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**")

RESPONDENT'S REPLY POST-HEARING BRIEF

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22 October 2021

BEFORE:

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Mr. Baiju S. Vasani, Arbitrator

Prof. Marcelo Kohen, Arbitrator

Secretary of the Tribunal

Ms. Marisa Planells-Valero

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I. INTRODUCTION

1. Respondent hereby submits its Reply Post-Hearing Brief, in response to Claimants' First Post-Hearing Brief ("**Claimants' PHB**"). Respondent also reiterates all arguments it put forward in its previous submissions and at the Hearing. The present submission will deal with jurisdiction (II); attribution of the Agency's conduct to Respondent (III); alleged Treaty violations (IV); compensation for the alleged damage (V); and will present Respondent's request for relief (VI).

II. THE TRIBUNAL HAS NO JURISDICTION IN THE PRESENT CASE

A. NO JURISDICTION *RATIONE MATERIAE*

2. As a preliminary matter, and contrary to Claimants' assertion,[1] Respondent's argument about the Sembi Agreement's invalidity under Cypriot law was not belated. It was given in Serbia's Rejoinder[2] and *in response* to Claimants' argument that Article 41ž of the Law on Privatization did not invalidate the contract under Cypriot law – the argument that was raised for the first time in Claimants' Reply, based on the second expert report of Mr. Georgiades submitted also with the Reply.[3] Mr. Georgiades' second expert report likewise dealt for the first time with issues of governing law of the Sembi Agreement, effects of the Sembi Agreement under substantive rules of Cypriot law and the effects of Article 41ž of the Law on Privatization under such rules.[4] Claimants cannot seriously argue that Respondent should be denied an opportunity to answer their contentions simply because those contentions were raised only in Claimants' third written submission in this arbitration.

3. Claimants also make, in passing, a casual observation that "*Professor Emilianides based his report on the wrong law.*"[5] This is a transparent attempt to devalue the expert's testimony without any real justification: Prof. Emilianides based a part of his report on the analysis of the choice of law rule for voluntary assignment in Rome I Regulation, although due to the temporal scope of the Regulation,[6] the pertinent rule was contained in the Rome Convention. However, choices of law rules for voluntary assignment are identical in both instruments for all relevant purposes,[7] making Prof. Emilianides' comments equally applicable to Article 12 of the Rome Convention.[8] This is a notorious fact that even Claimants did not attempt to contest. Tellingly, Claimants' own legal expert, Mr. Georgiades, has made the same mistake, by erroneously relying on the Rome I Regulation instead of the Rome Convention in his second expert report.[9]

4. Likewise, Mr. Georgiades' proposition made at the Hearing and referred to in Claimants' submission that the Sembi Agreement is a two-headed creature - being a contract on voluntary assignment and a contract on sale *at the same time*[10] - is not only innovative and unsupported by any authority, but also unhelpful to the Claimants' case, as has already been explained.[11]

5. Going past these preliminary remarks, Claimants argue that their putative investment comprised of three separate assets acquired through the Sembi Agreement: (1) Mr. Obradovic's shares in BD

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[1] Claimants' PHB, para. 15.
[2] Respondent's Rejoinder, paras. 663-665.
[3] Claimants' Reply, para. 627.
[4] Second Expert Report of Agis Georgiades, paras. 3.1-3.27.
[5] Claimants' PHB, para. 16.
[6] Regulation (EC) No 593/2008 of the European Parliament and of the Council, 17 June 2008, Article 28, **CE-458**.
[7] Transcript, Day 6, 169:20-170:07 (Emilianides).
[8] Convention on the Law Applicable to Contractual Obligations of 1980, **CE-835**.
[9] Second Expert Report of Agis Georgiades, fn. 30.
[10] Claimants' PHB, para. 19.
[11] Respondent's PHB, paras. 72-74.

Agro, (2) Mr. Obradovic's receivables against BD Agro and (3) the Privatization Agreement itself.[12] They are wrong on all accounts.

1. Sembi Agreement did not transfer beneficial ownership

6. Claimants' argument about the alleged transfer of beneficial ownership in Mr. Obradovic's shares under the Sembi Agreement has been presented from the onset in meandering fashion with the idea of avoiding many obstacles that leave the contract without effect. Nothing changed in the Claimants' latest submission. If anything, Claimants demonstrate even more creativity. The Sembi Agreement evolves from a contract on assignment to a contract on sale ("*transfer of shares*") and back, in order to produce intended effects under Cypriot law and to avoid, at the same time, any prohibition of Serbian law.[13] Likewise, Serbian law, according to Claimants, allows for the assignment of beneficial ownership in shares,[14] but simultaneously, restrictions on transfer of ownership affect only the legal title.[15] Claimants' case is irreversibly flawed as a result of distorted and tendentious reading of the Sembi Agreement and misinterpretation of law.

1.1. Sembi Agreement does not provide for a separate transfer of beneficial ownership

7. As already explained, there is absolutely nothing in the text of the Sembi Agreement that would support Claimants' theory – that it contemplates separate transfer of different assets held by Mr. Obradovic, independently from the assignment of the Privatization Agreement to Sembi.[16] Claimants argue that the language of Article 4 is clear and unambiguous.[17] Respondent agrees. However, Claimants' reading of clear and unambiguous terms is wrong: Article 4 of the Sembi Agreement primarily refers to Mr. Obradovic transferring all of his "***right, title and interest in and to the Contract [the Privatization Agreement]***" to Sembi.[18] The subsequent sentence of Article 4 is clearly connected with the stipulation from the previous one – "*Mr. Obradovic agrees to sign any such documents and do all such things as may be necessary* ***to effect the transfer to the Purchaser [Sembi] of the Contract together*** *with any other asset whatsoever held by Mr. Obradovic which are related to the business of BD Agro*." The word "*together*" connecting the transfer of the Privatization Agreement and any other asset held by Mr. Obradovic evidently shows that the transfer of any other asset related to the business of BD Agro was meant to ensue as a consequence of the transfer of the Privatization Agreement, and not separately and independently.[19] The Hearing also confirmed that Claimants are the only ones capable of identifying stipulations that are just not contained in the Sembi Agreement. Even Claimants' expert admitted he was instructed to assume that the Sembi agreement provides for the separate transfer of beneficial ownership in Mr. Obradovic's shares.[20]

8. Parties' legal experts for Cypriot law, Mr. Georgiades and Prof. Emilianides, both agree that, as a principle of Cypriot law, subsequent conduct of contractual parties is generally inadmissible for interpreting a contract.[21] Yet, Claimants apparently argue that the Tribunal should accept the subjective meaning of terms in the Sembi Agreement, simply because Mr. Rand and Mr. Obradovic, two individuals obviously interested in the outcome of the proceeding, subsequently testified that

[12] Claimants' PHB, para. 25.
[13] Claimants' PHB, paras. 19, 41, 42 & 47.
[14] Claimants' PHB, paras. 52-54.
[15] Claimants' PHB, para. 43.
[16] Respondent's Rejoinder, paras. 675-683; Respondent's PHB, paras. 81-90.
[17] Claimants' PHB, para. 30.
[18] Agreement between Mr. Obradovic and Sembi of 22 February 2008, Article 4, **CE-29**.
[19] Second Expert Report of Prof. Mirjana Radovic, para. 115.
[20] Transcript, Day 6, 157:25-158:06 (Georgiades): "*[Q.] Just to be clear, your position that the Sembi Agreement indeed stipulates separate transfer of shares to Sembi is the result of your instructions that you received, and not the fact that this is stated explicitly in the contract, am I right? A: Yes*."
[21] Third Expert Report of Agis Georgiades, para. 2.25; Transcript, Day 6, 173:21-174:18 (Emilianides).

they had intended to transfer beneficial ownership in shares.[22] When it comes to Sembi's and Mr. Obradovic's subsequent conduct, Respondent once again submits that, even if it would be acceptable as means of interpretation, it does not support Claimants' interpretation.[23]

9. **First**, the only document which actually mentioned that Sembi was the owner of BD Agro, were the 2008 financial statements submitted as CE-420.[24] As the Tribunal is by now well aware, Claimants have repeatedly misrepresented that these statements were submitted in 2009. It is clear now that 2008 financial statements were submitted only in August 2014.[25] It is also clear that the 2008 financial statements which Claimants submitted on record as CE-420 are not even the ones which were submitted to the Register in 2014. The statements filed were actually not in English, but in Greek, and they substantially differ from the English version which was submitted by Claimants in this arbitration.[26] In a last effort to save their face in this regard, Claimants have been reduced to submitting an alleged "draft" of these financial statements with metadata that should prove that the document was "prepared in 2009".[27] Respondent has already explained the irrelevance of this document.[28] Furthermore, one does not need to be an IT expert to know that such a document means *i.e.* proves nothing, as it is extremely easy to backdate pdf files.[29] While Respondent cannot prove or disprove that Claimants have backdated this draft, it is clear that in the circumstances, the submitted draft has no evidentiary weight beyond Claimants' own words.

10. On the other hand, the actual time of filing of 2008 financial statements is very indicative. In 2014, around the time that the financial statements were filed, Mr. Obradovic confirmed on two separate occasions (once to the Agency, and once to the police) that he was attempting to complete the assignment procedure for the shares in BD Agro due to a recent deal that he had with his "partner" from Canada. Specifically, at the meeting with the Agency he "*stated that during the purchase of several entities of privatization, including "BD Agro" Dobanovci, he has had a* ***partner*** *with whom he* ***came into conflict*** *of opinion on the management of agricultural goods, a year and a half ago. For the above reasons, the decision was made to* ***divide business*** *and 'for the partner to get all the companies in Belgrade, therefore "BD Agro" was part of that division.* ***The idea is that the partner replaces the shares held in the PIK Pester, Sjenica, with the shares of Djura Obradovic in "BD Agro",*** *Dobanovci, but the problem is that the Agency did not issue a certificate of execution of contractual obligations and there is a pledge on those shares, although he paid the entire purchase*

[22] Claimants' PHB, para. 31.

[23] Respondent's PHB, paras. 85-87.

[24] With respect to Claimants' audacious complaints about Respondent's "belated" discovery of Claimants' own untruthfulness regarding these statements, it is sufficient to simply note: "*Nemo auditur propriam turpitudinem allegans*".

[25] Interestingly, the Cyprus Commercial Registry was quite clearly unable to locate the financial statements despite significant efforts, however after Claimants intervened – these statements were suddenly located. See Respondent's Letter dated 27 August 2021, paras. 13-17.

[26] The first page of the financial statements submitted in 2014 to the Register contain a note that the document is a "True copy of the audited financial statements of the company presented before the Annual General Meeting that took place on January 4, 2010.", which is then followed by signatures of Sembi's chairman of the Board of Directors and secretary. This is non-existent in Exhibit CE-420. Furthermore, the statements submitted to the Register contain only 15 pages. On the other hand, Exhibit CE-420 contains additional 5 pages (including in particular: Detailed Income Statement, Operating Expenses, Finance Costs and a statement by the auditor). See Stamped copy of Sembi's 2008 financial statements, 8 August 2014, **CE-909**, pp. 1 (title page), 2 (contents). Cf. Report and financial statements of Sembi Investment Limited for the period from 31 December 2007 to 31 December 2008, **CE-420**, pp. 1 (title page), 2 (contents), 15 (Detailed income statement), 16 (Operating Expenses), 17 (Finance Costs), 18-19 (auditor's statement).

[27] See Claimants' Application dated 8 October 2021.

[28] See Respondent's Response to Claimants' Application, 14 October 2021.

[29] The Tribunal could test this possibility for itself. **First step:** Right-click on the date and time in the bottom right corner of your screen. Select "Adjust date/time". A window will open. On the left side of the window select the Date & time tab. Turn off the function "Set time automatically". Then, under "Change date and time" click Change, enter *e.g.* 4 October 2005, and click Change. **Second step:** Open a new Microsoft Word document. Type *e.g.* "Mr. Obradovic is the sole and beneficial owner of BD Agro". Select "File" in the top left corner of your window. Select "Save as". Click "Browse". Select "Save as type" and then choose "PDF". Click on "Save". **Third step:** Use Claimants' instructions from the email dated 19 October 2021 to view "metadata" of the pdf that was saved in the second step. *The process was described assuming that the operating system is Windows 10. However, the principle may be used in other operating systems as well, using essentially the same steps.*

price."[30] When confronted with this document, Mr. Obradovic used the easiest way out – he testified that he did not remember the meeting, but has not denied the conversation from the minutes.[31] Unsurprisingly, Mr. Obradovic gave substantially the same statement in November 2014 before the police authorities.[32]

11. **Second,** Claimants have now submitted, for the first time, Sembi's 2008 Income Declaration that was allegedly filed to the Cyprus tax authorities in 2010.[33] This document should apparently prove the authenticity of the 2008 financial statements, as well as the fact that these statements were "prepared" in December 2009.[34] While Respondent has already explained the irrelevance of this document and the assertion that Claimants are trying to "prove",[35] it should also be noted that the contents of the pertinent document do not support Claimants' arguments. Specifically, the information provided under the 2008 Income Declaration is quite scarce, does not mention BD Agro, and even directly defeats Claimants' explanations of its beneficial ownership over BD Agro.[36] In any event, conveniently for Claimants, third parties (such as Respondent) may not access *i.e.* obtain the documentation of Sembi from Cyprus tax authorities.[37] Hence, Respondent is not in a position to independently verify the authenticity of this 2008 Income Declaration, nor can it access the remaining income declarations of Sembi in any event (and *e.g.* compare them in detail to all remaining financial statements that were filed in 2019). Having in mind all of the above, the Tribunal should give no evidentiary value to this unverifiable document.

12. **Third,** Claimants also rely on minutes of meetings of Sembi's Board of Directors.[38] Curiously, these minutes were allegedly prepared from 2008 until October 2010.[39] Claimants fail to explain why they would suddenly stop creating minutes of meetings after October 2010. Furthermore, when going through the contents of the submitted minutes, there appear to be certain peculiarities. For instance, although Mr. Obradovic committed various breaches of the Privatization Agreement in the period of 2008-2010, and although the Agency was threatening with termination,[40] there is not

[30] Minutes from meeting held at the Privatization Agency, 4 February 2014, **RE-36**.

[31] Second Witness Statement of Mr. Djura Obradovic, para. 90; Third Witness Statement of Mr. Djura Obradovic, paras. 104-109.

[32] Minutes from the interview with Mr. Obradovic, 10 November 2014, p. 8, **RE-658** ("*I note that I have left the company "BD AGRO" a.d. Dobanovci as a majority owner* ***in May 2013****. The reason for my departure from BD AGRO was a* ***gentlemen's division between me and my partners from Canada****.* ***I am still considered as a majority owner*** *in the company* ***but the procedure to change the ownership*** *structure in the company* ***is currently ongoing****, the Decision of the Minister of Economy is awaited so that the ownership structure is finalized. After my departure from the company, there have been some personnel changes.*"; emphasis added)

[33] Sembi's Income Declaration for 2008, 7 June 2010, **CE-911**.

[34] See Claimants' Application dated 8 October 2021.

[35] See Respondent's Response to Claimants' Application, 14 October 2021.

[36] Claimants rely on p. 2 of the translation of the Income Declaration, and refer to cost and net book value of 15.599.727 listed in the row "*Shares in affiliated undertakings*" (under Financial Assets). However, one cannot determine what are "affiliated undertakings" – are those companies, projects or something else. Similarly, one cannot determine what would be the percentage of such shares. Furthermore, it cannot be determined why – contrary to the actual 2008 financial statements (**CE-909**, pp. 6 and 13) – there is no value expressed under "*Shares in affiliated undertakings*" in the section regarding investments (**CE-911**, p. 2, point 2.1.B.III.1). Likewise, the Income Declaration shows that there were no receivables that Sembi held against anyone, including BD Agro (see *e.g.* **CE-911**, p. 2, points 2.1.A.III.2. or 2.1.B.II.3) – which further defeats the contention that such a transfer occurred under the Sembi Agreement. Finally, the Income Declaration definitely does not reflect the purported debt towards the Lundins, but a substantially higher amount of debts – thereby again indicating that Claimants have never been truthful regarding the exact role of the Lundins and other people whose money was previously loaned to Mr. Obradovic. All in all, it is clear that the scarce content of the Income Declaration can provide literally no answers to any of the relevant questions in this arbitration *i.e.* that it is in contradiction with the information provided by Claimants.

[37] Respondent has addressed its Cypriot legal advisors immediately after Claimants submitted the documentation in question, and it has been informed that there is no way for it to obtain the income tax returns of Sembi.

[38] Claimants' PHB, para. 32.

[39] Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, **CE-422**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 28 November 2008, **CE-423**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 11 May 2009, **CE-425**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 7 May 2010, **CE-427**.

[40] Respondent's Rejoinder, paras. 81-94.

a single word about these crucial issues in the minutes. Likewise, it is unclear what was the point of holding the meetings,[41] having in mind that at every meeting, Mr. Obradovic, Mr. Rand and Mr. Jovanovic were all attending the meeting from the same location, via telephone from Belgrade.[42] On the other hand, the Cypriot directors were certainly not necessary to discuss any of the matters regarding BD Agro, as Mr. Rand himself confirmed.[43] In any event, while certain affairs of BD Agro have been allegedly discussed at the meetings, it is unclear what was exactly the role of Sembi (was it an owner, and if so, to which extent, or was it simply a creditor who was monitoring how its money was spent, or did it have some other role).

13. **Fourth**, Sembi did not fulfill its obligations under the Sembi Agreement. There is no evidence that Sembi has ever assumed Mr. Obradovic's EUR 4.8 million debt towards "*other institutions in Geneva*" or paid the same amount to Mr. Obradovic under Article 2,[44] nor that Sembi has ever paid the remainder of the purchase price for BD Agro, as it was stipulated in Article 3.[45] In particular, if Sembi instructed Mr. Obradovic to collect EUR 4.7 million receivables from BD Agro and use that money to pay the purchase price to the Agency as Claimants suggest,[46] it is unclear why Sembi's receivables towards Mr. Obradovic were not accordingly reduced after each remaining installment of the purchase price was paid. Instead, these receivables were reduced only in 2012,[47] whereby the three installments were paid in 2008, 2010 and 2011.[48]

14. **Fifth**, Mr. Obradovic continued to act as the owner of BD Agro even after the conclusion of the Sembi Agreement. For instance, funds obtained by Crveni Signal from the loan guaranteed by BD Agro and funds obtained from Agrobanka by BD Agro itself were transferred to Mr. Obradovic's personal bank accounts in the period starting from December 2010, nearly three years after the conclusion of the Sembi Agreement.[49] Mr. Obradovic kept this money for himself and not a cent of it found its way to the alleged beneficial owner of BD Agro.[50]

1.2. Serbian law, not Cypriot law, governs the transfer of ownership in Mr. Obradovic's shares

15. Although Cypriot law governs the mutual relationship between the parties to the Sembi Agreement,[51] proprietary aspects of the transaction are governed by Serbian law. As explained by Prof. Emilianides at the Hearing, Serbian law as the law of the *situs* of shares, applies not only to

[41] Sembi's Articles of Association does not provide that the meetings are obligatory. *See* Sembi's Articles of Association, **CE-864**, Article 101 (*"The Directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit…")*.

[42] Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, p. 1, **CE-422**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 28 November 2008, p. 1, **CE-423**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 11 May 2009, p. 1, **CE-425**; Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 7 May 2010, p. 1, **CE-427**.

[43] Second Witness Statement of Mr. Rand, para. 62.

[44] Sembi Agreement, Article 2, **CE-29**; Respondent's PHB, para. 87; Transcript, Day 1, 133:11-24 (Mihaj).

[45] Sembi Agreement, Article 3, **CE-29**.

[46] Claimants' Rejoinder on Jurisdiction, para. 482.

[47] Report and financial statements of Sembi Investment Limited as of 31 December 2009, p. 15, **CE-656**; Report and financial statements of Sembi Investment Limited as of 31 December 2010, p. 14, **CE-657**; Report and financial statements of Sembi Investment Limited as of 31 December 2011, p. 14, **CE-658**; Report and financial statements of Sembi Investment Limited as of 31 December 2012, p. 14, **CE-659**.

[48] Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, **RE-33**.

[49] Respondent's Rejoinder, paras. 358-361; Crveni Signal Bank Statement from Agrobanka, 2 June 2010, **RE-372**; Payments to Mr. Obradovic's bank account no. 245-0100101831196-74 in Nova Agrobanka, for the period of 18-25 January 2011, **RE-551**; Payments to Mr. Obradovic's bank account no. 245-0100101831196-74 in Nova Agrobanka, for 8 April 2011, **RE-552**; Mr. Obradovic's Bank Statement from Vojvodjanska Banka for 14 February 2011, **RE-437**.

[50] Respondent's PHB, para. 112; Respondent's Rejoinder, paras. 121-124.

[51] Agreement between Mr. Obradovic and Sembi of 22 February 2008, Article 9, **CE-29**.

the mode of transfer of ownership, but also determines the moment when the transfer takes place and whether a transaction can lead to the transfer of ownership.[52]

16. Claimants still insist that Serbian law is relevant only for the issue of transfer of *legal title* in shares.[53] They even refer to the contention as "*common ground*."[54] In reality, Prof. Emilianides was quite clear about the fact that Serbian law was applicable to the transfer of ownership, regardless of whether the issue at stake concerned the possibility of transfer of legal title or beneficial ownership:

> *"A: My answer was that the transfer of ownership would be covered by Serbian law, that would refer to whether, with regard to the transfer of ownership, the particular transaction can be considered sufficient to give title.* ***So if Serbian law does not recognise for the purposes of transfer of ownership****, which I don't know,* ***the beneficial title, that would be completely relevant****. So I never said that this is restricted to legal title,* ***this is something, as I said, that would be governed by Serbian law, both the question of legal title and the question of beneficial title, with regard to the transfer of ownership question****."*[55]

17. On the other hand, although Mr. Georgiades accepts the differentiation between contractual and proprietary effects of the Sembi Agreement, he argues that the competence of Serbian law is restricted to *formalities* of transfer of the legal title in shares, which is contrary to the authority that he relied on in his reports.[56]

18. In sum, regardless of whether the Sembi Agreement is classified as an assignment or as a contract on sale, it is Serbian law that determines if and when the beneficial title in Mr. Obradovic's shares could be transferred to Sembi separately from the nominal title. In other words, the transfer of ownership in shares is governed entirely by Serbian law.[57]

19. Claimants further argue that certain Serbian statues supposedly introduce the concept of beneficial ownership into Serbian legal system.[58] Respondent has already explained why reliance on the Law on Central Record of Ultimate Beneficial Owners and the Law on Capital Markets is inapposite.[59] The fact that Claimants have expanded their list with the addition of the Law on Prevention of Money Laundering[60] does not add anything to their argument. **First**, none of those statutes establishes proprietary rights of a "*beneficial owner*" in shares nominally owned by another person or entity. Thus, Claimants argue that Serbian law establishes "*rights that form a part of or stem from beneficial ownership*",[61] but they are still unable to point to any such rights. **Second**, neither Claimants nor their legal experts are able to identify a single decision of Serbian courts that would confirm Claimants' contention – a decision that would recognize that shares registered in the name of a natural person are in fact owned by another.[62]

20. **Third**, Claimants rely on two public invitations for tender procedures for sale of Duvanska Industrija "Vranje" and Beopetrol a.d. in order to demonstrate that Serbian law recognizes

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[52] Transcript, Day 6, 170:08-24 (Emilianides).
[53] Claimants' PHB, para. 38.
[54] Claimants' PHB, para. 38.
[55] Transcript, Day 6, 194:08-19 (Emilianides).
[56] Respondent's PHB, para. 73; Lord Collins of Mapesbury, Prof. Jonathan Harris, *Dicey, Morris & Collins, The Conflict of Laws* (London: 15th ed., 2012, Sweet & Maxwell), 33-027, **CE-836**: "*Thus whether the transfer of the movable is valid, and therefore whether a contract to sell operates as a sale, depends, at least in general, on the law of the country in which the movable is situate (lex situs)."* See, also, para. 24-066, in the context of assignment of shares in a company: "*Nevertheless, there are cases in which it might be inappropriate to apply the choice of law rules derived from Art. 14 of the Regulation (or Art. 12 of the Rome Convention), or, indeed, from the common law.* ***The Principle of exception has been recognized in some areas: the transfer of shares in a company, for example, is probably governed by the law of the place of incorporation (which is probably also the lex situs of the shares)****…*".
[57] Transcript, Day 6, 194:20-195:09 (Emilianides).
[58] Claimants' PHB, para. 53.
[59] Respondent's Rejoinder, paras. 575-581.
[60] Law on the Prevention of Money Laundering and the Financing of Terrorism, **CE-867**.
[61] Claimants' Reply, para. 523.
[62] Respondent's PHB, para. 62.

beneficial ownership and that it allows for separate transfer of such ownership in shares of joint stock companies.[63] However, Claimants' argument does not prove in any way what they are set on proving: the only relevant source for these questions is Serbian law itself and the position of Serbian law is unequivocal - both shares and economic rights pertaining to shares are acquired and transferred hand in hand, through the registration of ownership in the Central Securities Registry.

1.3. Sembi Agreement was concluded in breach of Article 41ž of the Law on Privatization

21. It is now undisputed that Article 41ž of the Law on Privatization represents an overriding mandatory provision of Serbian law.[64] Not only Serbian, but Cypriot law as well recognizes the concept,[65] whose main purpose is to be applied to any situation falling within its scope without regard to the law determined as applicable under the relevant choice of law rule.[66] In other words, Article 41ž must be applied regardless of the fact that the parties agreed on the application of Cypriot law to the Sembi Agreement.[67] The only remaining question is whether the Sembi Agreement falls within the scope of Article 41ž which prevents assignment without prior authorization of the Agency.[68] Respondent has explained why the question must be answered in the affirmative.[69] Claimants continue to disagree and argue that the provision at stake, while restricting assignment of the Privatization Agreement, did not prevent Mr. Obradovic from transferring beneficial ownership in shares to Sembi, separately from the transfer of the Privatization Agreement.[70] The argument must fail for several reasons.

22. **First**, Claimants' argument is built on the wrong starting premise – that the Sembi Agreement in Article 4 somehow provides for separate transfer of beneficial ownership in Mr. Obradovic's shares. As explained above, this is simply not the reality which the Sembi Agreement represents.

23. **Second**, even if one would accept, for the sake of argument, that the plain text of the Sembi Agreement says what it does not say, Article 41ž would still prevent a separate transfer of shares that were the object of the Privatization Agreement. Claimants essentially argue that Article 41ž prevents unauthorized transfer of the Privatization Agreement but, at the same time, allows for individual rights and obligations under the contract to be disposed without any restrictions on piecemeal basis. In other words, under Claimants' reading, the provision allows for partial assignment. Such interpretation is a travesty and would effectively render the provision entirely meaningless.

24. The whole point of an assignment of a contract concluded in the privatization is to cause the change in ownership of the privatized capital and the whole point of Article 41ž was to prevent this from occurring without explicit, prior authorization by the Agency. This is the fact well known to Claimants who in August 2013 attempted to transfer the Privatization Agreement from Mr. Obradovic to Coropi. The main purpose of the Coropi Agreement is clearly stated in its Article 1 – Mr. Obradovic (*the Assignor*) would, through the assignment of rights and obligations in the Privatization Agreement in accordance with the Law on Privatization (*i.e.* with prior consent of the

[63] Claimants' Rejoinder on Jurisdiction, paras. 10-12; Claimants' PHB, paras. 55-59. It should be noted that these tenders did not stipulate that the bidder will be the person i.e. entity having the beneficial ownership over the shares, as Claimants contend. The tenders do not even envisage beneficial ownership over the shares, but simply mention the possibility of a bidder to invoke a beneficial owner regarding certain references. The tenders also do not imply that the nominal and beneficial owners may be different persons *i.e.* entities. *See* Public Invitation for Duvanska industrija "Vranje" a.d., para. 4, **CE-890**; Public Invitation for Beopetrol a.d. Beograd, para. 5, **CE-891**.

[64] First Expert Report of Dr. Ugljesa Grusic, para. 76.

[65] Convention on the Law Applicable to Contractual Obligations of 1980, Article 7, **CE-835**.

[66] First Expert Report of Dr. Ugljesa Grusic, para. 65.

[67] Agreement between Mr. Obradovic and Sembi of 22 February 2008, Article 9, **CE-29**.

[68] 2001 Law on Privatization, **CE-220.**

[69] Respondent's PHB, paras. 63-69.

[70] Claimants' PHB, paras. 41, 42.

Agency), transfer his capital (shares in BD Agro) to Coropi (*the Assignee*).[71] For Claimants to argue now that Article 41ž did not require a prior consent of the Agency for the transfer of shares[72] is simply disingenuous.

25. **Third**, Claimants are now attempting to describe Ms. Vuckovic's testimony at the Hearing – that, had there been no pledge on shares, a buyer in privatization would be free to dispose with the capital of the privatized company – as an "*admission*" that shares in BD Agro could have been transferred without assignment of the Privatization Agreement.[73] However, this contention is entirely irrelevant in the context of Article 41ž and facts of the case at hand.

26. It is undisputed that the pledge on Mr. Obradovic's shares remained in place during the entire course of his contractual relationship with the Agency. Even if one would accept the contention advanced by Claimants: that the retention of the pledge became unlawful on 9 April 2011 (which it did not), the Sembi Agreement was concluded more than three years earlier. In sum: the only way in which Claimants were able to obtain Mr. Obradovic's shares on 22 February 2008 was through the assignment of the Privatization Agreement. The only way for the assignment to be lawful was for the Agency to give its prior consent to the transaction, in accordance with Article 41ž of the Law on Privatization. The fact that Claimants subsequently attempted to conclude the Coropi Agreement confirms that they were aware of this and that their argument about the alleged inapplicability of the imperative rule in question is untenable.

27. **Finally**, Claimants' constant insistence on a difference between the transfer of nominal title and supposed transfer of beneficial ownership in shares under the Sembi Agreement does not help their argument. Just as Article 41ž does not allow for partial assignment of "nominal title" in rights and obligations under the Privatization Agreement, it cannot be brushed aside by simply labeling those rights as "beneficial".[74]

1.4. Sembi Agreement did not result in the transfer of beneficial ownership even under substantive rules of Cypriot law

28. **First**, as explained by Prof. Emilianides, both in his report,[75] and during the Hearing,[76] under Section 23 of Cypriot Contract Law, a contract concluded against statutory prohibition is null and void and cannot produce any effect, *neither in law nor in equity*.[77] This is precisely the case with the Sembi Agreement.

29. Claimants attempt to respond by arguing that the Article 41ž of the Law on Privatization does not prohibit, but rather expressly authorizes assignment.[78] This is yet another example of Claimants' peculiar approach in reading what seems to be a simple provision.[79] The absurdity of the argument

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[71] "*The Assignor hereby assigns to the Assignee the SPA with all rights and obligations arising out of that agreement, in accordance with the law.*
With the assignment from the paragraph 1 of this Article, 75.87197% of the Entity's capital is transferred onto the Assignee*, which represents 666,621 (six hundred sixty-six thousand six hundred twenty-one) shares of nominal value of RSD 1,000 (one thousand Serbian dinars), ISIN: RSBDAGE01362, CFI: ESVUFR, as at August 5th 2013.*" 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**. Emphasis added.

[72] Claimants' PHB, para. 42.

[73] Claimants' PHB, para. 47.

[74] Respondent's Rejoinder, paras. 652-659.

[75] Expert Report of Achilles C. Emilianides, para. 30.

[76] Transcript, Day 6, 170:25-171:18 (Emilianides).

[77] Respondent's PHB, para. 76.

[78] Claimants' PHB, para. 67.

[79] 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.*" Article 41ž(4) of the 2001 Law on Privatization, **CE-220**: "*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.*"

is evident from Claimants' contention itself – Claimants argue that Article 41ž expressly authorizes assignment "***when prior consent is obtained***."[80] It is undisputed between the Parties that no prior consent of the Agency was ever requested, let alone obtained.

30. **Second**, Claimants seem to argue that the parties in the Sembi Agreement apparently acted in accordance with Article 41ž, since Mr. Obradovic took upon himself to do "*all such things as may be necessary to effect the transfer*" of the Privatization Agreement to Sembi.[81] Prof. Emilianides explained, under cross-examination, that such standard contractual provision would not save the contract from nullity under rules of Cypriot law.[82] This is a vague provision that does not, in any event, require Mr. Obradovic to obtain prior consent of the Agency for the assignment.

31. Claimants are likewise undisturbed by the fact that Mr. Obradovic has never, in more than eight years, acted upon the obligation that he allegedly undertook in the Sembi Agreement – to obtain the consent of the Agency for the assignment.[83] This is unsurprising since the parties to the contract have never intended to request the consent and Claimants' reading of Article 4 is obviously an invention created with the purpose of reconciling the Sembi Agreement with requirements for validity under Cyprus contract law.

32. **Third**, the Sembi Agreement, likewise, is not a contract that would require *a subsequent authorization* by the Agency *in order to be performed*, as Claimants would have it.[84] Article 41ž demands *prior consent* of the Agency for the conclusion of the assignment, and Claimants' reliance on the Cypriot Supreme Court's judgment in *Arsiotis*[85] is inapposite.[86]

33. In any event, even if the Claimants' characterization of the Sembi Agreement and reading of the Article 41ž would be accepted as correct, the contract would still not have resulted in the transfer of beneficial ownership in shares. Under the reasoning in *Arsiotis*, even contracts that require fulfillment of a certain precondition before they can be performed are null and void *ab initio* when *"…**it appears that the parties intended at the time of making the contract to violate the law when performing it***."[87]

34. It is according to Claimants' submission that the parties to the Sembi Agreement considered the contract "*fully effective and duly performed their respective contractual rights and duties*."[88] Under Claimants' own narrative, Sembi and Mr. Obradovic acted in all aspects as Mr. Obradovic's rights and obligations from the Privatization Agreement transferred to Sembi, without regard to the

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[80] *Ibid.*

[81] Agreement between Mr. Obradovic and Sembi of 22 February 2008, Article 9, **CE-29**.

[82] Transcript, Day 6, 198:07-199:14 (Emilianides): "*MR ANWAY: But Professor, you don't dispute that this language would cover the situation where Mr Obradovic would seek approval from the Agency under Article 41ž.*

A. No, I would disagree with you, because if that was the case, I would have expected a specific provision in the contract stating that both parties acknowledge that such consent by the Agency is needed, and that Mr Obradovic has secured such consent.

Q. Whether or not you would prefer to have more specific language in it, the language does contemplate Mr Obradovic doing all such things as may be necessary to effectuate the transfer, and on your own opinion, one of the things he needed to do to effectuate the transfer was obtain the Privatization Agency's approval under Article 41ž?

A. Okay, let me disagree with you again, and your interpretation, because this is not a question of preference. If you want to have a valid agreement under Cypriot law, you would have the provision I mentioned. By not having the provision I mentioned, you cannot simply interpret a general wording saying "he will do in the future something to be needed" as specifying that the object of the agreement is not to circumvent the provisions of the law. As I said, in my understanding, for such a provision, if it was a public contract in Cyprus, where you cannot under any circumstances simply assign a public contract without the consent of the Republic of Cyprus, it would be clear that any such wording in a contract, and if someone signed such a contract without having secured the agreement of the Republic of Cyprus, the agreement would be void. So I do not agree with the different interpretation here.

[83] On the contrary, in 2013 he requested consent for assignment to a different company - Coropi.

[84] Claimants' PHB, para. 74.

[85] *Arsiotis and others v. Highway Gardens*, Civil Appeal No.106/12, Judgment dated 18/04/2018, p. 11, **CE-841**.

[86] Respondent's PHB, paras. 77-78.

[87] *Arsiotis and others v. Highway Gardens*, Civil Appeal No.106/12, Judgment dated 18/04/2018, p. 11, **CE-841**. Emphasis added.

[88] Claimants' Reply, para. 898.

requirement of prior consent under the imperative rule of the Law on Privatization. The only thing that Claimants are able to show in support of the contention that the Sembi Agreement did not intend to circumvent the requirement is a rather vague stipulation that "[*M]r. Obradovic agrees to sign any such documents and do all such things as may be necessary to effect the transfer to the Purchaser [Sembi] of the Contract…*".[89] As Prof. Emilianides explained, such general wording of the provision cannot be interpreted "*as specifying that the object of the agreement is not to circumvent the provisions of the law*."[90] On the other hand, Mr. Obradovic has failed even to inform the Agency about the Sembi Agreement, let alone attempted to obtain its consent for the assignment. This undeniably shows that the parties to the Sembi Agreement never intended to act in accordance with Article 41ž at the time of entering into contract, thereby making the Sembi Agreement null and void under the *Arsiotis* rationale.

35. **Finally**, according to the most authoritative treatise on Cypriot law: *"[T]he benefit of a contract may not be assigned where the identity of the person for whom the obligation is to be discharged is a matter of importance to the other party to the contract*."[91] Mr. Georgiades relied on the same authorities to assert that, even in such cases, the assignment is valid as between the assignor and the assignee.[92] However, even a cursory overview of the authorities cited reveals that the contention is simply incorrect. As it is stated in *Chitty on Contracts* – any contractual rights involving personal qualifications of a creditor, *such as his credit, are incapable of assignment*.[93] *Snell's Equity* refers to similar situations in which an assignment is prevented.[94]

36. It is a matter of fact that it could not have been irrelevant for the Agency to whom it was selling BD Agro's capital. Mr. Obradovic was indeed given a credit based on his personal qualifications – an option of delayed payments of the purchase price.[95] Sembi was not able to simply take place of Mr. Obradovic and to continue enjoying the same benefits.

37. Claimants do not dispute that the identity of Mr. Obradovic was a matter of importance to the Agency. Instead, they construe an argument which is based on the analogy between the Privatization Agreement and a simple commercial contract for provision of services. The argument presupposes that "*Beneficially Owned Shares*" are just proceeds arising from the Privatization Agreement that could have been assigned to any third party without restrictions.[96] The analogy is untenable for obvious reasons: it might work well when the obligation of a contracting party is to simply make a payment of money, in which case it is presumably irrelevant for that party to whom it would discharge this obligation (the assignor or the assignee). It is, however, utterly wrong in the case at hand: the obligation of the Agency was to transfer the capital of BD Agro to Mr. Obradovic and to Mr. Obradovic alone, and it would be both legally and practically impossible to discharge this obligation to Sembi. In other words, shares in BD Agro were not merely the Agency's debt that Mr. Obradovic could have freely assigned to Sembi without consent of the debtor (the Agency).

38. Claimants also make a great deal of Prof. Emilianides' "*admission*" that a contracting party can assign "*the economic benefit of the contract*" when such contract is of personal nature.[97] Although

[89] Agreement between Mr. Obradovic and Sembi of 22 February 2008, Article 4, **CE-29**.
[90] Transcript, Day 6, 199:01-05 (Emilianides).
[91] John McGhee, *Snell's Equity* (London: 33rd ed., 2015, Thompson Reuters), para. 3-049, **CE-507**. The same rule is referred to in Hugh Bale, *Chitty on Contracts* (London: 30th ed., 2008, Sweet & Maxwell), 19-054, **CE-840**.
[92] Transcript, Day 6, 150:03-152:10 (Georgiades).
[93] Hugh Bale, *Chitty on Contracts* (London: 30th ed., 2008, Sweet & Maxwell), 19-055, **CE-840**.
[94] John McGhee, Snell's Equity (London: 33rd ed., 2015, Thompson Reuters), para. 3-049, **CE-507**: "*There may be other reasons which make the identity of the contracting party important and so* ***prevent assignment****. Thus a contract to deliver coal on credit terms was not assignable since the assignee might not have had the same creditworthiness as the assignor.*" Emphasis added.
[95] Respondent's PHB, para. 80.
[96] Claimants' PHB, paras. 48-52.
[97] Claimants' PHB, para. 48.

the argument is irrelevant for the case at hand, Claimants' submission also fails to deal with the crucial caveat raised in Prof. Emilianides' testimony – a contracting party can assign its claims for money against the other party, *unless it was precluded from doing so by the contract or otherwise*.[98] This is precisely the case here, as Mr. Obradovic was precluded to assign his shares without obtaining previous consent from the Agency under Article 41ž of the Law on Privatization.

2. Sembi Agreement did not provide for transfer of Mr. Obradovic's receivables against BD Agro to Sembi and, in any event, those receivables are non-existent

39. According to Claimants, the Sembi Agreement resulted in transfer of legal title in Mr. Obradovic's receivables to Sembi.[99] However, such result simply does not follow from the terms of the contract. Sembi Agreement does not provide for separate transfer of Mr. Obradovic's monetary claims against BD Agro, in fact, it does not even mention such claims. It is the Claimants' construction that "*any other assets whatsoever held by Mr. Obradovic […] related to the business of BD Agro*" represent such receivables.[100] Even if that would be the case, the fact remains that those assets were meant to be transferred *together* with the Privatization Agreement and not independently from it.[101]

40. In addition, and in any event, the issue is moot. Claimants insist that Respondent has failed to contest that legal title to the receivables transferred to Sembi.[102] In reality – there is nothing to contest since there are no Mr. Obradovic's receivables against BD Agro. More importantly, those receivables did not exist at the time immediately before the challenged measure (termination of the Privatization Agreement and consequential transfer of shares) was taken, as deemed necessary, for example, by the *Vestey* tribunal.[103] Not only that BD Agro did not owe anything to Mr. Obradovic at the time of the alleged breach, but it was exactly the opposite – according to the analysis of shareholder loans, it is undisputed between the Parties' financial experts that Mr. Obradovic has received between EUR 0.5 million and over 1 million more from BD Agro than he had lent to the company.[104] The fact that Sembi did not report its "receivables" against BD Agro during the bankruptcy proceeding speaks for itself. There was nothing to report. The same goes for Sembi's internal documents – the company's financial statements do not record any receivables against BD Agro, only receivables against Mr. Obradovic,[105] who still owes to Sembi EUR 2.7 million as of 2019 although BD Agro repaid (*i.e.* overpaid) all of the shareholder loans by 2013. This means that Mr. Obradovic has not transferred the repayments of shareholder loans to Sembi or otherwise he would not have any outstanding debts towards Sembi. Or to put it differently, if Claimants would claim that the EUR 2.7 million debt of Mr. Obradovic towards Sembi relates to the receivables under the Sembi Agreement, they are directly admitting not only that Sembi does not hold any receivables against BD Agro, but also that Sembi exercised absolutely no control over Mr. Obradovic's actions related to BD Agro.

41. Finally, even if Claimants would somehow be allowed to overcome the jurisdictional hurdle based on Sembi's ownership of non-existent asset, the claim would still have to fail on merits. Claimants do not dedicate a single paragraph in any of their submissions to explaining how exactly Respondent deprived Sembi of its receivables towards BD Agro. This alone should be sufficient to put an end to any further discussion about the issue.

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[98] Transcript, Day 6, 206:20-207:15 (Emilianides).
[99] Claimants' PHB, paras. 26-28.
[100] Agreement between Mr. Obradovic and Sembi of 22 February 2008, Article 4, **CE-29**.
[101] *Ibid.*
[102] Claimants' PHB, paras. 26, 28.
[103] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April, 2016, paras. 253,254, **CLA-32**.
[104] Respondent's PHB, para. 141.
[105] Report and financial statements of Sembi for 2017, p. 14, **CE-664**; Transcript, Day 3, 7:3-12 (Markicevic).

3. Sembi Agreement did not transfer beneficial ownership of the Privatization Agreement to Sembi

42. Just as it prohibited assignment of the legal title in the Privatization Agreement, Article 41ž did not allow for unauthorized transfer of economic rights in the contract. Claimants' argument in that regard is yet another manifestation of a recurring theme in all of their submissions - that allegedly Article 41ž prohibits unauthorized assignment of nominal title in the Privatization Agreement but it does not restrict transfer of beneficial title.[106] Starting from this erroneous premise, Claimants are able to argue that Cypriot law governs the transfer of beneficial ownership[107] and that Serbian law is irrelevant (since it supposedly governs only the transfer of "*legal title*").

43. In this way, Claimants are effectively protected from just any restriction contained in Serbian law. Respondent has already explained why such interpretation is unacceptable and why prohibition of assignment in Article 41ž necessarily covers both formal position of a contractual party and economic interest in the contract.[108] Under the reasoning of the *Occidental* tribunal, when a contact prohibits assignment without prior authorization, the prohibition covers all forms of transfers or assignments, including transfer of economic interest in the contract (*i.e.* beneficial ownership).[109] This rationale equally applies in circumstances where the prohibition is contained in a statute.

44. Finally, Claimants' argument is contradictory in its essence. It is impossible to interpret Serbian law as generally permitting assignment of beneficial ownership, on the one hand,[110] and read each and every restriction on assignment contained in Serbian law as applying only to the nominal title in an asset, on the other.

4. There are no Claimants' "interest in Sembi's rights under the Sembi Agreement"

45. In their latest submission, Claimants appear to be coming to terms with the fact that the Sembi Agreement was null and void. This is why they advance a series of alternative arguments that should save their case on jurisdiction.[111]

46. Among those arguments is the one that the nullity of the Sembi Agreement could only affect the beneficial ownership of Mr. Rand's children since it was channeled through Sembi and Ahola Trust, and not the ownership of Mr. Rand.[112] However, it suffices to see Claimants' chart representing the investment's structure[113] in order to understand that the assertion is incorrect: Mr. Rand's supposed ownership was also channeled through Sembi (and Rand Investments acting as an intermediary). Hence, the fact that Sembi did not obtain the beneficial ownership in shares leaves Mr. Rand without the ownership as well.

47. Another argument that features prominently in Claimants' PHB presupposes that Claimants, independently from the alleged beneficial ownership in shares, obtained enforceable rights against Mr. Obradovic based on Cypriot law, under the Sembi Agreement.[114] There are two important points here.

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[106] Claimants' PHB, para. 73.
[107] Claimants' PHB, para. 70.
[108] Respondent's Rejoinder, paras. 653-659.
[109] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 306, **CLA-75**.
[110] Claimants' PHB, paras. 53-61.
[111] Claimants' PHB, paras. 90-92, 96-99.
[112] Claimants' PHB, para. 99.
[113] Claimants' Memorial, para. 54.
[114] Claimants' PHB, para. 90.

48. **First**, the argument again assumes that the Sembi Agreement was valid and enforceable contract. As explained above and previously by Respondent,[115] the Sembi Agreement was null and void not only under Serbian, but under Cypriot law as well and could not create any effects even between Mr. Obradovic and Sembi.[116] **Second**, relevance of the distinction between *ius in rem* and *ius in personam* in the case at hand was already elaborated in Respondent's previous submission.[117] In sum, even if the Tribunal would accept that the Sembi Agreement created valid contractual rights of Sembi against Mr. Obradovic (which it did not), there is no way to establish the Agency's responsibility for the taking of contractual rights vested in the contract between two private parties, as a result of the Agency's conduct towards Mr. Obradovic in the framework of the Privatization Agreement. This is all the more true since the Agency was entirely unaware of the Sembi Agreement's existence.

5. Mr. Rand did not exercise control over Mr. Obradovic's shares in BD Agro

49. As Respondent has explained previously, Mr. Rand was not the person in control of BD Agro's business. In this regard, Respondent's PHB contains a comprehensive analysis of evidence on record, including evidence discussed at the Hearing.[118] Claimants' submission does not add anything to the discussion, apart from the plain assertion that Mr. Rand was in control of the company, based on a single email sent by Mr. Rand to Messrs. Obradovic, Jovanovic and Markicevic (containing no instructions whatsoever) and his testimony that he talked about BD Agro's affairs with Mr. Obradovic over the phone.[119] As a result, Respondent respectfully directs the Tribunal's attention to its previous submissions.

B. NO JURISDICTION RATIONE VOLUNTATIS

50. Claimants' purported investment was made in breach of imperative rules of Serbian law and the principle of good faith.[120] Two preliminary remarks are needed in the light of Claimants' latest submission. First, Respondent reiterates that its objection in this regard was not belated for reasons explained at the Hearing and, in any event, the issue of illegality is of such character that the Tribunal would be compelled to discuss it on its own motion.[121] Second, all of Respondent's objections deal with *making* of the investment. This applies not only to the fact that the investment was made in breach of rules for trading in securities ("*Securities Objection*"), but also to the deceitful conduct in obtaining BD Agro's capital ("*Non-Disclosure Objection*") and securing the funds for the payment of purchase price by extracting money and assets from the company ("*Siphoning Objection*" and "*Land Machination Objection*"). The illegality analysis must include Claimants' conduct at the very least up to 8 April 2011.[122]

1. Shares in BD Agro were obtained in breach of imperative rules of Serbian law

51. Even if one would accept that the Sembi Agreement could have resulted in Claimants obtaining Mr. Obradovic's shares, this would still mean that the Claimants' ownership was obtained through the breach of not only Article 41ž of the Law on Privatization, but through the breach of the 2006

[115] Respondent's Rejoinder, paras. 660-667.
[116] Transcript, Day 6, 170:25-171:18 (Emilianides).
[117] Respondent's PHB, paras. 91-98.
[118] Respondent's PHB, paras. 99-112.
[119] Claimants' PHB, para. 97.
[120] Respondent's PHB, paras. 132-145.
[121] Transcript, Day 1, 177:25-179:09 (Djundic).
[122] Transcript, Day 1, 179:10-180:01 (Djundic).

Securities Law – providing for mandatory trade in securities over the Belgrade Stock Exchange (BSE).[123] In response, Claimants offer two arguments, both without merit.

52. **First**, Claimants once again argue that Serbian regulation on trading in securities applies only to the transfer of legal title in shares of public companies.[124] Naturally, this argument cannot be reconciled with the one Claimants consistently advance – that Serbian law allows for disposition of beneficial ownership in shares.[125] Quite simply: if Serbian law allows for separate transfer of beneficial ownership in shares, rules regulating the market of securities must apply to such transfer as well. Furthermore, Claimants' interpretation would leave restrictive rules from national laws of the state parties to the BITs without any purpose – those rules would be easily circumvented by simply labeling investors' rights as beneficial – even when the BITs themselves allow to the parties to introduce certain restrictions on the acquisition of assets.[126]

53. **Second**, Claimants repeat that the Sembi Agreement could have been effectuated lawfully by one of the three methods suggested by their legal expert, Ms. Tomic Brkusanin.[127] This is not only moot, since it is undisputed that Claimants have never employed any of these methods, but it is also factually and legally wrong – none of these methods were actually available to Claimants.[128]

2. Deceitful conduct in the acquisition of BD Agro's capital

54. Although Mr. Obradovic allegedly submitted a winning bid in the September 2005 public auction for BD Agro acting on "*Mr. Rand's behalf*",[129] this remained hidden from the Agency and other participants at the auction. This is the way in which Mr. Obradovic, as a Serbian citizen, was given an option to pay the purchase price in six annual installments – an advantage over all other participants which certainly affected the outcome of the public auction.[130] If it was not for this advantage, it is almost certain that Mr. Obradovic would not be able to secure the investment.[131] Deceitful conduct in the acquisition of an investment leaves it without protection under the BITs and the ICSID Convention.[132]

55. Claimants continue to argue that everyone, including the Agency and Respondent, knew from the very beginning that Mr. Rand was the true owner of BD Agro.[133] Specifically, Claimants have asserted that the minutes of the meeting held on 15 December 2014 referred to the "representatives" of BD Agro, which should allegedly confirm that the Ministry considered Mr. Broshko to represent BD Agro.[134] This allegation however is not only unconvincing but also in contradiction with the minutes themselves where Mr. Broshko was described as the director of Rand Investments – not as representative of BD Agro.[135] Moreover, even when Mr. Markicevic wrote to the Agency and referred to the meetings which he attended together with Messrs. Broshko and Doklestic, he

[123] 2006 Law on Market in Securities and Other Financial Instruments, Article 52(2), **RE-111**.
[124] Claimants' PHB, para. 117.
[125] Claimants' PHB, paras. 53-61.
[126] Transcript, Day 1, 163:06-20 (Djundic).
[127] Claimants' PHB, paras. 119-122.
[128] Respondent's PHB, paras.136, 137.
[129] Claimants' Opening Statement at the Hearing, slide 10.
[130] Two other participants at the auction were legal entities (one domestic and one foreign) and, as such, ineligible for the payment in installments: Minutes of the public auction nos. 4 and 5, 29 September 2005, **RE-213**. See, also, Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Article 39(1), **RE-218**.
[131] Respondent's PHB, para. 140.
[132] See, for example, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 238, 239, **RLA-19**; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paras. 123, 124, **RLA-115**; *Metal-Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 165, **RLA-161**; *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, 16 May 2014, para. 131, **RLA-159**.
[133] Claimants' PHB, paras. 110-114.
[134] Claimants' PHB, para. 114.
[135] See list of participants in Exhibit **RE-38**.

explicitly referred to himself as the "representative" of BD Agro, and to Messrs. Broshko and Doklestic as the "representatives" of Mr. Rand.[136]

56. Claimants also rely on the fact that Mr. Obradovic was absent from certain meetings with the Agency about assignment of the Privatization Agreement to *Coropi*, as supposedly proving that the Agency was aware that Mr. Obradovic was "*only a nominal owner*."[137] Claimants' assertion is not only factually incorrect,[138] but entirely off point. The meetings in question were held in 2014 and 2015, almost ten years after the 2005 public auction for acquisition of BD Agro's capital. Whatever Claimants are now attempting to infer from these meetings, the fact remains that they are unable to avoid the fact that their own case implies that Messrs. Rand and Obradovic tricked the Agency into believing that the company was being sold to Mr. Obradovic in his own personal capacity, only to allegedly reveal Mr. Rand's ownership to the Agency in January 2014,[139] almost a decade after the auction.

57. By engaging into such deceitful conduct Claimants have placed their putative investment outside the scope of protection offered by the BITs and the ICSID Convention. What Claimants are left with is the assertion that the Agency did not request from them to reveal the beneficial ownership and control structure of the investment at the time of the auction – a point which was proved to be both misplaced and untrue. Unlike in certain tender procedures where only legal entities were eligible for participation,[140] the public auction for BD Agro was open also for natural persons and it was simply impossible for the Agency to inquire about the beneficial owner of a natural person. On the other hand, during the public auction, Mr. Obradovic was under the very clear obligation to reveal whether he was participating in his own name and on his own behalf, or as a representative of another party. [141]

3. Land Machinations

58. With respect to rather obvious land machinations of Mr. Obradovic, Claimants have utterly failed to provide justification for his conduct. Even Mr. Rand distanced himself from Mr. Obradovic's actions and confirmed that they were inappropriate.[142]

59. In a last ditch attempt to justify at least one of these transactions, Claimants have submitted a recent judgment confirming the acquittal of Mr. Obradovic regarding the Land Swap case.[143] However, this judgment in fact backfires against Claimants' case. First, the judgment confirms that the pertinent land swap transaction was unlawful. As it is explained therein, a commercial court has declared the contract in question to be null and void[144] and found that BD Agro acted in bad faith.[145] Second, the criminal court acquitted Mr. Obradovic under the rules of criminal law, emphasizing

[136] Letter from BD Agro to Privatization Agency, 2 July 2015, **CE-46** (referring to the meeting held on 27 April 2015 (see minutes of this meeting submitted as exhibit **RE-23**)).
[137] Claimants' PHB, para. 113.
[138] Respondent's PHB, paras. 126, 127. See Transcript, Day 4, 15:10-19 (Vuckovic) and Day 4, 160:3-20 (Stevanovic).
[139] Claimants' PHB, para. 111.
[140] At the tenders that Claimants rely on, only legal entities were eligible to participate, meaning that it was not expected that a natural person may have a beneficial owner in any event. See Public Invitation for Duvanska industrija "Vranje" a.d., para. 4, **CE-890**; Public Invitation for Beopetrol a.d. Beograd, para. 5, **CE-891**.
[141] Respondent's Rejoinder, paras. 807-808; Respondent's PHB, paras. 138-140.
[142] Transcript, Day 2, 41:24-42:8 (Rand).
[143] Decision of the Court of Appeal in Belgrade, 26 May 2021, **CE-907**.
[144] *Ibid.*, p. 3 ("*the Commercial Court, in its judgment dated 14 September 2017, addressed and resolved the issue of whether the land exchange agreement was legal, finding* ***the land exchange*** *agreement dated 4 January 2010* ***null and void***").
[145] *Ibid.*, p. 4 ("*the judgment further notes, in allowing the exchange of state-owned agricultural land,* ***BD Agro did not act with the care of a prudent owner****, particularly taking into account that an inspection of the certificate no. 952-550/07* ***dated 15 July 2008****, issued by the Real Estate Registry, reveals* ***that all the relevant plots were restituted*** *to their previous owners in 1993, 1994, 1995 and 1996, respectively, that is,* ***many years before the relevant land exchange agreement was signed***.")

that it must apply different standards than a commercial court.[146] Specifically, the court concluded that "*giving of instructions and orders in the capacity of the majority owner of a company […] do not qualify as acts that in and of themselves constitute the criminal offences.*"[147] Hence, the appellate court did not conclude that Mr. Obradovic did not do anything illegal – just that his actions did not reach the level of criminal liability. Third, the acquittal (both by the trial court and the appellate court) confirms that the Serbian justice system is completely independent and that Respondent did not have any intention to harass or intimidate Mr. Obradovic. Finally, the judgment confirms yet again that Mr. Obradovic was the majority owner who exclusively controlled BD Agro.[148]

4. Siphoning of BD Agro's funds

60. The analysis of the relationship between BD Agro and Mr. Obradovic as the company's majority owner undeniably shows that the affair was detrimental and, in the end, fatal for the company. There are several points that merit the Tribunal's attention.

61. ***BD Agro before and after Mr. Obradovic*** **-** In their PHB[149] Claimants have had the audacity to (again[150]) compare the state of affairs in BD Agro before and after Mr. Obradovic privatized it in 2005. Specifically, they contend that in 2005, upon its privatization, BD Agro was in a dilapidated state, but that "*everything changed after the Claimants made their investment in Serbia*".[151] In particular, Claimants point to the fact that there were approximately 350 employees in BD Agro in 2005, who had not been paid wages for several years.[152] Yet, what Claimants omit to add is that in 2015, there were only 127 employees in BD Agro,[153] and that they also had not been paid wages for several years.[154] Furthermore, Claimants note that most of BD Agro's approximately 1,000 cows had leucosis in 2005, but omit that in 2014, BD Agro had merely 634 cows in total.[155] Likewise, Claimants boast with the fact that the farm, including in particular its buildings and facilities, was allegedly transformed under their leadership into one of the largest and most successful dairy farms in the Balkans.[156] Yet, what they omit to add is that in 2014, Mr. Markicevic himself submitted a criminal complaint against the former management of BD Agro headed by Mr. Ljubisa Jovanovic (from 2005-2013), accusing him of damaging BD Agro through fraudulent construction works for those same buildings in the amount of EUR 2.8 million.[157] Finally, it must be particularly emphasized that BD Agro's total liabilities in 2005 amounted up to approximately EUR 14.8

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[146] *Ibid.*, p. 4 ("*[…] a decision rendered in a different type of proceedings cannot bind the court conducting criminal proceedings in its assessment as to whether a crime has been committed, since the court must base its verdict in a criminal case solely on the evidence presented at the main hearing. Such evidence may include a judgment of a court rendered in a different type of proceedings, which can be used as a basis for the finding of relevant facts; but* ***the court cannot, however, take over the legal conclusion of such other judgment that an action indeed constitutes a crime and that a defendant committed that crime****. In view of the foregoing, in the case at hand, the first-instance court, in finding the facts of the relevant criminal case, […] took into account the relevant judgment of the Commercial Court in Belgrade, but rightly concluded, upon assessing the relevant piece of evidence in conjunction with other presented evidence, that there was a lack of evidence that the defendants had indeed committed the crimes with which they are being charged.*")

[147] *Ibid.*, p. 15.

[148] Namely, the prosecutor, after its thorough investigation noted how "*Djura Obradovic, as the owner of BD Agro and chairman of its Board of Directors, made all the decisions in the company and exerted a continuous influence on the employees", while the appellate court also noted how Mr. Obradovic was "giving […] instructions and orders in the capacity of the majority owner of a company*". As expected, there was again absolutely no mention of Mr. Rand anywhere in the judgment. See *ibid.*, pp. 13-14.

[149] Claimants' PHB, paras. 2-4, 102-103.

[150] Transcript, Day 1, 12:11-13:6 (Anway). Transcript, Day 2, 3:18-5:9 (Rand).

[151] Claimants' PHB, paras. 2-3, 102.

[152] Claimants' PHB, para. 2. Claimants also allege that the workers "*did not have basic clothing*" which is absurd.

[153] Notes to 2015 financial statements, p. 2, **CE-171**.

[154] Notes to 2015 financial statements, p. 11, **CE-171**.

[155] Pre-pack Reorganization Plan, p. 24, **CE-321**.

[156] Claimants' PHB, paras. 2-3, 102.

[157] Criminal Complaint against Mr. Jovanovic and others as of 8 December 2014, p. 5, **RE-258**.

million,[158] while in 2015, they amounted to anywhere between EUR 40-57 million.[159] Claimants take pride in the fact that BD Agro seemingly invested millions of euros in its herd, buildings and equipment after 2005, but they deliberately overlook that virtually all of these investments came from bank loans, which BD Agro was unable to service due to its poor business results.[160] The devastating management of BD Agro after the privatization has even been confirmed by Claimants' witnesses themselves at the Hearing.[161]

62. ***Transactions between BD Agro and Mr. Obradovic*** - Claimants have simply not been able to come up with reasonable explanation why BD Agro repaid Mr. Obradovic substantially more shareholder loans than it ever received from him. Instead, Claimants argue that Mr. Cowan's analysis did not reflect transactions conducted outside bank accounts.[162] Yet, Claimants seem to forget that all non-bank transactions that they could think of have been included in Dr. Hern's analysis, and yet he still found that at least EUR 0.5 million[163] was extracted from BD Agro by Mr. Obradovic.[164] Furthermore, Dr. Hern admitted that these non-bank transactions were actually only included at Claimants' instructions, not as his own conclusions.[165] Similarly, Dr. Hern admitted that he saw no reason to include the transactions with associated companies into the analysis, but that this was done solely upon Claimants' instructions.[166] He was also not even aware of the debts that the associated companies had towards BD Agro.[167]

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[158] BD Agro's Business Plan for the years 2006-2011, p. 24, **CE-20**. Calculated according to the Average exchange rates of the dinar against the world's leading currencies, National Bank of Serbia, **RE-365**.

[159] Updated Hern analysis, **CE-908**; Mr. Cowan's presentation, slide 4.

[160] Interestingly, while it struggled with its overwhelming debts towards banks, BD Agro managed to return all shareholder loans (and even more) that it received from Mr. Obradovic. The priority of servicing its "debts" towards Mr. Obradovic can be seen from the fact that BD Agro was taking additional bank loans only to repay the shareholder loans themselves. See Respondent's Rejoinder, paras. 352-365.

[161] Transcript, Day 3, 56:06-18 (Markicevic) ("*PROF. KOHEN: [...] Mr Markicevic [...] how do you evaluate the financial management of BD Agro before your arrival at the company? A. Well, as I just said in my previous answer, so the fact that BD Agro had around €40 million of debt, and that some of it, most of it was towards the banks, and the interest rates were not very favourable for BD Agro, it could have been managed, I would say, in a better way, but everything -- all consequences of management, I would say, are reflected in the level of liabilities, so that's obvious from the financial statements."*)

[162] Claimants' PHB, paras. 128-129.

[163] There are several problems with Dr. Hern's calculations, which render the amount of siphoned funds much higher. Namely, as he confirmed at the Hearing, his analysis was based entirely on detailed instructions from Claimants' counsel. That is how he included inflows from Mr. Obradovic that were as high as RSD 50 million, although these inflows were received as payments for certain goods or services (*i.e.* Mr. Obradovic got something in return, the funds were not repayable). See Transcript, Day 8, 98:4-99:4 (Hern); Transcript, Day 8, 139:11-140:6 (Cowan). This was the description and the code used for such payments. Yet, Claimants have brushed this fact off and said that the payments were actually shareholder loans, although they submitted no evidence showing that the payments were indeed loans (*e.g.* a shareholder loan agreement). Hence, as Mr. Cowan confirmed, without any appropriate supporting documentation, there is no basis to treat these payments differently than they were described in the bank statements. See Transcript, Day 8, 140:4-6 (Cowan).

[164] When taking into account the non-bank transactions included in the analysis of shareholder loans (Land Assignment and surplus mandatory investments), the asset extraction still remains quite evident. When taking into account the alleged surplus investment obligations (which could not be verified) and the *nominal* value of the land assigned to BD Agro on account of repayment of shareholder loans, the figure comes down to RSD 96,283,382 – which is still in the range of EUR 1 million. On the other hand, Dr. Hern arrives at the result of RSD 44,796,892 when also looking at surplus investments and the value of the assigned land to Mr. Obradovic (which is still in the range of EUR 500,000, *i.e.* around 10% of the purchase price for BD Agro's shares).

[165] That is how Dr. Hern did not verify in any way the amount of the alleged surplus investments, *i.e.* whether the inclusion of the pertinent amount in the calculation was justified or not (Transcript, Day 8, 92:13-23 (Hern)). He also took into account the nominal value of the land assigned by BD Agro to Mr. Obradovic, as presented to him by Claimants. Yet, as he confirmed during cross-examination, the appropriate nominal value of this land should have actually been higher for another RSD 4 million (Transcript, Day 8, 100:13-104:7 (Hern)).

[166] Dr. Hern was instructed to take into account all of transactions between BD Agro and other Serbian companies allegedly also in Mr. Rand's beneficial ownership. The main problem with this is the fact that not even Dr. Hern knows why these transactions would be included in the shareholder loan analysis. He saw no documents justifying this and he simply followed instructions (Transcript, Day 8, 95:2-17 (Hern)).

[167] Dr. Hern was not even aware of the undisputed debts that the associated companies had towards BD Agro at the valuation date. See Transcript, Day 8, 95:18-97:8 (Hern). The total debt of the associated companies towards BD Agro was RSD 188,264,260 in 2015 *i.e.* as of the valuation date. See CE-171 p. 32, RE-105 page 3. As of 2019 *i.e.* as of today, the debt stands at RSD 90 million (the transcript incorrectly states 19 instead of 89 million). See RE-1, RE-190, RE-373, RE-376, RE-375, RE-374. In any event, even under Claimants' instructions, the relevant calculations were still mathematically incorrect.

63. Finally, Claimants also assert that Mr. Cowan relied on descriptions of transactions listed in the bank statements.[168] They claim that since these descriptions may sometimes be wrong, this "*makes Mr. Cowan's analysis absolutely unreliable*".[169] However, Claimants have offered no documents which would indicate that the descriptions in question are indeed wrong. Here, Claimants also ignore the fact that BD Agro's financial statements corroborate the descriptions of the transactions in question.[170]

III. CONDUCT COMPLAINED OF IS NOT ATTRIBUTABLE TO RESPONDENT

64. ***The Agency was not a* de facto *organ of Respondent.*** Claimants continue to argue that the Agency was *de facto* organ of Respondent, but are completely silent about the international legal standard ("complete dependence"[171]) for establishing attribution on this basis, which is clearly not met in the present case. Instead, Claimants state that the Agency was structurally and functionally part of the Serbian state administration.[172] However, their structural argument does not hold because the Agency had a separate juridical person from Respondent and was not part of the state administration, unlike the Romanian privatization entity in *Awdi*.[173] As far as Claimants' functional argument is concerned, it is based on the fact that the Agency exercised some governmental powers,[174] but this is irrelevant in the context of the applicable standard for *de facto* organs.

65. In this context, Claimants insist that witnesses confirmed that the government appointed the Agency's management, the Ministry supervised legality of the Agency's work, or acted as the second instance on appeal over certain Agency's decisions.[175] However, all this is clearly insufficient to make the Agency a *de facto* organ of Respondent.[176]Also, this conclusion is fortified by the testimony of its former director who stated that he took his decisions independently, while the decisions of the Commission for Control were taken by consensus and following a discussion with arguments.[177] Claimants also insist on the fact that the funds from the sale of privatized assets were forwarded to state budget and later on used for purposes designated by the government,[178]

That is how Claimants instructed Dr. Hern that BD Agro's debts which Inex assumed in 2005 were RSD 114 million, although in reality they were approximately RSD 111 million, which can be easily calculated by summing up the amounts presented in the debt assignment agreements (**CE-444**). See, also, Transcript, Day 8, 92:24-93:11 (Hern).

[168] Claimants' PHB, para. 130.

[169] Claimants' PHB, para. 131.

[170] BD Agro's financial statements also confirm that these transactions were not recorded as shareholder loans from Mr. Obradovic. See Notes to BD Agro's financial statements for 2006, p. 15, **CE-819**. The debt of BD Agro on account of shareholder loans increased towards Mr. Obradovic for around RSD 268 million in 2006. However, if one would take into account all bank transactions conducted between Mr. Obradovic and BD Agro in 2006 (including the payments for goods and services – code 221), this debt should have increased for around RSD 320 million (see **CE-889**). The significant difference between the financial statements and bank statements practically correlates with the RSD 50 million (221 code payments) which Dr. Hern included in his calculations as loan payments from Mr. Obradovic, but which should have obviously been excluded. When confronted with these documents at the Hearing, Dr. Hern did not have an answer, and again confirmed that he was just instructed to assume otherwise. See Transcript, Day 8, 100:13-104:7 (Hern).

[171] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgement of 26 February 2007, para. 392, **RLA-86**; See also *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, ICJ, Judgment of 27 June 1986 p. 52, para. 109, **RLA-9**. See also Rejoinder, 1087-1095.

[172] See Claimants' PHB, para. 171. Claimants do not argue that the Agency was *de jure* organ, see, also, Reply, para. 940.

[173] See Article 2 of the Law on Privatization Agency, CE-238. See also, Rejoinder, 1087-1095. For differentiation between the present case and *Awdi* see Rejoinder, para. 1096-1100.

[174] See Reply, para. 949.

[175] See Claimants' PHB, paras. 173-174.

[176] See Rejoinder, paras. 1090-1095.

[177] Transcript, Day 4, 104:22-106:03 (Cvetkovic). This is also evidenced by the transcripts from the sessions of the Commission for Control, see Transcript of the audio recording from the meeting of the Commission for Control, 23 April 2015, **CE-768**.

[178] See Claimants' PHB, para. 174. Here, Claimants also misrepresent the Transcript, because the witness stated that the Agency itself kept part of the proceeds from the sales, while the rest was transferred either to state budget or to other owners whose capital assets the Agency sold, see Transcript, Day 4, 131:16-23 (Cvetkovic).

while disregarding the fact that the Agency had its own sources of funding and independently decided on the use of its funds.[179]

66. ***There was no attribution under Article 5 of ILC Articles.*** In this context, Claimants rely on (i) the Ministry's report after supervision which referred to its power to supervise holders of public authorities while performing delegated state administration tasks;[180] (ii) Prof. Radovic's statement that Ombudsman is entitled to control activities "*where the public authority acts as an authority*";[181] and (iii) the Agency's statement in *Uniworld* arbitration that it acted as the holder of public powers.[182] However, all this concerns Agency's *control of performance* of privatization agreements, and not directly its termination of these agreements, or its refusal to release pledge over shares or to allow assignment of a privatization agreement.

67. In the *Uniworld* arbitration, the Agency stated that it acted as the holder of public powers "*during execution of control of compliance with investor's obligations*".[183] Similarly, the Ministry's report extensively discussed the Agency's controls over the Buyer's performance of the Privatization Agreement and issued an instruction about the modalities of the next control, not an instruction to terminate the Privatization Agreement.[184] This is understandable since the Ministry could neither order (instruct) the Agency to terminate the Agreement, nor terminate it by itself.[185] In the report, the Ministry only asked the Agency to take the measures that it was entitled to take,[186], which included termination under Article 41a of the Law on Privatization. In the same vein, the Ombudsman was also concerned with the Agency's and the Ministry's conduct during *control over performance* of the Privatization Agreement.[187] It follows that Claimants have failed to show that the *measures complained of* (termination, refusals to release the pledge and to agree to assignment) were in this particular case performed in the exercise of delegated sovereign powers, as required by international law.[188]

68. Finally, Claimants continue to rely on a pronouncement by one Serbian court that the notice of termination constituted the Agency's use of its legal power delegated by the state, although it has been demonstrated that this sole decision has not been followed and is at odds with a constant practice of Serbian courts that termination is "*a unilateral declaration of will of one contracting party to the other contracting party*".[189]

69. ***No attribution under Article 8 of ILC Articles.*** Here, as well, Claimants fail to appreciate the applicable international standard, requiring that instructions, direction and control must be

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[179] See Transcript, Day 4, 106:08-16 (Cvetkovic). See also, Witness Statement of Vladislav Cvetkovic para. 4.
[180] See Claimants' PHB, para. 179
[181] See Claimants' PHB, paras. 180-181.
[182] See Claimants' PHB, paras. 179 & 181.
[183] *Uniworld v. Privatization Agency and Srbija-Turist A.D.*, ICC Case No. 14361/AVH/CCO/JRF/GZ, Award, para. 295 *in fine*, **CE-252**. The Agency also confirmed its capacity as a contract party, see *ibid.*, note 57.
[184] "*Send the notice to the Buyer, Djura Obradovic about additionally granted term of 90 days for delivery of evidence on actions in accordance with the provisions of the Agreement on sale of socially owned capital through the method of public auction of Poljoprivredno prehrambeni kombinat "Buducnost" Dobanovci (changed name AD "BD AGRO" Dobanovci), that is in accordance with the Notice on additionally granted term of November 9, 2012*." Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, **CE-98**; see also, *ibid.*, pp. 2-13.
[185] See Transcript, Day 6, 75:16-21 (Radovic).
[186] "*[…] undertake the measures within its legal authorizations […]*", see Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, last paragraph, **CE-98**.
[187] "*In the process of control of performance of contractual obligations from the Agreement […] the Privatization Agency […] and the Ministry of Economy made omissions in their work […]*". Opinion of the Ombudsman, 19 June 2015, p.8, **CE-42**.
[188] Claimants agree with this rule, see Reply, para. 960.
[189] Decision of the Higher Commercial court, Pž. 9899/2008 of 21 January 2009, p. 1, **RE-157.1**. For more on the decision invoked by Claimants, see Rejoinder, paras. 1061-1065. Similarly, Claimants continue to rely on Mr. Milosevic's view that notice of termination and the decision on transfer of the capital have all characteristics of administrative acts, oblivious to the fact that there is virtually no legal authority or scholar in Serbia that would share the same view, see Transcript, Day 5, 49:04-13 (Milosevic) & Rejoinder, para. 1069.

demonstrated with respect to specific conduct and not generally.[190] Thus, general control of the Ministry over the Agency, even if it existed (*quod non*), is clearly insufficient in this context. The same goes for general statements about a binding nature of the Ministry's instructions. What is required is the showing of specific instruction or directive concerning the conduct complained of in the case at hand.[191] Accordingly, Claimants' insistence on the use of the word "instruction" or "order" in certain Agency's documents is clearly inapposite, unless it does not specifically relate to the impugned conduct.[192]

70. Claimants also rely on Ms. Vuckovic's saying that her understanding was that the Ministry's instruction in supervisory proceedings was binding on the Agency.[193] However, her testimony should be contrasted with statements of Mr. Cvetkovic that he did not consider the Ministry's communications to be binding on the Agency.[194] In any event, the Ministry's instruction in the present case did not direct termination of the Privatization Agreement, but addressed the Agency's control of its performance by the Buyer, leaving it to the Agency to take the next step in accordance with its "legal authorizations".

71. Unable to provide evidence of specific instructions for specific conduct, Claimants resort to conjectures. According to one, the binding nature of the Ministry's instructions is confirmed by the fact that the Agency refrained from making any decisions on the Privatization Agreement until the conclusion of the supervision proceedings.[195] However, evidence points to another explanation: the Agency waited as it was not reasonable to take a decision before receiving opinion of the Ministry on interpretation of law.[196] Another Claimants' conjecture is that the Ministry's instruction upon conclusion of the supervision proceedings was to terminate the Privatization Agreement and that this instruction was followed, because the Notice of Termination mentions that the termination was "*in line with the Report of the Ministry of Economy*".[197] However, the reference to the Ministry's Report cannot be interpreted as a reference to an instruction to terminate, because there is no such instruction in this document. Rather, it can only be interpreted as a reference to the Ministry's statement that the Agency should take a measure "within its legal authorizations",[198] which does not constitute an instruction to undertake a specific action.[199]

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[190] See Rejoinder, para. 1120 & Counter-Memorial, paras. 579-581, and references therein.

[191] "*Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation*", Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 47 para. 3, **CLA-24**.

[192] See Claimants' PHB, paras. 186-187. It should be noted that Ms. Vuckovic's testimony referred to by Claimants showed that she interchangeably referred to the Agency's seeking "instructions" and "opinion" from the Ministry, thereby using these words colloquially without giving them any strict legal meaning, see Transcript, Day 3, 41:6-42:23 (Vuckovic) & Claimants' PHB, para. 186(a).

[193] Claimants' PHB, para. 186.

[194] "*I am absolutely sure that these were not orders…*" Transcript, Day 4, 122:1-2 (Cvetkovic); "*… I don't think it was possible for the Ministry to communicate with the Agency in any other way, except for making comments on whether the Agency did something in line with the law or not*." *ibid.* 126:18-22 (Cvetkovic).

[195] See Claimants' PHB, para. 188. The Agency actually did not stand still, it continued activities concerning compliance with the Privatization Agreement in the meantime, see Transcript, Day 3, 178:23-179:1 (Radovic-Jankovic).

[196] "*The factual and legal complexity of this situation, possible consequences, as well as the need for taking a stand based on interpretation of privatization regulations and regulations about contract and torts, are precisely the reasons why the Agency, in line with its legal and contractual authorizations, was not able to make a decision in this case without previously obtaining an opinion from the Ministry of Economy*", Letter from the Privatization Agency to the Ombudsman, 14 November 2014, p. 3, **CE-43**.

[197] See Claimants' PHB, para. 189, referring to Notice of Termination of the Privatization Agreement, 28 September 2015, p. 3, **CE-050**.

[198] See Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13, last paragraph, **CE-98**.

[199] See Transcript, Day 1, 192:07-20 (Djeric); See also Respondent's Opening Statement, slide 85 & Rejoinder, paras. 1119-1131.

IV. RESPONDENT DID NOT VIOLATE ITS TREATY OBLIGATIONS

A. THERE WAS NO EXERCISE OF SOVEREIGN POWERS

72. Claimants' main argument in this context is that privatization *per se* has a governmental, and not a commercial, character, considering "*the underlying public interest inherent in the privatization process*" and "*the public policy goals*" transpiring from the text of the Privatization Agreement, particularly from the Buyer's obligations to invest in the target company, to maintain its business operations and comply with a social program.[200] However, the public policy goals or interests involved in, or underlying, certain conduct are not determinative for its characterization as sovereign or commercial: "*[w]hat matters is not the* 'service public' *element, but the use of* 'prerogatives de puissance publique' *or governmental authority*".[201] Further, the use of governmental authority must be established in each specific instance of impugned conduct, and cannot be drawn from generalizations about the nature of the process, as Claimants do.[202] Claimants' reference to *Awdi* in this context is to no avail, because it addressed attribution under Article 4 of the ILC Articles, and not differentiation between commercial and sovereign acts.[203] The same goes for Claimants' reference to *Bosca v. Lithuania*, where the tribunal based its decision that conduct of the Lithuanian privatization fund was of sovereign nature on the evidence confirming specific features of the privatization in Lithuania with heavy governmental involvement, not on a general principle that every privatization is governmental in nature.[204]

73. The accepted test in international law for distinguishing commercial from sovereign conduct is whether it is "*conduct which any contract party could adopt*".[205] Clearly, termination of the Privatization Agreement, refusal to release the pledge and refusal to consent to assignment are examples of conduct which any party could adopt, having no sovereign characteristics and being essentially contractual in nature. In this regard, the Agency was "*acting like any contractor trying to achieve…*"[206] compliance.[207]

74. The only Claimants' argument that addresses specifically termination in the present case is that the Ministry's report on supervision of the Agency made reference to Article 46 of the Law on State Administration, which concerns supervision of holders of public authorities when performing

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[200] See Claimants' PHB, paras. 194-196 & Reply, paras. 1021-1030.

[201] See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83**. Even conduct undertaken in preparing defense of a country may be of commercial nature, as is clear from paradigmatic case of the army buying boots for its soldiers, which is a commercial act, see Counter-Memorial, para. 608 and note 691.

[202] Alternatively, Claimants rely on distortions of Serbian law as they refer to a Serbian court decision stating that termination of privatization agreement was the Agency's use of a legal power obtained by transfer of authority from the state, see Claimants' PHB, para. 198. This decision clearly does not reflect Serbian law and was superseded by consistent court practice stating that termination was a unilateral declaration of will of a contracting party, see Rejoinder, paras. 1061-1065.

[203] See *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, paras. 322-323, **CLA-26**.

[204] "***The evidence presented by both Parties*** *confirms that* ***the privatization process*** *is a governmental process, highly regulated by a series of governmental decrees and rules, culminating in a multi-step State-approval process. The applicability of the Civil Code to certain aspects of the SPF's work does not change the governmental nature of the acts adopted in the process of privatization*." *Luigiterzo Bosca v. Lithuania*, UNCITRAL, Award, 17 May 2013, para. 127 (emphasis added and footnote omitted), **CLA-42**; see, also, *ibid.*, para. 128.

[205] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 348; **CLA-37**; see, also, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83** ("*Any private contract partner could have acted in a similar manner*") & *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case, NO. ARB/05/22, Award, 24 July 2008, para. 492, **CLA-46** ("*the ordinary behavior of a contractual counterparty*"). A similar standard was used in *Mafezzini* and quoted in *Jan de Nul*: "*whether specific acts or omissions are essentially commercial rather governmental in nature…*", see, *ibid.* para. 168.

[206] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 168, **RLA-83**.

[207] See Respondent's PHB, paras. 263-265.

delegated state acts.[208] However, as already discussed, the supervision report dealt with the Agency's *control* over performance of the Privatization Agreement, and provided instructions in this regard, but has not addressed termination itself.

75. Finally, Claimants argue that the termination and transfer of shares were sovereign acts because they were not motivated by any commercial considerations, which they allege was confirmed by witnesses at the Hearing.[209] While it is inaccurate as a matter of fact,[210] this argument also starts from a wrong premise, because it assumes that for an act to be of commercial nature it must be motivated by commercial considerations, which is not in accordance with the applicable international law standard requiring examination of the nature or substance of an act, not of its motivation. This is confirmed by the *Jan de Nul* award which did not look into the reasons behind an act but into whether the act itself was an exercise of governmental authority "*irrespective of the reasons*" for which it was undertaken.[211]

B. THERE WAS NO EXPROPRIATION

1. Termination of the Privatization Agreement was lawful under Serbian law

1.1. The essence of Mr. Obradovic's breach of Article 5.3.4

76. Throughout the proceedings, including in PHB, Claimants trivialized the breach, saying that it was both "non-essential" and "insignificant".[212] Respondent has already explained why these assertions are wrong,[213] so it will just briefly remind the Tribunal of several facts that also show that the breach was important and significant.

77. In simple terms, the Privatization Agreement was terminated because Inex and Crveni Signal did not repay the money loaned from BD Agro.[214] Importantly, that same money eventually ended up on Mr. Obradovic's personal bank account.[215] After Inex and Crveni Signal made these payments to Mr. Obradovic, on 25 February 2011 the Agency issued its Notice and granted Mr. Obradovic a 60-days deadline to prove that "*all the loans given by the Subject of privatization to third parties from the credit funds secured by the encumbrances on the property of the Subject were repaid*".[216] Had Mr. Obradovic been diligent he would have made sure that Inex and Crveni Signal settled their debts towards BD Agro. He could have done that either by returning the money to these companies so that they could repay BD Agro, or by himself taking over the debt and making the repayments to BD Agro. What Mr. Obradovic chose to do instead was to use part of the money received from Inex and Crveni Signal to pay the last instalment of the purchase price on 8 April 2011.[217]

78. In other words, Mr. Obradovic's breaches of Article 5.3.4 provided him with the funds to pay the last installment of the purchase price. Claimants now contend that the payment of the purchase price

[208] See Claimants' PHB, para. 198.
[209] See Claimants' PHB, para. 199.
[210] See Respondent's PHB, para. 263.
[211] See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **RLA-83**.
[212] Claimants' PHB, para. 259.
[213] Respondent's Rejoinder, paras. 201-230; Respondent's PHB, paras. 247-257.
[214] *See e.g.* Respondent's Counter-Memorial, paras. 129-134; Respondent's Rejoinder, paras. 156-177.
[215] **First,** on 2 June 2010, Crveni Signal transferred RSD 65,000,000 to the personal bank account of Mr. Obradovic. See Respondent's Rejoinder, para. 121; Crveni Signal Bank Statement, 2 June 2010, **RE-372**. **Second**, on 14 February 2011 Inex also transferred RSD 30,400,000 to the personal bank account of Mr. Obradovic. *See* Respondent's Rejoinder, para. 123; Agreement on Interest-Free Loan of 29 December 2010, **RE-10**; BD Agro Bank Statement from Nova Agrobanka for 29 December 2010, **RE-427**; Bank Statement of Mr. Obradovic's, 14 February 2011, **RE-437**.
[216] Letter from the Agency to Mr. Obradovic, 25 February 2011, **RE-388**.
[217] Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, **RE-33**.

actually made the breach of Article 5.3.4 irrelevant.[218] However, the above described sequence of events shows that the breach was important and significant not only from the perspective of the Privatization Agreement but also from the perspective of Mr. Obradovic who paid the last instalment by committing the breach.

1.2. Claimants' repeatedly lie about remedy of the breach

79. Claimants again emphasized in their PHB that "*BD Agro had repaid the [221 Million Loan] […] by 2012. The pledges remained registered after the repayment only because the state-run Nova Agrobanka arbitrarily refused to issue a confirmation necessary for their deletio*n".[219] However, it is a fact that the refinancing agreement for the 221 Million Loan explicitly retained the pertinent pledges, which means that there was no basis for them to be deleted.[220] There is also no evidence that Claimants have ever requested deletion from the bank. Finally, Claimants have also failed to show why have they not sought to obtain the deletion permit through court proceedings,[221] if the bank indeed "arbitrarily refused" to issue it (*quod non*).

1.3. The Agency's right to termination

80. Claimants continue to argue that the Agency did not have the right to terminate the Privatization Agreement on the basis of 5.3.4 violation, which has already been thoroughly refuted.[222] Further, Claimants have focused on the opinion of the Radovic & Ratkovic law firm in order to prove that termination was unlawful.[223] However, it is sufficient to note that literally each and every Serbian court decision on the file speaks against the conclusions from that legal opinion.[224]

81. Claimants also argue that Article 41a of the Law on Privatization did not allow the Agency to request the remedy of the breach and subsequently terminate the privatization agreement, if the buyer failed to remedy a breach. Instead, Claimants argue that all that the Agency was allowed to do after an additional deadline given to the Buyer was to determine whether a breach was "still present".[225] Claimants advance an absurd contention that "*determination whether a breach is still*

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[218] Claimants' PHB, paras. 221 *et seq*.

[219] Claimants' PHB, para. 10; See also *ibid*., paras. 234-235.

[220] Respondent's Rejoinder, paras. 126-132.

[221] Law on Mortgage, Article 44, **CE-718** ("*Deletion of the mortgage is performed at the request from the owner […]. With the request […] the following shall be submitted: 1) statement in writing from the mortgage creditor that it consents to the deletion of the mortgage;* ***or 2) final judicial decision which confirms that the claim of the mortgage creditor ceased*** *[…]*"; emphasis added).

[222] See Claimants' PHB, paras. 213-217 & Respondent's PHB, paras. 241-245.

[223] Claimants' PHB, paras. 217, 253.

[224] By way of example, see court practice noted in Respondent's Counter-Memorial, paras. 100-105, 118, 121; Respondent's Rejoinder, paras. 201 *et seq.* As a matter of fact, the same attorney that signed the pertinent legal opinion (Violeta Mitrovic) represented the Agency in at least two of such court cases, where completely opposite legal positions (compared to the Radovic & Ratkovic legal opinion) were adopted by the highest Serbian court (Supreme Court of Cassation) – that the Agency had the right to terminate the privatization agreement for a reason not foreseen by the agreement as a termination reason, and regardless of the fact whether the purchase price was paid. See Legal Opinion of Radovic & Ratkovic, 11 June 2013, **CE-34**, p. 3 ("*According to the agreement itself, the Agency does not have the right to terminate the agreement due to violation of obligation referred to in Article 5.3.4, because this is not stipulated as a reason for termination*."), p. 4 ("*After the payment of the sale and purchase price […] the subject of privatization was finally privatized and thus all contractual and legal control authorities of the Privatization Agency ended, regardless of the fact that after fulfillment of the agreement, the Agency was sending notices to the buyer about possible termination of the agreement, while setting additionally granted terms for fulfillment*."). *Cf.* Judgment of the Supreme Court of Cassation no. Prev. 132/13 of 29 May 2014, p. 4, **RE-356** ("*Failure to comply with any of the undertaken obligations, even if not foreseen by the* [privatization] *contract as a termination reason, can be the reason for termination of the contract in accordance with the law itself.*"); Judgment of the Supreme Court of Cassation, 14 November 2013, pp. 5-6, **RE-62** *("[…] the goal of privatization can be achieved only by meeting all contractual obligations […] as a consequence the agreement may be lawfully terminated due to non-fulfilment of only one contractual obligation […] in the event of failure to meet one of the contractual obligations (in this specific case not investing) termination of agreement will follow and transfer of the sold capital to the then existing Share Fund. […]*". This conclusion was made by the court regardless of the fact that "*In the specific case […] the buyer of capital […] paid the sales price*").

[225] Claimants' PHB, paras. 221-230. Here, Claimants rely on Prof. Radovic, whose testimony they manipulate by taking it out of context.

present is different from the determination of whether the breach has been remedied".[226] In particular, according to them, if the additional deadline would expire after the purchase price was fully paid that would mean that the breach was not "still present". This allegation was never argued before by Claimants (nor anyone else for that matter) – presumably due to the fact that it is obviously absurd.[227] Even Claimants' own expert evidently disagrees with it and argues that "*under Article 41a(1) of the Law on Privatization, termination occurred ex lege if the buyer* ***failed to remedy the violation*** *of the privatization agreement* ***within an additional deadline*** *granted by the Privatization Agency*".[228] Prof. Radovic concurs.[229]

82. Claimants further emphasized that if the breach was not remedied during the period of control, *i.e.* until the full payment of the purchase price, it would be "absurd" for the Agency to insist upon the remedy of the breach, since after the price is paid the buyer was entitled to repeat the very same conduct that led to the breach in the first place.[230] As already explained[231] this would mean that, after the payment of the purchase price, the Agency's requests for remedy would become meaningless, as the very same conduct that represented the breach could have been undertaken after the payment of the price. In fact, Claimants' erroneous interpretation goes against what their own expert confirmed at the Hearing - that if the buyer managed to pay the full purchase price before he managed to complete the required investments, the Agency would still be entitled to insist upon the fulfillment of the investment obligation,[232] regardless of the fact that the buyer would be able to dispose of the investment after he paid the price (and for example donate the equipment that he just invested).[233] This, however, did not lead Mr. Milosevic to conclude that the insistence upon the fulfilment of the investment obligation would be "absurd". Since all the obligations under the Privatization Agreement are of equal importance, the same logic must apply to Article 5.3.4, and it is therefore unclear why the insistence upon the remedy of the breach of that Article after the payment of the purchase price would be absurd, as Claimants contend.

1.4. The requests for remedies were fully justified and lawful

83. Claimants also spend several pages of their PHB on insisting that the Agency requested some remedies which were unjustified and unlawful.[234] **First**, Claimants repeat their newly concocted allegation noted above (*see* paragraph 81), in saying that the Agency "*was only entitled to monitor the buyer's compliance with its obligations under the Privatization Agreement, rather than request any remedies that it deemed appropriate*".[235] It is unclear what Claimants wish to accomplish with this, as this would imply that the Agency should not have given any directions to Mr. Obradovic on how to remedy the established breaches.[236] In other words, their contention defeats itself as it implies that the Agency should have treated Mr. Obradovic in a less transparent way than it did. **Second**, Claimants advance a number of unfounded assertions regarding their alleged confusion about the exact remedies that were requested from Mr. Obradovic, *i.e.* about the lack of justification

[226] Claimants' PHB, para. 229.
[227] For one thing, according to that interpretation, after the Agency would discover a breach, it was giving additional deadlines to itself – not to the buyer. Specifically, it was not giving a deadline for the buyer to remedy the breach, but it was giving a deadline for itself at the end of which it would determine "*whether a breach was still present*".
[228] First Expert Report of Mr. Milos Milosevic, para. 66 (emphasis added).
[229] Transcript Day 6, 25:6-15; First Expert Report of Prof. Mirjana Radovic, paras. 29 *et seq*.
[230] Claimants' PHB, paras. 231-232.
[231] Respondent's Rejoinder, para. 223.
[232] Transcript, Day 5, 46:22-48:3 (Milosevic).
[233] Transcript, Day 5, 48:4-14 (Milosevic).
[234] Claimants' PHB, paras. 236-242.
[235] Claimants' PHB, para. 236.
[236] Furthermore, as already explained in Respondent's PHB, the Agency did not always request a "remedy" per se, but only additional documentation and/or clarifications from the buyer, which it needed in order to determine whether a breach (still) exists. See Respondent's PHB, paras. 225-238.

for the requested remedies[237] – which allegations have been utterly defeated in Respondent's PHB already.[238]

2. Absence of any bad faith in termination of the Privatization Agreement

84. In order to create an appearance of bad faith where there is none, Claimants advance several arguments with respect to termination of the Privatization Agreement: **First**, Claimants contend that the Agency requested that "*Mr. Obradovic submit evidence that he had fulfilled obligations under Article 5.3.3 and 5.3.4 'no later than' 8 April 2011*".[239] Claimants advance that this meant that the Agency requested something impossible - that Mr. Obradovic's breach is remedied in the past *i.e.* by travelling backwards in time before 8 April 2011. As Prof. Radovic rightly noted at the Hearing, Claimants' reading of these words was "*completely illogical and insane*".[240] Furthermore, as the interpreters confirmed at the Hearing, the words "*no later than*", were more precisely translated as "*conclusively with*",[241] which makes it clearer that the Agency referred to the fact that the additional deadline was given only regarding the breaches that occurred concluding with 8 April 2011. Claimants' current "illogical and insane" reading of the Agency's notices was of course never raised by Mr. Obradovic or BD Agro, as they always knew exactly what they needed to do – not to travel backwards in time in order to remedy the breaches before 8 April 2011 but to, within the additionally granted term, remedy the breaches that occurred prior to that date. **Second**, when it comes to Article 5.3.3, the Agency never requested Mr. Obradovic to "raise cows from the dead"[242] or anything similar. It simply insisted upon a clear and unequivocal statement from the auditor regarding fulfillment of these obligations.[243] **Third**, Claimants grossly misrepresent the record by stating that Mrs. Vuckovic allegedly confirmed at the Hearing that, on 20 July 2015,[244] the Agency asked for compliance with a number of obligations within an "*impossible five-day deadline*".[245] This is completely false, as Mrs. Vuckovic very clearly explained that the buyer had a 90-day deadline.[246] This is also evident from the written evidence,[247] just as it is that Mr. Obradovic never objected to the given deadline. **Fourth**, citing Mrs. Radovic Jankovic, Claimants also note that the Agency acted in bad faith since it did not follow the opinions on economic and legal justification for termination from the Ministry and a law firm, respectively.[248] However, Claimants fail to note that Mrs. Radovic Jankovic made it clear that the Agency had a "*differing point of view*" as it "*had*

[237] Claimants' PHB, paras. 237-242.

[238] See Respondent's PHB, paras. 182-238. Respondent already explained that Mr. Obradovic could have avoided termination simply by having Inex and Crveni Signal repay the debts. Claimants now contend that this is in contradiction with the documentary evidence and that Mr. Cvetkovic confirmed at the Hearing that "*it would not be even possible for the Agency to tell Mr. Obradović that all that needed to be done was for Inex and Crveni Signal to repay the funds they owed to BD Agro*" (Claimants' PHB, para. 241). First of all, the question whether the Agency could have made requests that would go against the Agency's notices is moot, as Respondent never claimed this. As Mr. Cvetkovic rightly confirmed, in order to see what the buyer had to do to remedy the breach, one would have to look at the letters themselves as *"all communication with the buyer happened through formal letters"* (Transcript, Day 4, 153:1-15 (Cvetkovic). However, it is exactly when looking in these formal letters that it can be seen that termination could have been avoided if these debts were repaid, as this was the only remaining breach in September 2015. This is also confirmed by Mr. Obradovic's auditor (*see* Auditor report of 12 January 2015, **CE-327**), as well as by Mr. Markicevic (see Letter of 2 July 2015, **CE-46**).

[239] Claimants' PHB, para. 246.

[240] Transcript, Day 6, 56:15-57:11 (Radovic).

[241] Transcript, Day 6, 59:5-12 (Interpreter). In fact, this latter translation was used by Claimants in translating other notices from the Agency. *See* Letter from the Privatization Agency of 23 June 2015, point 7), **CE-351**.

[242] Claimants' PHB, paras. 238, 251; Transcript, Day 1, 48:3-7 (Anway).

[243] Respondent's PHB, paras. 225-238.

[244] Letter from Privatization Agency to BD Agro, 20 July 2015, **CE-47**.

[245] Claimants' PHB, para. 252.

[246] Transcript, Day 4, 86:14-87:24 (Vuckovic).

[247] Letter from the Privatization Agency to D. Obradović, 27 April 2015, **CE-348**; Letter from Mr. Obradovic to the Privatization Agency of 30 April 2015, **RE-42**; Letter from the Privatization Agency to D. Obradović and BD Agro, 23 June 2015, **CE-351**; Letter from BD Agro to Privatization Agency, 2 July 2015, **CE-46**; Letter from Privatization Agency to BD Agro, 20 July 2015, **CE-47**; Letter from Mr. Djura Obradović to Privatization Agency, 8 September 2015, **CE-48**.

[248] Claimants' PHB, para. 253.

a uniform practice towards all entities undergoing privatization, therefore [it] treated this entity [BD Agro] the same as the other ones",[249] while it could not accept the Ministry's opinion which did not deal with legal aspects of termination.[250] **Fifth**, Claimants consider that the Agency acted in bad faith due to the fact that it knowingly kept the pledge over the shares in place after the payment of the purchase price.[251] However, this was a justified decision which was in line with the Agency's practice.[252] **Sixth**, Claimants' witnesses stated at the Hearing that they did not know what was the alleged bad faith motive for the Agency to request remedy of these breaches and ultimately terminate the Privatization Agreement,[253] which is echoed by Claimants.[254] However, Claimants speculate that a local tycoon wished to acquire BD Agro's land and instrumentalized workers for that purpose, for which they provide no evidence whatsoever. Claimants' speculation should therefore be outright dismissed.[255]

3. Respondent's alleged expropriatory conduct was not contrary to public international law

85. Claimants argue that the termination of the Privatization Agreement and the subsequent transfer of BD Agro's shares fail to satisfy requirements for a lawful expropriation but do not expound on this argument further,[256] so the Tribunal is respectfully directed to Respondent's previous submissions in this regard.[257]

86. In arguing that the alleged expropriation was contrary to public international law, Claimants focus on the question of proportionality, claiming that the measures were *"completely disproportionate under both Serbian law and public international law"*.[258] Respondent has already comprehensively explained the fallacy of Claimants' proportionality argument based on the Serbian Constitution.[259] Claimants now also invoke Article 12 (good faith principle) and Article 13 (prohibition of abuse of right) of the Law on Obligations,[260] without giving any reasoning as to how the Agency's conduct violated these principles. However, there is ample evidence of absence of any bad faith on part of the Agency.[261]

87. Claimants also make an argument that there was a violation of the principle of proportionality as part of public international law. However, for this principle to apply, the termination of the Privatization Agreement must be deemed an administrative act, which is not the case here.[262] Further, Claimants rely on the pronouncement in *Occidental v. Ecuador* that *"any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed*

[249] Transcript, Day 3, 157:1-10 (Radovic-Jankovic).
[250] Transcript, Day 3, 138:12-17 (Radovic-Jankovic) ("*As you can see in this case, the Ministry said it was economically justified not to terminate the agreement but we terminated it* ***because the Ministry had taken into account only the economic aspects of the privatization, without taking into account the legal aspects***"; emphasis added).
[251] Claimants' PHB, para. 254.
[252] Respondent's Rejoinder, paras. 271-297; Respondents' PHB, paras. 300-308.
[253] Transcript, Day 3, 56:17-21 (Markicevic); Transcript, Day 3, 109:25-110:1 (Broshko).
[254] Claimants' PHB, para. 6.
[255] "*[…] evidence suggests that a local tycoon wished to acquire valuable land and, to do so, instrumentalized a few employees, nostalgic of socialist-times overemployment and collective ownership, to lodge complaints with the [Agency] and the Ombudsman, which ultimately led to Serbia expropriating the Claimants' investment*", Claimants' PHB, para. 6.
[256] Claimants' PHB, para. 255.
[257] See Rejoinder, paras. 199-238 & 1251-1265. See also Respondent's PHB, Section III.D.
[258] Claimants' PHB, para. 255.
[259] See Rejoinder, paras. 1228-1236; Respondent's PHB, paras. 294-295.
[260] Claimants' PHB, para. 256.
[261] See Respondent's PHB, Sections III. B, IV.C & paras. 318-322. See, also, Rejoinder, paras. 201-210 & 1341-1345.
[262] See Respondent's PHB, para. 283.

and its consequences",[263] but ignore the tribunal's detailed specification of this finding, also adopted by the annulment committee,[264] which was clearly satisfied in the present case.[265]

88. Claimants argue that the termination of the Privatization Agreement was disproportional for two reasons. **First**, they assert that the pledge on BD Agro's assets caused no harm or damage to anyone,[266] and claim that the company's value was the same regardless of whether the loans were secured by pledge or not.[267] However, Claimants miss the point. The question is not whether the pledging of the assets affects the value of the company, but whether the pledging of the assets and transferring the loaned funds secured by the pledge to third parties (even in the form of a loan), harms the well-being of BD Agro and its prospect of being *"a stable company with a continuous, viable business activity",* which compliance with Article 5.3.4 was meant to ensure.[268] As Respondent already explained, "sufficient serious harm" was caused to the company in this regard.[269] Moreover, the question of proportionality should not be viewed merely from the economic perspective but in consideration of all the circumstances of the case.[270] Thus, the Tribunal should also consider the Buyer's bad faith[271] and the general purpose of privatization fulfilled by enforcing compliance with privatization agreements.[272]

89. **Second**, Claimants argue that the termination was disproportional because the Agency could have waived any breach of the Privatization Agreement.[273] However, they fail to note that Article 41a(1)(3) of the Law on Privatization, which governs this matter, does not envisage the possibility of the waiver of breach. Namely, under this provision, the Agency had the option to either give the buyer yet another additional deadline to remedy the determined breach or terminate the agreement.[274] Furthermore, the issue is directly related to and affects the purpose of privatization, as can be seen from Serbian court practice, which requires all contractual obligations to be fulfilled to satisfy the goals of privatization.[275] Finally, the Agency's ability to consent to dispositions under Article 5.3.4 bears no impact on the issue because (a) the consent is explicitly prescribed as *prior* and *not subsequent* to disposition,[276] and (b) after a breach of contract has been determined, the situation falls under Article 41a which excludes waiver as an option.[277]

90. In conclusion, there was no expropriation of Claimants' investment, nor did Respondent's conduct breach the proportionality principle.

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[263] *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. 416, **CLA-75**. See Claimants' PHB, paras. 257-258.

[264] "*(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.*" *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. 416, **CLA-75**; *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**.

[265] See Respondent's PHB, paras. 285-287.

[266] See Claimants' PHB, para. 259.

[267] See Claimants' PHB, para. 259. See also, Claimants' Opening Statement, slide 94.

[268] 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**; Respondent's PHB, Section III. A.

[269] See Respondent's PHB, par. 286.

[270] 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**. See also, *ibid.*, paras. 379-383.

[271] See Rejoinder, paras. 175-177; Respondent's PHB, paras. 267-271. See also, Respondent's PHB, par. 286.

[272] See Respondent's PHB, paras. 263-266.

[273] See Claimants' PHB, para. 260.

[274] See Article 41a of the Law on Privatization, **CE-220**. See also, Respondent's PHB, para. 262.

[275] See, *e.g.*, Judgment of the Supreme Court of Serbia, Prev. 410/2005 dated 1 March 2006, p. 2, **RE-166**. That the possibility of a waiver was excluded is confirmed by Prof. Radovic, as well, see Transcript, Day 6, 131:07-09; 31:16-24 (Radovic)

[276] See Article 5.3 of the Privatization Agreement, **CE-17**.

[277] In any case, the Agency had no other remedy at its disposal apart from terminating the Privatization Agreement, unlike the Ministry in *Occidental*, see Respondent's PHB, paras. 258-262 & 284.

C. OTHER RESPONDENT'S ACTIONS WERE NOT IN BREACH OF TREATY OBLIGATIONS

91. Claimants further contend that Respondent breached the non-impairment provision, the FET standard, and the umbrella clause including by refusing: (1) to release the pledge and (2) to allow the assignment of the Privatization Agreement because both decisions were arbitrary and unreasonable.[278]

92. ***The decision not to release the pledge was not arbitrary and unreasonable.*** This has already been amply discussed by Respondent.[279] Thus, in the following paragraphs, it will limit itself to directly responding to Claimants' misrepresentation of Prof. Radovic, Ms. Radovic-Jankovic, and Ms. Vuckovic's testimonies. **First,** while Prof. Radovic stated that terms "for the period of 5 years" and "until final payment of sale and purchase price" were clear terms generally speaking, she clarified that the meaning of these terms bears further interpretation in the circumstances of the present case, "*because the term [of the agreement] was extended*".[280] Prof. Radovic also stated that in the present situation, where there is a dispute between the parties as to how to interpret the provision of the contract one should not only apply Article 99(1) of the Law on Obligations, but also Article 99(2) which mandates that the intent of the parties and principles of contract law should be taken into account.[281] The wording of Article 2 of the Share Pledge Agreement was drafted with a *bona fide* buyer in mind, where the full payment of the purchase price would be the last obligation that the buyer would fulfil.[282] However, this was obviously not so in the present case. Moreover, *exemptio non adimpleti contractus*, a principle of contract law stipulated in Article 122 of the Law on Obligations, also entitled the Agency to refuse to release the pledge until the Buyer fully complied with Article 5.3.4 of the Agreement.[283] Finally, it should be noted that Article 100 of the Law on Obligations, espousing *contra proferentem* rule,[284] that Claimants allege would necessitate interpretation in favor of Mr. Obradovic,[285] is simply not applicable in the circumstances of the present case, as the issue goes not to clarity, but intent of the parties.[286]

93. **Second**, Claimants quote a number of statements from Ms. Radovic-Jankovic and Ms. Vuckovic in an attempt to present that the Agency acted in bad faith, willfully breaching the Privatization Agreement.[287] However, the Agency took a reasoned decision, carefully weighing the issues before it, and acted in line with *exceptio non adimpleti contractus*, as evidenced by the testimonies of Ms. Vuckovic and Ms. Radovic-Jankovic, as well as the Transcript of the Commission for Control session held on 23 April 2015.[288]

94. ***Agency's refusal to allow the assignment of the Privatization Agreement was not arbitrary and unreasonable.*** This has already been demonstrated in Respondent's written submissions.[289] Nevertheless, Claimants continue on insisting that the Agency's refusal to allow the assignment of

[278] See Claimants' PHB, para. 262.
[279] See Respondent's PHB, paras. 300-308.
[280] See Transcript, Day 6, 104:01-13 (Radovic).
[281] See Transcript, Day 6, 108:10-110:08 (Radovic, President). See also Article 99(2) of the Law on Obligations, **CE-865**.
[282] See Transcript, Day 6, 108:12-15 (Radovic); Transcript, Day 3, 166:08-167:10 (Radovic-Jankovic).
[283] See Transcript, Day 6, 106:24-107:03 (Radovic); Transcript, Day 3, 166:04-08 (Radovic-Jankovic). See also, Transcript, Day 4, 70:23-71:02 (Vuckovic).
[284] See Transcript, Day 6, 105:18-106:02 (Interpreter).
[285] See Claimants' PHB, para. 265.
[286] See Transcript, Day 6, 106:14-16 (Radovic).
[287] See Claimants' PHB, para. 267.
[288] See Transcript, Day 4, 72:06-12 (Vuckovic); Transcript, Day 3, 169:12-18 & 177:17-178:03 (Radovic-Jankovic); Transcript of the audio recording from the meeting of the Commission for Control, 23 April 2015, **CE-768**. See also Respondent's PHB, para. 302-307.
[289] See Rejoinder, paras. 1296-1303.

the Privatization Agreement was arbitrary and unreasonable.[290] After this contention was devastated in written submissions,[291] Claimants now rely on a newly advanced allegation that Mr. Markicevic obviously came up with for the Hearing. Specifically, he explained that the certificates on lack of criminal convictions/prosecutions were never delivered by Claimants in the assignment procedure, because they should have confirmed that Mr. Jennings "*[h]as never been convicted for any criminal offenses, including those listed in Article 12 of the Privatization Law […]*".[292] Since foreign countries would never, according to Mr. Markicevic, issue a certificate referring to Article 12 of the Serbian Law of Privatization, they delivered an affidavit of Mr. Jennings instead. Mr. Markicevic also alleged that the practice of the Agency was to accept the affidavits instead of certificates,[293] but he was unable to corroborate any such "practice" (as none exists).[294] In addition to that, the newly concocted explanation regarding the impossibility to obtain these certificates is highly unconvincing, because no one was required to provide a foreign certificate referring to Article 12 of the Law on Privatization[295] – but to criminal convictions or ongoing criminal procedures themselves.[296] Rather, if *e.g.* the person in question was never convicted of any criminal acts (as Claimants seem to contend in the case of Mr. Jennings[297]) - it was obviously sufficient that the foreign certificate simply states this fact, without specifying for which criminal acts the person was *not* convicted. There is no explanation as to why such simple certificate was impossible to obtain. Furthermore, Article 12 of the Law on Privatization did not list any country-specific criminal acts, as it only provided general examples of kinds of criminal offences that would be an impediment for assignment, such as criminal offences against life and person (*e.g.* murder), property (*e.g.* robbery) etc.[298]

95. Likewise, Claimants refer to Mr. Broshko's testimony about Agency's request for a bank guarantee in January 2015 to contend that "*the Agency engaged in the protracted negotiations regarding the assignment in bad faith, knowing full well it would never accept the request".*[299] As Respondent already explained,[300] the request for a bank guarantee was not the result of bad faith, but the result of Claimants' own failure to submit the required documentation for more than a year. In the meantime, the Agency's rulebook changed and, already since April 2014, provided for a delivery

[290] Claimants' PHB, paras. 269-272.
[291] Rejoinder, Section I.E.
[292] Transcript, Day 3, 26:23-27:15 (Markicevic).
[293] Transcript, Day 3, 27:22-28:8 (Markicevic)
[294] Transcript, Day 3, 27:16-28:8 (Markicevic).
[295] The only *affidavit* (not certificate from competent authority) that was requested, and that needed to relate to Article 12 of the Law on Privatization, was the one which Mr. Jennings submitted. However, this affidavit did not somehow erase the separate requirement to submit certificates of the competent authority regarding criminal convictions and procedures. See Procedure for Conducting of Activities of the Center for Control of 29 November 2011, Article 8.2., **RE-107**; Rulebook on undertaking of measures of 7 April 2014, Article 34, **RE-93**; Statement of the controlling shareholder of Coropi that he is not a party in the sense of Articles 12-12b of the Law on Privatization, 21 August 2013, **RE-57**.
[296] For the sake of clarification, Article 12 of the Law on Privatization (**CE-223**) was not a basis for prosecution of any specific criminal acts. It only listed the types of criminal acts which would preclude an individual from becoming a buyer in privatization. Thus, the rulebook that prescribed which documentation needed to be submitted in order to fulfil the conditions for the assignment, prescribed that the applicant should have submitted "***certificate of the competent authority**, not older than six months, that the person who is a controlling member or a controlling shareholder of a legal entity has not been convicted of criminal offenses under Article 12 of the Law on Privatization and a **certificate from the competent authority**, not older than six months, that the procedure for criminal offenses under Article 12 of the Law on Privatization is not being conducted against the person who is a controlling member or controlling shareholder*" (emphasis added). Hence, it was obvious that the certificate itself should not refer to the Law on Privatization, but solely confirm that an individual was not convicted of certain categories of criminal acts or that there was no criminal procedure conducted against him for these categories. See Procedure for Conducting of Activities of the Center for Control of 29 November 2011, Article 8.2., **RE-107**; Rulebook on undertaking of measures of 7 April 2014, Article 34, **RE-93**.
[297] Statement of the controlling shareholder of Coropi that he is not a party in the sense of Articles 12-12b of the Law on Privatization, 21 August 2013, **RE-57**.
[298] Law on Privatization (2001), Article 12, **CE-220**; Law on Privatization (2014), Article 12, **CE-223**.
[299] Claimants' PHB, paras. 271 and 272.
[300] Respondent's Rejoinder, Section I.E.

of the bank guarantee as the only possible form of security.[301] However, Mr. Broshko himself confirmed that he never actually read the relevant rulebook stipulating conditions for assignment, nor could he confirm that even his attorney ever consulted this easily accessible document.[302]

V. COMPENSATION FOR THE ALLEGED DAMAGE

96. The Parties agree on the principle of full reparation for injury caused by illegal acts.[303] However, Claimants allege that Respondent accepts that this principle also entitles an investor to compensation for (all) consequential losses, which is too broad and must be qualified.[304] As the ILC stated, an injury that is too "remote" or "consequential" is not subject to reparation under international law.[305] Significantly, apart from their brief assertion about consequential losses, Claimants have still nothing to say about *causality*.[306] To wit, BD Agro's bankruptcy would have in any case occurred, even if there had been no termination of the Privatization Agreement. This is sufficient to dispose of Claimants' compensation case. Nevertheless, in the following, Respondent will respond to Claimants' post-hearing arguments concerning the most prominent issues of contention between the parties: (A) size of BD Agro's land; (B) valuation of Zones ABC land; (C) valuation of BD Agro's other assets.

A. SIZE OF BD AGRO'S LAND

97. Claimants misleadingly argue[307] that Ms. Ilic's calculation of the size of the land owned by BD Agro in Zones A, B and C, accepted by Dr. Hern, is somehow in conflict with her alternative calculation excluding certain land. It should be recalled that the reason for exclusion was that this land was not actually property of BD Agro, although it was registered in its name at the time of valuation.[308] In her first report, Mr. Ilic expressly noted this issue, but did not further deal with it, because her first report was primarily a review of valuations contemporaneous to the valuation date.[309] The considerations about ownership were, however, reflected in her second report when she provided her alternative valuation excluding such land.[310]

98. Contrary to Claimants' assertions,[311] the fact that ownership claims against BD Agro were submitted to the courts after the valuation date is irrelevant. What matters is when third-party ownership rights arose and that was prior to 21 October 2015 for each of the claims. Importantly, Claimants have always been aware of the contentious ownership issues related to the land that

[301] Respondent's Rejoinder, para. 317.
[302] Transcript, Day 3, 103:16-104:24 (Broshko). *See also* Respondent's Rejoinder, paras. 320, 322.
[303] See Claimants' PHB, para. 273; Reply, para. 1296; Counter-Memorial, para. 764.
[304] Claimants' reference to Counter-Memorial, para. 783, in support of this point is inaccurate, because Respondent has never accepted that BD Agro was a going concern that should be valued on the basis of DCF method, see *ibid.* paras. 781-783.
[305] See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, p. 93, para. 10, **CLA-24**.
[306] Although the issue has been extensively discussed by Respondent, see Rejoinder, paras. 1417-1423. See also, Transcript, Day 1, 213:05-216:12 (Djeric) & Respondent's Opening Statement ppt, slides 114-116.
[307] Claimants' PHB, paras. 283 & 293.
[308] See Respondent's Submission on Quantum, paras. 13-61.
[309] In particular, the list of BD Agro's land in Ms. Ilic's first expert report was based on the lists in the Confineks report, as they had at its disposal land registry extracts and inventory lists closest to the date of valuation, see First Expert Report of Danijela Ilic, Introduction, item 6; Transcript, Day 7, 114:09-18 (Ilic); First Confineks Report, dated 5 December 2015, pp. 38-40, **CE-142**.
[310] See Second Expert Report of Danijela Ilic, Appendix II, para. 1. It should be noted that not all of BD Agro's land to be excluded from the valuation on the basis of contested ownership is located in Zones A, B and C, see Respondent's Demonstrative Exhibit no. 1, **RDE-1**.
[311] See Claimants' PHB, paras. 284 & 288.

should be excluded from the valuation of BD Agro.[312] In the following, Respondent will explain why each of Claimants' objections to the specific grounds for exclusion is unfounded:[313]

- The claim made by ZZ Buducnost Dobanovci was based on the 1996 Law on Cooperatives, with sufficient ground not to be frivolous.[314] Moreover, the claim was never decided on its merits,[315] and nothing prevents ZZ Buducnost from bringing a new claim to establish its ownership rights once it does gather the needed evidence – a claim with which the new owner of the land would then have to contend. Nevertheless, the decision of the Bankruptcy Trustee to sell the relevant land is understandable, considering that the initial claim was dismissed for the time being and the land could not remain in the limbo of the bankruptcy process perpetually.

- Regarding the dispute with the Republic of Serbia, Respondent reiterates that the Agreement on Exchange of Land between the Ministry of Agriculture and BD Agro has already been found to be null and void by the courts, and this decision is final.[316] It is also not to be expected that BD Agro will receive either land or monetary compensation due to the invalidity of the agreement because (a) it accepted the consequences of restitution in the Privatization Agreement[317] and (b) it acted in bad faith when swapping the land it knew was subject to restitution.[318]

- Claimants also argue that the dispute with Inter Kop should be disregarded because the company never performed the work it owed to BD Agro in exchange for the land.[319] This is patently false, as the companies have signed a set-off declaration for the appropriate amount,[320] and even though Inter Kop did not register the land to its name, it did continuously pay property taxes for it.[321]

- Concerning the land sold to Hypo Park,[322] Claimants assert that it should not be excluded from valuation because it was owned by BD Agro at the valuation date according to Ms. Ilic[323], which is a misrepresentation of Ms. Ilic's valuations explained above. However, Claimants themselves have accepted that the land in question was already sold to Hypo Park at the valuation date, even though it continued to be registered to BD Agro.[324] Claimants act in bad faith as they now argue that the land was actually owned by BD Agro.

- Respondent also notes that sufficient reasons have been provided for the exclusion of the land distributed to the employees of BD Agro prior to the privatization, land labeled as public roads[325] and the land expropriated in 1991 (whereby the validity of the expropriation has been

[312] See Respondent's Submission on Quantum, paras. 59-61.
[313] Respondent concedes that no further exclusion is necessary for the land sold to Eko Elektrofrigo because it was never included in Ms. Ilic's original calculation accepted by Claimants, see Claimants' PHB, para. 289.
[314] See Respondent's Submission on Quantum, paras. 16-19.
[315] See Respondent's Submission on Quantum, paras. 20-21 & 23.
[316] First Instance Judgment of Commercial Court in Belgrade dated 14 September 2017, **RE-587**; Second Instance Judgment of Commercial Appellate Court dated 31 January 2019, **RE-588**.
[317] See Articles 6.1.1 & 1.1 of the Privatization Agreement with Annexes, **CE-17**. The Privatization Agreement provided that the *"integral part of the subject's property includes nationalized property"*, and the buyer agreed to act pursuant to the relevant regulation on the issue of restitution. See also Respondent's Submission on Quantum, para. 28.
[318] See Respondent's Submission on Quantum, para. 31.
[319] Claimants' PHB, para. 288.
[320] Declaration of Set-off dated 14 April 2011/9 May 2011, **RE-591**.
[321] Inter kop doo Tax Return for Calculated Property Tax for 2014, **RE-593**; Inter kop doo Tax Return for Calculated Property Tax for 2015, **RE-594**; Inter kop doo Tax Return for Calculated Property Tax for 2016, **RE-595**; Inter kop doo Tax Return for Calculated Property Tax for 2017, **RE-596**. See also Respondent's Submission on Quantum, paras. 33-36.
[322] See Respondent's Submission on Quantum, para. 50; see also Respondent's Demonstrative Exhibit no. 1, item 8, **RDE-1**. See First Expert Report of Richard Hern, para. 55, Tables 3.1 & 3.2, Sources.
[323] See Claimants' PHB, para. 291.
[324] See First Expert Report of Richard Hern, para. 55, Tables 3.1 & 3.2; Rejoinder on Jurisdiction, paras. 745-746; Purchase Agreement between BD Agro DB Dobanovci and Hypo Park Dobanovci dated 11 June 2008, **CE-144**.
[325] See Respondent's Submission on Quantum, paras. 41-45.

confirmed by Serbian courts in 2012).[326] Also, Claimants have been aware that the land in question does not belong to BD Agro in both cases.[327]

- Although not mentioned by Claimants, Respondent also submits that the land conceded to the Municipality of Zemun and sold to Galenika should be excluded from the valuation for reasons explained in Respondent's Submission on Quantum.[328] Indeed, Claimants have acquiesced that at least part of the land sold to Galenika did not belong to BD Agro at the time of valuation and therefore was excluded from Dr. Hern's valuation.[329]

99. Finally, Respondent notes that some of the land parcels with contested ownership mentioned by Claimants were already excluded from the contemporaneous valuations of BD Agro's on which Ms. Ilic relied and, therefore, were never included in her valuation.[330] Obviously, there is no need for non-existing parcels to be excluded.

B. VALUATION OF ZONES ABC LAND

1. Batajnica transactions are not an appropriate comparator

100. Claimants' expert Dr. Hern has recently discovered that Batajnica transactions are "the best evidence" for valuation of Zones ABC land.[331] However, as Respondent has already demonstrated, this is not accurate, because the two land tracts are substantially different in location, existing infrastructure and development potential.[332] In this context, Claimants' PHB makes a number of inaccurate statements, which will be discussed in turn.

101. **First**, Claimants assume that Batajnica *transactions* were actual transactions (expropriations).[333] However this is not borne by the evidence on record, which indicates that the assessments were made *for the purpose* of expropriation, not that actual expropriations (i.e. transactions) took place on the basis of these prices.[334] Furthermore, these assessments themselves were not based on actual market transactions but on most recent tax *decisions* of the Tax Administration, assessing market value of the land for the purpose of taxation, which is different from market valuation according to international standards.[335] They provide no information about the actual transactions behind tax decisions that were used in the assessments.[336] It is also not clear what are the dates of underlying transactions or of assessments themselves, as this is not stated in the documents which themselves bear 2016 dates, subsequent to the valuation date.[337] Without these information, it is simply

[326] See Respondent's Submission on Quantum, paras. 47-49. See also Judgment of the Commercial Court in Belgrade no. P-7649/2010 dated 30 March 2012, **RE-629**.
[327] See Respondent's Submission on Quantum, paras. 42, 44, 49 and 59. For the land distributed to the employees and land labeled as public roads compare the lists of parcels in paras. 42 & 44 with the table from the 2014 Pre-Pack Plan reproduced in para. 59.
[328] See Respondent's Submission on Quantum, paras. 51-56.
[329] See Claimants' Rejoinder on Jurisdiction, para. 748.
[330] See Claimant's PHB, para. 292, item e) and footnote 310.
[331] Previously, Dr. Hern relied on Mr. Mrgud's valuation, see Respondent's PHB, paras. 335-338.
[332] See Respondent's PHB, paras. 340-350.
[333] See Claimants' PHB, paras. 294, 297 & 300. In this context, Claimants misrepresent the transcript to argue that "*the Batajnica expropriations*" represented the fair market value of the expropriated land, while avoiding the part showing that Mr. Grzesik could not confirm the actual time of the assessments, *compare* Claimants' PHB, para. 300 & Transcript, Day 7, 98:7-24 (Grzesik).
[334] See Respondents' PHB, para. 339 & note 656 referring to the relevant exhibits.
[335] Comparable evidence in property valuation, RICS information paper, 1st edition (IP 26/2012), **RE-325**, Statutory valuations, Section 3.3.; see also Presentation of Danijela Ilic, ppt, slides 17-23.
[336] 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**.
[337] *Ibid.*

impossible to make any meaningful comparison and conclusion as to whether these assessments are suitable for market valuation of Zones ABC land at the valuation date.

102. **Second**, Claimants' main thesis is that the Batajnica land is comparable to Zones ABC land "*precisely because neither of them was connected to a road leading to the major highway proximate to each location"*.[338] This thesis is based on two inaccurate assumptions. One is that in 2015 both land tracts were *close* ("proximate") to a nearby highway. However, while the Batajnica land is adjacent to and bordering a highway,[339] Zones ABC land is not near one.[340] Another inaccurate assumption is that neither of them was *connected to a road leading to a major highway*, because unlike Zones ABC land, certain plots of the Batajnica land valued in 2016 *were connected* to a road leading to a highway (which ran between the land and Batajnica settlement).[341]

103. Claimants also make other inaccurate allegations in order to show that the Batajnica and Zones ABC lands are comparable:

- that both are close to a railway,[342] which is inaccurate because Zones ABC land is *not* close to a railway,[343] while there is a railway *on* the Batajnica land.[344]
- that the Batajnica land "*lacked direct access to any roads*" which would make it similar to Zones ABC land,[345] but the map provided by Mr. Grezisik clearly indicates straight lines of the roads passing through Batajnica land or connecting to it,[346] which is in sharp contrast to Zones ABC land, where there are no roads visible;[347] furthermore, Batajnica land borders: a highway, a major local road that stretches between the land and Batajnica settlement, the settlement itself, and a railway - all this does not obtain in respect to Zones ABC land.[348]
- that both had "*a similar intended use*",[349] which is not accurate because the Batajnica land was intended for development of a major infrastructural project of national importance supported

[338] See Claimants' PHB, para. 306, and, also, paras. 298-299.
[339] See Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015, Section 2.1 - Plan Boundary, **CE-521**, and Expert Report of Krzystof Grzesik, para. 6.17.
[340] See, also, Transcript, Day 7, 93:18-23 (Grzesik). Even Dr. Hern states that the land is about one kilometer away from the highway, see Transcript, Day 8, 24:15-25:10 (Hern).
[341] See Presentation of Krzystof Grzesik, ppt, slide 5 (EUR 28/m2 transaction marked red connecting to the road).
[342] See Claimants' PHB, para. 297(b), without reference.
[343] As can be seen from the General Regulation Plan for Zones A, B and C, there is no mention of any railroad in or near Zones ABC, 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, Sections A.4 & B.1., **CE-143.** See, also, Presentation of Dr. Richard Hern, ppt, slide 17.
[344] See Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015, Section 2.1. - Plan boundary & Section 4.1.2. – Railway infrastructure: "*For the construction and operation of the planned terminal, as far as railway infrastructure is concerned, it is necessary to build a new track from Batajnica station to the terminal complex on the left side of the* ***existing railway*** *Batajnica-Surcin-Ostruznica, i.e., on the sides of the terminal*." (translated by Respondent, emphasis added), **CE-521**.
[345] See Claimants' PHB, paras. 298-299.
[346] See Expert Report of Krzystof Grzesik, para. 6.17; Mr. Grzesik's ppt presentation, slide 5; Transcript, Day 7, p. 105:12-17 (Grzesik).
[347] See, e.g., Second Expert Report of Danijela Ilic, p. 23, para. 2.86 & p. 40, para. 1.4 (aerial photographs of Zones ABC). See, also, First Expert Report of Danijela Ilic, para. 9.79. Sremska gazela road has been planned for years, but construction has not started, see First Expert Report of Danijela Ilic, para. 9.79 & Transcript, Day 8, 26:9-11 (Hern) ("*… as I understand even today, that road has not been built…*").
[348] See Expert Report of Krzystof Grzesik, para. 6.17 & Mr. Grzesik's ppt presentation, slide 5: (i) a plot directly bordering a highway was valuated at 32 EUR/m^2; (ii) a plot bordering a local road and Batajnica settlement itself was valuated at 28 EUR/m^2; (iii) plots connected to another local road and bordering the railway were valuated at 28 and 37 EUR/m^2, respectively. All were valued in 2016.
[349] Claimants' PHB, para. 297(c).

by the state and funded by EU,[350] while Zones ABC land was to be developed at private initiative of BD Agro for commercial purposes.[351]

104. Claimants ignore further important differences between two lands tracts: (i) the Batajnica land is close to Batajnica settlement, while Zones ABC is at some distance from Dobanovci;[352] and (ii) Batajnica land was electrified, Zones ABC land was not.[353]

105. Claimants also try to approximate development potential of the Batajnica land with that of Zones ABC land, but they again make a number of misrepresentations. One concerns the impact of the zoning regulations. Claimants argue that, in 2013, the Batajnica land in fact had a lower development potential than Zones ABC land, because there was no regulation plan whatsoever, which was reflected in the land valuations being at 27 EUR/m^2, while the 2016 valuations at 28-37 EUR/m^2 were higher due to adoption of a detailed regulation plan in 2015. Accordingly, Claimants' valuation of Zones ABC land at 30 EUR/m^2 is in fact conservative.[354] However, Claimants fail to note that 2013 valuations were made subsequently to a 2012 decision by the City of Belgrade that a detailed regulation plan for the Batajnica land would be drafted, which certainly had an impact on the price of the land, while there was no such decision with respect to Zones ABC land in 2013.[355]

106. Claimants also unduly restrict Respondent's argument about development potentials of two land tracts to the question of which type of zoning plan is applicable to them.[356] Although this is an important element in the analysis, which by itself shows that the two are not comparable,[357] there are other substantial differences between them concerning the purposes for which they are developed, who carries the development, the level of existing infrastructure, as well as their locations. Claimants here rely on Dr. Hern's testimony that development costs for the Batajnica land would be the same as for Zones ABC land because "*both land is in exactly the same state at that point in time*",[358] but considering the mentioned differences this is simply not credible. In this context, one should recall that Mr. Bodolo's valuation report estimated development costs for Zones ABC land at EUR 100 million, which Claimants have never refuted.[359] One should also consider here that Mr. Markicevic-led management estimated in 2015 that preparatory activities before sale of the land could take years.[360] Further, contrary to Claimants' position,[361] it indeed makes a difference who will be willing to raise and spend this kind of money: whether it is the government,

[350] See Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015, 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), **CE-521**; Transcript, Day 7, 128:9 (Ilic) ("*the funding was through the EPA funds"*).

[351] 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 B.1.2, **CE-143**.

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

[353] See Respondent's PHB, para. 347 and references therein.

[354] See Claimants' PHB, para. 303.

[355] See Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015, at point 3 - Legal and planning basis, **CE-521**.

[356] See Claimants' PHB, para. 301.

[357] There is a substantial difference in the level of detail and steps for implementation between the Batajnica Detailed Development plan and the General Development plan for Zones ABC, which means that one would not be able to start development of Zones ABC on the basis of the existing regulatory documents, see Presentation of Danijela Ilic, ppt, slides 14-15; Second Expert Report of Danijela Ilic, paras. 2.84-2.90 & General Regulation Plan for the BD Agro Complex Zones A, B and C, 31 December 2008, Section G.3 – Implementation stages, **CE-143.** In this context, Claimants misrepresent Ms. Ilic's testimony alleging that she confirmed that the detailed regulation plan was not required for the development of the Zones ABC land, while she expressly stated otherwise, see Claimants' PHB, para. 302 & Transcript, Day 7, 137:25-139:3 (Ilic).

[358] See Claimants' PHB, para. 304, quoting Dr. Hern.

[359] See Report on evaluation of market value of bankruptcy debtor's property, p. 18, **CE-511**.

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

[361] See Claimants' PHB, para. 305.

doing it not for the purpose of making profit but in pursuance of its strategic and public interest goals, while being funded by the European Union,[362] or a private investor looking for profit and raising money on the market. Obviously, only the latter can be a knowledgeable buyer for the purpose of establishing a fair market value, because the state here acts not in pursuance of profit but of its strategic public policy goals.

107. All this shows that Claimants attempt to present the Batajnica land as comparable to Zones ABC land for purposes of valuation is based on inaccurate assumptions and ignoring of evidence. It should be recalled here that *virtually none* of sources for Dr. Hern's land valuation has withstood scrutiny,[363] so Claimants' land valuation clearly fails, as well.

2. Dobanovci transactions should not be used in the valuation

108. Claimants argue that two transactions concerning land in Dobanovci confirm Dr. Hern's valuation of Zones ABC land but were unjustifiably disregarded by Ms. Ilic. Allegedly, Ms. Ilic admitted at the Hearing that one of the land plots was right next to the land on which BD Agro's farm was located and there were no residential buildings next to it.[364] This is a misrepresentation, because Ms. Ilic disregarded this transaction as it was "*located near urbanized residential area*",[365] not because "*there were no residential buildings next to it*", as Claimants contend. Considering that the land plot near BD Agro's farm buildings was on an asphalt road with all infrastructure, and next to other buildings, with Dobanovci settlement just down the road,[366] it is indeed "*located near urbanized residential area*" and, as such, is not comparable with the land in Zones ABC, which are completely disconnected from any buildings and any road . Further, it is incorrect that Ms. Ilic conceded the asphalt road in question extends to the huge area of Zones ABC land, which is clear when one reads the whole discussion.[367]

3. Claimants' criticism of Ms. Ilic's report is unfounded

109. ***Asking prices***. Claimants criticize Ms. Ilic for not disclosing exact location of the land plots which were subject to the asking prices that she relied upon in her valuation, so she could not establish that the land in question was comparable.[368] This is inaccurate, because the screenshots of advertisements that Ms. Ilic provides as evidence contain description of the advertised land plots, with sufficient information to locate them.[369] It is also inaccurate that Ms. Ilic did not "*clearly establish[] and critically analyze[]*"[370] their relevance, as required by the applicable international standards.[371]

110. ***30% discount.*** At the Hearing, Ms. Ilic clarified that the 30% discount she applied on estimated prices for Zones ABC land was due to the difference between BD Agro's representative sample and the representative comparable, which concerned availability of infrastructure and access to the roads.[372] Claimants argue that since it is impossible to establish the exact location of the land that

[362] Transcript, Day 7, p. 128:2-9 (Ilic).
[363] See Respondent's PHB, paras. 331-339.
[364] See Claimants' PHB, para. 308-309.
[365] See First Expert Report of Danijela Ilic, para. 9.90.
[366] See First Expert Report of Danijela Ilic, para. 9.90, Figure 35; Transcript, Day 7, 150:16-22 (Ilic) ("*One uses this road to get to BD Agro farm, and there, there are a lot of residential facilities… But yes, at the very entrance to the farm there are residential facilities. On both sides of this road there are residential facilities.*").
[367] See Transcript, Day 7, 155:11-157:9 (Ilic).
[368] See Claimants' PHB, paras. 313-315.
[369] See Asking prices for KO Dobanovci, **RE-561**. Transcript, Day 7, 152:18-153:3 (Ilic).
[370] Claimants' PHB, para. 314.
[371] See First Expert Report of Danijela Ilic, p. 115 ("*Selected comparables, both asking prices and sale prices, have similar location to the BD land, however all of them have access from public road and availability of infrastructure close to them or available at the plot, while intended use is the same.*").
[372] See Presentation of Danijela Ilic, ppt, slide 11 (with reference to Exhibit **RE-540**, which should be corrected to **RE-561**).

was the subject of asking prices, Ms. Ilic's discount is unjustified.[373] However, if one reads descriptions of the land put on sale it is clear that all parcels had infrastructure and access to the roads,[374] which Ms. Ilic considered warranted the discount, based on her experience.[375] This is in conformity with international valuation standards.[376] It is interesting that neither Claimants nor their experts have directly challenged Ms. Ilic's discount of 30% on the estimated price for Zones ABC land until the Hearing.[377]

111. In this context, Claimants discuss the impact of the size of land on valuation and follow the view of Dr. Hern, who stated that there was no basis to apply a size discount in the valuation because what matters was how a higher value would be achieved in a hypothetical transaction, implying that the size *per se* does not matter.[378] Claimants then refer to Mr. Grzesik's who stated that there may be a premium on the size[379] but fail to see the contradiction between two experts. Moreover, Dr. Hern himself elsewhere seems to have accepted that size does matter when commenting that, in one transaction, a large area of BD Agro's land sold may have put a downward pressure on the price.[380] As can be seen, Claimants' experts themselves are contradictory and therefore unconvincing about the impact of the size of land on valuation.

112. **On-site inspection.** Claimants also criticize Respondent's financial expert for not critically assessing the advertised land plots and not visiting Belgrade to inspect the valued property.[381] This is completely irrelevant, because Mr. Cowan expressly stated in his report that he relied on Ms. Ilic's valuation,[382] and, in any case, was not required to undertake land valuation himself.[383] On the other hand, Ms. Ilic – as Respondent's land valuation expert – indeed visited BD Agro's land.[384]

C. VALUATION OF BD AGRO'S OTHER ASSETS

113. Claimants value BD Agro's assets other than the land in Zones ABC at EUR 41.2 million by using upper bound of Dr. Hern's DCF valuation of the core assets (the farm, building, equipment, etc.) and the adjusted book value of BD Agro's other construction land and land in Becej of EUR 4.3 million, although, they say, the valuation using the adjusted book value of the core assets would yield an even higher value of EUR 46.8 million.[385] However, Claimants have conveniently forgotten to mention that in both cases the value of the core assets is driven upwards by Dr. Hern's excessive upper bound valuation of agricultural land at EUR 15.5 million. If one were to use his lower bound

[373] See Claimants' PHB, paras. 323.
[374] See Asking prices for KO Dobanovci **RE-561**.
[375] See First Expert Report of Danijela Ilic, p. 115.
[376] See International Valuation Standards 2013, July 2013, IVS Framework, para. 57, **CE-516** & Comparable evidence in property valuation, RICS information paper, pp. 10-11, Section 6.2, **RE-325.**
[377] Claimants' PHB claims that they challenged the discount but refers only to Reply, para. 1373, which however deals with a completely different topic – whether duration of conversion process from agricultural to construction land would have affected the price. In this context, Claimants' quote Dr Hern's general remark that there was no basis for a size discount. However, Dr. Hern has not addressed Ms. Ilic's 30% discount in his reports.
[378] See Claimants' PHB, para. 320 & Third Expert Report of Richard Hern, para. 40.
[379] See Claimants' PHB, para. 321 referring to Mr. Grzesik's testimony.
[380] See First Expert Report of Richard Hern, para. 65 *("… the area sold was very large (around 102ha), which may have put a downward pressure on the price*") & Third Expert Report of Richard Hern, para. 37 *("… Ms Ilic discusses BD Agro's sale of 102ha land from 2008 at 15 EUR/m2, which I have not relied on in my valuation due to the large area which may have put a downward pressure on the sale price*").
[381] See Claimants' PHB, paras. 316-317.
[382] See Second Expert Report of Mr. Sandy Cowan, para. 5.2. ("*I am a business valuation expert, rather than an expert in the land valuation sector. I have therefore been instructed to rely on the First Expert of Ms Ilic for valuing BD Agro's land and Mr Bodolo's report*"); Third Expert Report of Mr. Sandy Cowan, para. 3.6.
[383] Indeed, the fact that Dr. Hern, who is not an expert in land valuation, valued BD Agro's land by himself, resulted in numerous factual and methodological mistakes, which make his land valuation unreliable, see Respondent's PHB, paras. 331-339 & Second Expert Report of Danijela Ilic, paras. 2.1-5.9.
[384] See First Report of Ms. Danijela Ilic, para. 9.9.
[385] See Claimant's PHB, para. 324.

valuation of agricultural land of EUR 4 million, the value of the "core assets" would go down to EUR 31 million, which is lower than the DCF valuation Claimants espouse now.[386]

114. Claimants criticize Mr. Cowan for including in his valuation a EUR 200,000 provision for ***pending court proceedings***, but wrongly refer to the discussion about Mr. Cowan's inclusion of EUR 9,2 million liabilities on account of pending court proceedings,[387] which was subsequently identified as misstatements in BD Agro's 2014 and 2015 financial statements and removed from his valuation. However, the EUR 200,000 item should remain as it was included in the 2015 financial statements.[388] Further, Claimants conveniently forget to consider another liability that was discovered during discussion of pending court proceedings – EUR 1.8 million unpaid interest on Banca Intesa loan.[389]

115. Further, Claimants criticize Mr. Cowan for overstating ***capital gains tax***, having no regard to any deductions,[390] but fail to state what deductions they deem were necessary. Dr. Hern calculated capital gains tax by using the "deferred tax liabilities" in BD Agro's 2015 balance sheet as a proxy of the capital gains, on the basis of Claimants' instruction only.[391] However, considering that the land was significantly revalued, calculation on this basis yields extremely low number. Mr. Cowan's calculation of capital gain tax of EUR 5.7 million by deducting the tangible asset book value at 31 December 2013, as a proxy for the purchase price, from the value of land according to Ms. Ilic and applying 15% capital gain tax rate appears more credible.[392]

116. Claimants also criticize Mr. Cowan for allegedly including inapplicable ***redundancy payments*** in its valuation.[393] However, Dr. Hern's argument in this regard is based solely on Mr. Markicevic's testimony,[394] which is at odds with the Privatization Agreement and the rules of Serbian law, according to which redundancy payments would be mandatory in both the bankruptcy and a going concern scenarios.[395]

117. ***Not a going concern.*** Despite compelling evidence that BD Agro was *not* a going concern in 2015,[396] Claimants make a number of inapposite arguments in this regard. First, they point out that the Agency itself recognized that the company was a going concern when it voted for 2015 financial statements at the shareholders' meeting.[397] However, the fact that a business is classed as a going concern in its financial statements due to financial support from its parent company or shareholders, does not mean that the same business was a going concern on a standalone basis and should not be valued as one as a matter of objective valuation. For example, the Agency had an incentive to keep the company going in order to prepare it for sale, instead of forcing it into bankruptcy. Similarly, the fact that BD Agro's creditors voted for amended pre-pack reorganization plan is not a confirmation that the company was a going concern, because the vote was likely motivated by creditors' preference for pre-pack reorganization where they had a perspective of collecting larger percentage of their receivables, instead of bankruptcy where Banca Intesa, as secured creditor, would have collected all the money.[398] In this context, Claimants argue that the majority of

[386] See Updated Analysis of Richard Hern, **CE-908** & First Expert Report of Sandy Cowan, para. 109.
[387] See Claimants' PHB, para. 326 and note 354.
[388] See Third Expert Report of Sandy Cowan, paras. 2.17-20 & 4.2 *et seq.* See also Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci, January 2016, **CE**-172.
[389] See Third Expert Report of Sandy Cowan, para. 2.23.
[390] See Claimants' PHB, para. 327.
[391] See First Expert Report of Richard Hern, paras. 144-145.
[392] See Second Expert Report of Sandy Cowan, para. 6.12.
[393] See Claimants' PHB, para. 328.
[394] See Second Expert Report of Richard Hern, paras. 181-183.
[395] See Second Expert Report of Sandy Cowan, paras. 6.17-6.20.
[396] See Presentation of Sandy Cowan, slide 9 and exhibits referred to therein.
[397] See Claimants' PHB, paras. 331-332.
[398] See Transcript, Day 8, 67:1-69:22 (Djeric & Hern).

creditors' votes in favor of pre-pack reorganization plan would have been achieved even if BD Agro's land pledged to secure loans from Banca Intesa and Nova Agrobanka would have been valued at the amount estimated by Respondent's experts.[399] However, this is inapposite, because the point is not what would be the position of Banca Intesa as a secured creditor according to the valuation by Respondent's experts. Rather, the point is what was realistic and probable at the valuation date and, as Dr. Hern confirmed, it was certainly possible that a valuation would have been adopted in restructuring proceedings that would have given Banca Intesa absolute majority of votes in Class A,[400] which would have led to the rejection of the pre-pack restructuring plan and, ultimately, to BD Agro's bankruptcy, regardless of the termination of the Privatization Agreement.

118. Dr. Hern also argues, contrary to arbitral practice,[401] that past performance should not be relevant when assessing whether a business is a going concern, and justifies this in the case of BD Agro by a vague reference to investment that had been undertaken and Serbia's "*potential involvement with those investment incentives*".[402] Dr. Hern obviously obfuscates, because the performance of BD Agro prior to 2015 was not affected by Respondent in any way, while it is completely unclear what were "investment incentives" and Serbia's potential involvement with them he mentions.[403] Anyhow, Dr. Hern essentially argues that a *knowledgeable buyer* would have paid the same amount of money for BD Agro, with its 10 years of loss making, as she would have paid for a dairy farm in Serbia with an identical business plan, but having record of being profitable for 10 years. This is absurd.

119. ***Asset based valuation***. Claimants argue that asset-based determination of the fair market value of BD Agro does not depend on whether BD Agro was a going concern or not.[404] However, if BD Agro is not a going concern, this means that there is no continuity of the business and implies a liquidation value for the company. Considering the actual circumstances of BD Agro, particularly that the company has been illiquid since 2013 and generally in distress, it is not reasonable for it to be sold on an asset-by-asset basis at leisure as Claimants present. Rather, in such circumstances, a knowing buyer would be aware of the distressed circumstances of the business, which would act as a leverage to extract a lower price. [405]

120. ***Distress discounts.*** Claimants' criticism of Mr. Cowan's distress discounts fails to take into account that the definition of fair market value also includes that "*the parties had acted knowledgeably*", which means that "*both the willing buyer and the willing seller are reasonably informed about the nature and characteristics of the asset […]*."[406] In particular, Claimants miss the point when they state that the definition envisages hypothetical buyer and seller and does not envisage taking into account any circumstances "*specific to the actual owner of the valued assets*",[407] because the reason for Mr. Cowan's application of distress discounts was not a distressed state of BD Agro's owner, but of the company itself, which is the asset that is valued. Moreover, BD Agro's bankruptcy is not in itself a reason for distress discount, as Claimants wrongly assume,[408] but rather the fact that a

[399] See Claimants' PHB, para. 334.
[400] See Transcript, Day 8, 67:1-6 (Hern); see, also, Respondent's PHB, para. 297.
[401] See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 8.3.3, **CLA-49**.
[402] See Claimants' PHB, para. 334 (quoting Dr. Hern).
[403] See Letter from BD Agro to the Ministry of Economy and Privatization Agency dated 6 October 2014, **CE-318** & Letter from Rand Investments to I. Markićević dated 7 May 2015, **CE-350**.
[404] See Claimants' PHB, paras. 336-340.
[405] See Kantor, M. (2008), Valuation for arbitration, p. 251, **RE-486**.
[406] See IVS 104, Market Value, pp. 18-19, paras. 30.1 & 30.2(h), **CE-517**.
[407] Claimants' PHB, para. 342.
[408] See Claimants' PHB, paras. 343-344. Claimants are also wrong that competition among willing buyers would have alleviated effects of financial distress of the ass et, as has been seen in the actual bankruptcy sale of BD Agro's assets, which were sold for 50% of their value. Compare Evidence of the sale of BD Agro, dated 9 April 2019, **RE-171**; Report on valuation of market value of BD Agro on the date of 30 June 2018 (Valuation team headed by Mr Tibor Bodolo), **CE-511**.

willing buyer would *know* that BD Agro was going into bankruptcy and would have taken into consideration that it could just wait for this to happen rather than pay much more up front.

121. ***Bankruptcy costs.*** Claimants argue that Mr. Cowan inflated bankruptcy costs in his bankruptcy scenario and point to the fact that the actual bankruptcy costs were many times lower.[409] This is inapposite, because a willing and reasonably informed buyer would not be in a position to know the actual costs incurred during BD Agro's bankruptcy which occurred one year after the valuation date,[410] but would have acted on the basis of information from credible sources at his disposal, which is precisely how Mr. Cowan estimated the bankruptcy costs in his valuation.[411]

* * *

122. ***Conclusion on experts***. Respondent's experts have provided valuations that are based on evidence and continue to stand after the Hearing. In contrast to that, valuations of Claimants' experts have been undermined in their fundamentals, in particular the land valuations which have been exposed as lacking credible and/or comparable sources.

123. ***Conclusion on valuation of BD Agro***. Mr. Cowan has established that BD Agro was not a going concern at the date of valuation, which leads to BD Agro's accounts being in red for EUR 20.2 or 25.8 million, depending on whether the contested land is excluded from the valuation, meaning that the company's value was nil.[412] Alternatively, if one adopts a going concern scenario for BD Agro (*quod non*), its value was EUR 13.8 million, which would be subject to capital gains tax of EUR 0.2 million, resulting in Claimants' interest being valued at EUR 10.8 million.[413]

124. ***Calculation of interest.*** It should be noted that Claimants also continue to maintain their case for calculation of interest on the principal amount of their claim pursuant to Serbian law,[414] which is not justified, because interest must be calculated in accordance with international arbitral practice which speaks in favor to calculation on the basis of six months annual LIBOR/EURIBOR rate. In this regard, Claimants have failed to address Respondent's arguments from the Rejoinder, to which the Tribunal is respectfully directed.[415] In the similar vein, Claimants have completely ignored Respondent's detailed arguments showing that the claim for a tax gross-up for the Canadian tax made by certain individual Canadian Claimants is completely unjustified.[416]

VI. REQUEST FOR RELIEF

125. Respondent requests the Arbitral Tribunal to

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

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

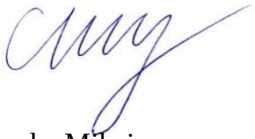
(2) *order* Claimants to reimburse Respondent all its costs of the proceedings, with interest.

[signature page follows]

[409] See Claimants' PHB, para. 346.
[410] See Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings, 30 August 2016, **CE-109**.
[411] See First Expert Report of Sandy Cowan, para. 8.16 referring to a World Bank report, **RE-193**; Second Expert Report of Sandy Cowan, paras. 6.24-6.28. In any case, Dr. Hern has failed to take into account all actually incurred costs of BD Agro's bankruptcy, see Respondent's letter of 5 February 2021 in response to Claimants' letter of 20 January 2021, para. 20.
[412] See Presentation of Sandy Cowan, slides 4 & 14.
[413] See Presentation of Sandy Cowan, slide 15 & Respondent's Demonstrative Exhibit no. 2.
[414] See Claimants' PHB, para. 348 and references therein.
[415] See Rejoinder, paras. 1475-1488.
[416] See Respondent's Submission on Quantum, paras. 109-129 & Claimants' PHB, para. 349.

Respectfully submitted,

Counsel for Respondent



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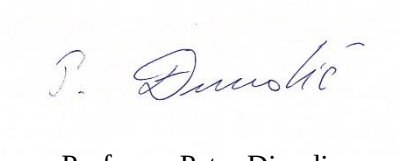

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