INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WILLIAM ARCHIBALD RAND

Applicant

– v –

REPUBLIC OF SERBIA

Respondent

(ICSID Case No. ARB/18/8)

REPLY ON ANNULMENT

7 February 2025

SQUIRE PATTON BOGGS

nstlaw/Stankovic & Partners

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I. INTRODUCTION

A. Preliminary statement

1. The Award[1] should be partially annulled for two separate reasons: (*i*) the Tribunal[2] failed to state reasons with respect to most aspects of its decision on quantum; and (*ii*) the Tribunal manifestly exceeded its powers when it declined to exercise its jurisdiction over some of the claims raised by Mr. William Archibald Rand ("**Mr. Rand**"). Nothing in Serbia's Counter-Memorial on Annulment ("**Counter-Memorial**") refutes Mr. Rand's arguments presented in the Memorial on Annulment ("**Memorial**").

2. Mr. Rand seeks only partial annulment of the Award. He does not seek annulment of the Tribunal's decision to uphold jurisdiction under the Canada-Serbia BIT with respect to Mr. Rand's investment in a 75.87% beneficial shareholding in BD Agro ("**Beneficially Owned Shares**").[3] Nor does he seek annulment of the Tribunal's decision that Serbia violated the standard of fair and equitable treatment under Article 6 of the Canada-Serbia BIT when it unlawfully terminated the Privatization Agreement on 28 September 2015 and seized the Beneficially Owned Shares on 21 October 2015.[4]

3. These parts of the Award are not subject to the Committee's review and need not—and in fact, must not—be addressed again in the present annulment proceedings. Nonetheless, Serbia dedicates an entire Part C of its Counter-Memorial—no less than

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1 The award in the original arbitration was issued on 29 June 2023 and supplemented by the Decision on Claimants' Request for a Supplementary Decision dated 27 October 2023 ("**Award**"). The Award was rendered under the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, which entered into force on 27 April 2015 ("**Canada-Serbia BIT**"), and the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, which entered into force on 23 December 2005 ("**Serbia-Cyprus BIT**" and, with the Canada-Serbia BIT, "**Treaties**").

2 The tribunal consisted of Prof. Gabrielle Kaufmann-Kohler (President), Mr. Baiju S. Vasani and Prof. Marcelo G. Kohen ("**Tribunal**").

3 To recall, Mr. Rand acquired the beneficial ownership of the Beneficially Owned Shares in two steps. Mr. Rand first became the beneficial owner of a 70% shareholding in BD Agro ("**Privatized Shares**"), which Mr. Djura Obradović, a Canadian-Serbian businessman, purchased, as a nominal owner, under an agreement on sale of the Privatized Shares ("**Privatization Agreement**") with the Privatization Agency of the Republic of Serbia and Montenegro ("**Privatization Agency**"), dated 28 September 2005. In 2006, Mr. Rand subscribed, through Mr. Obradović, an additional 5.87% of BD Agro shares against an in-kind contribution to BD Agro's capital. Award, ¶¶ 10, 14, 240, 315, 708 and fn. 211.

4 Award, ¶ 623.

18 pages—to set out its disagreement with the Tribunal's decisions, essentially repeating the same arguments that it raised in the arbitration proceedings and that were expressly addressed and rejected by the Tribunal in the Award.[5]

4. Serbia's submissions are clearly irrelevant because the task of the Committee is to decide on Mr. Rand's request for *partial* annulment of the Award—and Serbia's grievances do not relate to the parts of the Award that Mr. Rand seeks to have annulled. Therefore, Mr. Rand will not respond to Serbia's factual allegations set out in Part C of the Counter-Memorial. These allegations have been conclusively rejected by the Tribunal. Nothing more is needed to address them.

5. Mr. Rand also does not seek annulment of the Tribunal's decision that Serbia must fully compensate Mr. Rand for the harm caused to him by the illegal seizure of his investment, that the compensation must correspond to the equity value of Mr. Rand's shareholding and that the equity value must be calculated as the difference between the fair market value of BD Agro's assets and the total value of BD Agro's liabilities as of the valuation date of 21 October 2015 ("**Valuation Date**").[6]

6. Mr. Rand, however, does seek annulment of most parts of the Tribunal's valuation of BD Agro's assets and liabilities, and he does so for a number of reasons.

7. *First,* the Tribunal's reasoning related to the valuation of BD Agro's most valuable asset—279 hectares of prime land designated for construction of business and commercial areas ("**Construction Land**")—is contradictory, irreconcilable and/or insufficient. Worse yet, the Tribunal ignored key evidence related to the valuation of the Construction Land.

8. The Parties submitted a large number of contemporaneous documents on the value of the Construction Land. These documents included, among other things, the following:

   a. evidence on actual transactions involving parts of the Construction Land;

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5 Counter-Memorial, ¶¶ 13-55.

6 Award, ¶ 699.

b. evidence on several other contemporaneous transactions with comparable construction land;

c. contemporaneous valuations of comparable construction land prepared by the Serbian Tax Authority; and

d. contemporaneous valuations of the Construction Land prepared by Serbian valuators.[7]

9. The Tribunal's treatment of this evidence was manifestly contradictory and its reasoning for rejection of some of the evidence was clearly insufficient. For example, while the Tribunal refused to rely on some of this evidence expressly because it post-dated the Valuation Date, it then relied on evidence post-dating the Valuation Date for valuation of BD Agro's liabilities.

10. Worse yet, the Tribunal squarely contradicted its own holdings of the appropriate valuation methodology when it based its valuation of the Construction Land solely on five adjusted asking prices submitted by Serbia—rather than on evidence from numerous actual contemporaneous and comparable transactions, which the Tribunal itself stated should carry greater evidentiary value than asking prices.

11. The Tribunal's valuation of BD Agro's remaining assets and liabilities was equally flawed. The Tribunal did not provide any reasons at all for its valuation of BD Agro's remaining assets. Its reasoning related to its valuation of BD Agro's liabilities was also contradictory and insufficient.

12. The lack of reasoning, contradictory reasoning and failure to address relevant evidence each constitute a ground for annulment under Article 52(1)(e) of the ICSID Convention, and they warrant partial annulment of the respective parts of the Award because each had a major impact on the outcome of the case. As Mr. Rand explains in detail below, the errors in the Tribunal's reasoning decreased BD Agro's valuation by as much as **EUR 61 million**.

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[7] Memorial, ¶ 89.

13. Another reason for partial annulment of the Award is that the Tribunal manifestly exceeded its powers when it declined to exercise its jurisdiction over Mr. Rand's: *(i)* claims related to his investments other than the Beneficially Owned Shares, *i.e.* Mr. Rand's 3.9% indirect shareholding in BD Agro ("**Indirect Shareholding**") held through his wholly-owned Serbian company, Marine Drive Holding d.o.o. ("**MDH**");[8] *(ii)* loans to BD Agro of approximately EUR 2.2 million for the purchase and transport of BD Agro's new herd;[9] *(iii)* and payment of approximately EUR 160,000 for the services of herd management experts provided to BD Agro ("**Loans**").[10]

14. The Tribunal's rejection of jurisdiction over the Indirect Shareholding represents a manifest excess of powers because the Tribunal:

    a. departed from established case law providing that there is no need to investigate, for the purposes of establishing jurisdiction, whether the claimant satisfies additional conditions to the ownership of shares;

    b. failed to inform Mr. Rand that it would apply the so-called *Salini* test and require evidence of his "*contribution*" with respect to the Indirect Shareholding; and

    c. failed to recognize the existence of numerous contributions made by Mr. Rand towards BD Agro, despite expressly recognizing these contributions in relation to Mr. Rand's ownership of the Beneficially Owned Shares.

15. Similarly, the Tribunal's rejection of jurisdiction over the Loans represents a manifest excess of powers because the Tribunal:

    a. incorrectly applied to the Loans a carve-out from the protection of the Canada-Serbia BIT under Articles 1(k) and 1(l) thereof;

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8 Mr. Rand is the sole shareholder of MDH Serbia and MDH Serbia holds a 3.9% share in BD Agro. *See* Award, ¶ 21.

9 Commercial Court in Belgrade Decision number 9. St-321/2015, Decision on the List of Determined and Contested Claims, 30 March 2018, p.2 (English translation), **CE-136**.

10 Award, ¶ 274 ("*through Rand Investments, Mr. Rand also paid approximately EUR 160,000 to remunerate the services provided to BD Agro by herd management experts Messrs. Wood and Calin*").

b. incorrectly departed from: (*i*) the definition of "*investment*" in the Canada-Serbia BIT; and (*ii*) established case law, providing that there is no need to investigate whether Mr. Rand's investment in the Loans satisfies the requirement of "*duration*" under the so-called *Salini* test; and

c. stated, without any reasoning whatsoever, that the Loans did not meet the alleged requirement of "*duration*" even though Mr. Rand had held the Loans for up to a decade before the commencement of the arbitration.

16. The Tribunal's manifest excess of powers with respect to both the Indirect Shareholding and the Loans is a ground for annulment of the respective part of the Award under Article 52(1)(b) of the ICSID Convention.

17. The Tribunal's annullable errors are undeniable. Thus, Serbia attempts to salvage the Award by proposing an incorrect, excessively stringent standard of review that would make it impossible to ever annul any ICSID award. For example, Serbia erroneously suggests that the Committee cannot look into the substance of the Award and examine the Tribunal's understanding of facts, interpretation of law and appreciation of evidence.[11] This cannot be the case. The Committee's review of the reasons for annulment invoked by Mr. Rand necessarily requires that the Committee examine the merits of the Tribunal's findings.

18. The object and purpose of the annulment procedure is not limited to safeguarding the integrity of the proceedings, but equally protects the integrity of the resulting award. Thus, the Committee must be able to assess whether the Award complies with the requirement that "*the reasoning presented in the award should be coherent and not contradictory, so as to be understandable by the Parties and must reasonably support the solution adopted by the tribunal*".[12]

19. The "*reasoning presented in the award*" refers to both fact and law.[13] It is therefore squarely within the Committee's mandate to examine the Tribunal's factual findings

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11 Counter-Memorial, ¶¶ 7-10.

12 *Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7,* Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 23, **RLA-257**.

13 ICSID, *History of the ICSID Convention, Volume II-2* (1968), p. 851, **CLA-224**.

and legal conclusions. Without such an examination, the Committee could not determine whether "*the award has failed to state the reasons on which it is based*", as it is mandated to do under Article 52(1)(e) of the ICSID Convention.

20. Similarly, the Committee will have to examine the substance of the Award when it considers whether "*the Tribunal has manifestly exceeded its powers*" under Article 52(1)(b) of the ICSID Convention. Established case law confirms that a rejection of jurisdiction when jurisdiction exists amounts to an excess of powers.[14] The Committee, thus, must be able to form its own view on whether jurisdiction existed and was erroneously rejected.

21. Serbia's claim that Mr. Rand "*frequently introduces new legal arguments*" in these annulment proceedings is also without merit. What Serbia labels as "*new arguments*" are in reality comments on the Tribunal's reasoning in the Award. Needless to say, Mr. Rand could not have commented on the Tribunal's reasoning—or lack thereof—before he received the Award.

22. The applicable legal standard obviously cannot prevent Mr. Rand from analyzing the Award and explaining why the Tribunal failed to state reasons for some of its decisions and/or why the Tribunal committed a manifest excess of powers. Any other interpretation would run contrary to the object and purpose of the annulment procedure under Article 52 of the ICSID Convention because it would prevent the applicants from showing the existence of annullable errors.

23. Finally, Serbia is mistaken when it argues that the ICSID Convention favors "*finality of ICSID arbitration awards*".[15] According to Serbia, the finality of ICSID awards means that any doubts should be resolved "*in favor of the arbitral tribunal*."[16]

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14 *E.g., Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 86, **RLA-155**; *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/07, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 43, **CLA-190**; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, ¶ 80, **CLA-194**; *Lucchetti v Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, ¶ 99, **CLA-209**.

15 Counter-Memorial, ¶ 3.

16 Counter-Memorial, ¶ 5.

Serbia's argument has been expressly disproved in the decisions of several *ad hoc* committees.

24. ICSID *ad hoc* committees have repeatedly confirmed that no presumption "*in favorem validitatis*" applies in annulment proceedings under Article 52 of the ICSID Convention.[17] For example, the *ad hoc* committee in *Soufraki* expressly concluded that such a presumption "*finds no basis in the text of Article 52 and has not been used by annulment committees*":

> Some commentators have suggested that in case of doubt, an annulment committee should decide in favor of the validity of the award. Such presumption, however, finds no basis in the text of Article 52 and has not been used by annulment committees.[18]

25. Contrary to Serbia's submissions, the discretion of *ad hoc* committees not to annul an award, even in the presence of an annullable error, is far from unlimited. Numerous *ad hoc* committees agreed that such discretion should only be used "*where annulment is clearly not required to remedy procedural injustice*",[19] *i.e.* when the annullable error in the particular case could not have had a material effect upon the outcome of the

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17 *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, ¶ 76, **CLA-221**; *Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7,* Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 22, **RLA-257**; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision, 5 February 2002, ¶ 18, **CLA-185**; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 62, **RLA-155**; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic,* ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, ¶ 70, **RLA-228**.

18 *Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7,* Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 22, **RLA-257**.

19 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, 22 December 1989, ¶ 4.10, **CLA-184**. *See also Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, 17 December 1992, ¶ 1.20, **CLA-218**; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3, Decision on Annulment, 13 April 2020, ¶ 148, **RLA-260**.

case.[20] *Ad hoc* committees also stressed that the discretion "*should not be exercised to the point of defeating the object and purpose of the remedy of annulment*."[21]

* * *

26. If the correct legal standard is applied to the facts of this case, it is clear that the Tribunal committed several annullable errors that had a material effect upon the outcome of the case. As a result, the Award should be partially annulled for the reasons set out above and in more detail in the following parts of this Reply.

B. Organization of the Memorial

27. This Reply on Annulment ("**Reply**") is structured as follows:

a. Section I is this Introduction;

b. Section II explains that the Tribunal failed to state reasons on which it based its conclusions on quantum;

c. Section III explains that the Tribunal had manifestly exceeded its powers by refusing to exercise jurisdiction over certain claims;

d. Section IV demonstrates that the Tribunal's decision on costs must be annulled because it is based on other annullable parts of the Award; and

e. Section V sets out Mr. Rand's Request for Relief.

28. This Reply annexes a number of exhibits (*e.g.* **CE-[x]**) and legal authorities (*e.g.* **CLA-[x]**) numbered consecutively following those submitted in the arbitration and with the Memorial.

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20 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, ¶ 73, **RLA-228**. *See also Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the ad hoc Committee on the Application for Annulment of Consortium R.F.C.C., 18 January 2006, ¶ 226, **CLA-222**.

21 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, 22 December 1989, ¶ 4.10, **CLA-184**. *See also Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment, 15 April 2019, ¶ 51, **CLA-223**; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment, 13 April 2020, ¶ 148, **RLA-260**; *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022, ¶ 51, **RLA-231**.

II. THE TRIBUNAL FAILED TO STATE REASONS ON WHICH IT BASED ITS CONCLUSIONS ON QUANTUM

29. As explained above, the Tribunal found Serbia liable for breaching the BIT by unlawfully seizing the Beneficially Owned Shares.[22] At the same time, the Tribunal concluded that Mr. Rand must be compensated for this breach.

30. The Tribunal decided to calculate the compensation due to Mr. Rand based on BD Agro's equity value as of the Valuation Date.[23] The Tribunal calculated the BD Agro's equity value as the difference between the fair market value of BD Agro's assets and the total value of BD Agro's liabilities.

31. The Tribunal's methodological approach to calculation of the compensation due to Mr. Rand is well reasoned and clearly understandable. However, the same cannot be said with respect to the actual valuation of BD Agro's assets and liabilities.

32. First and foremost, the Tribunal's reasoning related to the valuation of BD Agro's most valuable asset—279 hectares of prime land designated for construction of business and commercial areas ("**Construction Land**")—is contradictory, irreconcilable and/or insufficient. In addition, the Tribunal ignored key evidence related to the valuation of the Construction Land. Mr. Rand addresses all these issues in detail in **Section II.A** below.

33. Worse yet, the Tribunal did not provide any reasons whatsoever for its valuation of BD Agro's remaining assets. Mr. Rand addresses this issue in **Section II.B** below.

34. Finally, the Tribunal also failed to provide reasoning for its valuation of BD Agro's liabilities. As Mr. Rand demonstrates in **Section II.C** below, the Tribunal's reasoning with respect to its valuation of BD Agro's liabilities is contradictory, irreconcilable and/or insufficient.

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22 Memorial, ¶¶ 62-66.

23 Award, ¶ 699.

35. Lack of reasoning, contradictory reasoning, insufficient reasoning and/or the failure to address relevant evidence all represent grounds for annulment under Article 52(1)(e) of the ICSID Convention.[24] Serbia, in general, agrees.[25]

36. The only disagreement between Mr. Rand and Serbia is whether the Award indeed lacks reasoning—meaning whether the reasoning provided by the Tribunal is contradictory, insufficient and/or ignores relevant evidence. As Mr. Rand explains in **Sections II.A to II.C** below, this is clearly the case. Serbia's attempts to show otherwise are based on misinterpretation of applicable legal standards and the Award itself and, as such, must be rejected.

A. The Tribunal's reasoning related to the valuation of the Construction Land is contradictory, irreconcilable and/or insufficient and the Tribunal ignored key evidence

37. The Construction Land was BD Agro's most valuable asset. Its valuation was the main focus of the Parties' submissions on quantum both during the written phase of the proceedings and at the Hearing. Despite the crucial importance of the valuation of the Construction Land, the Tribunal's reasoning with respect to such valuation clearly falls short of the required standard.

38. *First*, the Tribunal's reasoning related to various aspects of the Construction Land valuation is contradictory and insufficient. Mr. Rand demonstrates this in **Section II.A.1** below.

39. *Second*, the Tribunal ignored—without any explanation—key evidence related to the valuation of the Construction Land. As Mr. Rand explains in **Section II.A.1.f.vi.161** below, the evidence ignored by the Tribunal would have increased the valuation of the Construction Land by approximately EUR 45 million.[26]

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24 Memorial, ¶ 83.

25 Counter-Memorial, ¶¶ 78, 82, 130, 189.

26 Memorial, ¶ 7.

1. The Tribunal's reasoning related to the valuation of the Construction Land is contradictory and insufficient

40. As Mr. Rand demonstrated already in the Memorial, the Parties submitted a large number of contemporaneous documents related to the valuation of the Construction Land. These documents included, among other things: (*i*) evidence from actual transactions involving parts of the Construction Land; (*ii*) several other highly comparable transactions; (*iii*) contemporaneous valuations of comparable construction land prepared by the Serbian Tax Authority; and (*iv*) contemporaneous valuations of the Construction Land prepared by Serbian valuators.[27]

41. The Tribunal's treatment of this evidence was manifestly contradictory and its reasoning for rejection of some of the evidence relied upon by the Parties was clearly insufficient. Worse yet, the Tribunal's approach led to an absurd situation where the Tribunal based its entire valuation of the Construction Land on five adjusted asking prices submitted by Serbia—which, according to the Tribunal and both Parties, have the lowest evidentiary value—rather than on evidence from numerous actual contemporaneous transactions—which, also according to both the Parties and the Tribunal itself, carry the highest evidentiary value.

42. Mr. Rand addresses the individual flaws in the Tribunal's reasoning, as well as Serbia's attempts to defend it, *seriatim* below.

a. The Tribunal stated that land located in the Batajnica area was not comparable to the Construction Land—but then accepted Serbia's reliance on an asking price for land in the same area

43. In their valuation of the Construction Land, Claimants relied, among other things, on evidence from the so-called "*Batajnica transactions*". Specifically, Claimants relied on the Serbian Tax Administration's assessment of the market value of several land plots in the Batajnica area, which were comparable to the Construction Land.[28]

44. The Tribunal rejected evidence from the Batajnica transactions, stating that the Batajnica land was "*an unsuitable comparator*".[29] According to the Tribunal, this was

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27 Memorial, ¶ 89.

28 Memorial, ¶ 93; Dr. Richard Hern First Expert Report, 16 January 2019 ("**Hern First ER**"), ¶ 69.

29 Memorial, ¶ 95; Award, ¶ 693(third bullet point).

because (*i*) the transactions are allegedly "*different from property valuations based on international standards*"; (*ii*) they post-date the Valuation Date; and (*iii*) the Batajnica land is allegedly not comparable to the Construction Land given purported differences in access to infrastructure.[30]

45. It is undisputed that while the Tribunal rejected evidence from the Batajnica transactions, it based its valuation solely on five asking prices identified by Serbia's real estate expert, Ms. Ilić. Importantly, the Tribunal did so even though one of these five asking prices was also for land in Batajnica.[31]

46. The Tribunal therefore reached conclusions that are clearly contradictory—it rejected the Batajnica transactions relied upon by Claimants because they allegedly represented "*an unsuitable comparator*", but then accepted an asking price relied upon by Serbia from the very same area. These two conclusions are clearly contradictory and, as such, "*incapable of standing together on any reasonable reading of the decision.*" As a result, the Tribunal's reasoning warrants annulment.[32]

47. Serbia admits that contradictory reasoning warrants annulment,[33] but claims that in the present case, the Tribunal's approach was allegedly not contradictory. Serbia is wrong.

48. As Mr. Rand demonstrates in the following paragraphs, Serbia attempts to defend the Tribunal's reasoning based on assertions that are factually incorrect and, more importantly, cannot be found anywhere in the Award.

49. *First*, Serbia argues that the Tribunal's rejection of the Batajnica transactions was motivated by the incompatibility between the location of the Construction Land and *"the location of the specific land in Batajnica*", not the Batajnica region generally.[34] According to Serbia, "*there is no indication that the advertised land [from the asking*

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30 Award, ¶ 693(third bullet point).

31 Memorial, ¶ 96; Danijela Ilić First Expert Report, 23 January 2020 ("**Ilić First ER**"), p. 145(pdf).

32 Counter-Memorial, ¶ 78: "*Such genuine contradictions 'must be such as to be incapable of standing together on any reasonable reading of the decision*'".

33 Counter-Memorial, ¶¶ 77-78.

34 Counter-Memorial, ¶ 88.

prices evidence] was in the same exact area as the land in the Batajnica transactions."[35] This is not the case.

50. Serbia's argument is factually incorrect because the advertisement setting out the relevant asking price states that there is "*[i]nfrastructure close to the plot*" and "*[a]ccess from the paved road*".[36] The Tribunal confirmed that the Batajnica transactions also were "*close to the Batajnica settlement and to major traffic infrastructure (highway, roads, and railway).*"[37] The text of the advertisement, thus, shows that the advertised land and the land from the Batajnica transactions were in fact similar. Given such similarities, to be consistent, the Tribunal should have either accepted or reject the evidence related to both the advertised land and the land from the Batajnica transactions.

51. The Tribunal's decision to reject the evidence from the Batajnica transactions but then accept the asking price from the same area could only be consistent if the Tribunal explained how the advertised land differs from the land from the Batajnica transactions. The Tribunal, however, did not do so and could not do so because, as Serbia itself admits, there is "*no indication*" of the exact location of the advertised land.[38]

52. *Second,* Serbia argues that the Tribunal did not refuse to rely on the Batajnica transactions only because the land subject to these transactions was, allegedly, not comparable to the Construction Land. According to Serbia, the Tribunal refused to rely on the evidence from the Batajnica transactions also because the Batajnica transactions: (*i*) are "*different from property valuations based on international standards*" and (*ii*) they are based on information post-dating the Valuation Date.[39]

53. According to Serbia, this means that even if there was a contradiction in the Tribunal's reasoning—based on the fact that it rejected the Batajnica transactions as not being comparable to the Construction Land and then, at the same time, accepted an asking

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35 Counter-Memorial, ¶ 89.

36 Asking prices for KO Dobanovci, p. 4, **RE-561**.

37 Award, ¶ 693(third bullet point)(iii).

38 Counter-Memorial, ¶ 89.

39 Counter-Memorial, ¶ 87.

price from the same location—this contradiction would "*not affect the outcome of the case*".[40] According to Serbia, this is because the Batajnica transactions would, in any case, be rejected based on the remaining two reasons mentioned above. This argument is, once again, simply incorrect.

54. The other two reasons for the Tribunal's rejection of the Batajnica transactions are also contradictory and/or insufficient. The first reason given by the Tribunal is frivolous and ignores key evidence. Specifically, the Tribunal concluded that the Batajnica transactions were "*different from property valuations based on international standards*" because they, allegedly, represented assessments by the tax administration for determining the tax on property transfer.[41] This statement is incorrect.

55. The Batajnica assessments were not used for determining the tax on property transfer, but for the purpose of paying compensation for land expropriated in Batajnica. Hence the price range included therein represents an actual direct market transaction (an expropriation), as Claimants' expert, Dr. Hern, explained in his expert report.[42] Moreover, the Batajnica assessments explicitly state that they provide a "*market valuation*" of the valued land, and that the valuation is based on actual market transactions.[43]

56. Dr. Hern extensively explained the status and history of the Batajnica assessments in his expert report. The Tribunal, however, completely ignored his explanation.[44] This ignoring of key evidence—in this case Dr. Hern's explanation—on its own warrants an annulment. The *ad hoc* committee in *Teco v. Guatemala* stressed that tribunals cannot "s*imply gloss over evidence upon which the Parties have placed significant*

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40 Counter-Memorial, ¶ 87.

41 Award, ¶ 693(third bullet point)(i).

42 Dr. Richard Hern Third Expert Report, 6 March 2020 ("**Hern Third ER**"), ¶ 70; Batajnica expropriation screenshot from Belgrade Land Development Public Agency website, **CE-888**.

43 Tax Administration Zemun Branch (17 March 2016), Number 021-464-08-00029/2016-I1A02, Delivery of information on market value of immovable, your reference number 9268/6-5 dated 12 February 2016, **CE-159**; Tax Administration Zemun Branch (8 June 2016), Number 021-464-08-00029-1/2016-I1A02, Delivery of information on market value of immovable your reference number 32381/6-05 dated 25 May 2016, **CE-160**; Tax Administration Zemun Branch (24 August 2016), Number 021-464-08-00125/2016-I1A02, Delivery of information on market value of immovable your reference number 47336/6-05 dated 28 July 2016, **CE-161**.

44 Hern Third ER, ¶¶ 68-72.

emphasis", such as Claimants constantly emphasized Dr. Hern's reports in this case, "*without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory*."[45]

57. The second reason given by the Tribunal, *i.e.* the assertion that the Batajnica transactions post-dated the Valuation Date is contradictory. As Mr. Rand explains in detail in **Section II.C.1.a** below, while the Tribunal rejected certain evidence based on the fact that it post-dated the Valuation Date, the Tribunal eventually relied on other evidence that post-dated the Valuation Date for some of its other main conclusions.[46]

58. The two additional reasons given by the Tribunal thus suffer from the same flaws as the first one and only confirm the fact that the Tribunal's decision on the value of BD Agro's Construction Land should be annulled.

59. *Third,* none of the above explanations provided by Serbia are set out anywhere in the Award. Serbia's attempts to defend the Tribunal's rejection of the Batajnica transactions are, therefore, based solely on reasons invented *ex-post facto* by Serbia—not on actual reasons formulated by the Tribunal. Serbia cannot defend the Tribunal's contradictory reasoning by inventing new reasons and explanations that the Tribunal itself never invoked.

60. *Finally,* the Tribunal's contradictory reasoning for the rejection of the evidence from the Batajnica transactions is clearly relevant for the outcome of the dispute. The difference between the value of the Construction Land adopted by the Tribunal and the value calculated based on the price per m^2 implied by the Batajnica transactions is between **EUR 36 million and 61 million**.[47]

b. The Tribunal rejected Dr. Hern's reliance on the Batajnica transactions post-dating the Valuation Date, but then accepted Serbia's reliance on asking prices with unknown dates

61. As explained above, one of the reasons for which the Tribunal rejected the use of evidence from the Batajnica transactions was that these transactions—according to the

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45 *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 131, **CLA-186**.

46 *See* §§ II.C.1.a and II.A.1.b below.

47 Memorial, ¶ 101.

Tribunal—post-dated the Valuation Date.[48] The Tribunal eventually valued the Construction Land solely based on five asking prices presented by Serbia. However, with respect to two of these asking prices, Ms. Ilić merely stated that they were from 2015—without further specifying whether they pre-dated or post-dated the Valuation Date of 21 October 2015.[49]

62. The fact that the Tribunal rejected evidence from the Batajnica transactions because they, allegedly, post-dated the Valuation Date and, at the same time, accepted Serbia's asking prices, even though their date was and remains unclear, represents another example of the Tribunal's contradictory reasoning.[50]

63. Serbia's only response is that Mr. Rand allegedly "*does not challenge the Tribunal's reasoning but challenges correctness of its assessment of evidence, i.e. whether the Tribunal was justified in relying on Ms. Ilic's representations or not*".[51] This is simply wrong.

64. Mr. Rand challenges the Tribunal's reasoning because the reasons provided by the Tribunal are contradictory and cancel one another out. Contradictory reasoning may amount to a failure to state reasons,[52] and in fact does amount to a failure to state reasons in the present case.

65. Serbia's argument that "*Claimants never raised the issue of the dates of the transactions in question during the Arbitration*"[53] is a red herring. The dates of the asking prices became relevant only in the light of the Tribunal's decision that evidence post-dating the Valuation Date cannot be used for valuation of BD Agro's assets. Given that the Tribunal made this determination only in its Award, Mr. Rand had no reason to raise the issues of the dates of the asking prices before.

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48 Award, ¶ 693(third bullet point)(ii).

49 Ilić First ER, Appendix 2, table 2.6, p. 145(pdf); Asking prices for KO Dobanovci, **RE-561**.

50 Memorial, ¶ 107.

51 Counter-Memorial, ¶ 93(1).

52 Counter-Memorial, ¶ 77.

53 Counter-Memorial, ¶¶ 93(2), 96.

66. The contradiction significantly affects the outcome of the case.[54] Even if the median price of the Construction Land increased by EUR 0.3 per square meter as a result of exclusion of the 2015 asking prices—as Serbia alleges[55]—the price of the Construction Land would increase by over **EUR 800 thousand**.[56] That is more than 5% of the total damages awarded to Mr. Rand.[57] That is certainly not a "*negligible*" change, as Serbia attempts to present it.

c. The Tribunal refused Dr. Hern's reliance on the First Confineks Valuation because it was not based on "*comparable transactions*"—but then accepted Serbia's valuation, which was based solely on five asking prices and no comparable transactions

67. As explained in the Memorial, Claimants' expert, Dr. Hern, supported his lower bound valuation of the Construction Land by reference to a valuation prepared by the Serbian licensed court expert Confineks d.o.o. Beograd on 5 December 2015 ("**First Confineks Valuation**"). This valuation was commissioned by BD Agro based on directions from the Privatization Agency in November 2015 and valued the Construction Land at approximately EUR 67 million (as opposed to the Tribunal's valuation of EUR 41.9 million).[58] The EUR 67 million valuation was contemporaneously accepted by Serbia.[59]

68. The Tribunal, however, refused to rely on the First Confineks Valuation because it "*does not refer to evidence of comparable transactions.*"[60] Yet, the Tribunal's valuation of the Construction Land is not based on comparable transactions either. On the contrary, it is based solely on five asking prices identified by Serbia. This glaring contradiction finds no explanation in the Award.

69. Mr. Rand explained that this contradiction was akin to the one in *Tidewater*. Same as the *Tidewater* tribunal, the Tribunal also "*contradicted its own analysis and reasoning*

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54 Counter-Memorial, ¶ 98.

55 Counter-Memorial, ¶ 98 and fn. 182.

56 The size of the Construction Land was 279 hectares. *See* Award, ¶ 691. The area of 2,790,000 square meters times EUR 0.3 gives the result of EUR 837,000.

57 EUR 14,5 million. *See* Award, ¶ 717(d).

58 Memorial, ¶¶ 109-110; Award, ¶ 707.

59 Memorial, ¶ 111.

60 Award, ¶ 693(first bullet point).

by quantifying its estimation using one concrete criterion […] which it had rejected as unreasonable."[61] The *Tidewater* committee annulled the award on this basis and so should this Committee.

70. In its Counter-Memorial, Serbia admits that "*genuine contradictions*" which are "*incapable of standing together on any reasonable reading of the decision*" would warrant annulment.[62] Serbia, however, then goes on and attempts to distinguish between "*genuine contradictions*" and "*conflicting considerations*".[63] This is a distinction without a difference.

71. The fact that the Tribunal refused to rely on the First Confineks Valuation because it did not refer to evidence from comparable transactions, but then based its valuation of the Construction Land solely on asking prices, represents a "*genuine contradiction*", rather than "*conflicting considerations.*" All other contradictions identified in this Reply also represent genuine contradictions in the Tribunal's reasoning and thus constitute annullable errors under Article 52(1)(e) of the ICSID Convention.

72. Clearly aware that this glaring contradiction in the Tribunal's reasoning cannot be explained, Serbia tries to downplay its importance by arguing that "*the Tribunal rejected [Dr. Hern's lower bound valuation] primarily because it did not correspond to international valuation standards, as it was based on mass appraisals by tax authorities.*"[64] That is incorrect.

73. To begin with, the Tribunal did not state anywhere in the Award that its rejection of Dr. Hern's lower bound valuation was "*primarily*" based on the fact that it relied on, among other things, evidence from mass appraisals conducted by Serbian tax authorities.[65] That has been simply made up by Serbia.

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61 Memorial, ¶ 113; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 193, **CLA-188**.

62 Counter-Memorial, ¶ 78.

63 Counter-Memorial, ¶¶ 77-78.

64 Counter-Memorial, ¶ 102.

65 Counter-Memorial, ¶ 101.

74. More fundamentally, the fact that Dr. Hern's lower bound valuation was *also* supported by evidence from mass appraisals of tax authorities is irrelevant. The First Confineks Valuation is not based on any mass appraisals. Therefore, the fact is and remains that the Tribunal rejected the First Confineks Valuation—an important piece of evidence supporting Dr. Hern's lower bound valuation that was not based on any mass appraisals—simply because the First Confineks Valuation did not rely on comparable transactions. However, the Tribunal then relied exclusively on adjusted asking prices, which do not represent comparable transactions either.

75. This glaring contradiction in the Tribunal's reasoning is, once again, material for the outcome of the case. The First Confineks Valuation valued the Construction Land at approximately EUR 67 million, *i.e.* **EUR 25 million** *more* than the EUR 42 million valuation accepted by the Tribunal.[66]

d. The Tribunal rejected Dr. Hern's use of the Mrgud Valuation because Mr. Mrgud relied on asking prices—but then accepted Serbia's valuation based solely on asking prices

76. As explained in the Memorial, Dr. Hern's upper bound valuation of the Construction Land was based on a valuation prepared by Mr. Pero Mrgud, a Serbian licensed court expert ("**Mrgud Valuation**"), which valued the Construction Land at approximately EUR 84 million, corresponding to EUR 30 per m^2.[67] The only evidence to which the Tribunal referred when rejecting the Mrgud Valuation was the testimony of Claimants' real estate expert, Mr. Grzesik, who concluded that "***asking prices are the lowest level of evidence*** *that you can use in a valuation*":

> [Mr. Djeric]: Can we go back to Mr Mrgud's report, please? Mr Grzesik, you see *these five transactions and this table. Are you not a little bit concerned that it is on the basis of this undated small table* that Mr Mrgud comes up with a valuation of no less than €87 million for the land in Zones A, B and C? Don't you think that one who would read that would deserve something more to accept this amount, this figure, as a reliable one?

66 Award, ¶¶ 691, 707; Hern's updated analysis, Confineks land valuation and Land ABC TRX, **CE-908**.

67 Memorial, ¶ 115.

> [Mr. Grzesik]: Certainly, if you are relying on asking prices, then as *much information as possible is needed, because* ***asking prices are the lowest level of evidence*** *that you can use in a valuation*.[68]

77. Serbia's real estate expert, Ms. Ilić, also accepted that asking prices have the lowest evidentiary value[69] and should be used only in absence of appropriate actual transaction data.[70] Ms. Ilić also agreed that only data from actual transactions represents "*primary evidence*"[71] and "*primary market evidence*",[72] which is of the "*highest relevance*".[73] The same was confirmed by Claimants' expert, Mr. Grzesik.[74]

78. While the Tribunal agreed with the Parties experts' conclusion that asking prices are the lowest level of evidence, the Tribunal went on to base its entire valuation of the Construction Land, *i.e.* BD Agro's most valuable asset, solely on asking prices—and, specifically, only on asking prices submitted by Serbia. The Tribunal did so even though it had a plethora of other, more relevant, evidence—including evidence from actual comparable transactions.

79. The Tribunal could not have—without contradicting itself—rejected asking prices as "*the lowest level of evidence*" and, at the same time, base its entire valuation on asking prices, given that it had available to it evidence from actual, highly relevant, comparable transactions. Given that the Tribunal did exactly that, its reasoning is clearly contradictory. As a result, the Award must be annulled in the respective part.[75]

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68 Award, fn. 555; Tr., Hearing on Jurisdiction and Merits, Day 7, 80:16-81:2 (emphasis added).

69 Memorial, ¶ 117; Ilić First ER, ¶ 4.9; Danijela Ilić Second Expert Report, 16 March 2020 ("**Ilić Second ER**"), ¶ 5.3.

70 Ilić First ER, ¶ 9.20 ("*a valuer seeks comparable sales and/or asking prices, where sales are not available or not appropriate*").

71 Ilić First ER, ¶ 4.27 ("*Dr. Hern simply disregards the primary evidence- actual sale prices from the exhibit CE-182 (min = 2 €/m2) and applies information that cannot be considered market evidence, such as Dec 2015 Confineks report*").

72 Ilić First ER, ¶ 4.33 ("*Notwithstanding that Dr. Hern already had primary market evidence as comparables […] he additionally applied information which cannot be considered market evidence*").

73 Ilić First ER, ¶ 10.1 ("*I have applied the market evidence, which is of highest relevance, actual sale prices recorded in RGA and where necessary I have also applied adjusted asking prices.*"). *See also* Ilić First ER, ¶¶ 4.30, 8.9.

74 Krzysztof Grzesik Expert Report, 3 October 2019 ("**Grzesik ER**"), ¶ 6.10.

75 Memorial, ¶ 120.

80. Serbia, once again, cannot explain this clear contradiction. As a result, Serbia essentially tries to rewrite the Award by arguing that the Tribunal did not reject the Mrgud Valuation because it relied on asking prices as such, but because it "*did not provide any information whatsoever about the sources of the asking prices used or when they were published.*"[76] This argument is, once again, a red herring.

81. Even if Serbia were right, this would not address the actual contradiction identified by Mr. Rand—*i.e.* the fact that the Tribunal specifically concluded that asking prices represent the lowest level of evidence, but then based its valuation solely on asking prices—even though it had more reliable evidence available.

82. In addition, the Tribunal's contradictory reasoning would not be saved even if the only reason for the Tribunal's rejection of the Mrgud Valuation had been a lack of sufficient information about the asking prices it relied upon, as Serbia seems to suggest. This is because the information that Ms. Ilić provided with respect to the asking prices relied upon by Serbia—and eventually by the Tribunal—is equally scarce.

83. The advertisements produced by Ms. Ilić in support of her asking prices do not show the location of the land plots, and the description of the advertised land is, to be generous, extremely brief; some do not even provide a date.[77] The Tribunal provided no explanation whatsoever as to why it considered that the information about the asking prices provided by Ms. Ilić was sufficient. In fact, it did not address Ms. Ilić's brief and unsupported description of these asking prices at all.

84. In sum, the Tribunal correctly concluded—in line with the finding of the Parties' experts—that asking prices carry the lowest evidentiary weight. The Tribunal then, without any explanation, disregarded its own conclusion, based its valuation of the Construction Land solely on asking prices submitted by Serbia and ignored relevant evidence of the highest value—*i.e.* actual comparable transactions.[78]

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76 Counter-Memorial, ¶ 106.

77 Asking prices for KO Dobanovci, **RE-561**.

78 *See infra*, § II.A.2.

85. The contradiction in the Tribunal's reasoning is akin to the annullable errors in *Tidewater*.[79] Much like in *Tidewater*, the Tribunal "*contradicted its own analysis and reasoning*" and like in *Tidewater*, the respective part of the Award should be annulled.[80] Mr. Rand explained that this failure to state reasons had a material impact on BD Agro's valuation (causing a difference of EUR 45 million), which Serbia does not dispute.[81]

e. The Tribunal provided contradictory, insufficient and inadequate reasoning for its acceptance of a 30% discount to the value of the Construction Land

86. The Tribunal applied a 30% discount to the value of the Construction Land.[82] The Tribunal did so based on reasoning that was both contradictory and insufficient—with respect to both the application of a discount as such and its magnitude.

i. The Tribunal's reasons for the application of the discount are contradictory and insufficient

87. The Tribunal provided two alleged reasons for its acceptance of a discount applicable to the value of the Construction Land calculated based on the asking prices proposed by Serbia. First, an alleged difference in size between the land plots constituting the Construction Land and the land plots subject to Serbia's asking prices. Second, an alleged difference in infrastructure existing on the Construction Land and the land plots subject to Serbia's asking prices.[83] As Mr. Rand demonstrated already in the Memorial, neither of these reasons is tenable.

88. With respect to the difference in the size of the relevant land plots, the Tribunal accepted that—in general—larger land plots will attract lower prices per m^2 than smaller land plots (all other things being equal).[84] Based on this conclusion, the Tribunal should have applied a premium when valuing the Construction Land, because

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79 Memorial, ¶ 120.

80 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 193, **CLA-188**.

81 Memorial, ¶ 121.

82 Award, ¶¶ 696-697.

83 Award, ¶ 697.

84 Award, ¶ 697.

it consists of land plots that are smaller than the median size of the land plots from asking prices used by Ms. Ilić and the Tribunal.[85]

89. The Tribunal, however, did the exact opposite by applying a 30% discount to the value of the Construction Land. This approach directly contradicts the Tribunal's earlier finding that smaller land plots should attract a premium.[86]

90. The Tribunal's second alleged reason fares no better. The Tribunal stated that the infrastructure on the Construction Land was, allegedly, different from the infrastructure existing on the land plots subject to the asking prices submitted by Serbia. However, it is simply impossible to determine the location of such land plots subject to the five asking prices. As a result, it is also impossible to determine whether or not *any* infrastructure existed on these plots.[87]

91. Furthermore, even if *some* infrastructure did exist on these land plots, this would not make them different from the Construction Land. This is because the Construction Land also had full access to relevant infrastructure (roads, utilities, etc.) through the BD Agro farm—which was directly adjacent to the Construction Land.[88]

92. Not only that the Tribunal ignored this fact, it even applied the same discount also to BD Agro's Other Construction Land in Dobanovci, with respect to which it was undisputed that it was *fully* equipped with relevant infrastructure (roads, utilities, etc.).[89] This means that the infrastructure existing on the Other Construction Land was clearly better than the infrastructure allegedly existing on the land plots referenced in Serbia's asking prices. Therefore, the Tribunal should have applied a premium, rather than a discount to the value of the Other Construction Land. This further confirms the Tribunal's arbitrariness when applying the 30% discount.

93. Given the flaws described above, the Tribunal's reasoning related to the application of the 30% discount to the valuation of the Construction land is evidently "*insufficient*

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85 Memorial, ¶ 132.

86 Memorial, ¶ 134.

87 Memorial, ¶¶ 137-138.

88 Memorial, ¶ 139.

89 Memorial, ¶ 140.

to bring about the solution [and] inadequate to explain the result arrived at by the Tribunal."[90] As a result, the Tribunal's decision to apply this discount must be annulled.[91]

94. Serbia cannot justify the contradictions in the Tribunal's reasoning by reference to the Tribunal's discretion with respect to damages and the fact that tribunals may apply "*various discounts in calculating compensation*."[92] The fact that the Tribunal has discretion in determining the quantum of damages cannot excuse their lack of reasoning.

95. Even assuming, for the sake of Serbia's argument, that ICSID tribunals had a wide discretion in their assessment of evidence relating to damages, they still could not exercise such discretion in a manner that would lead to an annullable error—including the failure to state reasons. This is, indeed, confirmed by several ICSID *ad hoc* committees that annulled ICSID awards for failure to state reasons in relation to damages.

96. For example, in *Perenco v. Ecuador*, the tribunal disregarded all approaches to the calculation of damages proposed by the claimant and then "*simply 'acknowledged' that it has discretion and decided to award 'a nominal value.'*"[93] The *ad hoc* committee subsequently annulled the *Perenco* award because it considered that an

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90 *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 126, **CLA-190** "*In quick summary, the ad hoc Committee considers that there may be a ground for annulment in the case of: […] insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.*" *See also Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 21, **CLA-187**.

91 *Houssein Nuaman Soufraki v. United Arab Emirates,* ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 126, **CLA-190**. *See also Mr. Patrick Mitchell v. Democratic Republic of the Congo,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 21, **CLA-187**.

92 Counter-Memorial, ¶ 111.

93 *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶ 466, **CLA-193**.

explanation reduced to a reference to the tribunal's discretion without further reasoning is not sufficient and must lead to annulment.[94]

97. Similarly, the *ad hoc* committee in *Pey Casado v. Chile (I)* expressly recognized the tribunal's discretion in determining the quantum of damages, but confirmed that such discretion cannot excuse contradictions in the tribunal's reasoning:

> While *the Committee recognizes that arbitral tribunals are generally allowed a considerable measure of discretion in determining quantum of damages*, the issue in the present case is not per se the quantum of damages determined by the Tribunal. Nor does the problem lie per se in the Tribunal's chosen method of calculating the damages suffered by the Claimants. *The issue lies precisely in the reasoning followed by the Tribunal to determine the appropriate method of calculation, which, as demonstrated above, is plainly contradictory*.[95]

98. The *Tidewater v. Venezuela* committee also annulled the award for failure to state reasons in relation to quantum because the tribunal's reasoning was contradictory. The annulment was due to the tribunal's flawed approach to the assessment of compensation for legal expropriation. The tribunal applied a discounted cash flow methodology using a country risk premium, which it had previously rejected. The committee made it clear that the tribunal's discretion had no bearing on the fact that it committed an annullable error by contradicting itself and, hence, failing to state reasons for this aspect of its decision:

> As a result of the contradiction in the reasoning, Venezuela is not able to understand to what extent it has used its public power unlawfully when it offered compensation. *That is not the consequence of a misuse of the Tribunal's authority to discretion but of the Tribunal's contradictory reasoning* when presenting what, in its view, it considered the correct elements for the determination of compensation, but in reality used an element it had rejected earlier to fix the amount of compensation.[96]

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94 *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶¶ 466, 469, **CLA-193**.

95 *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 286 (emphasis added)(references omitted), **CLA-192**.

96 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 195 (emphasis added), **CLA-188**.

99. Finally, in *Teco v. Guatemala*, the *ad hoc* committee also annulled the award as to damages, because it found that the tribunal had failed to state reasons in its decision to dismiss the investor's request for additional compensation regarding the loss of value. The committee found that there was a failure to state reasons because the tribunal ignored evidence potentially relevant for the outcome of the case. The tribunal's discretion did not excuse the fact that the tribunal's reasoning with respect to damages was "*difficult to understand*" due to the tribunal's omission of relevant evidence, which constituted an annullable error under Article 52(1)(e) of the ICSID Convention.[97]

100. Simply put, ICSID jurisprudence confirms that the fact that a tribunal has discretion cannot excuse that tribunal for failing to state reasons. ICSID tribunals must state reasons even if they use certain discretion when deciding on quantum. Mr. Rand will show below that the Tribunal in this case simply failed to do so.

101. Serbia also cannot justify the Tribunal's contradictions by stating that an "*annulment does not concern the correctness of the reasoning in an award or its quality*".[98] Mr. Rand is not asking the Committee to assess the "*correctness*" of the Tribunal's reasoning. To the contrary, Mr. Rand is asking the Committee to assess whether the Tribunal's reasoning satisfies the requirements under Article 52(1)(e) of the ICSID Convention, *i.e.* to assess whether the Tribunal's reasoning was not contradictory, insufficient and/or inadequate.

102. The very first ICSID *ad hoc* committees, which were seized with the awards issued in the *Klöckner* and *Amco* cases, found that the reasons stated by the tribunal must be "*sufficiently relevant*" or "*sufficiently pertinent*", "*that is, reasonably sustainable and capable of providing a basis for the decision.*"[99] The *ad hoc* committees in *Soufraki*

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97 *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 138, **CLA-186**.

98 Counter-Memorial, ¶ 114.

99 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais,* ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, ¶ 120, **CLA-189**; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, 17 December 1992, ¶ 43, **CLA-218**.

v. UAE and *Patrick Mitchell v. Congo* confirmed that insufficient or inadequate reasons, which cannot reasonably support the decision, are equal to no reasons at all:

> [E]ven short of a total failure, some defects in the statement of reasons could give rise to annulment [...]. [...] Insufficient or inadequate reasons refer to reasons that cannot, in themselves, be a reasonable basis for the solutions arrived at.[100]

103. The *Soufraki* committee also concluded that it "*has to verify the existence of reasons as well as their sufficiency – that they are adequate and sufficient reasonably to bring about the result reached by the Tribunal*".[101] Similarly in *Patrick Mitchell*, the committee confirmed that an annullable error under Article 52(1)(e) exists "*whenever reasons are purely and simply not given, or are so inadequate that the coherence of the reasoning is seriously affected*".[102]

104. Serbia does not dispute the conclusions reached by the *Soufraki* and *Patrick Mitchell* committees. Serbia, however, argues that these committees allegedly "*defined insufficient and inadequate reasons in terms of their comprehension to the reader*", as opposed to their "*quality and foundation*".[103] However, such a distinction is nowhere to be found in the cited decisions. Serbia's reference to the decision in *Fábrica de Vidrios Los Andes* fares no better. The *ad hoc* committee in *Fábrica de Vidrios* simply stated that "*if reasons are 'insufficient from a logical point of view,' they will not enable the reader 'to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion.'*"[104] This statement is uncontroversial—and does not support Serbia's case.

105. Serbia also refers to the *MINE* and *Vivendi (I)* decisions, again arguing that the standard "*only requires that a reader should understand the award and nothing*

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100 *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶¶ 122-123, **CLA-190**. *See also Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 21, **CLA-187**.

101 *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 131, **CLA-190**.

102 *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 21, **CLA-187**.

103 Counter-Memorial, ¶ 130.

104 *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment, 22 November 2019, ¶ 121, **RLA-251**.

more."[105] Serbia again makes a distinction without difference—if the reasoning lacks quality and foundation or is otherwise insufficient or inadequate to justify the decision, it cannot be comprehensible to the reader.

106. Finally, Serbia cannot salvage the Tribunal's insufficient reasoning by references to the description of individual land plots subject to the asking prices provided in Serbia's exhibit RE-561.[106] Ms. Ilić derived her five asking prices from this exhibit, which contains screenshots of alleged listings of advertised land.[107] To begin with, the analysis of exhibit R-561 now provided by Serbia has been invented out of whole cloth and was not provided at all by the Tribunal in the Award. Serbia cannot supplement the Tribunal's reasoning by its own analysis and then argue that such an expanded reasoning is sufficient. What is relevant is the Tribunal's reasoning in the Award—and the Award simply does not contain the analysis now provided by Serbia.

107. In any case, the supplemental analysis extended by Serbia does *not* support the application of the discount either. On the contrary, exhibit RE-561 confirms that these advertisements do *not* show relevant differences between the infrastructure existing on the land plots described in this exhibit and the Construction Land.

108. The first announcement only states that an asphalt road leads to the plot and does not mention any infrastructure on the plot.[108] Serbia's only response to this fact is that "*the existence of infrastructure is implied in the fact that the advertisement states that the land is in the industrial zone, at Dobanovci highway bypass*."[109] This argument is not serious. No such implication can be made from the advertisement, and the Tribunal did not conclude so in its reasoning.

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105 Counter-Memorial, ¶ 79.

106 Counter-Memorial, ¶¶ 121-122.

107 Asking prices for KO Dobanovci, **RE-561**.

108 Asking prices for KO Dobanovci, p. 1(pdf), **RE-561**.

109 Counter-Memorial, ¶ 121(1).

109. The second announcement only states that infrastructure is in the vicinity of the plot.[110] Serbia argues that the correct wording is "*close to the plot"*.[111] This is, however, a distinction without difference.

110. Serbia's assertion that the land from second advertisement has infrastructure because it is located in an industrial zone and "*the location in the industrial zone implies that infrastructure is available*" is incorrect.[112] No such implication can be made, and the Tribunal certainly did not imply as much in the Award.

111. The fact that the second advertisement states that "*the land is near the highway and bypass*" also does not imply "*a road connection*", as Serbia incorrectly claims.[113] To state the obvious, the fact that a land plot is near the highway does not necessarily mean that it is connected to it. In addition, it is undisputed between the Parties that the Construction Land is also close to a highway.[114]

112. The third advertisement states that there is a dirt road leading to the plot and that infrastructure is 100 meters away.[115] Serbia limits its rebuttal to stating that "*the distance of only 100 meters to infrastructure is negligible.*"[116] This argument is clearly incorrect—if infrastructure is 100 meters away from the plot, it certainly is not on the plot and the plot, thus, is not comparable to the Construction Land.

113. The fourth advertisement states that there is an asphalt road leading to the land plot and that there is electricity, but it does not mention any other infrastructure.[117] Serbia contends that electricity is crucial and that "*it is unclear what other infrastructure*" could be needed.[118] Serbia is not serious—unless it believes that, for example, water supply and sewage does not represent infrastructure relevant for a commercial zone.

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110 Asking prices for KO Dobanovci, p. 2(pdf), **RE-561**.

111 Counter-Memorial, ¶ 121(2).

112 Counter-Memorial, ¶ 121(2).

113 Counter-Memorial, ¶ 121(2).

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

115 Asking prices for KO Dobanovci, p. 3(pdf), **RE-561**.

116 Counter-Memorial, ¶ 121(3).

117 Asking prices for KO Dobanovci, p. 4(pdf), **RE-561**.

118 Counter-Memorial, ¶ 121(4).

114. For the avoidance of doubt, Serbia's assertion that because the advertisement mentions "*premises*", it "*implies that there is also water supply to the land*" is again incorrect.[119] No such implication can be made and, more importantly, no such implication was made by the Tribunal.

115. The fifth—and last—announcement only mentions a highway being 1 km away from the plot.[120] Lacking a better argument, Serbia alleges that "*the map reproduced in the advertisement indicates that the land plot is near the road connecting the highway and nearby township.*"[121] Serbia also alleges that "*the land plot is in the close vicinity of industrial facilities, which indicates existence of infrastructure*."[122] No such indications were considered by the Tribunal, and they do not follow from the advertisement. Serbia is simply inventing these assertions without having any supporting evidence.

116. The Tribunal's insufficient and inadequate reasoning was crowned by the Tribunal's statement that "*Ms. Ilić's testimony that these differences [in infrastructure] justify a discount was not seriously rebutted.*"[123] To begin with, the Tribunal failed to acknowledge that Ms. Ilić's justification for the discount drastically changed at the hearing.[124] Before the hearing, Ms. Ilić had not argued that the alleged difference in access to infrastructure was the basis for the discount. Instead, she argued that the discount was justified by the difference in the median size of the Construction Land and her comparators.[125]

117. Despite Ms. Ilić's last-minute change of heart, Claimants soundly rebutted her new argument at the Hearing. Specifically, Claimants' expert, Dr. Hern, addressed Ms. Ilić's new argument in his opening presentation, demonstrating that it is impossible to determine the location of the plots from Ms. Ilić's asking prices evidence.[126]

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119 Counter-Memorial, ¶ 121(4).

120 Asking prices for KO Dobanovci, p. 5(pdf), **RE-561**.

121 Counter-Memorial, ¶ 121(5).

122 Counter-Memorial, ¶ 121(5).

123 Award, ¶ 697.

124 Memorial, ¶ 133.

125 *E.g.*, Ilić First ER, p. 115, ¶ 9.1.

126 Tr., Hearing on Jurisdiction and Merits, Day 8, p. 15:07–12 (Hern).

Claimants' counsel dedicated significant time to this issue during their cross-examination of Serbia's valuation expert, Mr. Cowan. Mr. Cowan confirmed that it is impossible to determine the location of the advertised plots.[127] Claimants also addressed Ms. Ilić's new argument in their post-hearing brief.[128] The Tribunal simply ignored Claimants' rebuttal and the expert testimony, without engaging with it.

118. *Finally*, as explained above, the Tribunal used the same discount not only to the Construction Land, but also to BD Agro's Other Construction Land in Dobanovci. This land is fully equipped with roads and other infrastructure–as Ms. Ilić herself admitted and as Serbia did not and does not dispute.[129] If the reason for the application of the 30% discount to the Construction Land had been a lack of infrastructure, the same discount clearly should not have been applied to the Other Construction Land, which represented land below the farm complex and, as such, had all relevant infrastructure.

119. Simply put, the Tribunal's decision to apply a discount rests on clearly contradictory reasons and should be annulled.

ii. The Tribunal provided insufficient, inadequate and contradictory reasoning for the magnitude of the discount

120. The Tribunal reduced its reasoning regarding the magnitude of the discount to the statement that *"[f]ailing more precise indications in the record about the size of this deduction, it appears reasonable to the Tribunal to accept the 30% discount applied by Ms. Ilić.*"[130] This attempt at reasoning is clearly insufficient.[131]

121. Having found that there should be *a* discount, the Tribunal needed to provide an understandable explanation for a specific percentage of such discount. The Tribunal simply failed to do so. There is nothing in the Award justifying a 30% discount, or any other magnitude for that matter.

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127 Tr., Hearing on Jurisdiction and Merits, Day 8, pp. 143:17–146:18 (Cowan).

128 Claimants' First Post Hearing Brief, ¶¶ 322-323.

129 Ilić First ER, ¶ 9.79.

130 Award, ¶ 697.

131 Memorial, ¶¶ 123-142.

122. The Tribunal's failure to state reasons with respect to the magnitude of the discount clearly warrants annulment of the Tribunal's decision on this point. A similar case arose in in *Perenco v. Ecuado,* where insufficient reasoning with respect to the tribunal's valuation of a loss of opportunity led the *ad hoc* committee to partially annul the award. The annullable failure to state reasons in *Perenco* was found in the tribunal's rejection of claimant's calculation and subsequent application of discretion, without further explanation.[132] The *Perenco* committee found that "*the Tribunal simply 'acknowledged' that it has discretion and decided to award 'a nominal value.*'" While doing so, the tribunal failed to state reasons, because "*[n]o explanation whatsoever is given as to what is the concept of a nominal value or the reason to award a nominal value as opposed to any other value.*"[133]

123. In the present case, like in *Perenco*, the Tribunal rejected Claimants' approach—that no discount should be applied—and, instead, adopted a 30% discount, without any explanation for why a 30% discount, rather than "*any other value*", should apply.[134]

124. Serbia's attempt to distinguish the *Perenco* decision based on the fact that the Tribunal adopted a percentage of the discount proposed by Ms. Ilić, rather than come up with a number of its own, as the *Perenco* tribunal did, is without merit.[135] It is irrelevant whether the Tribunal came up with its own value or whether it adopted one proposed by Serbia's expert. What is relevant is that the Tribunal was supposed to provide reasons for its decision. Indeed, the Tribunal itself recognized this principle at the Hearing:

> THE PRESIDENT: That is about the principle of the discount, but then the level of this discount, can you explain better why you come to 30%? I know you are saying this is a matter of judgment, but then *one exercises judgment in consideration of a number of factors, otherwise it becomes arbitrary,* so how do you justify your 30%?[136]

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132 *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶¶ 466, 469, **CLA-193**.

133 *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶ 466, **CLA-193**.

134 Award, ¶ 697.

135 Counter-Memorial, ¶ 138.

136 Transcript, Hearing on Jurisdiction and Merits, Day 8, 20 July 2021, 170:22-171:02 (emphasis added).

125. Yet, there was no "*consideration of a number of factors*" by the Tribunal. In fact, the Tribunal did not assess any factors when adopting the specific percentage of an applicable discount. As a result, the Tribunal's decision is—following the Tribunal's own logic—clearly arbitrary.

126. Finally, Serbia is wrong when it argues that "*[t]he scope of [the Tribunal's] discretion was even wider in this instance, and the requirement to state reasons much weaker, because there were no 'more precise indications in the record about the size of this deduction'*".[137] There indeed were other precise indications about the size of the discount on the record—Claimants and their experts consistently argued that the appropriate size of the discount is 0%.[138] Serbia's argument that "*Claimants failed to offer any indication about the size of discount*" is, thus, simply false.[139]

* * *

127. As explained in the Memorial, the Tribunal's flawed reasoning is clearly outcome-determinative. Even accepting the price per meter squared of the Construction Land proposed by Ms. Ilić based on asking prices, *i.e.* EUR 21 per m^2, the 30% discount unjustifiably lowers the value of the Construction Land by **EUR 18 million**.[140]

f. The Tribunal accepted Ms. Ilić's valuation of the Construction Land even though it contradicted the Tribunal's own findings on the appropriate valuation methodology

128. In his Memorial, Mr. Rand explained that the Award formulates six key principles for the valuation of the Construction Land:

1. the valuation should be based on actual comparable transactions as the primary, most relevant evidence;[141]

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137 Counter-Memorial, ¶ 135.

138 Hern Third ER, ¶¶ 36-41; Rejoinder on Jurisdiction, ¶ 765; Claimants' First Post Hearing Brief, ¶¶ 319-323.

139 Counter-Memorial, ¶¶ 135-136.

140 Ilić First ER, ¶ 9.1 (correctly should be 9.93).

141 Award, ¶ 693(first bullet point).

2. asking prices have the lowest evidentiary value and the valuation should not rely on asking prices with no corresponding information about dates and sources of these prices;[142]

3. the valuation should only rely on evidence from comparable areas—the Tribunal specifically identified Batajnica as a noncomparable area;[143]

4. the valuation should only rely on evidence pre-dating the Valuation Date;[144]

5. a discount is justified where evidence used in the valuation relates to comparable land with better access to infrastructure;[145] and

6. smaller land plots are more valuable per m^2 than comparable larger land plots.[146]

129. Mr. Rand also explained that the Tribunal accepted Ms. Ilić's valuation—*even though it does not comply with any of the above key principles*. The Tribunal therefore grossly contradicted its own reasoning.[147]

i. The valuation should be based on actual comparable transactions as the primary, most relevant evidence

130. In its Counter-Memorial, Serbia argues that this principle is not applicable, because the Tribunal did not expressly formulate it in the Award.[148] This is not the case. As explained above, the only reason that Tribunal provided for the rejection of the First Confineks Valuation was that it did "*not refer to evidence of comparable transactions.*"[149] Thus, the Tribunal either considered the comparable transaction to

142 Award, ¶ 693(second bullet point).

143 Award, ¶ 693(third bullet point).

144 Award, ¶ 693(third bullet point).

145 Award, ¶ 697.

146 Award, ¶ 697.

147 Memorial, ¶ 145.

148 Counter-Memorial, ¶ 146.

149 Award, ¶ 693(first bullet point).

be the primary and most relevant evidence or its rejection of the First Confineks Valuation was arbitrary.

131. Moreover, even Serbia agrees that "*there was indeed a consensus among experts about the principle that a valuation should, to the extent possible, be based on actual comparable transactions*".[150] Therefore, comparable transactions, if available, should be used before any other types of the evidence.

132. Crucially, there were at least two extremely relevant comparable transactions from Dobanovci (the municipality where the Construction Land is located), presented by Ms. Ilić herself.[151] In those transactions, the relevant land plots sold at EUR 28.4 per m^2 in July 2015 (*i.e.* only *three months* before the Valuation Date),[152] and at EUR 33.95 per m^2 in August 2015 (*i.e.* only *two months* before the Valuation Date).[153]

133. While Ms. Ilić tried to argue that these land plots were not comparable to the Construction Land because of their location, the Hearing clearly demonstrated this was not the case.[154] The plots are in fact very close to BD Agro's Construction Land: one is immediately adjacent to BD Agro's property[155] and the other is located in another industrial zone in the close vicinity of BD Agro.[156]

134. Serbia's assertion that "*Claimants' experts also never used these properties for their valuations*" is simply false.[157] Dr. Hern included these transactions in his opening presentation at the Hearing,[158] and so did Mr. Grzesik:

> [T]his is in Danijela Ilic's report, she did actually identify two actual transaction prices, the highest type of evidence which a valuer could hope for, and item 1 here was a sale of two land plots at €33.95/m2 and Surcin in Dobanovci, €28.4. What is particularly relevant here is

150 Counter-Memorial, ¶ 147.

151 Ilić First ER, Appendix 2, table 2.6, p. 142(pdf).

152 Ilić First ER, Appendix 2, table 2.6, p. 142(pdf).

153 Ilić First ER, Appendix 2, table 2.6, p. 142(pdf).

154 Ilić First ER, ¶ 9.90.

155 Ilić First ER, Appendix 2, table 2.6 at p. 142(pdf).

156 Ilić First ER, Appendix 2, table 2.6 at p. 142(pdf).

157 Counter-Memorial, ¶ 149.

158 Transcript, Hearing on Jurisdiction and Merits, Day 8, 20 July 2021, pp. 15:13 – 16:18 (Hern); Video recording, Hearing on Jurisdiction and Merits, Day 8, 20 July 2021, time: 0:25:21-0:27:34.

> item 2 is a site which is actually adjacent to the BD Agro land, and therefore I can't understand why this comparable transaction was rejected. I would have thought it's highly relevant, it's right next to the BD Agro farm.[159]

135. Claimants also referred to these two transactions in their post-hearing submission in support of their valuation of the Construction Land.[160]

136. Most importantly, the Tribunal did not reject these two comparable transactions. As Mr. Rand explains in detail in **Section II.A.1.f.vi.161** below, the Tribunal simply ignored them. Therefore, the problem with the Tribunal's reasoning is not deciding "*who was right*", as Serbia alleges.[161] The problem is that the Tribunal did not consider available and highly relevant actual transactions and, without rejecting those transactions, resorted to asking prices. This squarely contradicts the Tribunal's first valuation principle that the valuation should be based on actual comparable transactions as the primary, most relevant evidence.

ii. Asking prices have the lowest evidentiary value and the valuation should not rely on asking prices with no corresponding information about dates and sources of these prices

137. Serbia does not contest that the Tribunal adopted this principle.[162] Indeed, the Tribunal specifically referred to a statement of Mr. Grzesik that "*if you are relying on asking prices, then as much information as possible is needed, because asking prices are the lowest level of evidence that you can use in a valuation*."[163]

138. Mr. Rand explained already in the Memorial that Ms. Ilić's valuation does not comply with the Tribunal's second valuation principle. This is because it relies solely on five asking prices, *i.e.* the evidence with the lowest evidentiary value, even though highly relevant comparable market evidence was available. Moreover, as explained above, Ms. Ilić relies on these five asking prices without providing proper information about them. The advertisements referred to by Ms. Ilić do not show the location of the land

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159 Transcript, Hearing on Jurisdiction and Merits, Day 7, 19 July 2021, pp. 62:3-12 (Grzesik).

160 Claimants' First Post Hearing Brief, ¶¶ 308-312.

161 Counter-Memorial, ¶ 150.

162 Award, ¶ 693(second bullet point) and fn. 555.

163 Award, fn. 555.

plots, some do not show any date, and the description of the individual land plots is extremely limited.[164]

139. In the Counter-Memorial, Serbia admits that two out of the five sources are missing a date. Serbia, however, argues that Ms. Ilić "*represented that [the two asking prices from 2015] were published before the valuation date*".[165] This is not true. Ms. Ilić made no such representation.

140. Serbia's argument that "*Claimants never […] raised the question of whether two advertisements from 2015 were published before or after the Valuation Date*" is a red herring.[166] Claimants had no reason to raise this issue before the Tribunal concluded that only evidence post-dating the Valuation Date is relevant—and the Tribunal only did so in the Award.

141. Moreover, it is not possible to determine where any of the advertised plots were located. Serbia itself admits that only two out of the five sources contain a map.[167] However, even those two maps do not show where on the map the respective plots were allegedly located.

142. The fact that it is impossible to locate the advertised plots was confirmed at the Hearing by Serbia's quantum expert, Mr. Cowan.[168] Serbia's argument that Mr. Cowan was not able to identify the location of individual land plots because he was shown only one advertisement is clearly false.[169] Mr. Cowan was shown all five advertisements contained in exhibit RE-561 and confirmed that he could not determine the location of any of them.[170] In addition, Mr. Cowan explicitly confirmed that he had reviewed Ms. Ilić's reports, which discuss the advertised plots, before his

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164 Asking prices for KO Dobanovci, **RE-561**.

165 Counter-Memorial, ¶ 154.

166 Counter-Memorial, ¶ 156.

167 Counter-Memorial, ¶ 157.

168 Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 143:17-146:18 (Cowan); Video recording, Hearing on Jurisdiction and Merits, Day 8, 20 July 2021, time: 4:27:39-4:33:27.

169 Counter-Memorial, ¶ 157.

170 Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 143:17-146:18 (Cowan); Video recording, Hearing on Jurisdiction and Merits, Day 8, 20 July 2021, time: 4:27:39-4:33:27.

testimony at the hearing.[171] The fact that Mr. Cowan was not able to identify the location of any of the advertised plots, even though he had reviewed Ms. Ilić's reports discussing these land plots, further confirms that their location cannot be determined.

143. In an attempt to downplay the contradiction in the Tribunal's reasoning, Serbia argues that *"[t]o question and examine this evidence now, would go against the rule that assessment of evidence is a prerogative of the Tribunal and not a matter for annulment proceedings.*"[172] To be clear, Mr. Rand does not ask the Committee to *de novo* re-examine evidence. Mr. Rand merely asks the Committee to assess clear contradictions in the Tribunal's reasoning.

iii. The valuation should only rely on evidence from comparable areas—the Tribunal specifically identified Batajnica as a noncomparable area

144. The Tribunal formulated this principle when it rejected Dr. Hern's upper bound valuation of the Construction Land based on the Batajnica transactions, noting that the Batajnica land is closer to a settlement and to an existing major traffic infrastructure.[173]

145. In the Counter-Memorial, Serbia alleges that the Tribunal only noted incomparability between the location of the *specific* land in Batajnica referred to by Dr. Hern and the Construction Land.[174] That is not true.

146. The Tribunal explicitly based this distinction on the fact that "*Dr. Hern initially made a reservation about the comparability of the Batajnica land with [the Construction Land]*".[175] The Tribunal referred to a statement by Dr. Hern that " *[t]he Batajnica region is broadly comparable to BD Agro's land […] [h]owever, while the Batajnica*

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171 Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 142:25-143:07 (Cowan):
"*[Mr. Cowan:] I was instructed to rely on the valuation of Ms Ilic.*
[Mr. Pekar:] Did you independently assess the reasonableness of this instruction?
[Mr. Cowan:] I reviewed the report of Ms Ilic, and I considered, when taking into account Dr Hern's land valuation, and Mr Grzesik's land valuation, that Ms Ilic's land valuation was appropriate to rely on in this situation, yes."

172 Counter-Memorial, ¶ 155.

173 Award, ¶ 693 (third bullet point)(iii).

174 Counter-Memorial, ¶ 160.

175 Award, ¶ 693 (third bullet point)(iii).

region lies next to the E75 road […] BD Agro would have to rely on the Sremska Gazela for a connection to the E70".[176] Therefore, the alleged incompatibility clearly concerned the entire "*Batajnica region*", not just a specific land plot.

147. Despite this fact, the Tribunal then relied on an asking price (one of five) for the land that was located in Batajnica. As a result, the valuation of the Construction Land proposed by Ms. Ilić and adopted by the Tribunal does not comply with the Tribunal's third valuation principle.[177]

iv. The valuation should only rely on evidence pre-dating the Valuation Date

148. Serbia does not dispute that the Tribunal expressly formulated this principle. However, Serbia argues that while the Tribunal "*considered that the valuation should rely on information pre-dating the Valuation Date*" such information, according to Serbia, "*could be contained in evidence post-dating*" the Valuation Date.[178] This is not the case.

149. Serbia's interpretation—that evidence originating after the Valuation Date can be used as long as the underlying information pre-dates the Valuation Date—contradicts the valuation standards accepted by both Parties' experts. Specifically, Serbia's expert, Ms. Ilić, criticized Claimants' experts for using "*evidence*" post-dating the Valuation Date:[179]

176 Hern First ER, ¶ 69; Award, fn. 560.

177 Ilić First ER, Appendix 2, table 2.6, p. 145(pdf).

178 Counter-Memorial, ¶ 161.

179 Ilić First ER, ¶ 4.3.

> Date of valuation of the first expert report prepared by Dr. Hern[26] is 21st October 2015 i.e. date when the Privatization Agency rendered the decision on transfer of BD Agro's capital from Mr. Djura Obradovic to Privatization Agency[27]. According to the European Valuation Standards valuation date is defined as:
>
> *"The date to which the opinion of value applies (and for which the evidence supporting it is to be relevant) which cannot be later than the date when the valuation report is completed.[28]*
>
> All qualified valuers undertaking role of reviewers should also use only evidence which occurred before the date of valuation as well as call upon valuation standards which were in force at the date of valuation[29].

150. As explained above, the relevance of the Valuation Date is that the Tribunal calculated the fair market value of BD Agro's assets as of this date. The definition of the fair market value, which is undisputed between the Parties, requires that both a willing buyer and a willing seller act "*knowledgeably*", *i.e.* based on information available to them:

> The estimated amount for which the property should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.[180]

151. As a result, when calculating the fair market value, one must take into consideration what information was available as of the Valuation Date because only such information could enter into the decision-making process of a willing buyer and a willing seller. If information existed as of the Valuation Date but was only made available in evidence post-dating the Valuation Date, it cannot be taken into consideration because it was not available to a willing buyer and a willing seller at the relevant time on the Valuation Date.

152. The Tribunal's intention to exclude evidence post-dating the Valuation Date (as opposed to "*information*") is also evident from its reasoning relating to the size of BD Agro's Construction Land. The Tribunal explicitly rejected Serbia's argument that certain disputes over BD Agro's land were pending as of the Valuation Date, because BD Agro was still the legal owner of the land.[181] This conclusion confirms that any

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180 Grzesik ER, ¶ 6.1; Ilić First ER, ¶ 10.2.

181 Award, ¶ 690, second bullet point.

subsequent judgment would not be considered by the Tribunal, even if it was entirely based on information pre-dating the Valuation Date.

153. Despite expressly stating that the valuation should only rely on evidence pre-dating the Valuation Date, the Tribunal then based its valuation of the Construction Land on two asking prices submitted by Serbia without any evidence of their date. As such, it was impossible for the Tribunal to confirm that these two asking prices pre-dated the Valuation Date. The Tribunal, thereby, contradicted its fourth valuation principle.

v. A discount is justified where evidence used in the valuation relates to comparable land with better access to infrastructure

154. It is undisputed that the Tribunal adopted this principle.[182] Despite this fact, the Tribunal accepted Ms. Ilić's valuation, which clearly does not comply with this principle. As explained in detail above, Ms. Ilić's valuation of the Construction Land includes a 30% discount, even though there is no evidence of differences in access to infrastructure between the Construction Land and the land plots that were the subject of the asking prices used by Ms. Ilić.[183]

155. On the contrary, as demonstrated in **Section II.A.1.e.i** above, the land plots subject to the asking prices used by Ms. Ilić clearly do not have better access to infrastructure compared to the Construction Land.[184]

156. Without any evidence of any differences warranting a discount, the Tribunal clearly contradicted its fifth valuation principle by accepting the discount proposed by Ms. Ilić.

vi. Smaller land plots are more valuable per m^2 than comparable larger land plots

157. The Tribunal expressly formulated this principle in the Award: "*Dr. Hern himself accepted that size does matter when commenting that, in one transaction, the large*

182 Award, ¶ 697.

183 Memorial, ¶¶ 157-159.

184 Asking prices for KO Dobanovci, **RE-561**. *See supra*, ¶¶ 108-115.

area of BD Agro's land on sale may have pushed the price down".[185] Serbia disputes this and argues that "*the Tribunal considered but rejected the idea that bigger size of land plots in comparison with comparables justifies a price discount.*"[186] That is false.

158. The Tribunal only stated that "*BD Agro may have been able to split its land in smaller parcels before selling it, making any discount on the sale of the land as a whole inapposite*".[187] That only confirms the Tribunal's general consideration that smaller plots are indeed more valuable than larger plots.

159. As explained above, Ms. Ilić's valuation does not comply with the Tribunal's sixth valuation principle, because it applies a discount to the value of BD Agro's Construction Land, even though the size of the parcels constituting the Construction Land is actually smaller than the median size of the comparators used by Ms. Ilić.[188] As a result, to be consistent, the Tribunal should have—based on its own conclusion that smaller plots are, generally, more valuable than larger plots—applied a premium to the valuation of the Construction Land.

* * *

160. In the Counter-Memorial, Serbia admits that "*genuine contradictions*" which are "*incapable of standing together on any reasonable reading of the decision*" would warrant annulment.[189] That is exactly the case here. If the Tribunal had followed the first four valuation principles that it itself formulated, it would have necessarily concluded that *none* of the five asking prices identified by Ms. Ilić should be relied upon in the valuation of the Construction Land.

161. In addition, if the Tribunal followed its fifth and/or sixth valuation principle, it would have necessarily concluded that no discount should be applied to the valuation of the Construction Land. Instead, it should have applied a premium.

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185 Award, ¶ 697.

186 Counter-Memorial, ¶ 165.

187 Award, ¶ 697.

188 Ilić First ER, ¶ 9.1 (correctly should be 9.93).

189 Counter-Memorial, ¶ 78.

2. The Tribunal ignored key evidence when valuing the Construction Land

162. When addressing the valuation of the Construction Land, the Tribunal only addressed evidence on which Claimants relied for their upper and lower bound valuation.[190] The Tribunal did not address—*without any explanation*—other relevant evidence relied on by Claimants. Specifically, the Tribunal ignored:

a. documents from the Serbian Tax Administration based on actual comparable transactions in the Nova Pazova and Stara Pazova regions;[191]

b. the Second Confineks Valuation;[192] and

c. two highly relevant actual comparable transactions with construction land in Dobanovci from 2015, presented by Ms. Ilić.[193]

163. As Mr. Rand demonstrated in the Memorial, this evidence supports a significantly higher value of the Construction Land than the value ultimately adopted by the Tribunal.[194] Specifically, the Pazova transactions point to a value of 20 to 27 EUR per m^2;[195] the Second Confineks Valuation valued the Construction Land at 24 EUR per m^2;[196] and the two actual comparable transactions in Dobanovci from 2015 presented by Ms. Ilić support an average price of 31.17 EUR per m^2.[197] The value adopted by the tribunal is a mere 14.7 EUR per m^2.[198]

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190 Award, ¶ 693.

191 Hern First ER, ¶¶ 64, 68.

192 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, January 2016, **CE-172**.

193 Ilić First ER, Appendix 2, table 2.6, p. 142(pdf).

194 Specifically, the Tribunal adopted a value of 14.7 EUR per m2, while (*i*) the Pazova transactions point to a value of 20 to 27 EUR per m2; (*ii*) the Second Confineks Valuation valued the Construction Land at 24 EUR per m2; and (*iii*) the two actual comparable transactions in Dobanovci from 2015 presented by Ms. Ilić support an average price of 31.17 EUR per m2.

195 Hern First ER, ¶ 68.

196 Hern First ER, ¶ 79.

197 Ilić First ER, Appendix 2, table 2.6 at p. 142(pdf).

198 Award, ¶ 694.

a. The Pazova transactions

164. In his expert report, Dr. Hern explained that he used the Pazova transactions in his valuation because they were comparable to the Construction Land.[199] In the Counter-Memorial, Serbia argues that "*Dr. Hern mentioned the 'Pazova' transactions only as secondary evidence confirming his reliance on the Mr. Mrgud's valuation.*"[200] Serbia's argument misses the mark. Just because Dr. Hern did not use the Pazova transactions as primary evidence for the upper bound of his valuation, does not mean that this evidence was not relevant and could be completely ignored.

165. Serbia also argues that the Pazova transactions were assessments by the tax administration and originated after the Valuation Date. Therefore, Serbia alleges that they were implicitly rejected by the Tribunal, when it rejected the Batajnica transactions for the same reasons.[201] First, there is nothing in the Award that would confirm this interpretation, or that would even imply that this was indeed the Tribunal's thinking. Without any such explanation, it is not possible to overcome the Tribunal's silence concerning the Pazova transactions. In addition, it is not true that all Pazova transactions post-date the Valuation Date–at least one of the Pazova transactions was from 2013.[202]

166. Therefore, there is no justification for the Tribunal ignoring this highly relevant evidence submitted by, and relied upon, by Claimants.

b. Second Confineks Valuation

167. Regarding the Second Confineks Valuation, Serbia alleges that "*Dr. Hern in fact never relied upon it in his valuation of the construction land*".[203] It is true that Dr. Hern relied on the First Confineks Valuation, but he noted that it does not substantially differ from the Second Confineks Valuation.

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199 Hern First ER, ¶ 68.

200 Counter-Memorial, ¶ 173.

201 Counter-Memorial, ¶ 174.

202 Tax Administration Branch B Stara Pazova (23 12 2016), Number 235-464-08-00090/2016-J2B02, Delivery on Information Request, 23 December 2016, p. 2 (pdf), **CE-158**.

203 Counter-Memorial, ¶ 169.

168. Even more importantly, the Tribunal used the Second Confineks Valuation as evidence for the value of BD Agro's liabilities.[204] The Tribunal cannot use the Second Confineks Valuation for one part of the valuation and then reject it when it comes to another part (*i.e.* valuation of assets) without providing any explanation for such an approach.

c. Two highly relevant actual comparable transactions

169. The most important evidence ignored by the Tribunal were two highly relevant actual transactions concerning construction land in Dobanovci from 2015. These transactions were identified by Ms. Ilić and subsequently relied upon by both Claimants' and their experts.[205]

170. For example, Dr. Hern expressly stressed the importance and relevance of these transactions during his presentation at the Hearing:[206]

> Dr. HERN: Having said that, and this is something that I was also not able to respond to in my reports because it came too late, but I think *Ms Ilić did identify some transaction evidence that is indeed very relevant, and we talked a bit about this yesterday, but there are two particular transactions that Ms Ilić identified for very similar land to BD Agro's land; indeed that land, for one of the transactions, is located right next to BD Agro's farm, and you can see here on slide 17 the transaction of €28.4/m2 at a very similar date to the date we are talking about here in 2015, and the land is located right next to BD Agro's farm, where the road that passes past that transaction goes into BD Agro's farm and then connects to Zones A, B and C*.

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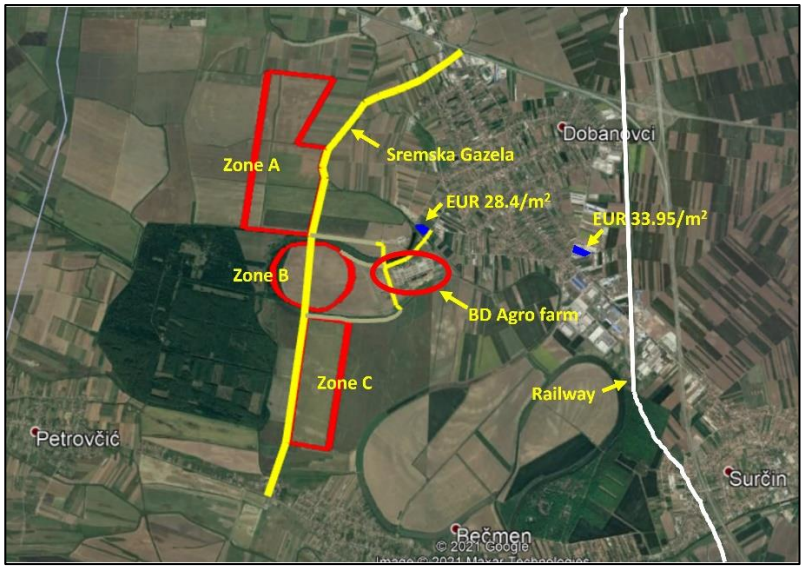
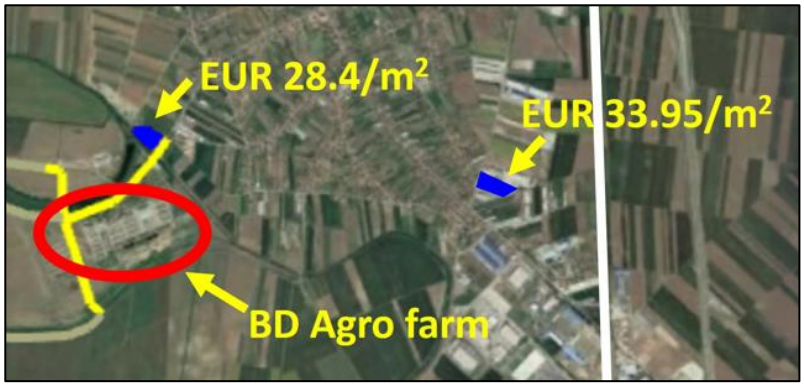
204 Award, ¶ 699.

205 Transcript, Hearing on Jurisdiction and Merits, Day 7, 19 July 2021, 62:2-62:12 (Grzesik); Transcript, Hearing on Jurisdiction and Merits, Day 8, 20 July 2021, 15:13-16:1 (Hern); Claimants' First PHB, ¶¶ 296, 308-312; Claimants' Second PHB, ¶ 120(b).

206 Transcript, Hearing on Jurisdiction and Merits, Day 8, 20 July 2021, 15:13-16:1 (Hern); Opening presentation of Dr. Hern, 20 July 2021, slide 17.





171. Serbia's assertion that "*none of Claimants' experts relied on these two transactions in their valuations of [the Construction Land]*" is, thus, simply false.[207] For the sake of completeness, neither Dr. Hern, nor Mr. Grzesik could have addressed these transactions in their written reports because Ms. Ilić only identified these two transactions in her report from 23 January 2020, *i.e.* after Mr. Grzesik submitted his expert report and after Dr. Hern submitted his first two expert reports.[208]

172. In addition, Claimants also referred to this evidence in their post-hearing submissions.[209] In particular, Claimants showed that one of these two transactions was with a land plot literally adjacent to BD Agro and took place in July 2015—only

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207 Counter-Memorial, ¶ 176.

208 Although Dr. Hern later submitted his Third Expert Report, he could not have addressed this issue because the scope of the report was limited to responding to new issues raised in Ms. Ilić's First Report and Mr. Cowan's Second Report. *See* Hern Third ER, ¶ 9.

209 Claimants' First PHB, ¶ 309.

three months before the Valuation Date. As Claimants explained, this was by far the most relevant piece of evidence for the valuation of the Construction Land.[210]

173. While Ms. Ilić eventually tried to argue that these two transactions were not comparable, the Hearing demonstrated that her position to be untenable. Specifically, Ms. Ilić argued that these two transactions were allegedly not comparable because they were—unlike the Construction Land—located in a residential area. This is not true.

174. In fact, Ms. Ilić admitted during her cross-examination that one of the land plots subject to these two transactions was in fact adjacent to BD Agro's Construction Land.[211] Ms. Ilić also admitted that this land plot was surrounded by fields to the north and west, by non-residential buildings to the east and by BD Agro's premises to the south.[212] As a result, this land plot clearly was not located in the residential area.

175. More importantly, even if Ms. Ilić were correct (*quod non*), this would change nothing to the fact that the Tribunal ignored these two transactions without any explanation. As explained in the Memorial, failure to observe relevant evidence constitutes a ground for annulment. The *ad hoc* committee in *Teco* v. *Guatemala* expressly stated that the *Teco* tribunal's decision was annullable because the tribunal "*failed to observe evidence which at least had the potential to be relevant to the final outcome of the case.*"[213]

176. In the Counter-Memorial, Serbia attempts to draw a distinction between *Teco* and the present case. Serbia argues that in *Teco,* the tribunal ignored expert reports provided by the parties, while the present Tribunal did engage with the expert reports to an extent.[214] However, Serbia conveniently omits to acknowledge that ignorance of expert reports was just one of the annullable flaws in *Teco*. Another flaw was the tribunal ignoring other, highly relevant evidence:

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210 Claimants' First PHB, ¶ 312.

211 Tr., Hearing on Jurisdiction and Merits, Day 7, 19 July 2021, 149:25-150:22 (Ilić); Video recording, Hearing on Jurisdiction and Merits, Day 7, 19 July 2021, time: 5:04:27-5:06:21.

212 Tr., Hearing on Jurisdiction and Merits, Day 7, 150:23-151:07 (Ilić).

213 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 135, **CLA-186**.

214 Counter-Memorial, ¶¶ 184-185.

> Second, the Tribunal failed to explain why it considered that the record contained "no evidence... of how the transaction price has been determined" when in actuality the record included both EPM's Non-Binding Offer Letter and Citibank's Fairness Opinion, which related to this issue even according to Guatemala. The Committee wishes to again stress that it is not addressing the Tribunal's assessment of the record before it, something which is not within its powers to do. The Committee cannot and will not make any finding with respect to the relevance or otherwise of these two pieces of evidence. The Committee limits itself to observing that, contrary to the Award's explicit holding, evidence on the issue existed. *And while the Tribunal was within its right to hold that this evidence was unpersuasive, immaterial, or insufficient, it did not make any such finding,* but one of nonexistence. Taking the Tribunal's words at face value, the Committee can only conclude that the Tribunal ignored this evidence.[215]

177. Serbia's attempt to distinguish the *Teco* decision, thus, clearly fails. Serbia's argument that because the Tribunal concluded that it "*finds Ms. Ilic's overall approach reasonable*", it therefore automatically accepted also her exclusion of the two Dobanovci transactions is equally misplaced. The Tribunal made this statement with respect to the 30% discount, not in reference to the exclusion of the two transactions.[216]

178. Serbia's assertion that "*Arbitration Rule 34(1), […] makes the tribunal sole judge of the probative value of evidence*" is equally inapposite.[217] The Tribunal simply cannot ignore relevant evidence—much less without any explanation. This was, once again, confirmed by the *Teco* committee:

> While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, *that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory*.[218]

179. As explained above, Claimants clearly "*placed significant emphasis*" on the evidence ignored by the Tribunal. As a result, if the Tribunal wanted to reject this evidence, it

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215 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 133, **CLA-186**.

216 Award, ¶ 696.

217 Counter-Memorial, ¶ 66.

218 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 131 (emphasis added), **CLA-186**.

should have provided an explanation for why it considered this evidence insufficient, unpersuasive or otherwise unsatisfactory. It is undisputed that the Tribunal did not do so.

180. Finally, the evidence ignored by the Tribunal clearly had "*the potential to be relevant to the final outcome of the case*" because it suggested a significantly higher valuation of the Construction Land than that adopted by the Tribunal in the Award. For example, the two ignored Dobanovci transactions indicate a value of comparable land of EUR 31.17 per square meter,[219] giving the Construction Land a total value of EUR 87 million—*i.e.* **EUR 45 million higher** than the Tribunal's valuation of EUR 42 million.[220]

* * *

181. In summary, it is evident that the Tribunal's reasoning with respect to its valuation of the Construction Land is severely deficient. It does not provide a reasonable basis for the Tribunal's decision, it is replete with internal contradictions and it completely ignores extremely relevant evidence. This failure to state reasons had a significant impact on the outcome of the case. The individual impact of the various issues with respect to which the Tribunal provided contradictory or insufficient reasoning is:

a. between **EUR 36 million** and **EUR 61 million** with respect to the Tribunal's rejection of the Batajnica transactions;[221]

b. **EUR 25 million** with respect to the Tribunal's rejection of the First Confineks Valuation;[222]

c. **EUR 45 million** with respect to the Tribunal's rejection of Mr. Mrgud's valuation;[223]

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219 Ilić First ER, Appendix 2, table 2.6, p. 142(pdf).

220 Award, ¶ 707.

221 Memorial, ¶¶ 101, 108.

222 Memorial, ¶ 114.

223 Memorial, ¶ 121.

d. between **EUR 18 million** and **EUR 25 million** with respect to the Tribunal's application of the 30% discount;[224]

e. **EUR 45 million** with respect to the Tribunal's ignoring of the two Dobanovci transactions;[225]

f. **EUR 25 million** with respect to the Tribunal's ignoring of the Second Confineks Valuation;[226] and

g. between **EUR 14 million** and **EUR 33 million** with respect to the Tribunal's ignoring of the Pazova transactions.[227]

182. The Tribunal's absent, contradictory and insufficient reasoning falls short of the requirement to state reasons under Article 48(3) of the ICSID Convention and, as such, represents an error annullable under Article 52(1)(e) of the ICSID Convention.

B. The Tribunal failed to provide *any* reasons for its valuations of BD Agro's other assets

183. The Tribunal did not provide *any* reasoning whatsoever with respect to its valuation of BD Agro's assets other than the Construction Land.[228]

184. The Tribunal divided BD Agro's remaining assets into the following categories:[229]

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224 Memorial, ¶¶ 127, 143.

225 Memorial, ¶ 178.

226 Memorial, ¶ 89(d)(ii); Award, ¶¶ 691, 707.

227 Memorial, ¶ 89(b)(iii); Award, ¶¶ 691, 707.

228 Memorial, § IV.C.

229 Award, ¶ 707.

At 21 October 2015 in EUR m	Value in EUR m
Dobanovci Development Land [Construction Land]	41.9
Other Construction Land	1.3
Novi Becej	0.2
Non-farm assets	**43.4**
Agricultural land	6.4
Other fixed assets	18.8
Current assets	5.0
Deferred tax assets	0.1
Farm Assets	30.3
Total assets	**73.7**

185. Serbia does not dispute that the Tribunal did not provide any reasoning for the valuation of these assets. However, Serbia notes that the Award includes a footnote that states the following: "*This table is based on the table in Cowan ER III, §4.4, after adjusting it as necessary in light of the Tribunal's conclusions above.*"[230] This footnote does not—and cannot—represent sufficient reasoning for the valuation of BD Agro's remaining assets.

186. To begin with, it is completely unclear what the Tribunal meant when it stated that the table was "*based on*" the table provided in Mr. Cowan's third report. It is equally unclear to what "*conclusions above*" the Tribunal intended to refer to—as no discussion of BD Agro's remaining assets is provided anywhere in the Award.

187. More importantly, the Tribunal provided no explanation for why the valuation of BD Agro's remaining assets should be based on Mr. Cowan's valuation, rather than Dr. Hern's valuation of the same assets. The Tribunal's decision, thus, clearly suffers from an absence of reasons.

230 Award, fn. 593; Counter-Memorial, ¶¶ 201-202, 206.

188. Serbia agrees that a complete absence of reasons represents a reason for annulment.[231] Indeed, in the words of the *Pey Casado v. Chile (I)* committee, "*as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow*".[232]

189. Serbia, however, also argues that while the Tribunal did not explain the reasons for its valuation of BD Agro's remaining assets, it was enough for the Tribunal to refer to Mr. Cowan's report.[233] According to Serbia, this is the case because the Tribunal's reasoning can be implied from this reference.[234]

190. Mr. Rand submits this is not a correct interpretation of Article 52(1)(e) because both Article 52(1)(e) and Article 48(3) of the ICSID Convention expressly require the tribunal to "*state*" the reasons for its decisions. The ordinary meaning of the verb "*state*" requires that the reasons be expressly set out in the award, rather than merely inferred or inferable.

191. Mr. Rand further notes that even the handful of *ad hoc* committees that entertained the proposition that the tribunal's reasons may be inferred imposed important limitations on such a possibility. For example, the *ad hoc* committee in *Rumeli v. Kazakhstan* held that the reasons for an award need not be stated expressly, but only if they are "*evident and a logical consequence of what is stated in an award.*" On the other hand, "*if such reasons do not necessarily follow or flow from the award's reasoning,* ***an ad***

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231 Counter-Memorial, ¶ 189. *See also e.g.*, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 97, **RLA-152**. The *ad hoc* committee found a breach of Article 52(1)(e) of the ICSID Convention on the basis that "*there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point*". *See also Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, ¶ 141, **CLA-189**.

232 *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 86, **CLA-192**.

233 Counter-Memorial, ¶ 190.

234 Counter-Memorial, ¶¶ 201-202, 206.

hoc committee should not construct reasons in order to justify the decision of the tribunal".[235]

192. The *CMS ad hoc* committee reached the same conclusion and found that the *CMS* tribunal failed to state reasons for its decision that Argentina breached the umbrella clause *vis-à-vis* CMS.[236] The committee reached that conclusion and partially annulled the award even though there was a possible implicit explanation for the tribunal's decision.

193. The committee observed that CMS offered a literal interpretation of the umbrella clause, alleging that it was sufficient that Argentina entered into legal obligations "*with regard to investments*".[237] The committee found that "*[i]t is implicit in [the] reasoning that the Tribunal may have accepted [CMS's] interpretation*" of the umbrella clause,[238] but held that this implicit acceptance was not sufficient. According to the *CMS* committee, while the tribunal's decision *could* be based on CMS's interpretation, there was nothing in the award that would confirm that this was actually the case:

> In the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN. *It could have done so by the above interpretation* of [the umbrella clause], *but in that case one would have expected a discussion of the issues of interpretation referred to above*. […]
>
> *In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point*. *It is not the case that answers to the question raised "can*

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235 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, 25 March 2010, ¶ 83 (emphasis added), **RLA-250**.

236 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶¶ 90-97, **RLA-152**.

237 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 92, **RLA-152**.

238 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 94, **RLA-152**.

> *be reasonably inferred from the terms used in the decision"; they cannot.*[239]

194. The situation is the same in the present case. There are no "*terms used*" in the Award that would allow the Parties to "*reasonably infer*" reasons that led the Tribunal to assign the specific value to individual categories of BD Agro's remaining assets.

195. Serbia's reliance on the annulment decisions in *Wena v. Egypt, Vivendi v. Argentina* and *Enron v. Argentina* is inapposite.[240] In reality, none of these decisions confirms Serbia's position.

196. The *ad hoc* committee in *Wena v. Egypt* concluded that the reasons might be "*implicit in the* ***considerations and conclusions*** *contained in the award, provided they can be* ***reasonably inferred from the terms used in the decision.***" The *ad hoc* committee also confirmed that the parties must "*be able to understand the Tribunal's reasoning*".[241]

197. In the present case, there is nothing in the Award that could possibly allow the Parties to understand—even implicitly—what reasons led the Tribunal to assign the specific value to individual categories of BD Agro's remaining assets. The one table and the one footnote reproduced above do not allow the reader of the Award to make any specific inference, let alone to understand the Tribunal's reasoning.

198. Serbia's reliance on the decision of the *ad hoc* committee in *Enron v. Argentina*, which simply quoted the conclusions of the *Wena ad hoc* committee, fails for the same reasons.[242]

199. The decision of the *ad hoc* committee in *Vivendi v. Argentina* does not assist Serbia's claim either. The *ad hoc* committee held that "*questions*" may be "*implicitly dealt with*"[243]—but, in this case, the Tribunal did not deal with the valuation of BD Agro's

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239 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶¶ 96-97 (emphasis added), **RLA-152**.

240 Counter-Memorial, ¶¶ 73-76, fn. 317.

241 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision, 5 February 2002, ¶ 81 (emphasis added), **CLA-185**.

242 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶ 75, **RLA-232**.

243 Counter-Memorial, fn. 321.

remaining assets in any manner, either explicitly or implicitly. The Tribunal simply put several numbers in a table in the Award. This is a complete absence of reasons rather than any form of implicit reasoning.

200. In the Memorial, Mr. Rand also referred to the annulment decision in *Watkins Holdings v. Spain*, which confirmed that "*[a] mere statement by the tribunal of its findings without more would not constitute reasons in an award*."[244] In response, Serbia cites the *Watkins Holdings* decision, arguing that a tribunal need not deal with each single argument or point made by parties, as long as it addresses the key points and connects them to the ruling, so that an informed reader can follow and comprehend the tribunal's reasoning:[245]

> Reasons, however, need not be a long narration of the full technical aspects of the considerations resulting in a decision *as long as the key points or pivots are identified and connected to the finding or ruling*, and they do not need to address every single argument or point made by the parties but rather *respond to the parties' underlying positions and theories* that support their respective cases.[246]

201. This only confirms Mr. Rand's case. The Tribunal in this case fell short of the standard formulated by the *Watkins Holdings* annulment decision—it said nothing about the "*key points or pivots*" and did not respond to the "*underlying positions and theories*" of the Parties.

202. Despite the Tribunal's evident and complete failure to state reasons with respect to its valuation of six categories of BD Agro's assets, Mr. Rand is requesting annulment of only two—(*i*) "*Novi Becej*"; and (*ii*) "*current assets*". As explained in the Memorial, the Parties' valuations of the remaining four categories of assets were not widely different and the Tribunal's valuation was always between the values advocated by the Parties. The remaining two categories are discussed *seriatim* below.

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244 *Watkins Holdings S.à r.l. and others v. Kingdom of Spain,* ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, ¶ 133, **CLA-207.**

245 Counter-Memorial, ¶¶ 194-195.

246 *Watkins Holdings S.à r.l. and others v. Kingdom of Spain,* ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, ¶ 133, **CLA-207**.

1. The "*Novi Becej*" castle and land

203. As Mr. Rand explained in the Memorial, the Tribunal did not provide any explanation for the assets included in the category it called "*Novi Becej*", nor did it provide any reasoning on their EUR 0.2 million value.[247] This is a significant flaw because the Parties included different assets in their respective valuations of the Novi Becej assets.

204. Claimants' valuation included BD Agro's co-ownership of the Dundjerski castle, agricultural, forest and construction land surrounding the castle.[248] Serbia's expert, Ms. Ilić, recognized the castle's existence, as well as BD Agro's ownership over the castle, but she did not include it in her valuation.[249] Mr. Cowan adopted Mr. Ilić's valuation of "*Novi Becej*".[250]

205. The Tribunal did not provide any reasons, and it is therefore unclear whether or not the Tribunal's valuation of "*Novi Becej*" includes the castle.

206. In the Counter-Memorial, Serbia argues that Mr. Cowan allegedly included the castle in the valuation of another category of BD Agro's assets—the "*other fixed assets*".[251] That is irrelevant. The issue is not whether Serbia included the castle anywhere in its valuation. The issue is that the Parties approached the valuation of the "*Novi Becej*" assets differently, and the Award does not explain whether the Tribunal accepted one of these approaches and, if so, why.

207. Moreover, Serbia's allegation that Mr. Cowan included the castle in "*other fixed assets*" is doubtful. Mr. Cowan placed the item of "*other fixed assets*" under "*Farm Assets*".[252] The castle is clearly not a farm asset and was never used as such. It would make no sense for Mr. Cowan to include the castle under "*Farm assets*". What is more, Mr. Cowan himself drew a parallel between his valuation of "*Novi Becej*" (*i.e.*

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247 Award, ¶ 707.

248 *E.g.*, Hern First ER, ¶ 116.

249 Ilić First ER, ¶¶ 9.75-9.78.

250 Cowan Second ER, ¶ 4.3.

251 Counter-Memorial, ¶ 199.

252 Cowan Third ER, ¶ 4.4.

the land) and Dr. Hern's valuation of "*Novi Becej*" (*i.e.* both the land and castle), suggesting that he did not take the castle into account:[253]

BD Agro - Comparison of Dr Hern's and my valuations

at 21 October 2015 'in €'m	Dr Hern's valuation (lower bound)	Dr Hern's valuation (upper bound)	All land		Excluding contested land	
			My valuation bankruptcy scenario	My valuation going concern scenario	My valuation bankruptcy scenario	My valuation going concern scenario
Dobanovci Development Land	63.6	85.5	41.9	41.9	25.7	25.7
Other construction land	1.2	3.8	1.3	1.3	0.9	0.9
Novi Becej	0.8	0.8	0.2	0.2	-	-
Non-farm / Non-core assets	65.6	90.0	43.4	43.4	26.6	26.6

208. Therefore, given the complete lack of reasoning and Parties' diverging submissions, it is unclear whether the castle was included in the Tribunal's valuation or not. It is equally unclear how the Tribunal arrived at the value of EUR 0.2 million.

209. Serbia's only response is that the Tribunal provided the necessary reasoning through the footnote that states that the table, including the valuation of BD Agro's other assets, including Novi Becej was "*based on the table in Cowan ER III, […] after adjusting it as necessary in light of the Tribunal's conclusions above*".[254] This argument is not serious.

210. As explained above, a footnote stating that the valuation of the majority of BD Agro's assets "*is based on*" a table in an expert report does not represent sufficient reasons. This is especially the case given that the footnote also refers to necessary adjustments made in the light of the "*Tribunal's conclusions*" that cannot be found anywhere in the Award.

211. Serbia's suggestion that this footnote indicates that the Tribunal agreed with Mr. Cowan's arguments and valuation,[255] is pure speculation. Serbia is reading into the

253 Cowan Third ER, ¶ 4.8.

254 Award, fn. 593.

255 Counter-Memorial, ¶ 201.

Award something that is simply not there. As explained above, "*an* ad hoc *committee should not construct reasons in order to justify the decision of the tribunal*".[256]

212. In any case, even if the Tribunal did intend to agree with Mr. Cowan's arguments and valuation, the Tribunal was obliged to explain why that was the case. Otherwise, there would be no need for a reasoned award at all; tribunals could simply state that they agree with and reference the submissions of the claimant or respondent, as the case may be. But that, of course, is not the standard of reasoning required under Articles 48(3) and 52(1) of the ICSID Convention. As noted above, readers must be able "*to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion.*"[257]

213. Finally, Serbia's argument that the Tribunal's omission of the castle in the valuation could have been remedied according to Article 49(2) of the ICSID Convention misses the mark. A request under Article 49(2) serves to address a tribunal's failure to decide, not a failure to state reasons. Here, the Tribunal decided on the value of BD Agro's assets, it is only unclear what the Tribunal decided, and why, specifically with respect to the value of the Novi Becej castle. Such a failure is properly addressed by the present request for annulment for failure to state reasons.

2. The "*Current assets*"

214. Much like with Novi Becej, the Parties also approached the valuation of BD Agro's current assets in different ways.

215. What Serbia's expert, Mr. Cowan, called "*Current assets*" were receivables from sales and specific operations, inventories, accrued expenses, other receivables, short-term financial investments, value added tax and cash, as reported on its balance sheet.[258] He included these as part of a category of assets labelled "*Other Current and Non-*

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256 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, 25 March 2010, ¶ 83, **RLA-250**.

257 *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment, 22 November 2019, ¶ 121, **RLA-251**.

258 Hern First ER, ¶ 120.

Current Assets", and valued them at EUR 6.6 million.[259] Mr. Cowan valued the "current assets" at EUR 5 million, using the Second Confineks Valuation.[260]

216. Same as with the "*Novi Becej*" category, it is unclear which assets are included in the Tribunal's valuation of "*Current assets*". It is equally unclear how the Tribunal arrived at the value of these assets.

217. Serbia again only points to the footnote in the Award preceding the table with the Tribunal's valuation of BD Agro's other assets, including the current assets.[261] As explained above, this footnote does not come anywhere close to the requirement to state reasons enshrined in Article 48(3) of the ICSID Convention.

218. The footnote cannot be even used to infer that the Tribunal accepted Mr. Cowan's valuation because the footnote expressly states that the Tribunal adjusted Mr. Cowan's numbers—but the Tribunal does not explain how and why. There is nothing in the Award that would suggest this is the case. However, even if it were, that would change nothing to the fact that the Tribunal did not provide any reasons for its decision—*i.e.* it did not explain why it accepted Mr. Cowan's valuation rather than the valuation provided by Dr. Hern.

219. Furthermore, Mr. Cowan based his valuation on the Second Confineks Valuation,[262] which post-dates the Valuation Date and, therefore, contradicts the Tribunal's reasoning.[263] Thus, if the Tribunal had simply accepted Mr. Cowan's valuation, without any further explanation, it would have only created a further contradiction in the Award.

220. Serbia's argument that the Second Confineks Valuation is based on information from the entire year 2015 and, thus, "*in large part consists of information originating before the BD Agro's Valuation Date*", is inapposite.[264] As explained above, the original date

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259 Memorial, ¶¶ 196-198; Hern First ER, ¶ 121.

260 Cowan Third ER, ¶ 4.4.

261 Counter-Memorial, ¶ 206.

262 Cowan Third ER, ¶¶4.4., 4.5.

263 *See infra,* § II.C.1.a.

264 Counter-Memorial, ¶ 209.

of the information is not relevant. What is relevant is when the information became available and could have served as a basis for a willing buyer and a willing seller to reach agreement on the fair market value of an asset.[265]

221. In addition, the Second Confineks Valuation relied, at least partially, on information from BD Agro's balance sheet included in BD Agro's 2015 financial statements.[266] However, the balance sheet contains information as of a specific date—in this case as of 31 December 2015.[267] This is more than two month after the Valuation Date. The balance sheet used by Confineks thus does not include "*information originating before the BD Agro's Valuation Date*".

222. Serbia's assertion that "*[i]t is incumbent upon Applicant to point to the specific information relied upon by the Tribunal which post-date the Valuation Date*" is equally incorrect.[268] Serbia does not provide *any* authority that would support this proposition. Indeed, there is none. What is relevant is that the Second Confineks Valuation, as such, post-dates the Valuation Date, that it is the basis for Mr. Cowan's valuation of "*Current assets*" and that Mr. Cowan's number was reproduced by the Tribunal without any explanation. Tellingly, Serbia itself does not explain what information about the value of BD Agro's assets included in the Second Confineks Report allegedly pre-dates the Valuation Date.

223. Serbia is also wrong when it claims that Claimants had not challenged Mr. Cowan's valuation of "*Current assets*" during the arbitration and, as a result, Mr. Rand cannot do so in this annulment proceeding.[269] Serbia's argument is based on an erroneous assertion that "*the annulment proceeding is not an opportunity to raise new arguments that were not part of the record in the arbitration*."[270] Serbia makes this statement with reference to the *OperaFund v. Spain* decision, where the committee concluded

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265 *See supra*, ¶¶ 150-151.

266 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, January 2016, p. 25, **CE-172**.

267 BD Agro AD Dobanovci Original Financial Statements for 2015, dated 31 December 2015, pp. 1-2, **CE-140**.

268 Counter-Memorial, ¶ 209.

269 Counter-Memorial, ¶¶ 207-208.

270 Counter-Memorial, ¶ 7.

that annulment proceedings concern the record before the tribunal, and no new evidence on the merits may be submitted.[271] The holdings of the *ad hoc* committee in *OperaFund v. Spain* are inapposite because Mr. Rand does not submit any new evidence on the merits.

224. On the contrary, Claimants challenged Serbia's valuation already in the arbitration—and proposed their own, different valuation prepared by Dr. Hern.[272]

225. While Mr. Cowan relied on the Second Confineks Valuation to value BD Agro's current assets at EUR 5 million,[273] Dr. Hern relied on BD Agro's 2015 Financial Statements to value BD Agro's current assets at EUR 6.6 million.[274] Dr. Hern explained that BD Agro's 2015 Financial Statements represented the appropriate basis for the valuation because they "*represent the closest available information relative to the expropriation date 21 October 2015*".[275]

226. Moreover, Mr. Rand does not challenge Mr. Cowan's valuation of "*Current assets*" in this annulment proceeding. Mr. Rand challenges the Tribunal's valuation of "*Current assets*" in the Award—because it lacks any reasoning.

* * *

227. In conclusion, the Tribunal did not provide any reasons for its valuation of BD Agro's remaining assets (*i.e.* assets other than the Construction Land). Contrary to Serbia's allegation, no reasoning for the Tribunal's valuation of these assets can be implied from other considerations in the Award.

228. Tellingly, Serbia itself does not identify any part of the Award that would imply what the Tribunal's reasoning was on this point. Therefore, like in the *CMS* case, "*there is*

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271 *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Decision on Annulment, 2 March 2023, ¶ 71, **RLA-216**.

272 *E.g.*, Reply, ¶¶ 1336-1337.

273 Cowan Third ER, ¶ 4.4.

274 Memorial, ¶ 198; Hern First ER, ¶ 121.

275 Reply, ¶ 1337; Hern First ER, ¶¶ 44, 47, 159.

a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point."[276]

229. Finally, the Tribunal's decision on the valuation of BD Agro's remaining assets is clearly outcome-determinative. The difference in valuation of these two categories of assets ("*Novi Becej*" and "*Current assets*") by the Parties was approximately **EUR 2.2 million**.[277]

230. Given all the above, the Award should be annulled in the respective part.

C. The Tribunal provided contradictory and insufficient reasoning with respect to its valuation of BD Agro's liabilities

231. Unfortunately, the Tribunals' failure to state reasons did not stop with the valuation of BD Agro's assets. When assessing the value of BD Agro's liabilities, the Tribunal's decision fares no better.

232. The Tribunal contradicted its own reasoning when deciding the value of several liabilities of BD Agro. It furthermore provided insufficient reasons for its quantification of BD Agro's capital gains tax liability, only proclaiming that Serbia's expert's approach is "*objective and logical*", without any further explanation. Finally, the Tribunal provided insufficient reasons for its quantification of BD Agro's total estimated liabilities, completely failing to respond to Claimants' arguments and likely double-counting BD Agro's tax liability as a result. Each of these issues is explained below.

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276 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 97, **RLA-152**.

277 Memorial, ¶ 202.

1. The Tribunal provided contradictory reasoning with respect to its valuation of BD Agro's liabilities

a. The Tribunal first refused to rely on evidence post-dating the Valuation Date, but then used such evidence to calculate BD Agro's liabilities

233. The Tribunal made it clear that it would not rely on any evidence post-dating the Valuation Date, *i.e.* 21 October 2015, when valuing BD Agro's equity.[278] The Tribunal also applied this principle—that evidence post-dating the Valuation Date should not be taken into account—when rejecting certain evidence relied upon by Claimants.[279]

234. In complete disregard of this principle, the Tribunal then used evidence post-dating the Valuation Date when making several determinations related to the value of BD Agro's liabilities. To recall, the Tribunal:

a. accepted Serbia's correction to the value of BD Agro's debt *vis-à-vis* Banca Intesa, which was based solely on events and evidence post-dating the Valuation Date;[280]

b. relied on the Second Confineks Valuation—prepared in January 2016 based on financial information as of 31 December 2015,[281] *i.e.* several months after the Valuation Date—for the value of BD Agro's liabilities, specifically its total estimated liabilities;[282] and its court proceedings liabilities.[283] and

278 Memorial, ¶ 203; Award, ¶ 693(third bullet point)(ii).

279 Award, ¶¶ 685, 690, first bullet point.

280 Award, ¶ 699(i).

281 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, 4 February 2016, p. 1, **CE-172**.

282 Award, ¶ 699(i).

283 Award, ¶¶ 699(iv), footnote 584 and 707.

c. relied on BD Agro's 2015 Financial Statements, prepared as of 31 December 2015 and approved on 30 June 2016, being well after the Valuation Date, to value the total estimated liabilities[284] and the court proceedings liabilities.[285]

235. In response, Serbia merely repeats its incorrect argument that the Tribunal did not refuse to rely on "*evidence*" post-dating the Valuation Date, but rather on "*information*" post-dating the Valuation Date.[286] As explained above, contrary to Serbia's allegation, the Tribunal's rejection related to the evidence, not just the underlying information.[287] Serbia does not point to any part of the Award proving otherwise.

236. In any event, the above-listed evidence used by the Tribunal post-dates the Valuation Date both in terms of its date of origin, as well as in terms of the date of origin of the underlying information.

i. BD Agro's debt *vis-à-vis* Banca Intesa

237. Banca Intesa was BD Agro's creditor based on a loan agreement from 2007.[288] In December 2016, *i.e.* over a year after the Valuation Date and the seizure of the Beneficially Owned Shares, Banca Intesa's rights under the loan agreement were acquired by a new creditor, called Agrounija.[289] This new creditor amended the calculation of the default interest accrued on BD Agro's debt. This happened only in January 2017, *i.e.* over a year *after* the Valuation Date.[290] Serbia itself refers exclusively to documents post-dating the Valuation Date when it explains how Agrounija amended the calculation of interest.[291]

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284 Award, ¶ 699(i).

285 Award, ¶ 699(iv).

286 Counter-Memorial, ¶ 214.

287 *See supra*, ¶¶ 150-151; Counter-Memorial, ¶ 214.

288 Counter-Memorial, ¶ 215.

289 Agrounija's Registration of Claim with Enclosures dated 13 January 2017, p. 3 (pdf), **RE-646**; Decision of the Commercial Court in Belgrade, 21 June 2017, p. 1 (pdf), **CE-553**.

290 Agrounija's Registration of Claim with Enclosures dated 13 January 2017, p. 4 (pdf), **RE-646**.

291 Counter-Memorial, ¶ 215.

238. Mr. Cowan reflected in his valuation the default interest accrued *before* the Valuation Date in accordance with the interest rate as amended over a year *after* the Valuation Date. Mr. Cowan did so even though Banca Intesa clearly did not claim the higher amount of interest as of the Valuation Date.[292]

239. Serbia's argument that Mr. Cowan retrospectively calculated the amended interest only up to the Valuation Date is irrelevant—he made the calculation based on both "*evidence*" and "*information*" post-dating the Valuation Date.[293]

240. The Tribunal's acceptance of the increased debt to Banca Intesa is in direct contradiction with its other findings. The situation was no different than with respect to the size of BD Agro's land. As explained above, there were disputes over BD Agro's land—both pending on, and initiated after, the Valuation Date—invoked by Serbia. The Tribunal refused to consider these claims because, as of the Valuation Date, these claims were not yet advanced or were not decided upon.[294] The conclusion should be the same with respect to Banca Intesa's claim.

241. Finally, to the extent that the Tribunal relies on Mr. Cowan's calculation as evidence for its valuation, that calculation also clearly post-dates the Valuation Date—Mr. Cowan prepared it only in the course of the arbitration. As a result, the additional default interest calculated by Mr. Cowan does not represent "*information*" that was available as of the Valuation Date either.

ii. Second Confineks Valuation

242. The Tribunal used the Second Confineks Valuation as the basis for its valuation of BD Agro's total estimated liabilities[295] and its court proceedings liabilities.[296] The Tribunal did so even though the Second Confineks Valuation clearly post-dates the

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292 Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, p. 33, **CE-101**.

293 Cowan Third ER, ¶¶ 2.21, 2.22.

294 Award, ¶ 690.

295 Award, ¶ 699(i).

296 Award, ¶¶ 699(iv), footnote 584 and 707.

Valuation Date as it was prepared only in January 2016 and relies on financial information as of 31 December 2015.[297]

243. Serbia alleges that the valuation of the total estimated liabilities prepared by Mr. Cowan and adopted by the Tribunal is based on Mr. Cowan's "*own analysis*" rather than the Second Confineks Valuation.[298] The opposite is true.

244. Mr. Cowan explicitly confirmed his reliance on the Second Confineks Valuation in his expert report:[299]

> **MY VALUATION**
>
> 2.17 I rely on the Feb 16 Confineks Report as a starting point for valuing BD Agro's total liabilities at the valuation date, as this was the basis for the asset and liability values in BD Agro's 31 December 2015 Financial Statements. According to the Feb 16 Confineks Report, total liabilities were €40.4 million[23].

[…]

at 21 October 2015 in €'m	Source	My valuation - going concern scenario
Total estimated liabilities	Feb 16 Confineks Report	(40.4)

245. He then continued to explain that he added the Banca Intesa claim, but he made no adjustments to the numbers set out in the Second Confineks Valuation.[300]

246. The Tribunal also understood that Mr. Cowan's valuation was based on the Second Confineks Valuation, to which Mr. Cowan simply added the debt *vis-à-vis* Banca Intesa:[301]

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297 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, 4 February 2016, p. 1, **CE-172**.

298 Counter-Memorial, ¶¶ 219-220.

299 Cowan Third ER, ¶¶ 2.17, 2.19.

300 Cowan Third ER, ¶¶ 2.18-2.20.

301 Award, ¶ 699(i).

> *Total estimated liabilities (excluding deferred tax liabilities)*: Relying on the figures included in the Second Confineks Valuation and his own analysis, Mr. Cowan submits that BD Agro's estimated liabilities were EUR 42.2 million. Dr. Hern reaches a lower figure of EUR 37.8 million. The Second Confineks Valuation determined that BD Agro's liabilities amounted to EUR 40.4 million. That amount was also used as the basis for liability values in BD Agro's 31 December 2015 Financial Statements. To that amount, Mr. Cowan added EUR 1.8 million because the principal amount of a Banca Intesa (later Agrounija) loan accounted for in the Second Confineks Valuation increased,[577] resulting in an increase in the interest payable thereon (and thereby increasing BD Agro's liabilities by that amount).[578]

247. The fact that Claimants "*never questioned Mr. Cowan's use*" of the Second Confineks Valuation is irrelevant.[302] The fact that the Second Confineks Valuation post-dates the Valuation Date only became relevant in light of the Tribunal's decision that no evidence post-dating the Valuation Date should be used for BD Agro's valuation.

iii. BD Agro's 2015 Financial Statements

248. The Tribunal relied on BD Agro's 2015 Financial Statements to support its valuation of BD Agro's total estimated liabilities[303] and the court proceedings liabilities.[304] Once again, the Tribunal did so even though BD Agro's 2015 Financial Statements were prepared as of 31 December 2015 and approved on 30 June 2016—*i.e.* after the Valuation Date.

249. Serbia's argument that the 2015 Financial Statements were only mentioned by Mr. Cowan "*to explain why he considered that the Second Confineks Valuation should be used as a starting point for his calculation*" is irrelevant.[305] The only relevant fact is that the Tribunal used the 2015 Financial Statements in its valuation, thus contradicting its own reasoning—including its own decision not to accept Mr. Hern's

302 Counter-Memorial, ¶ 220.

303 Award, ¶ 699(i).

304 Award, ¶ 699(iv).

305 Counter-Memorial, ¶ 221.

reliance on BD Agro's 2015 Financial Statements for BD Agro's total estimated liabilities.[306]

250. Serbia's assertion that Mr. Rand's arguments in this proceeding is contradictory to Claimants' position in the arbitration because Claimants argued that "*the Tribunal should have relied on Dr Hern's calculation of the total estimated liabilities which was based solely on BD Agro's 2015 Financial Statements*" shows that Serbia does not understand the ground for annulment invoked by Claimants.[307]

251. The ground for annulment does not depend on whether the Tribunal sided with the arguments of one Party or the other. What matters is that the Tribunal provided contradictory reasons for its decision. And this is exactly what the Tribunal did when it rejected Dr. Hern's reliance on BD Agro's 2015 Financial Statements and the Second Confineks Valuation because they post-date the Valuation Date, but then accepted Mr. Cowan's reliance of the same documents for the valuation of BD Agro's BD Agro's total estimated liabilities[308] and the court proceedings liabilities.[309]

b. The Tribunal provided contradictory reasoning for its calculation of redundancy payments

252. The Tribunal included in BD Agro's liabilities so-called "*redundancy payments*" that BD Agro's government-appointed management voluntarily agreed to make to BD Agro's employees whose employment was terminated under a redundancy program. This redundancy program was adopted *after* Serbia seized the Beneficially Owned Shares of BD Agro—*i.e.* after the Valuation Date.[310] In addition, it was only available to *state*-owned entities—which BD Agro became only after the seizure of the Beneficially Owned Shares and, thus, after the Valuation Date.

253. The Tribunal concluded that the redundancy payments were mandatory on the Valuation Date—pursuant to Annex 1 of the Privatization Agreement.[311] This

306 Award, ¶ 699(iv).

307 Counter-Memorial, ¶ 222.

308 Award, ¶ 699(i).

309 Award, ¶ 699(iv).

310 Dr. Richard Hern Second Expert Report dated 3 October 2019 ("**Hern Second ER**"), ¶ 182.

311 Award, ¶ 699(vi).

conclusion cannot be reconciled with the Tribunal's earlier conclusion that the Privatization Agreement ceased to apply upon the full payment of the purchase price in 2011.[312] As a result, the Tribunal's reasoning on this point is, once again, clearly contradictory.

254. Serbia responds by alleging that "*the Tribunal never asserted that this specific obligation ceased to exist with the payment of the purchase price*".[313] This is not true. The Tribunal expressly concluded that "*[o]nce the Agreement had ended, **there was nothing left to be fulfilled**, and hence no possible case of 'non-fulfillment.'*"[314] The Tribunal's conclusion that there was "*nothing left to be fulfilled*" clearly applies also to obligations related to the redundancy program.

255. Moreover, the Tribunal considered that it "*must give effect*" to the clear wording of the Privatization Agreement with respect to time limitations of individual obligations.[315] Annex 1 of the Privatization Agreement makes it clear that the redundancy payments obligation is limited to "*the period of two (2) years as of the day of conclusion of this [Privatization] Agreement*".[316] This obligation therefore lapsed on 4 October 2007.

256. The Tribunal's conclusion that "*BD Agro's 2015 financial statements also recognize redundancy payments as being obligatory*" is inapposite.[317] The 2015 Financial Statements only refer to the redundancy program in general, in the part on accounting policies.[318]

257. In addition, as explained above, the 2015 Financial Statements reflect the situation as of the specific date—in this case as of 31 December 2015.[319] As such, the Financial Statements post-date the Valuation Date and, more importantly, they reflect the

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312 Award, ¶ 612.

313 Counter-Memorial, ¶ 242.

314 Award, ¶ 617 (emphasis added).

315 Award, ¶ 612.

316 Privatization Agreement, 4 October 2005, Annex 1, **CE-017**.

317 Award, ¶ 699(vi).

318 Notes to the 2015 Financial Statements, § 2.19, **CE-171**.

319 *See supra*, § II.C.1.a.

situation *after* the seizure of the Beneficially Owned Shares, *i.e.* at the time when BD Agro was again a state-owned entity and, as such, had different obligations than it had as of the Valuation Date when it was a private company.

258. It follows that the Tribunal evidently contradicted its own reasoning also with respect to the alleged redundancy payments obligation, and the Award should be annulled also in this part. Contrary to Serbia's allegations, the contradiction is clear and indisputable and is not a matter of mere correctness of the Award.[320] It is a matter of reasoning so contradictory, that it is "*incapable of standing together on any reasonable reading of the decision*"—which Serbia itself admits warrants annulment.[321]

259. For the sake of completeness, the Tribunal's assertion that Claimants offered "*no authority in support*" of the fact that the redundancy payments were voluntary[322] was clearly incorrect.[323] Claimants relied on Dr. Hern who explained that the fact that no redundancy payments were envisaged as of the Valuation Date is confirmed by the fact that no redundancy costs are included in the March 2015 Reorganization plan.[324]

260. Serbia's argument that "*the redundancy payments were included in BD Agro's March 2015 Pre-pack Reorganization Plan*" is simply not true.[325] The "*severance*" payments referred to by Serbia in the March 2015 Reorganization plan are different from those envisaged by the Privatization Agreement, and do not reflect the redundancy payments.[326]

261. The Tribunal ignoring Dr. Hern's evidence resembles the situation in *Teco v. Guatemala.* The *Teco* committee annulled the award because the tribunal considered that there was "*no sufficient evidence*" and ignored information set out in the expert

320 Counter-Memorial, ¶¶ 240, 241.

321 Counter-Memorial, ¶ 78.

322 Award, ¶ 699(vi).

323 Hern Second ER, ¶ 182.

324 Hern Second ER, ¶ 182.

325 Counter-Memorial, ¶ 237.

326 Counter-Memorial, fn. 393.

reports filed in that arbitration.[327] Similarly here, the Tribunal made a decision on the basis that Claimants "*offer no authority in support*" of their position, even though Claimants clearly did so.

262. For all the reasons above, the Tribunal's decision on the inclusion of the redundancy payments in the valuation of BD Agro's liabilities must be annulled.

c. The Tribunal provided contradictory reasoning for its calculation of the conversion fee

263. The conversion fee was a fee payable to Serbia for formally changing the status of the Construction Land in the real estate registry. In the Memorial, Mr. Rand explained that the Tribunal's reasoning related to its calculation of the conversion fee was, once again, contradictory.[328]

264. The Parties agreed that the conversion fee should be calculated as 50% of the average price of equivalent agricultural land. The point of contention between the Parties was the value of equivalent agricultural land, from which the 50% fee would be calculated.[329] The Tribunal stated that it accepted the position of Serbia's expert, Ms. Ilić, that the average price of equivalent agricultural land should be based on the *previous year's tax assessment*.[330] The Tribunal then adopted the specific amount of the conversion fee calculated by Ms. Ilić.[331]

265. However, as explained in detail in the Memorial, Ms. Ilić did *not* use the previous year's tax assessment in her calculation of the conversion fee.[332] Instead, for the calculation of the conversion fee for the Construction Land, she used an average price of equivalent agricultural land which was not explained by her at all, and which did not correspond to the previous year's tax assessment.[333] Ms. Ilić also did not use the

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327 *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 68, 130, **CLA-186**.

328 Memorial, ¶¶ 88-92.

329 *E.g*. Hern Second ER, ¶¶ 175-177.

330 Award, ¶ 699(ii).

331 Award, ¶ 699(ii).

332 Memorial, ¶ 221.

333 Memorial, ¶ 221(b).

previous year's tax assessment for the calculation of the conversion fee for BD Agro's land in Bečmen.[334]

266. In the Counter-Memorial, Serbia does not contest that Ms. Ilić failed to use the previous year's tax assessment. Instead, Serbia alleges that by accepting Ms. Ilić incorrect calculation, the Tribunal merely "*arrived at an incorrect conclusion on the factual issue*", which is not basis for annulment.[335] Serbia's argument, once again, misses the point.

267. The issue is that the Tribunal expressly confirmed that the conversion fee should be calculated in one way—using the tax assessments—but then adopted Ms. Ilić's conversion fee that was calculated in a completely different way. This contradiction is the same as the one in *Tidewater v. Venezuela*.

268. In that case, "*the Tribunal has established elements for the determination of the market value*" and then "*it has fixed the amount in contradiction to these elements*."[336] Due to this contradiction, the *ad hoc* committee in that case concluded that the corresponding part of the award "*must be annulled*."[337] Same as in *Tidewater*, the Tribunal in this case established specific elements for calculation of the conversion fee, but then fixed the specific conversion fee in contradiction to those elements.

269. In response, Serbia invokes the decisions of *ad hoc* committees in *NextEra* and *Watkins Holdings*, which both concluded that an error in computation is a mere mistake, not a failure to state reasons.[338] It is evident from the above that in the present case, the Tribunal's reasoning suffers from more than a mere computation error.

270. In the present case, the issue is not that the Tribunal established certain calculation method and then made a mistake when applying that method. The Tribunal

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334 Memorial, ¶ 221(a).

335 Counter-Memorial, ¶ 248.

336 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 161 (emphasis added), **CLA-188**.

337 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 196, **CLA-188**.

338 Counter-Memorial, ¶¶ 249-250.

established a certain calculation methodology and then adopted a conversion fee calculated in a completely different way. That is not a computational error.

d. The Tribunal provided contradictory reasoning for inclusion of liabilities related to court proceedings

271. In the Memorial, Mr. Rand explained that the Tribunal's only explanation for the inclusion of the "*court proceedings*" liabilities in BD Agro's valuation is that "*Mr. Cowan includes EUR 200,000 in BD Agro's liabilities.* ***The Tribunal agrees, as the item was included in BD Agro's 2015 financial statements***."[339] Mr. Rand also explained that BD Agro's 2015 Financial Statements only include costs of court proceedings in the amount of RSD 50,000, *i.e.* approximately EUR 417.[340]

272. Moreover, in the footnote, the Tribunal refers to the Second Confineks Valuation, and not to the 2015 Financial Statements.[341] The Second Confineks Valuation also estimated the court proceeding costs at RSD 50,000, *i.e.* approximately EUR 417.[342]

273. Serbia alleges that the Tribunal did not take the court proceedings liability from either BD Agro's 2015 Financial Statements or the Second Confineks Valuation, but rather from Mr. Cowan.[343] This is not the case. The Tribunal expressly stated that it agreed with Mr. Cowan's number because "*the item was included in BD Agro's 2015 financial statements*":

> iv. *Court proceedings*: Mr. Cowan includes EUR 200,000 in BD Agro's liabilities. The Tribunal agrees, as the item was included in BD Agro's 2015 financial statements.[584]

274. In addition, footnote 584 of the Award, shown in the screenshot above, refers to the Second Confineks Valuation. It is, therefore, clear that both the 2015 Financial

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339 Award, ¶ 699(iv), Counter-Memorial, footnote 385 (emphasis added).

340 EUR/RSD rate as of 21 October 2015 was 119.9, as reported by the National Bank of Serbia. National Bank of Serbia Website - Exchange Rate EUR to RSD (2019), https://www.nbs.rs/internet/english/ dated 11 January 2019, **CE-137**. *See* BD Agro AD Dobanovci Original Financial Statements for 2015 dated 31 December 2015, **CE-140**.

341 Award, fn. 584.

342 Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci dated January 2016, p. 32 (item 405), **CE-172**.

343 Counter-Memorial, ¶ 233.

Statements and the Second Confineks Valuation were relevant for the Tribunal's consideration. However, these documents directly contradict the Tribunal's conclusion.

275. Moreover, as explained above, both the Second Confineks Valuation and the 2015 Financial Statements post-date the Valuation Date. As explained above, the Tribunal concluded that no evidence post-dating the Valuation Date should be used in the valuation.

2. The Tribunal did not provide sufficient reasons for its valuation of the capital gains tax

276. In the Memorial, Mr. Rand explained that both Parties' valuation experts included capital gains tax ("**CGT**") in BD Agro's liabilities to reflect the CGT that BD Agro would have to pay if it were to sell its assets.[344] The experts only disagreed on the actual amount of the applicable CGT.

277. Dr. Hern argued that the most appropriate approach is to approximate the value of the CGT by the deferred tax liabilities reported in BD Agro's 2015 Financial Statements. Mr. Cowan, on the other hand, attempted to calculate the CGT himself—even though he admitted he did not have all necessary information to do so.[345]

278. The resulting difference between the CGT calculated by Mr. Cowan and that calculated by Dr. Hern was EUR 2.6 million. The Tribunal accepted Mr. Cowan's CGT calculation. The *only* reason that the Tribunal gave for this conclusion was that Mr. Cowan's approach to the calculation of the CGT was "*objective and logical*".[346] Such proclamation is clearly insufficient.

279. The Tribunal did not provide any explanation for why it considered Mr. Cowan's approach objective and logical, nor why it believed that Dr. Hern' approach was not objective and/or logical. This is especially important given that, as explained above, Dr. Hern relied on information from BD Agro's audited financial statements, while

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344 Hern First ER, ¶ 144; Cowan Second ER, ¶ 6.12.

345 Cowan Second ER, ¶ 6.11.

346 Award, ¶ 699(v).

Mr. Cowan simply presented his own estimate, which he rightfully admitted was based on insufficient information.

280. Serbia recognizes the extreme brevity of the purported reasoning. It argues, however, that "*the tribunal is required to state reasons for its decision, but not necessarily reasons for its reasons*."[347] This argument is not serious.

281. Simply adopting an expert's opinion—without any explanation—undoubtedly constitutes a failure to provide reasons.[348] That is so especially where the other party contests that expert's opinion.

282. Serbia accepts that a failure to address the parties' argument that "*was so important that it would clearly have been determinative of the outcome*" warrants annulment of the award.[349] Serbia, however, argues that Mr. Rand "*failed to identify Claimants' arguments related to the Respondent's calculation of the CGT that the Tribunal allegedly did not address*".[350]

283. As explained above, the Tribunal did not address *any* of Claimants' arguments related to the calculation of the CGT. It merely cited to Mr. Cowan's calculation without providing any explanation.

284. Serbia also argues that Mr. Rand did not explain why Claimants' arguments related to CGT "*would have been determinative to the outcome of the case.*"[351] Once again, this is simply not true. Mr. Rand specifically explained that the difference between the Parties' calculation of the capital gains tax is **EUR 2.6 million**, *i.e.* approximately 18% of the total amount awarded to Mr. Rand (without interest).[352]

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347 Counter-Memorial, ¶ 257.

348 *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Individual Opinion of Fernando Piérola Castro dated 22 February 2022, ¶¶ 42-49, **CLA-208**.

349 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, ¶ 210, **RLA-162**.

350 Counter-Memorial, ¶ 261.

351 Counter-Memorial, ¶ 261.

352 Hern First ER, ¶ 34; Cowan Second ER, ¶ 6.12; Award, ¶¶ 707, 708.

285. Serbia further argues that reasons can be brief, as long as "*an informed reader can comprehend the reasoning*".[353] Serbia, however, does not explain how any reader could understand why the Tribunal adopted Mr. Cowan's calculation of the CGT.

286. Serbia also repeats its argument that reasons can be implied and that "*the Tribunal's reference to Mr. Cowan's report is sufficient to meet the requirement of providing the reasons*".[354] In support of this, Serbia cites the *InfraRed* committee, which stated:

> And the same occurs with Spain's reaction to the option of the Tribunal for the adoption of the DCF calculation proposed by Brattle rejecting Accuracy's alternative solution, even if this was correct, which InfraRed refuses. *To adopt the technical arguments of one expert in detriment of the other does not amount to a failure to state reasons but is in fact the presentation of reasons that do not correspond to the arguments of the other expert*.[355]

287. However, the decision in *InfraRed* is not comparable at all. In that case, the tribunal gave reasons for its acceptance of Brattle's calculation of damages on the basis of discounted cash flows (DCF) rather than Accuracy's alternative calculation based on the Regulatory Asset Base (RAB). The tribunal set out its reasons for adopting the DCF valuation method in paragraphs 532 – 544 of the award, explaining, among other things, that the DCF methodology was appropriate because InfraRed's investments had "*a sufficiently long track record both to permit a reasonably certain forecast of their future revenues and costs, and to identify with reasonable accuracy the uncertainties inherent in the approach and the discount factors to be applied to the calculation in consequence*."[356] The *InfraRed* tribunal even briefly discussed two earlier awards in *Eiser v. Spain* and *Novenergia v. Spain*, which also used the DCF methodology to quantify damages in the same context of breaches of investment protections stemming from amendments to Spain's support schemes for solar power

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353 Counter-Memorial, ¶ 259.

354 Counter-Memorial, ¶ 262.

355 Counter-Memorial, ¶ 262 citing *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, ¶ 694(emphasis added), **RLA-209**.

356 *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶ 535, **CLA-219**.

plants.[357] Thus, the *InfraRed* tribunal thoroughly explained its reasons for adopting the DCF methodology.

288. This is in stark contrast with the present case, where the Tribunal's only reasoning was that Mr. Cowan's approach was "*objective and logical*". If all that was needed was a reference to one expert report, the entire part of the Award addressing damages potentially could have been reduced to a single sentence: "*The Tribunal agrees with and adopts Mr. Cowan's valuation.*" Such an approach clearly would not comply with Article 48(3) of the ICSID Convention, according to which the tribunal must "*deal with every question submitted to the Tribunal and state the reasons*" on which the award is based.[358]

3. The Tribunal did not provide sufficient reasons for its valuation of the total estimated liabilities

289. In the Memorial, Mr. Rand explained that, in the Award, the Tribunal clearly stated that it was calculating the amount of total estimated liabilities "*excluding deferred tax liabilities*", *i.e.* taxes that are expected to be owed and payable as of a later date.[359] However, it is unclear whether the final value of "*total estimate liabilities*" adopted by the Tribunal included "*deferred tax liabilities*" or not.

290. Mr. Rand further explained that if the final value of the "*total estimate liabilities*" adopted by the Tribunal includes "*deferred tax liabilities*", it would mean that the Tribunal contradicted its previous conclusion that "*total estimate liabilities*" should be calculated without "*deferred tax liabilities*". It would also mean that the Tribunal double-counted the value of the capital gains tax.

291. In its Counter-Memorial, Serbia alleges that the Award is clear that the total estimated liabilities excludes deferred tax liabilities.[360] However, while the Award initially

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357 *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain,* ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶¶ 530-544, **CLA-219**.

358 ICSID Convention, Article 48(3), **CLA-017**.

359 Award, ¶ 699(i).

360 Counter-Memorial, ¶ 225.

proclaims so,[361] it does not mention this proclamation in the overall conclusion regarding valuation.[362]

292. The Tribunal concluded that the "*Total estimate liabilities*" amount to EUR 42.2 million.[363] The Tribunal purportedly took the value from: (*i*) the Second Confineks Valuation;[364] and (*ii*) BD Agro's 2015 Financial Statements.[365]

293. However, the EUR 42.2 million liability figure set out in the Second Confineks Valuation and BD Agro's 2015 Financial Statements already includes EUR 3.1 million of deferred tax liability. This deferred tax liability corresponds to the contemporaneously estimated amount of the capital gains tax.[366] Therefore, it appears that the Tribunal double-counted the capital gains tax. If so, the Tribunal artificially inflated BD Agro's liabilities by the value of the "*deferred tax liabilities*", *i.e.* by EUR 3.1 million.

294. This omission is an annullable error because the Tribunal completely ignored the arguments put forward by Claimants' valuation expert. Dr. Hern raised this exact issue of double-counting in his Second Expert Report and the Tribunal did not address it in any manner.[367]

295. Serbia alleges that Mr. Cowan, who committed the exact same double-counting as the Tribunal, later corrected this error.[368] However, it is completely irrelevant what Mr. Cowan did. The issue lies with the Tribunal's reasoning, which simply ignored a

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361 Award, ¶ 699(i).

362 Award, ¶ 707.

363 Award, ¶ 707.

364 Award, ¶ 699(i); Cowan Third ER, ¶ 4.4; Confineks d.o.o. Belgrade, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci dated January 2016, **CE-172**.

365 Award, ¶ 699(i); Notes to the 2015 Financial Statements, **CE-171**.

366 Confineks d.o.o. Belgrade, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci dated January 2016, section 3.2, p. 43, **CE-172**; Hern Second ER, ¶¶ 15, 172-173.

367 Hern Second ER, ¶ 172. Dr. Hern made his observation in response to Mr. Cowan's first expert report. In his second expert report, Mr. Cowan increased the amount of capital gains tax from EUR 3.1 million to EUR 5.7 million. As a result, the capital gains tax used by Mr. Cowan no longer corresponded to the amount of BD Agro's deferred tax liabilities. However, this fact does not change the conclusion that including the full amount of both the capital gains tax and deferred tax liabilities when calculating BD Agro's liabilities leads to double counting.

368 Counter-Memorial, ¶ 228.

crucial argument by one of the Parties. Moreover, as a matter of fact, Mr. Cowan did not correct his calculation and continued to double-count the CGT in his third and final expert report.[369]

296. The Tribunal's ignoring of Claimants' argument is an annullable error. As confirmed by the *Teinver ad hoc* committee, not addressing a party's argument that "*was so important that it would clearly have been determinative of the outcome*" warrants annulment.[370] The double-counting of CGT inflates BD Agro's liabilities by **EUR 3.1 million**. Claimants' arguments related to this double-counting, which the Tribunal chose to ignore, thus clearly represent arguments that "*would clearly have been determinative of the outcome*".

369 Cowan Third ER, ¶ 4.4.

370 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, ¶ 210, **RLA-162**.

III. THE TRIBUNAL HAS MANIFESTLY EXCEEDED ITS POWERS BY REFUSING TO EXERCISE JURISDICTION OVER CERTAIN CLAIMS

A. Manifest excess of powers is a ground for annulment

297. It is undisputed that a tribunal's failure to exercise jurisdiction constitutes a manifest excess of powers, which is a ground for annulment under Article 52(1)(b) of the ICSID Convention.[371]

298. As Mr. Rand already explained in his Memorial, *ad hoc* committees have taken two different approaches to the interpretation of the term "*manifest*". According to the first approach, adopted by the committee in *Vivendi v. Argentina*, the term "*manifest*" should be interpreted to mean "*substantial*" or "*serious*".[372] The *Vivendi* committee also explained that an excess of powers satisfies the requirement of being "*substantial*" or "*serious*" if it is "*clearly capable of making a difference to the result*":

> It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only *where the failure to exercise a jurisdiction is clearly capable of making a difference to the result* that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result,

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371 *E.g. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 86, **RLA-155**; *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/07, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 43, **CLA-190**; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, ¶ 80, **CLA-194**; *Lucchetti v Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, ¶ 99, **CLA-209**; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, June 14, 2010, ¶ 41, **CLA-116**; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application, 21 February 2014, ¶ 75, **CLA-016**; Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds. Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. 3rd ed. Cambridge University Press; 2022, Article 52, ¶ 196, **CLA-206**.

372 Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds. *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. 3rd ed. Cambridge University Press; 2022, Article 52, ¶ 161. **CLA-206**.

> amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b).[373]

299. The second approach, represented by, for example, the *Occidental v. Ecuador* decision, interprets the term "*manifest*" to mean "*clear, obvious and without need for further debate or investigation.*"[374]

300. Mr. Rand demonstrates in **Sections III.B and III.C** below that both approaches lead to the same result in the present case. The Tribunal's incorrect denial of jurisdiction over claims relating to Mr. Rand's investments, other than the Beneficially Owned Shares, constitutes an excess of powers that is "*clear, obvious and without need for further debate or investigation*" and that, at the same time, clearly impacted the result of the case. Therefore, the Tribunal's denial of jurisdiction constitutes a manifest excess of powers, and is, thus, a ground for annulment under Article 52(1)(b) of the ICSID Convention, under both approaches found in ICSID jurisprudence.

301. Serbia incorrectly suggests that the requirement of "*evident*" excess of powers precludes the Committee from engaging in any in-depth analysis of the Tribunal's decision.[375] This very suggestion was firmly refuted by the *ad hoc* committee in *Occidental v. Ecuador*,[376] which expressly held that the requirement that the excess of powers be "*manifest*" does not "*prevent that in some cases an extensive argumentation and analysis may be required to prove that the misuse of powers has in fact occurred.*"[377]

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373 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 86 (emphasis added)(references omitted), **RLA-155**.

374 Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds. *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. 3rd ed. Cambridge University Press; 2022, Article 52, ¶ 155. **CLA-206**.

375 Counter-Memorial, ¶¶ 264, 267.

376 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶ 57, **CLA-005**.

377 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶ 267, **CLA-005**.

302. The conclusion of the *Occidental* committee has been confirmed by numerous other *ad hoc* committees.[378] For example, the *Pey Casado v. Chile (I)* committee concluded that "*an extensive argumentation and analysis do not exclude the possibility of concluding that there is a manifest excess of power, as long as it is sufficiently clear and serious*."[379] So did the committee in *Caratube v. Kazakhstan*: "*The Committee agrees with Respondent that the term 'manifest' basically corresponds to 'obvious' or 'evident'. However, this does not prevent that in some cases an extensive argumentation and analysis may be required to prove that such a manifest excess of power has in fact occurred*."[380]

303. The committee in *Tenaris v. Venezuela* explained that this is simply because such an extensive analysis may be required to understand the tribunal's jurisdictional decision: "*This does not imply that whenever a tribunal reached a decision on jurisdiction after an extensive argumentation and analysis, there can be no manifest excess of power just because it may take the committee an equally extensive argumentation and analysis to understand the tribunal*."[381]

304. Therefore, in this case, the requirement that the excess of powers be manifest does not prevent the Committee and the Parties from engaging in complex argumentation and analysis to establish that an excess of powers has occurred, because the Tribunal

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378 *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 70, **CLA-192**; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application, 21 February 2014, ¶ 84, **CLA-016**; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, ¶ 75, **CLA-220**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 86, **RLA-155;** *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, 14 June 2010, ¶ 55, **CLA-116**; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, ¶ 80, **CLA-194**; *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 67, **CLA-187.**

379 *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 70, **CLA-192**.

380 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application, 21 February 2014, ¶ 84, **CLA-016**.

381 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, ¶ 75, **CLA-220**.

incorrectly denied jurisdiction over Mr. Rand's claims relating to his assets other than the Beneficially Owned Shares.

305. Finally, Serbia cannot seriously argue that a manifest excess of powers cannot occur when the tribunal decides on a point of law where the case law is not settled.[382] This allegation is contradicted for example by the *ad hoc* committee in *Malaysian Historical Salvors v. Malaysia,* which decided that there was a manifest excess of powers due to the tribunal's interpretation of the term "*investment*" in Article 25 of the ICSID Convention. The *ad hoc* committee recognized that opinions on the issue were diverging, but decided to side with the approach that rejects the so-called *Salini* test and annulled the award for a manifest excess of powers:

> While this Committee's majority has every respect for the authors of the *Salini v. Morocco* Award and those that have followed it, such as the Award in *Joy Mining v. Egypt*, and for commentators who have adopted a like stance – and, it need hardly add, for its distinguished co-arbitrator who attaches an acute Dissent to this Decision – it gives precedence to awards and analyses that are consistent with its approach, which it finds consonant with the intentions of the Parties to the ICSID Convention.[383]

306. Similarly, the *ad hoc* committee in *Patrick Mitchell v. Congo* annulled the award for the tribunal's manifest excess of powers because it disagreed with the tribunal's analysis of the existence of a protected investment under the applicable BIT. The BIT defined an investment as, among other things, "*returns which are reinvested*". The *ad hoc* committee considered that the claimed investment consisted of returns that were not reinvested by the investor. Thus, the ad hoc committee found that the tribunal committed a manifest excess of powers when it upheld jurisdiction.[384] The *ad hoc* committee annulled the award even though other ICSID tribunals had held that a demonstrative list of assets included in a treaty definition of "*investment*" does not

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382 Counter-Memorial, ¶¶ 293, 309.

383 *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶ 78, **CLA-194**.

384 *Mr. Patrick Mitchell v. Democratic Republic of the Congo,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 43, **CLA-187**.

exclude that other types of assets, not expressly listed on such a list, also qualify as protected investments.[385]

307. Another example is the decision of the *ad hoc* committee in *Occidental v. Ecuador (II)*. There, the award was annulled due to manifest excess of powers to the extent that the tribunal assumed jurisdiction over an investment beneficially owned by a third party.[386] The committee concluded that "*[b]y compensating a protected investor for an investment which is beneficially owned by a non-protected investor, the Tribunal has illicitly expanded the scope of its jurisdiction and has acted with an excess of powers.*"[387] The committee's decision was based on the principle that when ownership is split, "*international law grants standing and relief to the owner of the beneficial interest - not to the nominee.*"[388] Yet, numerous ICSID tribunals have accepted and granted claims filed by the nominal owner.[389]

308. It follows that *ad hoc* committees may—and indeed do—find manifest excess of powers of tribunals also when the tribunal has decided on a point of law where the case law is not settled.

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385 *E.g.*, *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, ¶ 63, **CLA-064**. *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, ¶ 77 (emphasis added), **CLA-003**; *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia I*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶ 129, **CLA-085**.

386 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶ 185, **CLA-005**.

387 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶ 266, **CLA-005**.

388 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, ¶ 259, **CLA-005**.

389 *E.g.*, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 358, **CLA-045**; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award 28 July 2015, ¶ 314, **CLA-168**; *See also Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006, ¶ 211, **RLA-073**.

B. The Tribunal manifestly exceeded its powers when it declined jurisdiction over Mr. Rand's Indirect Shareholding

309. To add to his Beneficially Owned Shares, Mr. Rand also acquired the Indirect Shareholding through his wholly-owned Serbian company, Marine Drive Holding d.o.o. ("**MDH**").[390]

310. The Indirect Shareholding falls squarely within the Canada-Serbia BIT's definition of a protected "*investment*", which includes, without limitation, "*a share, stock or other form of equity participation in an enterprise*".[391] Serbia did not dispute that MDH owns the Indirect Shareholding[392] and that the Indirect Shareholding is an "*investment*" protected by the Canada-Serbia BIT.

311. Even though the Indirect Shareholding was protected by the Canada-Serbia BIT, the Tribunal rejected to exercise its jurisdiction over the Indirect Shareholding under the ICSID Convention. The reason given by the Tribunal was that "*[t]he Claimants have proffered no evidence whatsoever of Mr. Rand's alleged contribution of EUR 0.2 million to acquire MDH Serbia's 3.9% stake in BD Agro.*"[393]

312. As Mr. Rand explains in this section, there are several issues with the Tribunal's decision. Specifically, the Tribunal:

a. departed from established case law providing that there is no need to investigate whether the claimant satisfies additional conditions to the ownership of shares (**Section III.B.1** below);

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390 Mr. Rand is the sole shareholder of MDH Serbia and MDH Serbia holds a 3.9% share in BD Agro. *See* Award, ¶ 21.

391 Canada-Serbia BIT, Article 1, definition of "*investment"*, **CLA-001**.

392 Curiously, Serbia asserts in this annulment proceedings that "*[t]he only viable evidence of MDH Serbia's acquisition of the 3.9% shareholding would be sale and purchase agreements*." (See Counter-Memorial, ¶ 324) This assertion is simply absurd. MDH purchased BD Agro shares on the stock exchange—and there are no agreements concluded when trading takes place on the stock exchange. In any event, Mr. Rand duly proved MDH's ownership of the Indirect Shareholding by *e.g.*, Extract from the CSD and Clearing House showing current shareholders' structure of BD Agro, 11 January 2019, **CE-255** or Minutes from the regular annual Shareholders' Meeting of BD Agro AD Dobanovci, 8 July 2016, **CE-141**.

393 Award, ¶ 273.

b. failed to inform Mr. Rand that it would apply the *Salini* test and require evidence of his "*contribution*" with respect to the Indirect Shareholding (**Section III.B.2** below); and

c. ignored the existence of numerous contributions made by Mr. Rand towards BD Agro in respect of the Indirect Shareholding, despite recognizing these contributions in relation to the Beneficially Owned Shares (**Section III.B.3** below).

313. Thus, the Tribunal's decision to reject jurisdiction over the Indirect Shareholding clearly represents a manifest excess of powers.

1. The Tribunal departed from the definition of "investment" in the Canada-Serbia BIT and established case law when it rejected jurisdiction over the Indirect Shareholding

314. As explained above, the Tribunal stated that it rejected jurisdiction over the Indirect Shareholding because "*[t]he Claimants have proffered no evidence whatsoever of Mr. Rand's alleged* ***contribution*** *of EUR 0.2 million to acquire MDH Serbia's 3.9% stake in BD Agro*."[394] According to the Tribunal, the requirement of "*contribution*" is inherent in the definition of investment under Article 25(1) of the ICSID Convention.[395] This holding is not tenable with respect to the Indirect Shareholding.

315. The ICSID Convention does not define the term "*investment*"—and intentionally so. The Convention intended to leave the freedom to define "*investment*" to the contracting parties:

> From a simple reading of Article 25(1), the Tribunal recognizes that the ICSID Convention does not define the term "investments". The Tribunal notes that numerous arbitral precedents confirm the statement in the Report of the Executive Directors of the World Bank that the Convention does not define the term "investments" because it wants to leave the parties free to decide what class of disputes they would submit to the ICSID.[396]

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394 Award, ¶ 273 (emphasis added).

395 Award, ¶ 228.

396 *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 159-60, **RLA-034**.

316. Because there is no definition of "*investment*" in the ICSID Convention, numerous investment tribunals have confirmed that the only relevant question is whether the purported investment satisfies the definition of "*investment*" under the applicable investment treaty.[397]

317. Serbia disagrees and argues that "*there is a general consensus*" that investments should be defined with reference to the so-called *Salini* criteria.[398] Serbia is wrong. There is no consensus—much less a general consensus—on the applicability of the *Salini* criteria. On the contrary, over-reliance on the *Salini* test has been repeatedly and heavily criticized by investment tribunals.[399]

318. ICSID *ad hoc* committees have taken the same approach. For example, the *ad hoc* committee in *Malaysian Historical Salvors v. Malaysia* confirmed that it is the investment treaties that bestow jurisdiction upon ICSID tribunals. As a result, the committee held that the importance of investment treaties should not be ignored by questionable interpretations of the term "*investment*" under Article 25(1) of the ICSID Convention.[400]

319. Serbia's attempt to distinguish the *Malaysian Historical Salvors* decision clearly has no merits. According to Serbia, this decision has no weight in the present case because

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397 *Philippe Gruslin v. Malaysia,* ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **CLA-087**; *Lanco Int'l, Inc. v. Argentine Republic,* ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 48, **CLA-088**; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 159-60, **RLA-034**; *Ambiente Ufficio SPA and others v. The Argentine Republic,* ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **CLA-089**; *Mr. Hassan Awdi, Enterprise Business Consultants Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 197, **CLA-026**; *Garanti Koza LLP v. Turkmenistan,* ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 241, **CLA-211**; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 93, **CLA-041**; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay,* ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 94, **CLA-212**.

398 Counter-Memorial, ¶ 283.

399 *E.g. Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, ¶ 294, **CLA-210**; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 294, **CLA-067**.

400 *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶ 73, **CLA-194**.

it did not concern the requirement of the investor's contribution, but another element of the *Salini* test—contribution to the host State's economy.[401] This is not true.

320. The committee rejected reliance on the *Salini* test as such—not on any of its individual elements. The committee concluded that the Tribunal's decision represents a manifest excess of powers because:

a. the tribunal failed to give effect to the definition of "*investment*" under the applicable investment treaty;

b. the tribunal improperly elevated the *Salini* criteria to jurisdictional conditions; and

c. the Tribunal's decision was in conflict with the "*decisions of the drafters of the ICSID Convention to reject a monetary floor in the amount of an investment, to reject specification of its duration, to leave 'investment' undefined, and to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID*".[402]

321. Serbia's assertion that the *Malaysian Historical Salvors* decision was "*severely criticized*" for substituting the tribunal's interpretation of law with its own is incorrect.[403] Serbia only refers to two commentaries. One merely states that annulment decisions reviewing questions of jurisdiction should be "*approached with caution*".[404] The other commentary only makes a mention of criticism allegedly made by "*commentators*", without identifying any.[405] That can hardly be interpreted as "*severe*" criticism.

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401 Counter-Memorial, ¶ 290.

402 *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶ 80(c), **CLA-194**.

403 Counter-Memorial, ¶ 291.

404 S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair (Eds.), *Schreuer's Commentary on the ICSID Convention,* 3rd ed., Cambridge University Press, 2022, Article 52, ¶¶ 183-184, **CLA-206**.

405 R. D. Bishop, S. M. Marchili, *Annulment under the ICSID Convention,* Oxford University Press, 2012, ¶ 6.82, **RLA-254**.

322. Serbia's reliance on another annulment case—*Patrick Mitchell v. Congo*—is also misplaced.[406] This decision disproves of, rather than supports, Serbia's case. The issue in the *Patrick Mitchell* case was whether returns collected outside of Congo qualify as a protected investment.[407] The *Patrick Mitchell* tribunal concluded that such returns do qualify as an investment, but the *ad hoc* committee disagreed and concluded that the tribunal exceeded its powers because its decision ran "*counter to the clear and precise provision of the Treaty*".[408] Therefore, the committee discussed "*investment*" under the ICSID Convention only as *obiter dictum* because its decision was based on the applicable BIT, not the *Salini* test.[409]

323. Furthermore, even tribunals that otherwise applied the *Salini* test found that shareholders do not need to satisfy additional conditions to the ownership of shares.[410] This stands to reason. The *Salini* test was proposed to address the question whether purely contractual rights of a contractor in a highway construction project constitute a protected investment. The Salini test was not proposed to examine whether the ownership of shares constitutes a protected investment.

324. In fact, it is difficult to imagine a clearer example of an investment within the meaning of Article 25 of the ICSID Convention than ownership of shares in a company. Shares in a company *as a rule* constitute a protected investment under Article 25 of the ICSID Convention, regardless of whether the investor has paid a purchase price or has acquired the shares through inheritance, donation or in any other lawful manner that does not involve payment of a purchase price.

325. Thus, the tribunal in *Lopez-Goyne* expressly concluded that "*[a]s a matter of fact, ownership of shares generally is considered sufficient*" to evidence the existence of an

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406 Counter-Memorial, ¶ 292.

407 *Mr. Patrick Mitchell v. Democratic Republic of the Congo,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 42, **CLA-187**.

408 *Mr. Patrick Mitchell v. Democratic Republic of the Congo,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 46, **CLA-187**.

409 *Mr. Patrick Mitchell v. Democratic Republic of the Congo,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 32, **CLA-187**.

410 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **CLA-198**; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542, **CLA-199**.

"*investment*".[411] The tribunal considered this general rule to be subject to a caveat that there should be no "*risk of abuse or circumvention of the jurisdictional requirements".*[412] No such "*special circumstances*" exist in this case and the Tribunal did not point to any such circumstances in the Award. To the contrary, the Tribunal expressly rejected Serbia's objection to jurisdiction based on an alleged abuse of process.[413]

326. Serbia argues that the *Lopez-Goyne* award implies that the intermediary company holding the investment must have made a contribution, as required under the *Salini* test.[414] This is, however, not what the *Lopez-Goyne* tribunal held. The *Lopez-Goyne* tribunal held that, absent abuse, ownership of shares is sufficient to establish the existence of a protected investment. The *Lopez-Goyne* tribunal examined whether the intermediary company made a contribution only because the intermediary company's investment was a concession (not a shareholding)[415] and because "*commitment of capital or other resources*" was expressly required under the applicable BIT.[416] Mr. Rand's company MDH owned shares in BD Agro (not a concession) and the Canada-Serbia BIT does not require contribution.

327. Similarly, in *Victor Pey Casado v. Chile*, the tribunal generally accepted that the characteristics of an investment from the *Salini* test apply,[417] but confirmed that one of the claimants, Foundation "Presidente Allende", had an "*investment*" in the form of

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411 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 319, **CLA-198**.

412 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **CLA-198** citing *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542, **CLA-199**; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 148, **CLA-091**; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 159, **CLA-160**.

413 Award, ¶ 470.

414 Counter-Memorial, ¶ 303.

415 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 329, **CLA-198**.

416 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶¶ 329-332, **CLA-198**.

417 *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 233, **CLA-199**.

shares of local news companies, even though it obtained the investment free of charge.[418] The tribunal was satisfied that the Foundation had an "*investment*" simply because it owned the shares.

328. Serbia's only response is that, in *Pey Casado*, the original investor had made a contribution before assigning the shares to the Foundation.[419] That is factually correct but does not change the fact that the Pey Casado tribunal only analyzed the Foundation's ownership of the shares.[420]

329. In any event, MDH obviously did make a contribution when it purchased the Indirect Shareholding. But Mr. Rand did not know this would be relevant because Serbia never argued that the Indirect Shareholding had been acquired without a contribution, and this matter was never raised by the Tribunal.

2. The Tribunal did not inquire about Mr. Rand's contribution, nor did it inform Mr. Rand that he needed to prove its existence

330. The Tribunal rejected jurisdiction over the Indirect Shareholding without *ever* inquiring with Mr. Rand about the payment for the shares made by MDH or inviting Mr. Rand to submit evidence of specific payments made by the MDH.[421] In addition, the Tribunal never informed the Parties that it intended to apply the *Salini* test and would require Mr. Rand to provide evidence of specific payments made for the Indirect Shareholding.

331. The Tribunal's approach is in direct contrast with its own conclusion that the Parties should always be given "*an opportunity to comment*" if the Tribunal "*intends to base*

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418 *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542, **CLA-199**.

419 Counter-Memorial, ¶ 304.

420 *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶¶ 516 *et seq*., **CLA-199**.

421 Mr. Rand was a witness in the arbitration and was examined at the hearing for over 1.5 hours both by Serbia's counsel and by all Members of the Tribunal. Yet, at no point was Mr. Rand asked by either Serbia or the Tribunal about how he acquired the Indirect Shareholding and how much he paid for it. *See* Video recording, Hearing on Jurisdiction and Merits, Day 2, 13 July 2021, time: 0:00:00-1:40:15.

its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate."[422]

332. Mr. Rand could not have anticipated that he would be required to prove contribution just because the *Salini* test was generally discussed in the arbitration. In fact, Serbia did not raise the *Salini* objection with regard to the Indirect Shareholding in its Counter-Memorial submitted in the arbitration. The only argument advanced by Serbia in relation to the Indirect Shareholding was that Mr. Rand was allegedly obliged to submit a waiver by MDH.

333. Serbia's argument that "*he who asserts must prove*" is inapposite.[423] Mr. Rand asserted that he had an investment (in the form of "*shares*"), which he proved. In fact, his title was never disputed. Mr. Rand could not expect that the Tribunal would apply a test much more demanding than the one explicitly stipulated in the BIT.

3. The Tribunal recognized contributions made by Mr. Rand towards BD Agro, but then chose to ignore them in relation to the Indirect Shareholding

334. In his Memorial, Mr. Rand explained that the Tribunal in fact did have evidence of Mr. Rand's contribution towards his Indirect Shareholding. Many of Mr. Rand's contributions recognized by the Tribunal as relevant with respect to the investment in the Beneficially Owned Shares in BD Agro are also related to the Indirect Shareholding.[424]

335. To recall, the Tribunal considered that the Beneficially Owned Shares were an "*investment*" under the ICSID Convention because Mr. Rand contributed towards BD Agro.[425] Serbia does not dispute that and the Tribunal, when elaborating on the evidence of Mr. Rand's contribution, mentioned several contributions towards BD Agro as a whole.[426] It is therefore completely inexplicable why such contributions

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422 Award, ¶ 188.

423 Counter-Memorial, ¶ 316.

424 Memorial, ¶¶ 286-290.

425 Memorial, ¶¶ 287-288.

426 Memorial, ¶ 287.

were recognized by the Tribunal only with respect to the Beneficially Owned Shares and not the Indirect Shareholding.

336. By way of example, the recognized contributions included Mr. Rand's management of BD Agro's business—through MDH as well as from his position on BD Agro's Board. They also included Mr. Rand's EUR 2.2 million financial contribution to BD Agro.[427] All these activities were directed at increasing the value of BD Agro as a whole—and, thus, represented a contribution with respect to both the Beneficially Owned Shares and the Indirect Shareholding.

* * *

337. In conclusion, the Tribunal's failure to exercise jurisdiction over the Indirect Shareholding clearly represents a manifest excess of powers. The Tribunal's error is "*manifest*" in all possible meanings of the word—it is both clear and significant enough to impact the outcome of the case. The decision to decline jurisdiction over the Indirect Shareholding must therefore be annulled.

C. The Tribunal manifestly exceeded its powers when it declined jurisdiction over Mr. Rand's investment in the form of the Loans

338. The Tribunal also rejected its jurisdiction over Mr. Rand's investment in the form of loans provided to BD Agro for:

a. the purchase and transport of BD Agro's new herd (approximately EUR 2.2 million)—the EUR 2.2 million payment was recognized as Mr. Rand's claim in the BD Agro's bankruptcy proceedings;[428] and

b. the payment for services of herd management experts provided to BD Agro (approximately EUR 160,000);[429]

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427 Memorial, ¶ 287.

428 Commercial Court in Belgrade Decision number 9. St-321/2015 (30 March 2018), Decision on the List of Determined and Contested Claims, p. 2 (English translation), **CE-136**.

429 Award, ¶ 274 ("*through Rand Investments, Mr. Rand also paid approximately EUR 160,000 to remunerate the services provided to BD Agro by herd management experts Messrs. Wood and Calin*").

339. These payments represent an investment in the form of "*a loan to an enterprise*", covered under letter (d) of Article 1 of the Canada-Serbia BIT[430] (together the "**Loans**").

340. The Tribunal, however, refused to exercise its jurisdiction over Mr. Rand's claims related to the Loans. The Tribunal did so because, according to the Tribunal, the Loans allegedly:

a. are excluded from the definition of investment under the Canada-Serbia BIT; and

b. lack the minimum duration required under the ICSID Convention.

341. Neither of these two conclusions is tenable.

342. As Mr. Rand already explained in his Memorial, the Tribunal's refusal to exercise jurisdiction over the Loans represents a manifest excess of powers because the Tribunal:

a. incorrectly applied to the Loans a carve-out from the protection of the Canada-Serbia BIT set out in Articles 1(k) and 1(l) thereof;

b. incorrectly departed from: (*i*) the definition of "*investment*" in the Canada-Serbia BIT; and (*ii*) established case law, providing that there is no need to investigate whether Mr. Rand's investment in the Loans satisfies requirement of "*duration*"; and

c. stated that the Loans did not meet the alleged requirement of "*a duration*", even though Mr. Rand had held the Loans for up to a decade before the commencement of the arbitration.

343. Each of these reasons will be discussed in detail below.

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430 Canada-Serbia BIT, Art. 1(d), **CLA-001**.

1. The Tribunal erroneously declined jurisdiction over the Loans under the Canada-Serbia BIT

344. The Loans clearly fall withing the definition of "*investment*" under Article 1(d) of the Canada-Serbia BIT, which states that one type of assets that qualify as the "*investment*" is "*loan[s] to an enterprise*".[431] As Mr. Rand demonstrated in his Memorial, the Loans clearly represent "*loan[s] to an enterprise*". Therefore, the Loans are a protected investment under the Canada-Serbia BIT. That should have been the end of the Tribunal's analysis.

345. The Tribunal, instead, focused on a carve-out from the protection of the Canada-Serbia BIT set out in Articles 1(k) and 1(l) thereof, which excludes claims to money arising from simple commercial loans, commercial sales and otherwise not in connection with another investment:[432]

> but "**investment**" does not mean:
>
> (k) a claim to money that arises solely from:
>
> (i) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or
>
> (ii) the extension of credit in connection with a commercial transaction, such as trade financing; or
>
> (l) any other claim to money;
>
> that does not involve the kinds of interests set out in subparagraphs (a) to (j);

346. The Tribunal, however, misapplied this provision. *First*, the Tribunal ignored the fact that this provision applies to commercial transactions. *Second*, the Tribunal ignored the exception in the last sentence of this provision (highlighted in the screenshot above).

347. Mr. Rand explained in the Memorial that the Loans do not represent a one-off provision of funds by an otherwise unrelated party. The Loans did not arise from a one-off transaction, but from a continuous relationship between BD Agro and Mr. Rand as the majority owner of BD Agro. There was also no exchange of money, goods

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431 Canada-Serbia BIT, Article 1, definition of "*investment"*, item (d), **CLA-001**; Memorial, ¶ 295.

432 Award, ¶¶ 344-345.

or services between Mr. Rand and BD Agro.[433] The nature of the Loans therefore render Articles 1(k) and (l) of the Canada-Serbia BIT inapplicable.

348. As Mr. Rand also explained in his Memorial, the Tribunal correctly concluded that Mr. Rand held a protected investment in the Beneficially Owned Shares under Article 1(b) of the Canada-Serbia BIT. The Loans were clearly linked to and involved that investment. Thus, the last sentence of the carve-out provision applies, and the Loans are not subject to the exclusion under Articles 1(k) and (l) of the Canada-Serbia BIT.

349. This interpretation of subparagraphs (k) and (l) is in line with the well-established interpretation of a nearly identical carve-out under NAFTA Article 1139(i) and (j), which reads:[434]

> but investment does not mean,
>
> (i) claims to money that arise solely from
>
> (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
>
> (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
>
> (j) any other claims to money,
>
> that do not involve the kinds of interests set out in subparagraphs (a) through (h);

350. As also explained in the Memorial, NAFTA case law clearly states that the carve-out excludes "*mere cross-border trade interests*",[435] and that "*something more permanent is necessary, such as a commitment of capital or other resources in the territory of a Party to economic activity in such territory*," in order for a claim to be treated as an

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433 Memorial, ¶¶ 299-300.

434 *The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America)*, UNCITRAL, Award on Jurisdiction, 28 January 2008, p. 47, **CLA-213**.

435 *The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America)*, UNCITRAL, Award on Jurisdiction, 28 January 2008, ¶ 144, **CLA-213**; *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 233, **CLA-214**; Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada, ICSID Case No. ARB/20/52, Award of the Tribunal, 13 March 2024, ¶¶ 367-370, **CLA-215**.

investment.[436] Mr. Rand's Loans were part of Mr. Rand's long-term investment in BD Agro and were clearly a "*commitment of capital […] to economic activity*" in the territory of Serbia.

351. Serbia's attempt to distinguish these NAFTA cases is in vain. Serbia argues that while those cases entailed "*contractual claims*", "*no contract was ever concluded between Mr. Rand and BD Agro*".[437] This argument is both incorrect and irrelevant.

352. Serbia's argument is incorrect because the NAFTA cases entailed "*cross-border trade interests*", not "*contractual claims*" as Serbia alleges.[438] Moreover, Serbia's argument it is based on a clearly incorrect assumption that all contracts need to be concluded in writing.[439] This is clearly not the case. Enough to say, Serbia does not refer to any provision stating that loans within the meaning of letter (d) of Article 1 of the Canada-Serbia BIT[440] would need to arise out of written agreements.

353. The argument is also irrelevant, because the investment does not have to be based on a contract to be protected under the BIT.

354. Serbia's assertion that Mr. Rand's reading of Article 1 of the Canada-Serbia BIT is too broad and creates a risk that any payment by an investor towards their investment's day-to-day operation would create a self-standing investment is without merit.[441] As explained above, the exception from the carve-out provision under the Canada-Serbia BIT makes it clear that only claims to money that "*involve the kinds of interests set*

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436 *The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America)*, UNCITRAL, Award on Jurisdiction, 28 January 2008, ¶ 144, **CLA-213**; *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 141(h), 231, 233, **CLA-214**; Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada, ICSID Case No. ARB/20/52, Award of the Tribunal, 13 March 2024, ¶¶ 367-370, **CLA-215**.

437 Counter-Memorial, ¶ 337.

438 *The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America)*, UNCITRAL, Award on Jurisdiction, 28 January 2008, ¶¶ 143-144, **CLA-213**; *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 233, **CLA-214;** *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Award, 13 March 2024, ¶¶ 367-370, **CLA-215**.

439 Rejoinder on Jurisdiction, ¶ 451.

440 Canada-Serbia BIT, Art. 1(d), **CLA-001**.

441 Counter-Memorial, ¶ 335.

out in subparagraphs (a) to (j)" fall outside the carve-out. Thus, there is no risk that any payment would qualify as an investment.

355. The allegation that Mr. Rand's payments were just "*money expended in expectation of a return through the increase of value of BD Agro*" does not advance Serbia's case either.[442] Every investment represents "*money expended in expectation of a return.*" Serbia refers in this context to *Inmaris v. Ukraine*.[443] However, *Inmaris* is not applicable. In *Inmaris*, the claimant's payments for repairs of a ship did not constitute an investment because they were not related to any other investment and did not result in the acquisition of any asset, such as claims to money.[444] Mr. Rand's extension of the Loans were related to his investment in the Beneficially Owned Shares and the Indirect Shareholding, and it gave rise to Mr. Rand's claim to money against BD Agro.

356. Finally, Serbia's assertion that Mr. Rand raised the above arguments related to the carve-out under Canada-Serbia BIT only in the annulment proceeding is simply false.[445] Mr. Rand consistently argued in the arbitration that the Loans were "*loans to an enterprise*" and were not captured by the carve-out language of letters (k) and (l).[446]

* * *

357. Given the above, the Tribunal's decision to reject jurisdiction over the Loans under the Canada-Serbia BIT clearly represents a manifest excess of powers. The Tribunal's decision is clearly contradictory to the very text of the Canada-Serbia BIT, as well as consistent case law interpreting similarly worded provisions of investment treaties. In addition, the Tribunal's decision clearly impacted the outcome of the case, as it led to the rejection of investment protection for a part of Mr. Rand's investment.

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442 Counter-Memorial, ¶ 335.

443 Counter-Memorial, ¶ 335.

444 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 101, **RLA-13.**

445 Counter-Memorial, ¶ 339.

446 Reply, ¶¶ 632-643; Rejoinder on Jurisdiction, ¶¶ 448-453.

2. The Tribunal erroneously declined jurisdiction under the ICSID Convention over the Loans

a. The Tribunal manifestly exceeded its powers when it rejected jurisdiction under the ICSID Convention over the Loans

358. The Tribunal also manifestly exceed its powers when it concluded that the Loans are not an "*investment*" within the meaning of the ICSID Convention.[447] The Tribunal reached this conclusion because, according to the Tribunal, the Loans lack the duration allegedly required by the above-discussed *Salini* test.[448]

359. Mr. Rand already addressed the *Salini* test and its inapplicability in the present case in **Section III.B.1** above.[449] Just to summarize, with respect to the duration requirement, it is undisputed that the requirement for an investment to have certain "*duration*" is not expressed in the ICSID Convention[450] or the Canada-Serbia BIT.[451]

360. Serbia, however, argues that "*the purpose of the duration requirement is to exclude short-term, one-time transactions*" from the scope of protected investment.[452] Serbia's only authority for this proposition is the *Casinos v. Argentina* case.[453] This award only states that the *Salini* criteria excludes "*one-time sales transactions that do not face investment-specific risk*" from access to ICSID dispute resolution. Mr. Rand's Loans clearly do not fall under this description.

361. The Loans faced significant investment-specific risk, which materialized when Serbia unlawfully seized the Beneficially Owned Shares and then mismanaged BD Agro into bankruptcy. The statement of the *Casinos v. Argentina* tribunal is, therefore, entirely inapplicable.

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447 Award, ¶ 274.

448 Award, ¶¶ 222, 274.

449 *See supra*, ¶¶ 315-322.

450 E.g. *Philippe Gruslin v. Malaysia,* ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **CLA-087**; *Lanco Int'l, Inc. v. Argentine Republic,* ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 48, **CLA-088**; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 159-60, **RLA-034**; *Ambiente Ufficio SPA and others v. The Argentine Republic,* ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **CLA-089**.

451 Canada-Serbia BIT, definition of "*investment",* Article 1(d), **CLA-001**.

452 Counter-Memorial, ¶ 355.

453 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, ¶ 189, **RLA-168.**

362. The Loans were also not "*short-term*", as Serbia incorrectly claims. The Loans had been held by Mr. Rand for *seven years* as of the Valuation Date and for *a decade* as of the date when the arbitration started. That is significantly more than the time required by tribunals applying the *Salini* test, as explained below.

363. In his Memorial, Mr. Rand explained that the *Deutsche Bank v. Sri Lanka* tribunal found that a hedging agreement for *twelve months* satisfied the alleged requirement of "*duration*".[454] Serbia counters that "*a payment is not a contract and Mr. Rand has never concluded a loan agreement with BD Agro*". However, a contract does not need to be in writing (as Claimants argued already in course of the arbitration).[455] Moreover, whether the Loans are "*loans*", "*contracts*" or "*claims to money*" is irrelevant for the purposes of the determination of their duration.

454 Memorial, ¶ 314.

455 Rejoinder on Jurisdiction, ¶ 451.

364. It is clear from the above that the Loans cannot be likened to the payments in *Doutremepuich v. Mauritius.*[456] There, the tribunal considered insufficient the duration of 9-11 months of one-off payments "*that were incurred as part of the preparations for a project which was not yet off the ground*".[457] BD Agro was long "*off the ground*" when Mr. Rand extended the Loans to BD Agro.

365. The Loans are also not "*one-time*", because the relationship between Mr. Rand and BD Agro was lasting, and his partial investments must be assessed in their unity, as part of one economic venture. This principle was already explained in the Memorial and is confirmed by decisions in *CSOB v. Slovak Republic* and *Sempra v. Argentina*.[458]

366. Serbia's attempt to distinguish the *CSOB* and *Sempra* cases clearly fails.[459] To begin with, Serbia alleges that *CSOB* and *Sempra* concerned actual loans, while the Loans held by Mr. Rand allegedly do not represent actual loans. Serbia alleges that "*payments for the benefit of an investment are not loans*".[460] As explained above (and not refuted by Serbia or the Tribunal), the payments extended by Mr. Rand on behalf of BD Agro created a claim of Mr. Rand *vis-à-vis* BD Agro for their repayment. Serbia does not explain what else than a "*loan*" such arrangement represents.

367. In any case, the *CSOB* tribunal did *not* limit its analysis to loans. On the contrary, it explained that individual "*transactions*" may qualify as a part of overall investment:

> a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a *transaction* which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[461]

368. Even under Serbia's incorrect interpretation, the Loans clearly represent "*transactions*". As a result, the *CSOB* decision is evidently relevant in the present case.

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456 Counter-Memorial, ¶ 357.

457 *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius,* PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, ¶¶ 143-144, **RLA-171.**

458 Memorial, ¶¶ 316-317.

459 Counter-Memorial, ¶¶ 356, 358.

460 Counter-Memorial, ¶ 359.

461 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 72, **CLA-003**.

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369. Given the above, the Tribunal's reasons for rejection of jurisdiction over the Loans due to alleged insufficient duration is simply indefensible and must be annulled.

b. The Tribunal failed to provide reasons for its decision to reject jurisdiction over Mr. Rand's investment in the form of the Loans

370. As Mr. Rand explained in his Memorial, the Tribunal's explanation of why it considered that the Loans did not have sufficient duration is limited to the following two sentence in the Award:[462]

> The Claimants allege that Mr. Rand made payments of approximately EUR 2.2 million for the replacement of BD Agro's herd. In addition, through Rand Investments, Mr. Rand also paid approximately EUR 160,000 to remunerate the services provided to BD Agro by herd management experts Messrs. Wood and Calin. The Tribunal is not convinced that these payments satisfy the duration criteria of the objective definition of investment in Article 25(1) of the Convention. For instance, the payment of consulting fees by Rand Investments does not have a significant duration, and the Claimants have not established the contrary.

371. Worse yet, the two sentences provided by the Tribunal do not provide any actual reasons for the Tribunal's decision to reject its jurisdiction. They do not explain why the Tribunal believed that the Loans do not "*satisfy the duration criteria of the objective definition of investment*" nor what such criteria are. It is equally unclear which facts were the basis for the Tribunal's conclusion about the alleged absence of duration of the Loans—the Loans clearly met the duration required by all other ICSID tribunals that applied the requirement.[463]

372. As explained above, the absence of any reasons for an award, or its particular aspect, represents a blatant violation of Article 48(3) of the ICSID Convention.[464] Annulment

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462 Award, ¶ 274.

463 *E.g. Salini v Morocco*, ICSID Case no. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶ 54: "*The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years*", **CLA-020**; *RFCC v Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, ¶ 62: "*L'opération satisfait ainsi à la durée minimale observée par la doctrine qui est de 2 à 5 ans*", **CLA-195**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶¶ 93–95, **CLA-217**; *Malaysian Historical Salvors v Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007, ¶¶ 110, 111, **CLA-216**.

464 ICSID Convention, Article 48(3), **CLA-017**.

is required when "*there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning*".[465]

373. Serbia's defense of the Tribunal's failure to state reasons is again that the Loans are allegedly not "*loans*".[466] This point is simply irrelevant. Whether the Loans qualify as "*loans*" or any other claim for money is not relevant for the assessment of their duration. And, as demonstrated above, the Tribunal did not provide any reasoning for why it considered the duration of the Loans insufficient.

374. Serbia alleges that the reasoning for the Tribunal's decision is implicit in the Award and can allegedly be inferred from the Tribunal's statement that "*Mr. Rand's expenditures were not loans, but simple payments for the benefit of BD Agro*".[467] Serbia's appeal to the Committee to "*supplement the reasoning*" of the Tribunal must fail.[468] There is no implicit reasoning available in the Award. The Tribunal's statement mentioned by Serbia does not relate to the duration of the Loans at all, and it does not justify the Tribunal's decision whatsoever. As the *ad hoc* committee in *Rumeli v. Kazakhstan* made clear, if the tribunal's reasoning does not "*follow or flow from the award's reasoning, an ad hoc committee should not construct reasons in order to justify the decision of the tribunal*".[469]

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465 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 97, **RLA-152**.

466 Counter-Memorial, ¶ 363.

467 Counter-Memorial, ¶ 365.

468 Counter-Memorial, ¶ 366.

469 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, 25 March 2010, ¶ 83, **RLA-250**.

IV. THE TRIBUNAL'S DECISION ON COSTS MUST BE ANNULLED

375. As Mr. Rand explained in his Memorial, the Tribunal's decision on costs must be annulled because it is based on other annullable parts of the Award.

376. To recall, the Tribunal ordered the Parties to each bear half of the costs of the proceedings and bear their own legal and other costs.[470] The Tribunal based its decision *inter alia* on the fact that: (*i*) Mr. Rand was successful with only some of his claims; and (*ii*) Mr. Rand was awarded only a small part of the damages that he claimed in the arbitration.[471] Because the Tribunal's decision on costs is based, *inter alia*, on the Tribunal's annullable decisions on jurisdiction and quantum, the decision on costs must follow the same fate.

377. Mr. Rand also noted that this conclusion is supported by the *ad hoc* committee in *MINE v. Guinea*, which stated that "*[t]he award of costs cannot survive the annulment of that portion of the Award with which it is inextricably linked*."[472] The same was true in *Teco* v. *Guatemala*.[473]

378. In the Counter-Memorial, Serbia attempts to question the applicability of these decisions to the present case. Serbia alleges that both the *MINE* and *Teco* committees annulled the entire basis for Tribunal's decision on costs, whereas in the present case, the parts of the Award subject to this annulment are only part of the basis for the Tribunal's decision on costs.[474] Serbia is wrong. For example, the *Teco* committee also did not annul the entire basis for the award on costs. The annulment of a portion of the award was nonetheless a sufficient reason for the annulment of the decision on costs.

379. Serbia's argument that the Tribunal would allocate costs in the same manner as it did, even if the issues subject to this annulment were decided differently is pure

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470 Award, ¶ 716.

471 Award, ¶ 716.

472 *Maritime International Nominees Establishment v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award, 22 December 1989, ¶ 6.112, **CLA-184**.

473 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 361-362, **CLA-186**.

474 Counter-Memorial, ¶¶ 373-374.

speculation.[475] The Tribunal did not state the weight of individual circumstances relevant for its cost decision. It is not clear which of them were more or less important, and it is not for the Parties or the Committee to guess.

[475] Counter-Memorial, ¶ 375.

V. REQUEST FOR RELIEF

380. Based on the above, Mr. Rand requests that:

a. pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Arbitration Rules, the Award issued in this case be annulled, concerning the quantification of damages, in paragraphs 693-697, 699(i.), 699(ii.), 699(iv.), 699(v.) and 699(vi.), 707 except items "*Other Construction Land*", "*Agricultural land*", "*Other fixed assets*", "*Deferred tax assets*" and "*Payment to Canadian suppliers*", 708 first sentence, the second part of the second sentence starting with "*resulting*" and the last sentence, 717(d) before "*together*" and 717(g) to the extent it relates to claims for damages;

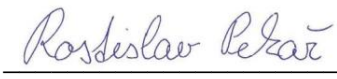
b. pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Arbitration Rules, the Award issued in this case be annulled, concerning the negative decision on jurisdiction, in paragraphs 228, 232 second sentence, 237 first, second and last sentence, 270-273, 274 third and last sentence, 275, 277 first sentence after "*Beneficially Owned Shares*", the word "*only*" in first and second sentence of paragraph 281, the word "*only*" in paragraph 290, 333, 343 third sentence, 344-345, 471 the second part of the first sentence starting with the word "*but*", 717(b) to the extent it relates to Mr. Rand's claims under the Canada-Serbia BIT, and 717(g) to the extent they relate to Mr. Rand's claims under the Canada-Serbia BIT;

c. pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Arbitration Rules, the Award issued in this case be annulled, concerning the decision on costs, in paragraphs 716, 717(e) and 717(f); and

d. pursuant to Articles 61(2) and 52(4) of the ICSID Convention, the Respondent is ordered to pay Mr. Rand's costs of this annulment proceeding, together with the Centre's costs.

381. Mr. Rand reserves the right to modify the request for relief, including the list of specific paragraphs that should be annulled, in further pleadings.

Submitted on behalf of Mr. William Archibald Rand



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