than that. Batajnica land is close to Batajnica settlement and is right next to or crossed by major traffic infrastructure (highway, roads, railway).[665] In contrast to that, Zone ABC is at some distance from Dobanovci.[666] It has no access to any road, because Sremska Gazela has not been built as of today, although it was first planned 7 years before the valuation date, 21 October 2015.[667] Zone ABC is also at some distance from the highway E-70, unlike Batajnica land which is right next to the highway E-75.[668] Finally, Zone ABC has no access to railway.[669]

346. As far as *development potential* is concerned, Claimants' experts have tried to present Zone ABC as having a realistic prospect of quick development, so to make it look similar to Batajnica land. In particular, Dr. Hern several times insisted that the money was allocated in 2014 for the construction of Sremska Gazela road,[670] which should cross through Zone ABC. However, it transpired at the Hearing that this was based solely on Mr. Markicevic's representations to the expert, while the documents referred to by Dr. Hern were showed not to support this contention, as they did not indicate that the money was allocated for that specific purpose.[671]

347. Further, although Claimants' experts tried to portray that Zone ABC and Batajnica land had the same level of infrastructure development,[672] this is simply not accurate. As can be seen from the 2015 General Regulatory Plan for Batajnica logistic centre, the Batajnica land at the time included an existing railroad and was adjacent to the highway E-75.[673] The land in

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[664] See First Expert Report of Richard Hern, para. 69.

[665] See Transcript Day 7, 126:1-128:8. See also Presentation of Danijela Ilic, ppt, slide 22

[666] Presentation of Krzystof Grzesik, ppt, slide 5. See also Presentation of Danijela Ilic, ppt, slide 22.

[667] General Regulation Plan for the BD Agro Complex Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin, 31 December 2008, **CE-143.**

[668] See Presentation of Krzystof Grzesik, ppt, slide 5. See also Presentation of Danijela Ilic, ppt, slide 22.. In this regard, Dr. Hern claimed, without evidence and as a personal assessment, that Zone ABC is 1km away from E-70 highway, see Transcript, Day 8, 24:15-25:10 (Hern). Even 1km is much further away that Batajnica land is from E-75 to which it is adjacent.

[669] See General Regulation Plan for the BD Agro Complex Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin, 31 December 2008, Section A.4 - Scope of the plan, **CE-143** compared to Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015, Section 2.1 - Plan Boundary, **CE-521**.

[670] See First Expert Report of Richard Hern, para. 60; Transcript, Day 8, 6:22-25 & 26:8-9 (Hern) (funds allocated to develop Sremska Gazela).

[671] See Transcript, Day 8, 35:6-40:18 (Hern).

[672] See Transcript, Day 7, 63: 16-22 & 87:16–88:1 (Grzesik).

[673] Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015,

question was also electrified.[674] This stands in sharp contrast to Zone ABC where there is no infrastructure whatsoever.[675]

348. Further, Batajnica land is developed by the City of Belgrade as a major infrastructure project financed by EU,[676] while Zone ABC would have to be developed by a potential buyer. The cost of infrastructural development of Zone ABC was estimated at EUR 100 million,[677] which would have been taken into account by a knowledgeable buyer. However, Dr. Hern's reports have not discussed this factor at all, while at the Hearing he unconvincingly stated that he took it into account "indirectly".[678]

349. Further, the Amended pre-pack reorganization plan, prepared by Mr. Markicevic-led management, estimated in 2015 that preparatory activities before the sale would take years: "*[t]o commence with the sale of that land, it is necessary to perform a series of previous actions and investments of funds for the purpose of regulating property relations, re-allotment of parcels and achieve compliance with the general regulation plan and so-forth.* ***The expected duration of these previous activities is uncertain, but it is certainly a multi-year period****...*"[679] At the Hearing, Dr. Hern argued that this does not affect his valuation, which is not *"dependent on the exact time at which that transaction takes place*".[680] This however neglects the fact that a valuation is made with reference to the exact time, *i.e.* the valuation date, which is 21 October 2015. A knowledgeable buyer would certainly be familiar with the fact that BD Agro's management made a pronouncement previously that same year about the necessity of multi-year preparatory activities before the sale of Zone ABC land, so Dr. Hern refusal to take it into account is wholly unconvincing.

350. In conclusion, there are major differences between Batajnica land and Zone ABC land in Dobanovci that make the former unsuitable to be used a comparator in the valuation of Zone

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Section 2.1 – Plan boundary & Section 3.1, paragraph 1 – Geological conditions: *"The terrain on which the subject location is part of spacious area, which major part is used as arable land, and lies in the immediate vicinity of E-75 highway and railway line Surcin-Batajnica"*, **CE-521** (translated by Respondent).

[674] Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015, Section 4.2.3 – Electric grid and facilities*: "The following is built in the subject area:- two overhead electric power lines 110 kV (on common poles) no. 104A/4, connection between substations TS Belgrade 9 and TS Nova Pazova 1, and no. 104B, link between junction Belgrade 9 and TS Stara Pazova;- two overhead lines of voltage level 35 kV, no. 347 A-B, connection TS 110/35 kV "Belgrade 9" - TS 35/10 kV "Batajnica 2";- overhead line of voltage level 35 kV, no. 320, connection TS 110/35 kV "Belgrade 9" - TS 35/10 kV "Batajnica""* **CE-521** (translated by Respondent).

[675] Transcript Day 7,121:13-122:05. See also General Regulation Plan for the BD Agro Complex Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin, 31 December 2008, Section D – Development rules and Section G.3 - Implementation stages, **CE-143.**

[676] See Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015, p.1, **CE-521**, stating that the plan was adopted by the Assembly of the City of Belgrade. See also *Ibid.* Section 1 -Initial remarks: *"The main goal of intermodal transport is to optimize the use of different types of means of transportation for all transport processes, which will reduce costs and improve the quality of services… Intermodal transportation shall contribute to long term, sustainable development of logistical infrastructure and multimodality of transport in Serbia… [t]he result will improve Serbia's competitiveness and attractiveness as a transit country…"* (translated by Respondent)

[677] See Report on evaluation of market value of bankruptcy debtor's property and evaluation of debtor as legal entity "BD AGRO" ad Dobanovci in bankruptcy on the date of 30 June 2018 (Valuation team headed by Mr Tibor Bodolo), p. 18, **CE-511**.

[678] See Transcript, Day 8, 46:3-19 (Hern).

[679] See Amendment to the Pre-pack Reorganization Plan of BD Agro, 6 March 2015, p. 79, **CE-101**.

[680] See Transcript, Day 8, 42:15-44:19 (Hern).

ABC land. Further, considering that other evidence that Dr. Hern advances in support of his valuation of this land has been shown to be flawed or inadequate, his valuation of Zone ABC land cannot be considered credible.

## VI. THE PROBATIVE VALUE OF TESTIMONIES OFFERED BY CLAIMANTS' WITNESSES

351. As Respondent has already shown, Claimants are unable to support most of their contentions in this proceeding with documentary evidence. In fact, their case crucially depends on witness statements that they submitted. When assessing the credibility of Claimants' witnesses, the Tribunal should be mindful of the fact that nearly all of them are individuals with direct interest in the outcome of this arbitration and/or individuals financially dependent upon Claimants. All of these individuals have been working together for years, and all of them have received, are still receiving and/or will receive significant funds from Mr. Rand *i.e.* Claimants.[681] This fact in itself is sufficient for the Tribunal to cautiously assess the evidentiary value of the testimony of these witnesses, and to take them into account with reserve. In any event, the witnesses themselves have made sure to hinder or outright destroy any remaining credibility that they had, as noted in some of the most blatant examples below. Those examples concern contradictions between respective witness statements and contentions that are easily disproved by documents on record.

### A. MR. OBRADOVIC

352. Mr. Obradovic proved to be insincere on several crucial points of his testimony.

353. *First*, Mr. Obradovic stated that he is not the nominal owner of Kalemegdan Investments,[682] and that he was the nominal owner until 2013.[683] However, as documentary record shows, and Claimants now confirm, he remained to be the nominal owner of Kalemegdan Investments after 2013,[684] and even at the time of the Hearing.[685]

354. *Second*, Mr. Obradovic was asked whether he has any debt towards any of the Claimants.

[681] Specifically: (i) Mr. Rand is seeking to directly receive tens of millions of euros; (ii) Mr. Obradovic still works for Mr. Rand as a "nominal owner" of several of his (allegedly owned) companies (Third Witness Statement of Mr. Djura Obradovic, para. 10; Transcript, Day 3, 21:17-22:10 (Markicevic)), and is likely expecting a success fee depending on the outcome of this arbitration (Transcript, Day 2, 101:13-102:2 (Obradovic)); (iii) Mr. Markicevic works for Mr. Rand in several of his (allegedly owned) companies (Transcript, Day 3, 15:5-16:1 (Markicevic)), has an employment contract with one of those companies, and additionally charges Mr. Rand significant funds through his family company for his "services" (Transcript, Day 3, 20:17-21:14 (Markicevic)); (iv) Mr. Broshko is directly employed with Rand Investments for years (Transcript, Day 3, 71:6-8 (Broshko)); (v) Mr. Jennings works for the Ahola Family Trust for many years (Witness Statement of Mr. Robert Jennings, paras. 5-7). The only witness who does not seem to be directly working for Mr. Rand is Mr. Azrac, although they appear to be long-time friends which are still doing business together through the Lundin Group (Witness Statement of Mr. Axel Azrac, paras. 3-4).

[682] Transcript Day 2, 81:25-82:3 (Obradovic).

[683] Transcript Day 2, 82:4-5 (Obradovic).

[684] List of Shareholders of Kalemegdan Investments Ltd, 12 March 2019, **RE-513**.

[685] Claimants' Letter dated 6 September 2021, pp. 5-6.

He replied negatively with no hesitation.[686] He was then asked more specifically whether he owed EUR 2.7 million towards Sembi in 2017. He again replied "no".[687] Just the following day, Mr. Markicevic was asked whether Mr. Obradovic owes Sembi approximately EUR 2.7 million. He replied "yes", and professed that Mr. Obradovic even confirmed this debt in writing in 2019.[688]

355. *Third*, when it comes to shareholder loans, Mr. Obradovic revealed at the Hearing another way of extracting money from BD Agro – through the cash register. Of course, he first denied that he ever took any money from BD Agro outside of bank accounts.[689] After a repeated question, he then admitted that he did take some, which was when "*I did have to go in some business trip with Mr Rand, then we would all take 1,000 or 2,000, but I never took cash out of the books and that has been ever, I am sure*."[690] What was EUR 1,000 or 2,000 for one business trip, then became EUR 1,000 or 2,000 for all ten years that he was the majority shareholder of BD Agro.[691] Finally, Mr. Obradovic stuck to "maybe" EUR 1,000 in total that he took in that way from BD Agro. Even that amount was under a reservation, as Mr. Obradovic stipulated that he believed that he did not take any money in that way, but he was not able to "categorically state no".[692] Evidently, Mr. Obradovic was evasive and untruthful (which could have been also seen from documentary evidence directly contradicting his claims in this regard[693]).

356. *Fourth*, Mr. Obradovic even admitted that he was untruthful in his witness statements. Specifically, in his second witness statement, Mr. Obradovic explicitly claimed that annual financial statements for 2008 were filed in 2009.[694] However, at the Hearing, he revealed that he did not know whether they were in fact filed in 2009 or not, but that he just assumed that they were.[695] As recent developments reveal, financial statements for 2008 were filed in 2014.[696]

### B. MR. RAND

357. When it comes to Mr. Rand, his credibility is no better than Mr. Obradovic's.

358. *First*, when asked who financed privatizations in Serbia other than BD Agro, Mr. Rand

[686] Transcript Day 2, 82:10-12 (Obradovic).
[687] Transcript Day 2, 83:12-14 (Obradovic).
[688] Transcript Day 3, 7:3-12 (Markicevic).
[689] Transcript Day 2, 94:2-10 (Obradovic).
[690] Transcript Day 2, 94:12-94:15 (Obradovic).
[691] Transcript Day 2, 94:22-95:1 (Obradovic).
[692] Transcript Day 2, 95:14-16 (Obradovic).
[693] *See* Respondent's Letter,27 August 2021, item (v); Email from the Tribunal, 17 September 2021.
[694] Second Witness Statement of Mr. Djura Obradovic, para. 46 ("*In accordance with Cyprus accounting rules, Sembi recorded its beneficial ownership of the Beneficially Owned Shares in its financial statements for year 2008, which were* ***filed in 2009***."; emphasis added).
[695] Hearing Transcript, Day 2, 88:19-20 (Obradovic) ("*Q. How do you know that they were filed in 2009? A. I assume.* ***I don't know***." ; emphasis added).
[696] Letter from the Cyprus Department of the Commercial Registry of Companies and Official Receiver, 11 August 2021, **RE-674**; Letter from the Cyprus Department of the Commercial Registry of Companies and Official Receiver, 19 August 2021, **RE-675**.

replied that he financed them from his own funds.[697] As always, he could not provide an exact number, just saying that the financing was well in excess of a million euros.[698] For one thing, it must be noted that the purchase prices for PIK Pester, Inex and Crveni Signal alone amounted to almost EUR 2 million.[699] Together with the purchase prices and obligatory investments (as well as potential non-obligatory investments) required in case of all other privatized companies, the total minimum amount that needed to be spent for this purpose went well over EUR 2 million.[700]

359. Other than that, one large payment has seemingly been overlooked by Claimants - approximately EUR 1.4 million that Inex used to purchase the debts of BD Agro just before its privatization in 2005. As Mr. Obradovic indicated in his third witness statement, these "*purchases were financed by money that Mr. Rand had* ***secured from the Lundin family***".[701] So, there were EUR 1.4 million that were directly or indirectly paid to Inex by the Lundins, and not by Mr. Rand as he professed. The episode about Inex's purchase of BD Agro's debts demonstrates again contradictions in testimonies of Claimants' witnesses: (i) the agreements on assignment of these debts stipulated that Inex paid for them, (ii) MDH Agreement states that Mr. Obradovic paid for them, (iii) Mr. Obradovic testified that the Lundins paid for them, while (iv) Mr. Rand testified that he paid for them. Therefore, whatever the explanation for the EUR 1.4 million would be, the fact of the matter is that Claimants have been evasive and contradictory in order to manipulate the Tribunal.

360. <u>*Second*</u>, Claimants have pointed out that Mr. Rand made the following investments in BD Agro: (i) the purchase price of approximately EUR 5,549,000 (2005-2011), (ii) the additional investment of approximately EUR 2 million (2005-2006); and (iii) the cost of approximately EUR 2.2 million for the replacement of BD Agro's herd financed in part directly by Mr. Rand (2008); and (iv) other payments and loans for the benefit of BD Agro – which exclusively included payments to Messrs. Grigor Calin and David Wood (2013-2014).[702] Evidently, the only "investment" that they claim was made from 2013 to 2015, were the payments to Mr. David Wood and Mr. Grigor Calin, which are approximately EUR 160,000.[703]

361. At the Hearing, Mr. Rand was confronted with his and his associates' letters sent between 2013 and 2015, saying that "since the summer of 2013" Mr. Rand invested up to EUR

[697] Transcript Day 2, 26:2-15 (Rand).
[698] Transcript Day 2, 26:22-27:3 (Rand).
[699] Privatization Agreement (PIK Pester), Article 1.2 (EUR 630,214.31) **RE-210**; Assignment agreement between V. Vukelić and D. Obradović, 2 March 2007, Article 1 (RSD 38,215,800 *i.e.* cca. EUR 478,000 (exchange rate: **RE-365**)), **CE-565**; Privatization Agreement (Inex), **RE-220 (**The purchase price for Inex was EUR 828,102.70. Although not visible in the translated part, Respondent notes that the figure can be clearly seen in Article 1.2 of the original**)**.
[700] *See* Privatization Agreement (PIK Pester), Articles 1.2 (EUR 630,214.31) and 5.2.1 (in the original: RSD 30,195,000), **RE-210**; Privatization Agreement (Inex), Articles 1.2 (in the original: EUR 828,102.70) and 5.2.1 (in the original: RSD 771,000), **RE-220**; Privatization Agreement (Beotrans), Articles 1.2 (in the original: EUR 12,874,63) and 5.2.1 (in the original: RSD 720,000), **RE-221**; Assignment agreement between V. Vukelić and D. Obradović, Article 1 (RSD 38,215,800), **CE-565**; Privatization Agreement (Uvac Gazela), **CE-814** (in the original: RSD 43,000 purchase price + RSD 108,000 investment obligation).
[701] Third Witness Statement of Mr. Obradovic, para. 17.
[702] Claimants' Memorial, para. 330.
[703] Claimants' Reply, para. 632.

500,000 in BD Agro.[704] When asked what these costs refer to, Mr. Rand stipulated that these were payments needed to keep the company going (*e.g.* feed for the animals). He further stated that these payments were wired either to Mr. Obradovic, or to BD Agro (as Mr. Obradovic left BD Agro in 2013).[705] However, Claimants never claimed that they made any such investments in BD Agro, especially not in the period between 2013 to 2015. Furthermore, BD Agro's bank statements show that absolutely no payments were made to BD Agro by Mr. Rand or any of the Claimants in that period.[706] Likewise, there is no evidence that Mr. Obradovic ever received any money from Mr. Rand in that period (nor in any other period at all). Having all of that in mind, it is evident that Mr. Rand was not truthful regarding these alleged investments either in his letters sent between 2013 and 2015, or at the Hearing.

362. *Third*, at the Hearing, Mr. Rand was asked whether MDH Serbia has any outstanding debts towards BD Agro. He stated that he did not believe so. Instead, he pointed out that at the time that the Privatization Agreement was terminated, BD Agro owed just over EUR 2 million to MDH Serbi, or Sembi, or to himself. The truth is that, at the time of the termination of the Privatization Agreement, MDH Serbia owed to BD Agro almost EUR 1 million,[707] and still owes almost EUR 100,000.[708] On the other hand, BD Agro did not owe anything to Sembi.

363. *Fourth*, with their Reply, Claimants introduced one page from Mr. Rand's alleged diary, which was undated and apparently taken out of its context.[709] They did so in order to "prove" that Mr. Rand was acquainted with Mr. Bubalo (minister at the time) before the auction for BD Agro.[710] At the Hearing, Mr. Rand confirmed that this page would have been written the same day, the day after or two days after the described event.[711] However, several facts indicate otherwise. For one thing, the event was described in past tense, indicating a passage of time between the event and the diary entry.[712] More importantly, the described event had to occur before the auction (or at least at the time of the auction) for BD Agro *i.e.* in September 2005 at the latest. Yet, the diary entry indicates that Mr. Ljubisa Jovanovic ("Ljuba") was no longer an assistant minister at the time. Having in mind that Mr. Jovanovic left his assistant position and joined BD Agro in December 2005[713] – this means that the diary entry was written after December 2005, which is months after the described events. Furthermore, in the diary, Mr. Rand referred to Mr. Jovanovic by his nickname (Ljuba). However, correspondence on the file indicates that, at the time, Mr. Rand was always

[704] Letter from Mr. Rand to the Ministry of Economy, 30 May 2014, **CE-37**; Letter from Mr. Rand to the Prime Minister, 18 September 2014, **CE-38**; Letter from BD Agro to the Privatization Agency, 26 February 2015, **CE-334**.
[705] Transcript, Day 2, 19:14-20:9 (Rand).
[706] Second Expert Report of Mr. Sandy Cowan, Appendix 3, para. 3.6.
[707] Notes to 2015 financial statements, p. 32, **CE-171**; Audit report by Prva revizija of 15 January 2015, p. 3, **RE-105**.
[708] Analytical card of debts owed by MDH on 1 January 2019, **RE-376**.
[709] Excerpt from Mr. Rand's diary, **CE-582**.
[710] Reply, para. 36.
[711] Transcript, Day 2, 22:3-5 (Rand).
[712] Indicatively, present tense was used when saying that Mr. Bubalo "*is a good friend of Ljuba*". Transcript, Day 2, 36:3-23 (Rand); Excerpt from Mr. Rand's diary, **CE-582.**
[713] Email from L. Jovanović to W. Rand et al., 9 February 2006, **CE-597**.

referring to Mr. Jovanovic by his full name "Ljubisa",[714] and started using "Ljuba" only years after the auction took place.[715] This strongly indicates that Mr. Rand was being untruthful in presenting his alleged diary entry.[716]

364. *Fifth*, in his second witness statement, Mr. Rand stipulated that the 2008 financial statements "*were filed in 2009 and on time*".[717] Yet, as already discussed, this statement is blatantly untrue.

365. *Sixth*, during his testimony, Mr. Rand was asked by the Tribunal whether he proposed to Mr. Jovanovic, then assistant to Minister Bubalo, to become CEO of BD Agro or was it the other way around. He responded by saying that the idea came up *after the privatization*.[718] This statement is in clear contradiction to an e-mail sent from Mr. Jovanovic on 29 September 2005 to Mr. Rand, on the day of auction of BD Agro in which Mr. Jovanovic suggested to Mr. Rand to use his forthcoming visit to discuss "*all relevant issues regarding [Mr. Jovanovic's] position as well as other farm programs details*."[719] Mr. Jovanovic also conveyed to Mr. Rand that he would, together with Mr. Obradovic ("*George*") "*coordinate **our presence** at the farm*."[720] This yet again shows not only that Mr. Rand was insincere about his arrangement with Mr. Jovanovic, since the idea of Mr. Jovanovic's appointment must have been already discussed, at least in general terms, before the privatization, but also that Mr. Rand has interest in hiding the true nature of his relationship with Mr. Jovanovic.

### C. MR. AZRAC

366. As for Mr. Azrac, his testimony came down to either refuting Claimants' allegations, or simply not remembering crucial details of the transactions that he was supposed to be a witness of. That is how he does not remember how many payments were performed towards Mr. Obradovic,[721] what documentation he gave to the bank when executing *i.e.* justifying the multimillion euro payments to Mr. Obradovic,[722] what amount did the Lundins decided to

[714] *See* Email from W. Rand to L. Jovanović, 7 February 2006, **CE-634**; Email from D. Groves to L. Jovanović and D. Obradović, 1 March 2006, **CE-412**; Email communication between W. Rand and L. Jovanović, 31 March 2006, **CE-638**; Email from W. Rand to L. Jovanović, 13 April 2006, **CE-631;** Email from W. Rand to L. Jovanović, 5 July 2006, **CE-607;** Email communication between W. Rand and BD Agro, **CE-611;** Email from W. Rand to I. Lundin and A. Azrac, 7 July 2006, **CE-586** ("*Ljubisa is going to be away on vacation* […]").

[715] Email communication between L. Jovanović and W. Rand, 1 November 2012, **CE-678**.

[716] While this irrelevant event prompted Mr. Rand to go through his diary and scan one page where he wrote about it, the enormous and crucial wholes in his "beneficial ownership" story have not deserved the same attention. That is how he did not bother showing pages where e.g. (i) the arrangement with the Lundins and Mr. Obradovic would be explained, (ii) it would be noted that Mr. Obradovic was following his instructions relating to BD Agro, (iii) there would be a note of the Lundins' waiver of the EUR 8.2 million debt against Mr. Rand. All that Mr. Rand could say in this regard was that nobody asked him to review his diaries in any other regard. *See* Transcript, Day 2, 23:21-24 (Rand).

[717] Second Witness Statement of Mr. William Rand, para. 61.

[718] Transcript, Day 2, 47:25-48:19.

[719] E-mail from Mr. Ljubiša Jovanović to Mr. William Rand, 29 September 2005, **CE-16**.

[720] E-mail from Mr. Ljubiša Jovanović to Mr. William Rand, 29 September 2005, **CE-16**.

[721] Transcript, Day 2, 66:15-18 (Azrac).

[722] Transcript, Day 2, 68:22-69:3 (Azrac).

waive,[723] nor whether the money from the Lundins even entered Serbia at all.[724]

367. Besides being unable to confirm crucial facts, Mr. Azrac apparently withheld *i.e.* misrepresented very important information until the Hearing. Specifically, in his witness statement, he confirmed that EUR 4.8 million was transferred to Mr. Obradovic by "*certain of the Lundins' associated entities as represented by 1875 Finance*". However, at the Hearing, after being questioned by both Respondent[725] and the Tribunal[726] in this regard, Mr. Azrac was trying to but eventually was unable to evade this line of questioning and revealed that these were not "associated entities" *i.e.* "*not another company […] it's* ***people having bank accounts who paid the €4.8 million***."[727] In fact, Mr. Azrac was ultimately unable to say who exactly gave EUR 4.8 million to Mr. Obradovic.[728],

**D. MR. JENNINGS**

368. Beside the fact that his witness statement insinuated that there was a *document* called the Control Agreement[729] between him and Mr. Rand – Mr. Jennings revealed that this alleged "agreement" was purely "verbal"[730] *i.e.* nothing more than a conversation between him and Mr. Rand. When asked about the legal ground upon which such an agreement was concluded at all (having in mind Mr. Rand's lack of relationship with the Ahola Trust), Mr. Jennings replied that it was primarily because Mr. Rand's children were infants at the time the trust was organized.[731] However, when this answer was questioned by the Tribunal (seeing that Mr. Rand's children are in their 30s today), Mr. Jennings withdrew his previous answer.[732]

**E. MR. MARKICEVIC**

369. While the (lack) of veracity of Mr. Markicevic's testimony has already been elaborated in other parts of this submission, it is important to note some other instances in which he was untruthful.

370. *First*, as the Tribunal will recall, Mr. Markicevic is apparently the witness who is tasked with raising alarms regarding criminal investigations in Serbia.[733] He is also the witness who continuously acts "surprised" and "shocked" for everything that goes against Claimants'

[723] Transcript, Day 2, 70:1-9 (Azrac).
[724] Transcript, Day 2, 75:6-8 (Azrac).
[725] Transcript, Day 2, 72:22-74:6 (Azrac).
[726] Transcript, Day 2, 76:3-77:13 (Azrac).
[727] Transcript, Day 2, 76:23-77:1 (Azrac).
[728] Transcript, Day 2, 77:9-13 (Azrac).
[729] Mr. Jennings made a capitalized definition of this alleged agreement ("Control Agreement") and then stipulated that he believed the Control Agreement was enforceable against him. This was a clear insinuation that an actual written agreement exists. *See* Witness Statement of Mr. Robert Jennings, para. 7.
[730] Transcript, Day 2, 123:2-5 (Jennings).
[731] Transcript, Day 2, 123:9-124:4 (Jennings).
[732] Transcript, Day 2, 124:25-126:18 (Jennings).
[733] Third Witness Statement of Mr. Igor Markicevic, paras. 139-167; Affidavit from Mr. Igor Markićević, 10 July 2019, **CE-375**.

story. [734] That is how Mr. Markicevic also acted naïve at the Hearing and professed that he is a person who never had any problems with the law before this arbitration.[735] He also contended that he was unaware of the criminal complaints against him, and that nobody ever followed up on them.[736] These are blatant misrepresentations. As the record shows, criminal proceedings were initiated against him before the start of this arbitration,[737] while his encounters with the police that arose during the present arbitration related exactly to the previously initiated cases.[738] The only criminal proceedings that Mr. Markicevic is apparently aware of is the case regarding his false testimony.[739] While he tried to present this case as something trivial,[740] the fact of the matter is that Mr. Markicevic is facing a potential prison sentence because of a well-grounded criminal case which is still very much active[741] and is being obstructed by Mr. Markicevic himself.[742]

371. *Second*, Mr. Markicevic was also surprised to hear from Respondent's opening statement that curing the breach of the Privatization Agreement was as simple as to make Crveni Signal and Inex return certain amounts to BD Agro.[743] Yet, this testimony goes completely against the documentation on file.[744] By way of example, it is sufficient to simply compare Mr.

[734] Third Witness Statement of Mr. Igor Markicevic, paras. 27 ("*To **my surprise*** […]") 104 ("*I was **shocked***."), 114 ("*To **my** unpleasant **surprise** […]*"), 115 ("*I was **shocked** that such demand was made […]*"), 154 ("*While **we were surprised** by this* […]"), 159 ("*The Ombudsman's statement came as a **complete surprise***."), 160 ("*I was also **shocked** […]*"), 187 ("*[…] the notice of termination […] came as a **shock to me***"); Third Witness Statement of Mr. Igor Markicevic, para. 128, fn. 156 („*I was **shocked to learn this** […]*").

[735] Transcript, Day 3, 5:15-18 (Markicevic).

[736] Transcript, Day 3, 10:6-21, 13:3-6 (Markicevic).

[737] Criminal Complaint against Mr. Markicevic and others, 26 November 2014, **RE-260**; Request for the Collection of Necessary Notifications no. KTR 2960/14, Third Basic Public Prosecutor's Office, 4 December 2014, **RE-261**; Criminal Complaint against Mr. Markicevic and others dated 2 June 2016, p. 3, **RE-669** (mistakenly referred to in Respondent's Response to the Application for Preliminary Measures as RE-675); Criminal Complaint against Mr. Obradovic and others dated 18 August 2020, p. 7, **RE-671** ("*First basic public Prosecutor's Office in Belgrade has made a request Kt.no. 3482/16 on 24/06/2016 […] and with which the criminal complaint was submitted by Gomilanović Radoje, […] against former responsible persons of the Companies „BD Agro in privatization" a.d. and „Crveni Signal" a.d.*" – referring to the criminal complaint RE-669); BD Agro's Criminal Complaint against Mr. Markicevic et al., 24 November 2017, **RE-263**; Request for Collection of Necessary Notifications no. KT 7123/17, First Basic Public Prosecutor's Office, 26 December 2017, **RE-266**; Request for Collection of Necessary Notifications no. KT 7123/17, First Basic Public Prosecutor's Office, 28 September 2018, **RE-264**; Official Note no. 7123/17, Deputy of the First Public Prosecutor, 28 September 2018, **RE-265**.

[738] *Cf. criminal file numbers in* Report of Police Department for the Suppression of Economic Crimes dated 18 July 2019, **RE-195**; Request for the Collection of Necessary Notifications no. KTR 2960/14, Third Basic Public Prosecutor's Office, 21 August 2019, **RE-262.**

[739] Transcript, Day 3, 13:7-10 (Markicevic).

[740] Transcript, Day 3, 14:11-15:3 (Markicevic).

[741] Rejoinder, para. 418; Criminal Complaint against Mr. Igor Markicevic, 26 February 2019, **RE-267**; Judicial Summons for the Suspect Igor Markicevic no. KT 3849/19, 10 July 2019, **RE-270**.

[742] Order of the First Basic Public Prosecutor's Office 22 January 2020, **RE-660**; Order of the First Basic Public Prosecutor's Office 19 February 2020, **RE-661**; Official Note of the First Basic Public Prosecutor's Office, 10 March 2020, **RE-662**.

[743] Transcript Day 3, 9:2-10 (Markicevic)

[744] *By way of example, see:* Letter from Mr. Obradovic and Mr. Jovanovic to the Agency, 9 November 2011, **CE-380;** Audit report, November 2011, **RE-18**; Proposal of the Centre for Control, 7 November 2012, p. 20, **RE-75.1** (the document mentions a meeting at the Agency where Mr. Obradovic stated that Crveni Signal and Inex will return the loans to BD Agro); Letter from Mr. Obradovic to the Ministry of Economy, 10 April 2012, **CE-77** (Mr. Obradovic explained why Crveni Signal and Inex have not returned the loans); Mr. Obradovic's letter to the Agency, 23 July 2012, **RE-21** (Mr. Obradovic explaining what is the current status of the debt of Crveni Signal and Inex towards BD Agro); Letter from Mr. Obradovic to the Auditor,

Markicevic's letter of 2 July 2015, and his recent testimony – to see that his "surprises" are nothing short of deceptive and manipulative.

372. *Third*, Mr. Markicevic was also asked by Claimants about whether he knew that the 2008 financial statements of Sembi were audited. He replied that "***[t]his was before my time**, but I reviewed, I am in possession of copies of most of Sembi's documentation, so I reviewed the 2008 financial reports and they are audited, yes*."[745] Yet, as we now know, this was actually not before Mr. Markicevic's time. As the record confirms, the 2008 financial statements were filed in August 2014,[746] which was over a year after Mr. Markicevic became a director of Sembi.[747] Thus, Mr. Markicevic was quite aware of the 2008 financial statements, having in mind that they were filed during his tenure, and must have been aware that the document was filed in 2014 and not in 2009. Nevertheless, he decided to participate yet again in one of Claimants' deceptions in this arbitration.

### F. MR. BROSHKO

373. Mr. Broshko also made sure that he denied every fact going against Claimants' case (no matter how absurd such denial was).

374. *First*, Mr. Broshko denied that he ever understood that there was a breach of the Privatization Agreement, and claimed that this stance was communicated to the Agency (who allegedly ignored whatever Mr. Broshko and his colleagues were saying).[748] Even upon the Tribunal's question, Mr. Broshko explicitly stated that they always challenged the Agency's position.[749] Yet, as it is explained in more detail above (III. B. 4), written communication between Mr. Obradovic, BD Agro, Mr. Broshko and the Agency clearly shows that Mr. Broshko's allegation is untruthful.

375. Not only has he misrepresented the general communication regarding the breaches, but Mr. Broshko denied the very clear content of a specific letter that he wrote to the Agency. Specifically, the letter proposed to the Agency that "*The shares of BD Agro will continue to be pledged […] and such pledge will be released only upon us satisfying within an agreed*

5 November 2012, **RE-20** (Mr. Obradovic delivered documentation to the auditor for the preparation of the new audit report, including in particular documentation on the debts of Crveni Signal and Inex towards BD Agro); Audit report, December 2012, **RE-19** (the auditor again focuses solely on the repayment of the debts of Crveni Signal and Inex towards BD Agro, but not the 221 Million Pledge); Letter from BD Agro to the Agency, 16 December 2014, **CE-323**; Letter from BD Agro to the Ministry, 16 December 2014, **CE-324** (Mr. Markicevic delivers documentation on the state of debts of Crveni Signal and Inex towards BD Agro); Minutes from the Meeting at the Ministry of Economy, 17 December 2014, **RE-22** (the representatives of BD Agro stipulated that the biggest problem in the execution of the obligations from the Privatization Agreement were the debts of Crveni Signal and Inex); **CE-327**, pp. 4-6 (the auditor stipulates what is the debt of Crveni Signal and Inex, but makes no mention of the 221 Pledge); Letter from Mr. Markicevic to the Agency, 2 July 2015, **CE-46**;

[745] Transcript, Day 3, 6:5-20 (Markicevic).

[746] Letter from the Cyprus Department of the Commercial Registry of Companies and Official Receiver, 11 August 2021, **RE-674**; Letter from the Cyprus Department of the Commercial Registry of Companies and Official Receiver, 19 August 2021, **RE-675**.

[747] Extract from the Company Register regarding Sembi, p. 3, **CE-53**.

[748] Transcript, Day 3, 78:3-12 (Broshko).

[749] Transcript, Day 3, 106:6-17 (Broshko).

*upon time period all conditions required to be met in order to successfully complete the privatization process for BD Agro*".[750] Yet, Mr. Broshko repeatedly denied the content of this document (even after asked about it by President), and was eventually confined to saying that it was never his intention to convey the clear message of the letter,[751] *i.e.* that Mr. Rand was willing to cure the breaches if the Agency allowed Coropi to become the owner of BD Agro.

376. <u>*Second*</u>, Mr. Broshko directly contradicted Mr. Rand's witness statement regarding the financing of BD Agro, and then acted as if there is no contradiction at all.[752] Specifically, he said that Mr. Rand would finance BD Agro further even regardless of the pledge over BD Agro's shares, while Mr. Rand previously stated that he was not willing to provide any further financing precisely due to the pledge.[753] Yet, one does not need to go further than just comparing these statements to see that Mr. Broshko was again being evasive and in an unreasonable denial.[754]

Respectfully submitted,

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[750] Email from E. Broshko to N. Galić, W. Rand et al. attaching a letter to D. Stevanović, 26 January 2015, p. 3, **CE-328**.
[751] Transcript, Day 3, 78:13-83:10 (Broshko).
[752] Transcript, Day 3, 85:17-23 (Broshko).
[753] Transcript, Day 3, 85:17-87:15 (Broshko).
[754] Transcript, Day 3, 85:17-87:15 (Broshko) ("*Q. […] you were* ***ready to continue with financing of BD Agro****, in case Privatization Agreement was assigned to Coropi, and* ***regardless of pledge*** *staying over the shares […]? A.* ***I believe that Bill would have done that, yes.***"; emphasis added). *Cf.* First Witness Statement of Mr. William Rand, para. 48 ("*As the Serbian Government was* ***refusing to release the pledge*** *on the Privatized Shares […]* ***I was not willing to make further investments into such an uncertain environment***."; emphasis added).