INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

AND

SEMBI INVESTMENT LIMITED (CYPRUS)

Claimants/Applicants

– v –

REPUBLIC OF SERBIA

Respondent

(ICSID Case No. ARB/18/8)

APPLICATION FOR PARTIAL ANNULMENT

24 February 2024

SQUIRE PATTON BOGGS

nstlaw/ Stankovic & Partners

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I. INTRODUCTION

A. Preliminary statement

1. This is an application for partial annulment ("**Application**") of the Award issued in the case of *Rand Investments Ltd. and others v. Republic of Serbia,* ICSID Case No. ARB/18/8, on 29 June 2023, as supplemented by the Decision on the Claimants' Request for a Supplementary Decision dated 27 October 2023 ("**Award**").

2. The Application is respectfully submitted pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Arbitration Rules by:

   a. Mr. William Archibald Rand ("**Mr. Rand**");

   b. Rand Investments Ltd., a limited liability company incorporated under the laws of Canada ("**Rand Investments**");

   c. Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand ("**Mr. Rand's Children**" and, together with Mr. Rand and Rand Investments, "**Canadian Claimants**"); and

   d. Sembi Investment Limited ("**Sembi**"), a limited liability company constituted under the laws of Cyprus (Canadian Claimants and Sembi together as "**Claimants**").

3. 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**").[1]

4. In the Award, the majority of the Tribunal, including Prof. Gabrielle Kaufmann-Kohler and Mr. Baiju S. Vasani ("**Majority**"), rightfully upheld jurisdiction over Mr. Rand's beneficial ownership of 75.87% of the shares in a Serbian agricultural

[1] The references in this Application to Exhibits A- and ALA- refer to documents and legal authorities respectively, submitted for the first time by Claimants in these annulment proceedings.

company, BD Agro AD, Dobanovci ("**BD Agro**" and "**Beneficially Owned Shares**").[2] The Majority also proceeded to award damages to Mr. Rand in the amount of EUR 14,572,730 plus interest.[3]

5. Unfortunately, the Majority failed to provide *any reasoning whatsoever* for several key conclusions related to its calculation of Mr. Rand's damages. In addition, the Majority's reasoning with respect to many of its other conclusions on quantum was contradictory, insufficient and failed to take into account key evidence relied upon by the Parties.[4] To illustrate the point, the Majority did not offer *any reasoning* for the value it assigned to *six out of seven* categories of BD Agro's assets, and its reasoning with respect to the remaining category is clearly contradictory.

6. The Tribunal also failed to provide *any reasons* for certain of its decision on jurisdiction. Specifically, the Tribunal rejected jurisdiction over EUR 2.36 million in loans provided by Mr. Rand to BD Agro in 2008 ("**Loans**") because they allegedly did not satisfy "*the duration criteria*". However, the Tribunal did not explain why that was supposedly the case. The Tribunal did not examine the actual duration of these Loans, nor formulated any test for when "*the duration criteria*" would be satisfied.[5]

7. *Ad hoc* committees have repeatedly held that a lack of reasoning, contradictory reasoning and failure to address evidence *all* represent grounds for annulment under Article 52(1)(e) of the ICSID Convention (failure to state reasons). As a result, Claimants request annulment of the parts of the Award for which the Majority failed to state reasons by failing to provide any reasoning, by providing contradictory reasoning and/or by failing to address relevant evidence. Claimants address this ground for annulment in detail in **Sections III.A and III.B.3** below.

8. Claimants also request annulment of the parts of the Award where the Tribunal manifestly exceeded its powers by incorrectly declining its jurisdiction over:

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2 Award, ¶ 471, **A-001**.

3 Award, ¶¶ 633, 708, 717, **A-001**.

4 Award, pp. 199-219, **A-001**.

5 Award, ¶ 274, **A-001**.

a. claims brought by Mr. Rand in relation to his additional 3.9% shareholding in BD Agro;

b. claims brought by Mr. Rand in relation to the Loans; and

c. all claims brought by Sembi, Rand Investments and Mr. Rand's Children.[6]

9. As Claimants demonstrate in **Section III.B** below, the Tribunal clearly had jurisdiction over *all* these claims. The Tribunal's failure to exercise its jurisdiction represents a ground for annulment under Article 52(1)(b) of the ICSID Convention (manifest excess of powers).

10. Based on the above reasons, Claimants respectfully request partial annulment of the Award. Claimants define the exact extent to which the Award should be annulled in the Request for Relief set out in **Section IV** below.

B. Procedural matters

11. The Award was supplemented by the Tribunal in its Decision on the Claimants' Request for a Supplementary Decision dated 27 October 2023 ("**Supplementary Decision**"). According to Article 49(2) of the ICSID Convention, the 120-day period stipulated in Article 52(2) of the ICSID Convention for filing of this Application runs from the date on which the Supplementary Decision was rendered.[7] As a result, the 120-day period lapses on 26 February 2024.[8] Therefore, this Application is timely filed on 24 February 2024.

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6 Award, ¶¶ 251-265, 270-277, 342-345, 347, **A-001**.

7 ICSID Convention, Article 49(2), **ALA-001**.

8 The 120-day period from 27 October 2023 ends on 24 February 2024. However, pursuant to Regulation 29(2) of the Administrative and Financial Regulations: "*A time limit shall be satisfied if a notification or instrument dispatched by a party is delivered at the seat of the Centre, or to the Secretary of the competent Commission, Tribunal or Committee that is meeting away from the seat of the Centre, before the close of business on the indicated date or, if that day is a Saturday, a Sunday, a public holiday observed at the place of delivery or a day on which for any reason regular mail delivery is restricted at the place of delivery, then before the close of business on the next subsequent day on which regular mail service is available.*" The Administrative and Financial Regulations of ICSID, April 2006, **ALA-002**.

12. In accordance with Administrative and Financial Regulation 16 and the Schedule of Fees effective from 1 July 2023, the non-refundable lodging fee of USD 25,000 has been transferred to the Centre.[9]

13. Claimants are jointly represented by Squire Patton Boggs and Stankovic & Partners.[10] Contact details for all communication in relation to this matter are as follows:

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9 Confirmation of Claimants' payment of the lodging fee to the Centre dated 22 February 2024, **A-002**.

10 Powers of Attorney issued by Claimants to Mr. Rostislav Pekař from Squire Patton Boggs s.r.o. and to Mr. Nenad Stanković and Ms. Sara Pendjer from Stankovic & partners law office **A-003** (submitted as **CE-001** in the arbitration).

II. FACTUAL BACKGROUND AND THE AWARD

A. Summary of the relevant facts

14. In 2005, Mr. Rand purchased 70% of the shares in BD Agro ("**Privatized Shares**").[11] The Privatized Shares were put up for a sale in a public auction organized by the Privatization Agency of the Republic of Serbia and Montenegro ("**Privatization Agency**").[12]

15. Mr. Rand decided to participate in the auction through Mr. Djura Obradović, a Canadian-Serbian businessman, with whom Mr. Rand had had a business relationship in Serbia. Messrs. Rand and Obradović agreed that, if they succeed in the auction, Mr. Obradović would be the nominal owner and Mr. Rand would be the beneficial owner of the Privatized Shares.[13]

16. Messrs. Rand and Obradović were successful and, on 4 October 2005, the Privatization Agency and Mr. Obradović entered into an agreement on sale of the Privatized Shares ("**Privatization Agreement**").[14] Under the Privatization Agreement, Mr. Obradović was to pay a purchase price of approximately EUR 5,549,000, payable in six instalments over a period of five years, and to invest an additional approximately EUR 2 million in BD Agro.

17. The Tribunal correctly concluded that Mr. Rand was the beneficial owner of the Privatized Shares. The Tribunal also correctly concluded that Mr. Rand "*was the one bearing the financial burden of the investment*"[15] because "*the funds for the acquisition of the Beneficially Owned Shares came from Mr. Rand*".[16]

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11 First Witness Statement of William Rand dated 5 February 2018, ¶¶ 13, 22, **A-004**.

12 W. Rand First WS, ¶¶ 13-22, **A-004**.

13 W. Rand First WS, ¶ 17, **A-004**; First Witness Statement of Djura Obradović dated 20 September 2017, ¶ 7, **A-005**.

14 Privatization Agreement with Annexes dated 4 October 2005, **A-006** (submitted as **CE-017** in the arbitration).

15 Award, ¶ 238, **A-001**.

16 Award, ¶ 240, **A-001**.

18. In October 2006, the Privatization Agency confirmed that the EUR 2 million additional investment had been made by October 2006.[17] As a result of this additional investment, Mr. Rand's beneficial shareholding in BD Agro increased to 75.87%.[18]

19. In 2008, Mr. Rand restructured his beneficial ownership of BD Agro to also involve the remaining Claimants. On 22 February 2008, Sembi acquired a direct beneficial ownership of BD Agro through an agreement with Mr. Obradović (the "**Sembi Agreement**").[19] Sembi's owners, in turn, were (and still are) the Ahola Family Trust (whose beneficiaries are, and always were, Mr. Rand's Children) and Rand Investments (which is solely-owned by Mr. Rand).[20]

20. Mr. Rand continued to invest in BD Agro beyond his contribution through his acquisition of the Beneficially Owned Shares. BD Agro's herd was replaced with new cows from the best genetic lines of the Holstein Friesian breed. The new herd was purchased almost exclusively in Canada and flown to Serbia at a personal cost to Mr. Rand of approximately EUR 2.2 million on chartered Boing 747 aircraft.[21] Moreover, Mr. Rand paid approximately EUR 160,000 for services provided to BD

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17 Privatization Agreement with Annexes dated 4 October 2005, Article 5.2.1, **A-006** (submitted as **CE-017** in the arbitration); Confirmation of the Privatization Agency of the Completion of Investment dated 10 October 2006, **A-007** (submitted as **CE-018** in the arbitration).

18 W. Rand First WS, ¶ 28, **A-004**.

19 Agreement between Mr. Obradović and Sembi dated 22 February 2008, Article 4, **A-008** (submitted as **CE-029** in the arbitration).

20 Corporate register of Sembi dated 27 June 2019, pp. 7-8 (pdf), **A-009** (submitted as **CE-417** in the arbitration); The Ahola Family Trust Indenture dated 6 March 1995, **A-010** (submitted as **CE-008** in the arbitration).

21 Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 607,759.50 executed on 21 October 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from W. Rand to Wiljill Farms Inc. for CAD 460,216.00 executed on 24 December 2008, **A-011** (submitted as **CE-021** in the arbitration); Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 695,030.90 executed on 21 October 2008; Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 124,100.92 executed on 9 December 2008, Confirmation of wire transfer from W. Rand to Sea Air International Forwarders of CAD 309,415 executed on 22 December 2008, **A-012** (submitted as **CE-022** in the arbitration); Confirmation of wire transfer from W. Rand to Trudeau International Livestock for CAD 443,080.00 executed on 21 October 2008, **A-013** (submitted as **CE-023** in the arbitration); Confirmation of wire transfer from W. Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **A-014** (submitted as **CE-024** in the arbitration).

Agro by herd management experts.[22] These direct expenses constituted, and were accounted for as, loans provided to BD Agro by Mr. Rand.

21. Between October 2008 and October 2012, Mr. Rand acquired on the Belgrade Stock Exchange an additional 3.9% indirect shareholding in BD Agro ("**Indirect Shareholding**"), which he purchased and held through his wholly-owned company, Marine Drive Holding d.o.o. ("**MDH Serbia**").[23]

22. On 8 April 2011, the Privatization Agency confirmed that it had received the last instalment of the purchase price.[24] On that date, the Privatization Agreement was fully consummated.[25]

23. Despite this fact, on 28 September 2015, the Privatization Agency unlawfully terminated the Privatization Agreement for alleged violation of its Article 5.3.4, which restricted BD Agro's ability to pledge its fixed assets.[26] On 21 October 2015, the Privatization Agency seized and expropriated the Beneficially Owned Shares.[27]

24. Serbia's seizure of the Beneficially Owned Shares frustrated BD Agro's reorganization plan.[28] The required majority of BD Agro's creditors had approved the plan. Following the seizure, the plan also needed to be approved by the Privatization Agency—which simply ignored BD Agro management's requests for such an

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22 Overview of Payments to Mr. David Wood dated April 2013-January 2014, **A-015** (submitted as **CE-062** in the arbitration); Overview of Payments to Mr. Gligor Calin dated May 2013-January 2015, **A-016** (submitted as **CE-068** in the arbitration).

23 Mr. Rand is the sole shareholder of MDH Serbia and MDH Serbia holds a 3.9% share in BD Agro. *See* Award, ¶ 21, **A-001**.

24 Confirmation of the Privatization Agency on the Buyer's Full Payment of the Purchase Price dated 6 January 2012, **A-017** (submitted as **CE-019** in the arbitration).

25 Award, ¶ 612, **A-001**.

26 Notice on Termination of the Privatization Agreement dated 28 September 2015, **A-018** (submitted as **CE-050** in the arbitration).

27 Decision of the Privatization Agency on the Transfer of BD Agro's Capital dated 21 October 2015, **A-019** (submitted as **CE-105** in the arbitration).

28 The reorganization was necessary because despite the significant value of BD Agro's underlying assets, the company was experiencing difficulty meeting its debt obligations due to lower cash flows from revenue generating operations.

approval. As a result, Serbian courts rejected the reorganization plan and, on 30 August 2016, declared BD Agro's bankruptcy.[29]

25. BD Agro's bankruptcy was the final blow to Claimants' investment, as it rendered all the remaining assets held by Claimants—*i.e.* the Indirect Shareholding and the Loans—worthless.

26. The Serbian Government did not offer to pay any compensation to Claimants, not even to return the purchase price paid for the Privatized Shares. It also failed to respond to Claimants' notification of a dispute. Thus, on 9 February 2018, Claimants filed their Request for Arbitration and initiated the arbitration proceedings.

B. The Award

27. On 29 June 2023, the Tribunal issued the Award. As a starting point, the Majority correctly upheld the Tribunal's jurisdiction over Mr. Rand's investment in the Beneficially Owned Shares, stating that "*the evidence […] unequivocally demonstrates that Mr. Rand was the investor involved in BD Agro's acquisition and operation*".[30]

28. The Tribunal, however, declined jurisdiction *ratione materiae* over Mr. Rand's remaining investments—the Indirect Shareholding and the Loans.[31] Moreover, the Tribunal upheld jurisdiction over the Beneficially Owned Shares solely as Mr. Rand's investment and refused to exercise jurisdiction over the claims of the remaining Claimants—*i.e.* Sembi, Rand Investments and Mr. Rand's Children.[32]

29. The Tribunal then correctly attributed the actions of the Privatization Agency to Serbia. In the Tribunal's words, these actions "*involved the exercise of governmental authority*" as "*[n]o private party could have done so*".[33]

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29 Second Witness Statement of Igor Markićević dated 16 January 2019, ¶ 91, **A-020**; Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, **A-021** (submitted as **CE-109** in the arbitration).

30 Award, ¶ 239, **A-001**.

31 Award, ¶ 277, **A-001**.

32 Award, ¶ 277, **A-001**.

33 Award, ¶¶ 491, 493, **A-001**.

30. The Majority concluded that on 28 September 2015, the Privatization Agency wrongfully terminated the Privatization Agreement for the alleged violation of Article 5.3.4. The Majority held that this obligation ceased to exist as of the date on which the purchase price was fully paid in 2011 and, as a result, the Privatization Agreement could not be lawfully terminated for an alleged breach of this provision four years later, in 2015:[34]

> The full purchase price was paid on 8 April 2011. As the obligation contained in Article 5.3.4 ceased on that date, it could not be breached thereafter. This is a matter of simple logic. […]
>
> In light of these elements, the Tribunal concludes that the Privatization Agreement could not be terminated after 8 April 2011 for an alleged breach of Article 5.3.4 that had occurred before that date. Therefore, the termination of the Agreement was unlawful.

31. The Majority also correctly concluded that the subsequent seizure of the Beneficially Owned Shares by the Privatization Agency represented a breach of the fair and equitable treatment standard provided in Article 6 of the Canada-Serbia BIT:[35]

> As the termination of the Agreement was unlawful, the seizure of the Beneficially Owned Shares, which was the direct consequence of the termination and was carried out in the exercise of sovereign powers, was wrongful as well and meets the threshold for finding a breach of Article 6 of the Treaty.

32. The Majority found that "*the Agency's seizure of the Beneficially Owned Shares deprived Mr. Rand of the entirety of his investment*"[36] and proceeded to award Mr. Rand damages in the amount of EUR 14,572,730 plus interest.[37] This was to compensate Mr. Rand for his loss as a beneficial owner of the Beneficially Owned Shares, which he held through Rand Investments and Sembi.[38]

33. The Tribunal calculated the amount of compensation due to Mr. Rand as the part of BD Agro's equity value corresponding to Mr. Rand's 75.87% share in BD Agro, plus

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34 Award, ¶¶ 612, 615, **A-001**.

35 Award, ¶ 623, **A-001**.

36 Award, ¶¶ 490, 606, **A-001**.

37 Award, ¶ 717(d), **A-001**.

38 Award, ¶ 708, **A-001**.

interest accrued from the valuation date of 21 October 2015.[39] The Tribunal calculated BD Agro's equity value by subtracting the total value of BD Agro's liabilities from the total value of its assets.[40]

34. When calculating the equity value, the Tribunal correctly considered BD Agro to be a going concern as of the valuation date and rejected the bankruptcy sales discount proposed by Serbia.[41] The Tribunal also correctly identified relevant categories of assets and liabilities entering into the valuation. However, the Tribunal then failed to provide reasons (or provided contradictory reasons) for how it arrived at the value of the majority of BD Agro's assets and liabilities.

35. In addition, the Tribunal also ignored evidence that was clearly relevant for the valuation of BD Agro's most valuable asset—its construction land. As Claimants explain in this Application, Tribunal's failure to state reasons and failure to consider relevant evidence are also annullable errors.

36. In the operative part of the Award, the Tribunal ordered Serbia to pay EUR 14,572,730 to Mr. Rand, together with interest at the average EURIBOR for 6 months deposits plus 2% per annum, compounded semi-annually, until the date of payment.[42] However, the operative part did not specify the date from which interest would accrue. Consequently, upon Claimants' request, the Tribunal issued the Supplementary Decision, clarifying that the interest should accrue from 21 October 2015—the date of the breach.[43]

37. On 12 January 2024, Serbia wired EUR 17,587,154.56 to Mr. Rand's bank account.

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39 Award, ¶ 682, **A-001**.

40 Award, ¶ 699, **A-001**.

41 Award, ¶ 685, **A-001**.

42 Award, ¶ 717(d), **A-001**.

43 Decision on the Claimants' Request for a Supplementary Decision dated 27 October 2023, ¶ 47(a), **A-022**.

III. GROUNDS FOR ANNULMENT

38. As explained above, there are two main reasons for which the Award should be partially annulled.

39. *First*, the Tribunal failed to provide reasons for many key aspects of its calculation of the amount of compensation awarded to Mr. Rand. Specifically, the Tribunal did not provide *any reasons* for: (*i*) the valuation of six out of seven main categories of BD Agro's assets valued by the Tribunal; and (*ii*) its assessment of the capital gains tax, *i.e.* one of the liabilities included in the Tribunal's calculation.[44] Claimants address these issues in detail in **Section III.A.2** below.

40. In addition, the Tribunal's reasoning provided with respect to other inputs relevant for its calculation of damages is in material respects inconsistent and contradictory. For example, while the Tribunal first rejected the use of information originating after the valuation date of 21 October 2015 ("**Valuation Date**"),[45] it subsequently repeatedly relied on such evidence.[46] Claimants address contradictions in the Tribunal's reasoning in detail in **Section III.A.3** below.

41. Finally, the Tribunal failed to consider crucial evidence put forward by the Parties. Most importantly, the Tribunal failed to take into consideration relevant evidence related to the valuation of BD Agro's most valuable asset—its construction land in the municipality of Dobanovci.[47] The evidence omitted by the Tribunal clearly shows that the value of BD Agro's construction land was much higher than the value estimated by the Tribunal.[48] Claimants address this error in **Section III.A.4** below.

42. As Claimants demonstrate in **Section III.A.1** below, *ad hoc* committees have repeatedly confirmed that a lack of reasoning, contradictory reasoning and/or the failure to address evidence all represent grounds for an annulment under Article 52(1)(e) of the ICSID Convention (the failure to state reasons).

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44 Award, ¶ 699(v), **A-001**.

45 Award, ¶ 693(third bullet point)(ii), **A-001**.

46 *E.g.* Award, ¶ 699(i), **A-001**.

47 Award, ¶ 693, **A-001**.

48 First Expert Report of Dr. Richard Hern dated 16 January 2019, ¶¶ 68, 70, **A-023**.

43. *Second*, the Tribunal incorrectly, and without providing any relevant reasoning, declined to exercise its jurisdiction over:

a. Mr. Rand's claims related to his 3.9% Indirect Shareholding in BD Agro;

b. Mr. Rand's claims related to his receivables *vis-á-vis* BD Agro for repayment of the Loans; and

c. all claims of Sembi, Rand Investments and Mr. Rand's Children.

44. As Claimants demonstrate in **Sections III.B.2** to **III.B.6** below, the Tribunal did so even though it clearly had jurisdiction over these claims. As Claimants explain in **Section III.B.1** below, the Tribunal's failure to exercise its jurisdiction represents a ground for annulment under Article 52(1)(b) of the ICSID Convention (manifest excess of powers). Moreover, the Tribunal's denial of jurisdiction over the Loans simultaneously represents a failure to state reasons and is addressed in **Section III.B.3**.

A. The Tribunal failed to state reasons on which it based many of its conclusions on quantum

1. Failure to state reasons is a ground for annulment

45. The obligation to state reasons flows from Article 48(3) of the ICSID Convention, which unequivocally imposes on the arbitral tribunal the obligation to "*deal with every question submitted to the Tribunal and **[to] state the reasons***" on which the award is based.[49]

46. Furthermore, Articles 48(3) and 52(1) of the ICSID Convention require, as a minimum, "*that parties can understand the reasoning of the Tribunal, meaning the reader can understand the facts and law applied by the Tribunal in coming to its conclusion*."[50] The MINE *ad hoc* committee—a leading authority on this issue—held that the requirement to state reasons can be satisfied only if the award enables the reader to follow the tribunal's reasoning:

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49 ICSID Convention, Article 48(3) (emphasis added), **ALA-001**.

50 Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, ¶ 105, **ALA-003**.

> [T]he requirement to state reasons is satisfied as long as *the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion,* even if it made an error of fact or of law.[51]

47. Other *ad hoc* committees have expressed similar views.[52]

48. A failure to state the reasons on which an award is based requires its annulment pursuant to Article 52(1)(e) of the ICSID Convention. According to this provision:

> Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: […] (e) that *the award has failed to state the reasons on which it is based*.[53]

49. ICSID annulment jurisprudence shows that an award falls short of the requirement to state reasons, for example, in the following circumstances:

a. absence of reasons for an award or its particular aspect;[54]

b. contradictory or frivolous reasons;[55]

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51 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, ¶ 5.09 (emphasis added), **ALA-004**.

52 See e.g. *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, ¶ 64, **ALA-005**; Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, ¶¶ 79, 81, **ALA-006**; TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 87, 124, **ALA-007**; 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, **ALA-008**; Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, ¶ 118, **ALA-009**; Tidewater Inc. et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 163, **ALA-010**.

53 ICSID Convention, Article 52(1)(e) (emphasis added), **ALA-001**.

54 *See 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, **ALA-011**. 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, **ALA-012**.

55 See e.g. Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, ¶ 6.107 ("[T]he requirement that the Award must state reasons on which it is based is in particular not satisfied by contradictory reasons."), **ALA-004**; see also Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, ¶ 107, **ALA-003**; Klöckner Industrie-Anlagen

c. insufficient or inadequate reasons;[56]

d. failure to address a particular question submitted to a tribunal; and[57]

e. failure to observe relevant evidence.[58]

50. Several of these circumstances arise in the present case with respect to many of the Tribunal's conclusions on jurisdiction and quantum. Namely, the Tribunal:

a. failed to explain its reasoning with respect to numerous key determinations in the Award;

b. provided inconsistent, contradictory and insufficient reasoning with respect to others; and

c. failed to observe relevant evidence.

51. Claimants address in this section III.A the instances where the Tribunal failed to state reasons with respect to its conclusions on quantum. The Tribunal's failure to state

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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, ¶ 116, **ALA-012**; Tidewater Inc. et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶¶ 173-191, **ALA-010**.

56 *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 ("*[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.*"), **ALA-013**; *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, **ALA-008**.

57 Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, ¶ 101 ("The ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award."), **ALA-006**; see also Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, ¶ 104, **ALA-003**; Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, ¶ 32, **ALA-014**; 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, ¶ 115, **ALA-012**; Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, ¶ 5.13, **ALA-004**.

58 The ad hoc committee in *TECO v. Guatemala* found that the 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*" which resulted in the Tribunal's line of reasoning being difficult to understand. *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 131, 135, **ALA-007**.

reasons with respect to its denial of jurisdiction over certain Claimants and investments is addressed in section III.B together with an explanation that these denials of jurisdiction represent a manifest excess of powers.

2. The Tribunal failed to provide *any* reasons for a substantial part of its conclusions on quantum

a. The Tribunal failed to provide *any* reasons for the value it assigned to *six out of seven* categories of BD Agro's assets

52. In the Award, the Tribunal concluded that Serbia must fully repair the harm caused to Mr. Rand by its illegal seizure of the Beneficially Owned Shares.[59] The Tribunal calculated the amount of compensation due to Mr. Rand as the part of BD Agro's equity value at the Valuation Date corresponding to Mr. Rand's 75.87% share in BD Agro, plus interest.[60]

53. To calculate the equity value, the Tribunal subtracted the total value of BD Agro's liabilities from the total value of its assets.[61] When calculating the value of BD Agro's assets, the Tribunal divided the assets into two categories: (*i*) farm assets, and (*ii*) non-farm assets.[62] The farm assets include: (*a*) agricultural land; (*b*) "*other fixed assets*"; (*c*) "*current assets*"; and (*d*) deferred tax assets.[63] The non-farm assets include: (*e*) "*Dobanovci Development Land [Construction Land]*"; (*f*) "*other construction land*"; and (*g*) "*Novi Becej*".[64]

54. The Tribunal assigned the following values to these categories of assets:[65]

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59 Award, ¶ 672, **A-001**.

60 Award, ¶ 682, **A-001**.

61 Award, ¶ 699, **A-001**.

62 Award, ¶ 707, **A-001**.

63 Award, ¶ 707, **A-001**.

64 Award, ¶ 707, **A-001**.

65 Award, ¶ 707, **A-001**.

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**

55. The Tribunal did *not* provide *any reasons* for how it calculated the value of the following six categories of assets:

a. additional construction land in Dobanovci and Bečmen (referred to by the Tribunal as the "*Other Construction Land*")[66];

b. land and buildings in Novi Bečej (referred to by the Tribunal as "*Novi Becej*");[67]

c. agricultural land;

d. other fixed assets;

e. current assets; and

f. deferred tax assets.

56. In fact, the Tribunal merely copied and pasted the value of these assets from the third expert report filed by Serbia's quantum expert.[68] The Tribunal did so without

66 Award, ¶ 639, **A-001**.

67 Award, ¶ 707, **A-001**.

68 Third Expert Report of Sandy Cowan dated 16 March 2020, ¶ 4.4, **A-024**; Award, ¶ 707, **A-001**.

providing any explanation for why it found these numbers to be correct and why it rejected the valuation of these same assets presented by Claimants and their quantum expert.

57. Despite the absence of any reasons, Claimants are not requesting annulment of the Award concerning the valuation of the "*Other Construction Land*", "*Agricultural land*" and "*Other fixed assets*" because the Tribunal's valuation of these items was in line with both experts' valuations.

58. The total lack of reasoning also makes it impossible to deduce what specific assets are supposed to be included in the category labelled by the Tribunal as "*Novi Becej*". Claimants' valuation of BD Agro's assets in Novi Bečej included the Dundjerski castle (a castle owned by BD Agro located near Novi Bečej) and the agricultural, forest and construction land surrounding the castle.[69] Relying on contemporaneous valuations approved by Serbia,[70] Claimants argued that the value of these assets, as of the Valuation Date, was EUR 0.8 million.[71]

59. The Tribunal did not explain at all why it assigned these assets the value of EUR 0.2 million. The Tribunal did not state whether it took the EUR 0.2 million value from the expert report prepared by Serbia's expert,[72] which only included the value of the land and not the Dundjerski caste, or whether the Tribunal arrived at that number through its own independent thought process.

60. A complete absence of reasons for an award or its outcome-determinative aspect is an undisputable reason for annulment.[73] In the words of the *Pey Casado v. Chile I*

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69 *E.g.* Hern First ER, ¶ 116, **A-023**.

70 Valuation prepared by Confineks d.o.o. Beograd in December 2015 pursuant to the instructions of Ms. Radmila Knežević, the Privatization Agency's representative administering the expropriated 75.87% shareholding in BD Agro. *See* Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci dated December 2015, **A-025** (submitted as **CE-142** in the arbitration).

71 Hern First ER, ¶ 118, **A-023**.

72 First Expert Report of Danijela Ilić dated 23 January 2020, ¶ 10.2, **A-026**; Second Expert Report of Sandy Cowan dated 24 January 2020, ¶ 4.3, **A-027**.

73 *See 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, **ALA-011**. 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*

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*".[74]

61. Similarly, the *ad hoc* committee in *CMS v. Argentina* decided to annul the award issued in the original proceedings because it found that there was "*a significant lacuna in the Award, which [made] it impossible for the reader to follow the reasoning […]*" of the tribunal.[75]

62. The conclusions of the *Pey Casado* and *CMS ad hoc* committees are directly applicable also in the present case. Same as in those cases, the Tribunal in the present case did not provide any "*express rationale for the conclusions*" regarding the value of BD Agro's asset, thus creating "*a significant lacuna in the Award.*"

b. The Tribunal failed to provide reasons for the value it assigned to BD Agro's liabilities

63. As explained above, to calculate BD Agro's equity value, the Tribunal subtracted the total value of BD Agro's liabilities from the total value of its assets.[76] When calculating the value of BD Agro's liabilities, the Tribunal divided them into the following six categories: (*i*) total estimated liabilities; (*ii*) conversion fee; (*iii*) payment to Canadian suppliers; (*iv*) court proceedings; (*v*) capital gains tax; and (*vi*) redundancy payments:[77]

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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, **ALA-012**.

74 *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, **ALA-015**.

75 *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, **ALA-011**.

76 Award, ¶ 699, **A-001**.

77 Award, ¶¶ 699, 707, **A-001**.

Total estimate liabilities	(42.2)
Conversion fee	(3.1)
Payment to Canadian suppliers	(2.2)
Court proceedings	(0.2)
Capital Gains Tax	(5.7)
Redundancy payments	(0.7)
Total liabilities	**54.1**

64. Same as with respect to BD Agro's assets, the Tribunal failed to provide *any reasons* for its calculation of BD Agro's liabilities, even though these items were disputed between the Parties. Specifically, the Tribunal accepted the value of the capital gains tax calculated by Serbia (EUR 5.7 million) solely because it found Serbia's approach to the calculation of the capital gains tax "*objective and logical*".[78] The Tribunal, however, did not provide any explanation for why it considered Serbia's approach objective and logical, nor why it believed that Claimants' approach was not objective and/or logical. The lack of reasoning, same as with respect to BD Agro's assets, prevents Claimants (or any informed reader for that matter) from following—much less understanding—the Tribunal's conclusion.

65. The Tribunal's lack of reasoning has led to an obvious error in that the Tribunal double-counted the capital gains tax in its calculation of BD Agro's total liabilities.

66. Specifically, as shown in the table above, when calculating BD Agro's total liabilities, the Tribunal added the amount of capital gains tax to the category of liabilities that the Tribunal labelled as "*total estimated liabilities*".[79] The EUR 42.2 million value that the Tribunal assigned to the "*total estimated liabilities*" was based on a figure included in BD Agro's contemporaneous valuation prepared by the Serbian valuation company

78 Award, ¶ 699(v), **A-001**.

79 Award, ¶ 707, **A-001**.

Confineks[80] and BD Agro's 2015 financial statements.[81] This EUR 42.2 million liability figure included EUR 3.1 million of deferred tax liability.[82] Thus, if the Tribunal believed that the capital gains tax was EUR 5.7 million, it should have deducted the EUR 3.1 million deferred tax from its assessment of "*total estimated liabilities*" to avoid double counting.

67. The Tribunal did not do so and thus double-counted BD Agro's tax obligations because the Tribunal's assessment of BD Agro's liabilities includes both the deferred tax of EUR 3.1 million (as a component on BD Agro's "*total estimated liabilities*") and the additional amount of capital gains tax of EUR 5.7 million. The Tribunal did so without *any explanation*.[83]

3. The Tribunal's reasoning related to many other conclusions on quantum is contradictory and/or insufficient

68. ICSID annulment jurisprudence shows that an award falls short of the requirement to state reasons if the reasons provided are contradictory or frivolous.[84] Reasons are contradictory when they effectively cancel each other out, not permitting the parties to understand the decisions of ICSID tribunals.[85]

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80 Award, ¶ 699(i), **A-001**; Cowan Third ER, ¶ 4.4; **A-024**; Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci dated January 2016, **A-029** (submitted as **CE-172** in the arbitration).

81 Award, ¶ 699(i), **A-001**; Notes to the 2015 Financial Statements, **A-030** (submitted as **CE-171** in the arbitration).

82 Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci dated January 2016, section 3.2, p.43, **A-029** (submitted as **CE-172** in the arbitration); Hern Second ER, ¶¶ 15, 172-173, **A-028**.

83 Hern Second ER, ¶¶ 172-173, **A-028**.

84 *See e.g. Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, ¶ 6.107, **ALA-004**; *see also* Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, ¶ 107, **ALA-003**; *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, ¶ 116, **ALA-012**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶¶ 173-191, **ALA-010**.

85 *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, ¶102, **ALA-016**; *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, ¶ 281, **ALA-015**.

69. An award also falls short of the requirement to state reasons if the reasons provided are insufficient or inadequate. Reasons are insufficient or inadequate if they cannot, in themselves, be a reasonable basis for the solutions arrived at.[86]

70. The instances where the Tribunal provided contradictory and/or insufficient reasoning are numerous. The Tribunal contradicted its own logic with respect to:

a. its position on the use of asking prices for the valuation of "*Dobanovci Development Land [Construction Land]*" ("**Construction Land**");

b. its approach to the use of certain comparable transactions for the valuation of the Construction Land;

c. its approach to the use of post-valuation date evidence for the valuation of BD Agro's Construction Land and BD Agro's liabilities;

d. its calculation of redundancy payments as BD Agro's liability;

e. its calculation of the conversion fee as BD Agro's liability;

f. its inclusion of liabilities related to certain court proceedings in the total value of BD Agro's liabilities; and

g. its acceptance of a 30% discount to the value of the Construction Land.

71. Claimants address all these issues *seriatim* below.

a. The Tribunal provided contradictory reasoning with respect to its position on the use of asking prices for the valuation of the Construction Land

72. The Construction Land was the most valuable category of BD Agro's assets, as valued by the Tribunal. In their submissions, the Parties relied on various types of evidence to value this land, including evidence from actual prior transactions involving BD Agro's land, comparable transactions, contemporaneous valuations of comparable

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86 *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, **ALA-013**; *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, **ALA-008**.

construction land prepared by the Serbian Tax Authority and contemporaneous valuations of BD Agro's land prepared by various Serbian valuators.[87]

73. The Tribunal disregarded all this evidence in favor of one specific type of evidence relied upon by Serbia—so-called asking prices, *i.e.* the prices included in real estate advertisements.[88] The Tribunal, however, expressly rejected asking prices as an unreliable type of valuation evidence when asking prices were invoked by Claimants' expert.[89]

74. Claimants' valuation of the Construction Land was based on, among other things, a contemporaneous valuation prepared by a Serbian valuator, Mr. Pero Mrgud, in December 2014.[90] Mr. Mrgud's valuation relied, same as Serbia's valuation in the arbitration, on asking prices to estimate the value of the Construction Land.

75. The Tribunal rejected Mr. Mrgud's valuation because, according to the Tribunal, "*Mr. Mrgud's valuation, based on asking prices, was flawed, because it provided no information about the sources of these prices or when they were published*".[91]

76. After rejecting Mr. Mrgud's valuation—as well as other evidence submitted by Claimants—the Tribunal adopted Serbia's valuation of the Construction Land.[92] However, Serbia's valuation was also based on asking prices—and these asking prices suffered from the same limitations as those used by Mr. Mrgud—their sources cannot be verified and several of them have no date.[93]

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87 *E.g.* Claimants' Memorial dated 16 January 2019, ¶ 542, **A-031**; Hern First ER, ¶ 62, **A-023**; Ilić First ER, ¶¶ 9.21, 9.88-9.91, **A-026**.

88 Award, ¶¶ 692-694, **A-001**.

89 Award, ¶ 693 and fn. 555, **A-001**.

90 In December 2014, Mr. Pero Mrgud, a Serbian licensed expert witness in the area of valuation of construction facilities, was commissioned to appraise the value of BD Agro's most valuable asset, the construction land in Dobanovci (the "**Mrgud Valuation**"). Taking the value of land calculated by Mr. Mrgud, the equity value of BD Agro was more than EUR 71 million. *See* Report on the valuation of the market value of construction land in the BD Agro complex Zones A, B and C in the town of Dobanovci dated December 2014, **A-032** (submitted as **CE-175** in the arbitration). *See* also Claimants' Memorial, 16 January 2019, ¶ 520, **A-031**.

91 Award, ¶ 693(second bullet point), **A-001**.

92 Award, ¶ 694, **A-001**; Cowan Second ER, ¶ 5.8, **A-027**.

93 Ilić First ER, ¶ 9.92 and Appendix 2, table 2.6, **A-026**.

77. The Tribunal, thus, accepted asking prices relied upon by Serbia, even though they suffered from the *same* limitations for which the Tribunal rejected asking prices relied upon by Claimants. This clear contradiction makes it entirely impossible to follow the Tribunal's reasoning on whether asking prices are or are not a relevant source of information for the valuation of the Construction Land.

78. A similar situation arose in the annulment proceedings in *Tidewater v. Venezuela*, where Venezuela complained in the annulment proceedings that "*the* ***Tribunal has established elements for the determination of the market value of Respondents'*** *business and of the appropriate amount of compensation for the lawful expropriation* ***and that it has fixed the amount in contradiction to these elements***."[94]

79. Specifically, the *Tidewater* tribunal rejected a 1.5% risk premium as unreasonable and concluded that a 14.75% risk premium should apply instead. However, at the same time, the tribunal awarded damages in the amount calculated based on the 1.5% risk premium.[95]

80. The *ad hoc* committee held that "*the Tribunal contradicted its own analysis and reasoning by quantifying its estimation using one concrete criterion […] which it had rejected as unreasonable.*"[96] The *ad hoc* committee then went on to conclude that "*one part of the Award, where a genuinely contradictory reasoning on the amount of compensation cancels out another reasoning with respect to the same compensation, must be annulled*."[97]

81. The same conclusion should be reached in the present case. Same as in *Tidewater*, the Tribunal used asking prices as a basis for its valuation of the Construction Land after it had specifically rejected asking prices as being unreliable. The Tribunal's

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94 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 161 (emphasis added), **ALA-010**.

95 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 186, **ALA-010**.

96 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 193, **ALA-010**.

97 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 196, **ALA-010**.

contradictory reasons cancel each other out and, as such, warrant annulment of the respective part of the Award.

82. Furthermore, same as with respect to the other issues discussed above, the impact of this error is material for BD Agro's valuation. The difference between Claimants' valuation of the Construction Land and the valuation adopted by the Tribunal is EUR 40.5 million.[98]

b. The Tribunal provided contradictory reasoning with respect to its position on the use of certain comparable transactions relied upon by the Parties

83. As explained above, one type of evidence relied upon by the Parties for valuation of the Construction Land was evidence from so-called comparable transactions, or "*comparables*" in short. Comparables are contemporaneously concluded transactions concerning land similar in location and type.

84. One type of the comparables relied on by Claimants were so-called "*Batajnica transactions*". These transactions reflect market value assessments made by the Serbian Tax Administration based on comparable market transactions for several land plots in the Batajnica municipality. Claimants' valuation expert, Dr. Hern, concluded that the land in Batajnica was broadly comparable to BD Agro's land, with a similar distance from Belgrade and the Belgrade airport.[99]

85. The Tribunal rejected Claimants' valuation based on the Batajnica transactions, stating that "*[t]here are […] major differences between the Batajnica land and [the Construction Land] that make the former an unsuitable comparator*".[100] However, after reaching this conclusion, the Tribunal accepted Serbia's valuation—even though the valuation relied, among other things, on an asking price for the land in the Batajnica region.[101]

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98 Award, ¶ 707, **A-001**; Hern's updated analysis (submitted as **CE-908** in the arbitration), Assets, **A-040**.

99 Hern First ER, ¶ 69, **A-023**.

100 Award, ¶ 693(third bullet point), **A-001**.

101 Ilić ER, p. 145(pdf), **A-026**.

86. The Tribunal thus again contradicted itself—it rejected Claimants' reliance on land prices in Batajnica, but then accepted Serbia's reliance on land prices in Batajnica. As explained above, the valuation of the Construction Land is a key input in BD Agro's valuation as a whole, with the difference between Claimants' valuation and the value accepted by the Tribunal being EUR 40.5 million.[102]

c. The Tribunal provided contradictory reasoning with respect to the use of evidence post-dating the Valuation Date

87. In the part of the Award rejecting Claimants' valuation of the Construction Land, the Tribunal made it clear that it would not rely on any evidence post-dating the Valuation Date, *i.e.* 21 October 2015:[103]

> ii. It is well accepted that the information used for valuation should originate on or before the valuation date. The Batajnica assessments, dating from March to August 2016, do not meet this requirement.[557] Mr. Grzesik admitted that he was not sure when the assessments actually took place.[558]

88. The Tribunal then used this conclusion as one of the reasons for its rejection of certain comparable transactions proposed by Claimants.[104] However, in complete disregard of this conclusion, the Tribunal then used evidence post-dating the Valuation Date to make several determinations related to the value of BD Agro's assets and liabilities:

a. the Tribunal accepted Serbia's valuation of BD Agro's debt *vis-à-vis* Banca Intesa, even though this valuation was based on information postdating the Valuation Date;[105]

b. the Tribunal relied on a valuation prepared by the Serbian company Confineks after the Valuation Date;[106] and

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102 Award, ¶ 707, **A-001**; Hern's updated analysis (submitted as **CE-908** in the arbitration), Assets, **A-040**.

103 Award, ¶ 693(third bullet point)(ii), **A-001**.

104 Award, ¶ 693(third bullet point)(ii), **A-001**.

105 Award, ¶ 699(i), **A-001**.

106 Award, ¶¶ 699(iv), footnote 584 and 707, **A-001**; Cowan Third ER, ¶ 4.4, **A-024**.

c. the Tribunal relied on BD Agro's 2015 financial statements prepared after the Valuation Date.[107]

89. The two different stances taken by the Tribunal regarding the use of post-valuation evidence cannot logically coexist with one another.

90. When faced with a similar situation, the *ad hoc* committee in *Pey Casado v. Chile (I)* annulled the affected part of the award for failure to provide reasons. Specifically, the *Pey Casado* tribunal had refused to consider an expropriation which took place before the BIT's entry into force, however, at the same time, based its calculation of damages on a contemporaneous valuation prepared in connection with that expropriation. The *ad hoc* committee concluded that the tribunal failed to state reasons, as the reasons were contradictory—and annulled the part of award dealing with damages:

> 285. The Tribunal's use of the expropriation-based damage calculation is *manifestly inconsistent with its decision a few paragraphs earlier that such an expropriation-based damage calculation is irrelevant and that all evidence and submissions relevant to such a calculation could not be considered*.
>
> 286. 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*.[108]

91. Similarly in *MINE v. Guinea*, the award was annulled in part concerning damages because the tribunal adopted a calculation inconsistent with its previous analysis of proposed damages theories:

> Having concluded that theories "Y" and "Z" were unusable because of their speculative character, the *Tribunal could not, without contradicting itself, adopt a "damages theory" which disregarded the real situation and relied on hypotheses which the Tribunal itself had rejected as a basis for the calculation of damages*. As the Committee stated in para. 5.09 supra, the requirement that the Award must state

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107 Award, ¶¶ 699(i) and 699(iv), **A-001**.

108 *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, ¶¶ 285-286 (emphasis added), **ALA-015**.

> the reasons on which it is based is in particular not satisfied by contradictory reasons.[109]

92. The conclusions of the *Pey Casado* and *MINE ad hoc* committees are clearly applicable also in the present case. Same as in those cases, the Tribunal used in its valuation evidence postdating the Valuation Date, even though it previously rejected reliance on such evidence.

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

93. When assessing BD Agro's liabilities, the Tribunal included the so-called "*redundancy payments*". These redundancy payments are payments to employees of BD Agro made redundant under a redundancy program adopted by BD Agro's government-appointed management *after* Serbia seized the Beneficially Owned Shares of BD Agro—*i.e.* after the Valuation Date.[110]

94. The Tribunal, however, concluded that the redundancy payments were mandatory to BD Agro already *before* the Valuation Date:

> While the Claimants submit that the redundancy program was voluntary, they offer no authority in support. In any event, BD Agro was obliged to prepare a redundancy program in accordance with Annex 1 of the Privatisation Agreement.[111]

95. This conclusion is in direct contradiction to the Tribunal's earlier finding that the Privatization Agreement ceased to apply upon the full payment of the purchase price in 2011.[112] These two conclusions simply cannot stand together—if the Privatization Agreement ceased to apply in 2011, then BD Agro could not have had any liabilities under the Privatization Agreement as of the Valuation Date of 21 October 2015.

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109 *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, ¶ 6.107 (emphasis added), **ALA-004**.

110 Hern Second ER, ¶ 182, **A-028**.

111 Award, ¶ 699(vi), **A-001**.

112 Award, 612, **A-001**.

96. In addition, the Tribunal's statement that "*[w]hile the Claimants submit that the redundancy program was voluntary, they offer no authority in support*" is false.[113] Claimants' valuation expert referred to authorities which clearly prove the opposite:

> Mr Cowan's inclusion of redundancy costs in the bankruptcy and indeed a going concern scenario is incorrect. The bankruptcy costs of EUR 0.7 million referred to in the January 2016 Reorganisation plan relate to a voluntary redundancy programme put in place by BD Agro's government appointed management after BD Agro was expropriated. They are therefore not relevant for the valuation of BD Agro's assets as of the date of expropriation, as no such programme was envisaged to be implemented by the old management prior to expropriation. This is evident from the fact that no such redundancy costs are included in the *March 2015 Reorganisation plan*. Indeed, this programme was only available to government controlled companies and hence could not have been implemented by BD Agro prior to expropriation.[114]

97. By incorrectly including the redundancy payments in BD Agro's valuation, the Tribunal artificially decreased BD Agro's equity value by EUR 0.7 million.

e. The Tribunal provided contradictory reasons for its calculation of the conversion fee

98. It was undisputed in the arbitration that the valuation of the Construction Land needed to take into account a conversion fee payable to Serbia for changing the status of the Construction Land in the real estate registry, called the Cadaster. The Parties agreed that the amount of the conversion fee was to be deducted from the total value of the Construction Land. The Parties also agreed that the conversion fee should be calculated as 50% of the average price of equivalent agricultural land. The only point of disagreement was the value of equivalent agricultural land.[115]

99. 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*

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113 Award, ¶ 699(vi), **A-001**.

114 Hern Second ER, ¶ 182 (emphasis added), **A-028**.

115 *E.g*. Hern Second ER, ¶¶ 175-177, **A-028**.

tax assessment.[116] The Tribunal also stated that it accepted Ms. Ilić's calculation of the conversion fee (amounting to EUR 3.1 million).[117]

100. The Tribunal did so despite the obvious issues with Ms. Ilić's calculation that Claimants' real estate expert, Mr. Grzesik, pointed out during the hearing:

> I should point out that that although Danijela Ilic applies an agricultural value of €3.4[/m^2] [to calculate the conversion fee], in her main valuation she has adopted an agricultural value of €1/m^2 so I can't understand why the difference but there is that difference.[118]

101. Thus, as explained by Mr. Grzesik, Ms. Ilić's calculation did *not* rely on the previous year's tax assessment when calculating the value of equivalent agriculture land. Instead, Ms. Ilić relied on an arbitrary value of agriculture land (EUR 3.4/m^2) that she presented in her report without any support whatsoever.[119]

102. Given that the Tribunal simply adopted Ms. Ilić's arbitrary calculation, it again acted in contradiction with its own previous reasoning. On one hand, the Tribunal made an unequivocal conclusion that the conversion fee should be calculated based on previous year's tax assessments. And on the other hand, it accepted Ms. Ilić's valuation that did *not* follow this approach.

103. The Tribunal's contradictory reasoning is further exacerbated by the fact that the Tribunal refers to numbers which were never used by either of the Parties: "*Mr. Grzesik reaches an agricultural land price of* ***EUR 1.85 million****, to which he applies a conversion fee of EUR 1.5 million. By contrast, Ms. Ilić arrives at an agricultural land price of* ***EUR 3.4 million*** *to which she applies a conversion fee of EUR 3.1 million.*"[120] The emphasized numbers do not have support in any of the Parties' submissions, and the Tribunal gives *no reasons* for their inclusion.

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116 Award, ¶ 699(ii), **A-001**.

117 Award, ¶ 707, **A-001**.

118 Transcript, Hearing on Jurisdiction and Merits, Day 7, dated 19 July 2021, 58:21-25, **A-033**.

119 Ilić First ER, ¶¶ 9.48-9.49, 9.1 (correctly should be 9.91), **A-026**.

120 Award, ¶ 699(ii) (emphasis added), **A-001**.

104. Also, it is clear that the conversion fee does not represent 50% of these numbers—even though, as explained above, the Parties agreed that the conversion fee should be 50% of the agriculture land value.

105. Importantly, same as with respect to the previous issues, the impact of Tribunal's analysis of the conversion fee is not negligible. On the contrary, the difference between the conversion fee calculated by Claimants and the one adopted by the Tribunal is EUR 2.4 million, *i.e.* approx. 17% of the total amount awarded to Mr. Rand.[121]

f. The Tribunal provided contradictory reasons for its inclusion of liabilities related to certain court proceedings

106. Another item added to BD Agro's liabilities by the Tribunal was a category of liabilities labeled by the Tribunal as "*court proceedings*". These additional liabilities are supposed to reflect contingent liabilities for pending court proceedings reported in the notes to BD Agro's 2015 financial statements.

107. Indeed, the Tribunal's only explanation for the inclusion of these 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***."[122]

108. However, BD Agro's 2015 financial statements only include costs of court proceedings in the amount of RSD 50,000, *i.e.* approximately EUR 417:[123]

405	5. Provisions for litigation expenses	0430		50		

109. To add to the overall confusion, in the footnote to its aforementioned statement, the Tribunal actually refers to a corporate valuation report by Confinkes, rather than to the

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121 Award, ¶ 707, **A-001**; Hern's updated analysis (submitted as **CE-908** in the arbitration), Assets, **A-040**.

122 Award, ¶ 699(iv) (emphasis added), **A-001**.

123 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, **A-034** (submitted as **CE-137** in the arbitration). *See* BD Agro AD Dobanovci Original Financial Statements for 2015 dated 31 December 2015, **A-035** (submitted as **CE-140** in the arbitration).

financial statements as such.[124] This Confineks report also estimates the court proceeding costs at RSD 50,000.[125]

110. The Tribunal's decision on this point is, thus, once again contradictory—as the Tribunal claims that its decision is based on documents that actually disprove it. Furthermore, as another inconsistency, both the Confineks report and the 2015 financial statements post-date the Valuation Date and, as explained above, the Tribunal made it clear that it would not rely on any evidence post-dating the Valuation Date, *i.e.* 21 October 2015.

g. The Tribunal's reasoning for the acceptance of a 30% discount to the Construction Land's value is insufficient and contradictory

111. During the hearing, the President of the Tribunal stated that a discount based solely on expert's judgement is arbitrary:

> 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%?[126]

112. However, the Tribunal then accepted a 30% discount to the Construction Land's value proposed by Ms. Ilić, even though she admitted that this discount had no support besides her "*experience in valuation of land*."[127] Ms. Ilić did not point out any factors that she considered in coming to her determination. By accepting Ms. Ilić's arbitrary discount, the Tribunal directly contradicted the position it took during the hearing.

113. Worse yet, the Tribunal did not provide any reasons for its acceptance of the discount proposed by Ms. Ilić besides noting that it accepted the discount "*[f]ailing more*

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124 Award, p. 214, fn. 584, **A-001**.

125 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), **A-029** (submitted as **CE-172** in the arbitration).

126 Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 170:22-171:02 (emphasis added), **A-036**.

127 Ilić First ER, ¶ 9.1 (correctly should be 9.91), **A-026**.

precise indications in the record about the size of this deduction."[128] The Tribunal thus again failed to provide any relevant reason for its decision.

114. The Tribunal's lack of reasoning can be likened to the case of *Perenco v. Ecuador*, where the *ad hoc* committee found insufficient reasoning with respect to the tribunal's valuation of a loss of opportunity. The *Perenco* tribunal stated that any estimation of the value of the loss of opportunity is an exercise of discretion and, therefore, it has decided to award a nominal value. However, the *ad hoc* committee considered that "*[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*".[129] Therefore, the *ad hoc* committee concluded that the tribunal failed to state reasons for its conclusion that compensation for a loss of profit should be awarded and for the amount of that compensation.

115. In the present case, like in *Perenco*, the Tribunal failed to provide an explanation for why a 30% discount, rather than "*any other value*" should apply. By accepting the unsupported discount, the Tribunal lowered the value of BD Agro's assets by up to EUR 24.72 million.[130]

4. The Tribunal ignored key evidence

116. In the Award, the Tribunal addressed evidence on which Claimants relied for their upper and lower bound of the Construction Land's value. After rejecting this evidence, the Tribunal adopted the valuation proposed by Serbia—without any scrutiny of that evidence whatsoever.[131]

117. Importantly, not only did the Tribunal not scrutinize the evidence relied upon by Serbia, it also ignored—without *any explanation*—highly relevant evidence relied on by Claimants. Specifically, the Tribunal ignored:

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128 Award, ¶ 697 **A-001**.

129 *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶ 466, **ALA-017**.

130 Hern's updated analysis (submitted as **CE-908** in the arbitration), Assets, **A-040**.

131 Award, ¶¶ 692-694, **A-001**.

a. documents from the Serbian Tax Administration related to acquisitions of land in the Nova Pazova and Stara Pazova regions;[132]

b. evidence from transactions from the Zemun region;[133] and

c. two actual transactions with land at Dobanovci from 2015 presented by Ms. Ilić.[134]

118. This above evidence supported a significantly higher value of the Construction Land than the value ultimately adopted by the Tribunal. For example, the Pazova transactions point to a value of 20 to 27 EUR/m^2,[135] much higher than the 14.7 EUR/m^2 adopted by the Tribunal.[136] Dr. Hern explained that he used the Pazova transactions in his valuation because they were comparable to the Construction Land: they were fully developed, with access to the same roads, although being further away from Belgrade and the airport.[137]

119. The Zemun transactions show prices ranging from 43 to 88 EUR/m2.[138] Although Dr. Hern did not use these transactions directly in his calculations, he made it clear at the hearing that he considered this evidence highly relevant.[139]

120. Finally, the actual transactions from 2015 presented by Ms. Ilić point to an average price of 31.17 EUR/m^2.[140] This is again significantly higher than the 14.7 EUR/m^2

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132 Hern First ER, ¶¶ 64, 68, **A-023**.

133 Hern First ER, ¶ 70, **A-023**.

134 Ilić First ER, Appendix 2, table 2.6 at p. 142(pdf), **A-026**.

135 Hern First ER, ¶ 68, **A-023**.

136 Award, ¶ 694, **A-001**.

137 Hern First ER, ¶ 68, **A-023**.

138 Hern First ER, ¶ 70, **A-023**.

139 Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 29:21-30:11, **A-036**.

140 Ilić First ER, Appendix 2, table 2.6 at p. 142(pdf), **A-026**.

adopted by the Tribunal.[141] While this evidence was first introduced by Serbia, Claimants also relied on it at the hearing and in their post-hearing submissions.[142]

121. The fact that both Parties relied on this evidence clearly shows its relevance. And indeed, these transactions represent transactions with land located just few hundred meters away from the Construction Land. Despite this fact, the Tribunal simply ignored this evidence and did not comment on it at all in the Award.

122. *Ad hoc* committees have already confirmed that such an ignoring of relevant evidence constitutes an annullable error. For example, in the *Teco* v. *Guatemala* case, the *ad hoc* committee expressly concluded 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.*"[143] According to the *Teco ad hoc* committee, this error made the tribunal's reasoning impossible to understand:

> The Committee wishes to point out that it cannot determine whether the evidence that was ignored by the Tribunal would have had an impact on the Award or not. *What can be ascertained at the annulment stage is that the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case. Due to the Award's lack of analysis of the above mentioned evidence and in spite of having had the benefit of the Parties' submissions and of the entire annulment record before it, the Committee could not understand the Tribunal's reasoning on the loss of value claim and whether the Tribunal dismissed it because it could not determine the actual value of EEGSA or its but for value.*[144]

123. On this basis, the *Teco ad hoc* committee concluded that:

> *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.*

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141 Award, ¶ 694, **A-001**.

142 Transcript, Hearing on Jurisdiction and Merits, Day 7, dated 19 July 2021, 62:2-62:12 (Grzesik), **A-033**; Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 15:13-16:1 (Hern), **A-036**; Claimants' First Post-Hearing Brief dated 27 September 2021, ¶¶ 296, 308-312, **A-037**; Claimants' Second Post-Hearing Brief dated 22 October 2021, ¶ 120(b), **A-038**.

143 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 135, **ALA-007**.

144 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 135-136 (emphasis added), **ALA-007**.

> A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.[145]

124. In a similar vein, when assessing the price per m^2 of the Construction Land, the Tribunal ignored the Pazova and Zemun transactions relied on by Claimants, as well as the Dobanovci transactions *relied upon by both Parties*. As explained above, this evidence clearly had "*the potential to be relevant to the final outcome of the case*", as it suggested a significantly higher valuation of the Construction Land than that adopted by the Tribunal in the Award.

B. The Tribunal has manifestly exceeded its powers by failing to exercise jurisdiction

1. Manifest excess of powers is a ground for annulment

125. According to Article 52(1)(b) of the ICSID Convention, "*either party may request annulment of the award*" if "*the tribunal manifestly exceeded its powers*."[146] Prior decisions of ICSID annulment committees confirm that the manifest excess of powers includes an ICSID tribunal's failure to exercise jurisdiction.[147] For example, the *ad hoc* committee in *Soufraki* concluded that "*manifest and consequential non-exercise of one's full powers conferred or recognized in a tribunal's constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as the overstepping of the limits of that power.*"[148]

126. In the present case, the Tribunal had—and should have exercised—jurisdiction over all claims under both the Canada-Serbia BIT, the Cyprus-Serbia BIT and also the ICSID Convention. The Tribunal's fundamentally incorrect decision to decline

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145 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 131 (emphasis added), **ALA-007**.

146 ICSID Convention, Article 52(1)(b), **ALA-001**.

147 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, **ALA-005**; Houssein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/07, Decision on Annulment, 5 June 2007, ¶ 43, **ALA-013**; Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, ¶ 80, **ALA-018**.

148 *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/07, Decision on Annulment, 5 June 2007, ¶ 43, **ALA-013**.

jurisdiction is annullable because it constitutes a manifest excess of the Tribunal's powers.

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

127. The Tribunal rejected jurisdiction over Mr. Rand's Indirect Shareholding, stating 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.*"[149]

128. The Tribunal's conclusion cannot stand because the Tribunal itself concluded that Mr. Rand made significant personal monetary and non-monetary[150] contributions to BD Agro, including:

a. his management of BD Agro both as the member of BD Agro's board and as BD Agro's indirect shareholder and ultimate beneficial owner;

b. his labor for BD Agro, including visiting BD Agro himself to control its operations and communicating with external consultants and business partners; and

c. his provision of the EUR 2.2 million Loans to BD Agro.[151]

129. The Tribunal incorrectly assigned all of these contributions solely to Mr. Rand's investment to the Beneficially Owned Shares—even though these contributions are equally relevant for Mr. Rand's Indirect Shareholding. By failing to consider Mr. Rand's investment in BD Agro as a whole, the Tribunal reached the untenable conclusion that there was no contribution of Mr. Rand towards his Indirect Shareholding in BD Agro.

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149 Award, ¶ 273, **A-001**.

150 It is well accepted that a contribution can take any form. *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 297, **ALA-019**; *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, ¶ 61, **ALA-020**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 131, **ALA-021**; *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, ¶ 73(i), **ALA-022**.

151 Award, ¶ 238, **A-001**.

130. The Tribunal's reference to *Quiborax* and *Caratube II* cases, stating that "*mere ownership*" of shares is not a proof of actual commitment of resources, is inapposite.[152] That is so because: (*i*) these cases are inapplicable to the case at hand; and (*ii*) a commitment of resources does not have to be limited to the initial purchase of shares.

131. *First*, the section of the *Caratube II* award quoted by the Tribunal is in fact a summary of the respondent's (Kazakhstan's) position on the existence of an investment by the claimant, Mr. Hourani.[153] The *Caratube II* tribunal did not elaborate on the requirement to make a contribution at all, because it found that there was no agreement to arbitrate Mr. Hourani's claims.[154] Moreover, unlike Mr. Rand, Mr. Hourani did not make any non-monetary contributions towards his investment.[155]

132. *Second*, the *Quiborax* case referred to by the Tribunal is easily distinguishable from the present case. This is because the circumstances in *Quiborax* were extremely peculiar.[156] The decisive ground for the *Quiborax* tribunal's denial of jurisdiction over one of the claimants was that he: (*i*) had received one share gratuitously and solely in order to comply with a formality under the host State's corporate law; and (*ii*) made no subsequent contribution towards the investment either.[157]

133. In contrast, Mr. Rand's investment in the Indirect Shareholding was not to comply with any legal formality, and Mr. Rand had made significant personal non-monetary

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152 Award, ¶¶ 271-272, **A-001**.

153 Award, ¶ 272, **A-001**; Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II), ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶¶ 675, 687, **ALA-023**.

154 Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II), ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 690, **ALA-023**.

155 *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award, 5 June 2012 ¶ 451, **ALA-024**.

156 The Lopez-Goyne Family Trust and others v. Republic of Nicaragua, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶¶ 319-321, **ALA-025** with reference to Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶¶ 232-233, **ALA-026**.

157 *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶¶ 232-233, **ALA-026**.

contributions to BD Agro throughout the duration of his investment. That as such is a factor making the *Quiborax* case not applicable.[158]

134. Finally, if the Tribunal believed that it was for Claimants to prove that Mr. Rand actually personally provided EUR 200,000 used for the purchase of the Indirect Shareholding, it could have inquired about this issue directly with Mr. Rand.

135. Indeed, Mr. Rand was a witness in the arbitration and was examined at the hearing both by Serbia's counsel and by the Tribunal. Yet, at no point was he asked about how he obtained the Indirect Shareholding, nor how much he paid for it. In fact, the Tribunal did not raise this issue at all during the hearing and did not ask the Parties to address this issue in their post-hearing briefs—even though the Parties exchanged two rounds of post-hearing briefs.

136. In fact, Mr. Rand simply had no way of knowing that the Tribunal expected him to show evidence of his EUR 0.2 million payment for the Indirect Shareholding.

137. Numerous ICSID tribunals have confirmed that "*there is no need to investigate how a shareholder acquired its interest in the entity holding the investment or whether it satisfies additional conditions to the ownership of shares.*"[159] Other tribunals expressly rejected the suggestion that an investment would need to satisfy any requirements other than those stated in the relevant investment treaty.[160]

138. If the Tribunal decided to depart from these decisions and to require Mr. Rand to show that his investment in the Indirect Shareholding met additional criteria, the Tribunal

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158 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶¶ 319-321, **ALA-025**.

159 The Lopez-Goyne Family Trust and others v. Republic of Nicaragua, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **ALA-025** citing Víctor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542, **ALA-027**; Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 148, **ALA-028**; 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, ¶ 158, **ALA-029**.

160 *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **ALA-030**; *Lanco Int'l, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 4, **ALA-031**; *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, **ALA-032**; *Ambiente Ufficio SPA and others v. The Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **ALA-033**.

should have so advised Mr. Rand, or at least inquired about the relevant factual information during Mr. Rand's oral testimony at the hearing. Had the Tribunal done so, Mr. Rand would have provided sufficient evidence.

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

139. The Tribunal also denied jurisdiction over the Loans provided by Mr. Rand to BD Agro in 2008.[161] The Tribunal's reasons for declining jurisdiction over the Loans were twofold: (*i*) the Loans are allegedly excluded from the definition of investment under the Canada-Serbia BIT; and (*ii*) the Loans allegedly lack duration required by the ICSID Convention. Neither of these arguments stands.

140. *First*, the Tribunal's conclusion that the Loans are excluded from protection by Articles 1(k) and (l) of the Canada-Serbia BIT[162] is contradictory to the very text of this treaty. Articles 1(k) and (l) of the Canada-Serbia BIT state the following:

> 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).*** [163]

141. The wording of the emphasized sentence makes it clear that the carve-out Articles 1(k) and (l) only applies if the investment under Articles 1(k) and/or (l) "*does not involve the kinds of interests set out in subparagraphs (a) to (j) [of Article 1].*" "*[L]oan[s] to*

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161 Award, ¶¶ 274-275; **A-001**.

162 Award, ¶¶ 344-345, **A-001**.

163 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments dated 27 April 2015, Article 1, definition of "*investment*", items (k) and (l) (emphasis added), **ALA-034** (submitted as **CLA-001** in the arbitration).

an enterprise" are specifically listed as an investment under letter (d) of Article 1. [164] As a result, the Loans are not subject to the exclusion under Articles 1(k) and (l) of the Canada-Serbia BIT.

142. Furthermore, even if Article 1(k) could apply to the Loans (*quod non*), the Loans would not be covered by this article because they do not arise from a commercial contract for the sale of a good or service between Mr. Rand and BD Agro. The invoices by the suppliers were issued to BD Agro and Mr. Rand only made the payments to the benefit of BD Agro. There was no exchange of money or services between Mr. Rand and BD Agro.

143. The Loans also do not constitute trade financing, because they cannot be separated from Mr. Rand's role as the majority owner of BD Agro. The Loans do not represent a one-off provision of funds by a third party which has no other interest in the investment. The Loans cannot be separated from Mr. Rand's investment in the Beneficially Owned Shares and the Indirect Shareholding—his investment must be viewed in its unity.[165]

144. *Second*, the Tribunal's conclusion that the Loans allegedly do not represent an "*investment*" under the ICSID Convention is equally incorrect. According to the Tribunal, this is because the Tribunal was "*not convinced that these payments satisfy the duration criteria of the objective definition of investment in Article 25(1) of the Convention*".[166]

145. The Tribunal, however, did not provide *any reasoning* in it reaching this conclusion, nor did it provide any test as to what would satisfy the required duration. In fact, the Tribunal did not even assess the duration of the Loans. If it had done so, it would have realized that Mr. Rand had held the Loans since 2008, a decade before Claimants initiated the arbitration in 2018. The Tribunal's failure to explain the alleged duration criterion and its failure to consider the actual duration of the Loans as of the date of

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164 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments dated 27 April 2015, Article 1, definition of "*investment*", item (d), **ALA-034** (submitted as **CLA-001** in the arbitration).

165 *E.g. Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, ¶ 72, **ALA-035**.

166 Award, ¶ 274, **A-001**.

initiation of the arbitration represents a failure to state reasons, which constitutes a ground for annulment under the ICSID Convention.[167]

146. In any case, the Tribunal again incorrectly read the requirement of duration into the ICSID Convention, even though the text of ICSID Convention does not require it.[168] At best, duration can be viewed as a common characteristic of an investment, but not as an element that is necessarily required for the existence of an investment.[169]

147. However, even if duration was a relevant criterion for the existence of an investment under Article 25 of the ICSID Convention, it should be analyzed in light of all the circumstances, including the investor's overall commitment.[170] For example the *Deutsche Bank v. Sri Lanka* tribunal found that a hedging agreement for *twelve months* satisfied this condition. The tribunal stated:

> With respect to duration, the Tribunal once again agrees with Schreuer that "*[duration] is a very flexible term. It could be anything from a couple of months to many years*". Further, the Tribunal concurs with the statement made by the Tribunal in *Romak SA v. Republic of Uzbekistan*, holding that "*short-term projects are not deprived of 'investment' status solely by virtue of their limited duration. Duration is to be analysed in light of all the circumstances, and of the investor's overall commitment*". While this Tribunal is aware that Romak was not an ICSID case, the analysis equally applies to proceedings under the ICSID Convention. As the ICSID Tribunal noted in *MCI v. Ecuador*, the 'duration' characteristic is not necessarily an element

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167 *See* Section III.A.1 above.

168 E.g. *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **ALA-030**; *Lanco Int'l, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 4, **ALA-031**; *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, **ALA-032**; *Ambiente Ufficio SPA and others v. The Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **ALA-033**.

169 Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award dated 31 October 2012, ¶ 303, **ALA-019**; 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, ¶ 165, **ALA-032**.

170 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012, ¶ 303, **ALA-019**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 208, **ALA-036**; *Mercuria Energy Group Limited v. Republic of Poland (II)*, SCC Case No. V 2019/126, Final Award dated 29 December 2022, ¶ 542, **ALA-037**; *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award dated 26 November 2009, ¶ 225 **ALA-038**; *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections dated 22 December 2019, ¶ 228; **ALA-039**; *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 18 December 2018, ¶ 377, **ALA-040**; *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction dated 23 August 2019, ¶¶ 120, 141, **ALA-041**.

> that is necessarily required for the existence of an investment, but is to be considered a mere example of a typical characteristic.[171]

148. In contrast to the duration of twelve months in *Deutsche Bank*, Mr. Rand has held the Loans since 2008, meaning that he had been holding them for *seven years* before the Valuation Date and for *a decade* as of the date when the arbitration started. Despite this fact, and despite the need to assess the duration in light of all the circumstances, the Tribunal offered no explanation for why the Loans allegedly lack the required duration. The Tribunal, thus, also failed to state reasons with respect to this point.

149. In addition, the payments made by Mr. Rand were part of an overall economic venture—his investment in the Indirect Shareholding and Beneficially Owned Shares of BD Agro—the latter of which the Tribunal found to fulfill the *Salini* test. In *CSOB v. Slovak Republic*, a loan was considered to be an investment, because the tribunal judged that it was part of an overall economic operation:

> An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, 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.[172]

150. In *Sempra v. Argentina*, the tribunal found that loans made in connection with another investment also constituted a protected investment:

> Despite the fact that the commercial papers, notes, bonds and negotiable instruments, as the instruments have been variously described, are not different from any other issuance of obligations, they were still made by a qualifying investor as a substitute for financial obligations previously undertaken in the context of the financing of the same investment. Such loans were in fact part of the investment's continuing financing arrangements, and were interposed at a moment when only the investor was available to make them […]. To the extent that the loans were made in connection with a legitimate

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171 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012, ¶ 303 (emphasis added), **ALA-019**.

172 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, ¶ 72, **ALA-035**.

> business purpose, as they in fact were, there is no reason to exclude them from the protected investment.[173]

151. Thus, the Tribunal manifestly exceeded its powers when it declined jurisdiction over Mr. Rand's claims relating to the investment made in the form of the Loans.

4. The Tribunal manifestly exceeded its powers when it declined jurisdiction over Sembi's claims

152. The Beneficially Owned Shares are "*shares*" and, thus, an "*investment*" under Article 1 of the Serbia-Cyprus BIT.[174] At the time of the breach, the direct beneficial owner of the Beneficially Owned Shares was Sembi.

153. Sembi's right under the Sembi Agreement—*i.e.* granting Sembi equitable title over the Beneficially Owned shares—qualifies as "*claims to money or to any performance under contract having economic value.*"[175]

154. The Tribunal's decision to deprive Sembi of protection under the Serbia-Cyprus BIT is manifestly erroneous and, again, based on an incorrect reading of the contribution requirement into the ICSID Convention even though, as explained above, the text of ICSID convention does not require it.[176]

155. However, even if the Tribunal was correct and the element of contribution was required under the ICSID Convention, the Tribunal misinterpreted it.[177] The Tribunal rejected jurisdiction over Sembi's claims stating that "*[a]ll funds paid by Sembi towards the BD Agro project were 'ultimately committed' by Mr. Rand, with Sembi's bank accounts merely acting as a conduit for such payments.*"[178] The Tribunal made

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173 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶¶ 214-215, **ALA-042**.

174 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 1(1), **ALA-043**.

175 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 1(1), **ALA-043**.

176 E.g. *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **ALA-030**; *Lanco Int'l, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 4, **ALA-031**; *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, **ALA-032**; *Ambiente Ufficio SPA and others v. The Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **ALA-033**. *See also Supra* ¶ 138.

177 Award, ¶ 228, **A-001**.

178 Award, ¶ 256, **A-001**.

this conclusion because, although it was Sembi which committed the funds, "*Mr. Rand was always in full control of Sembi*"[179] and "*personally guaranteed all of Sembi's […] obligations*".[180] Finally, the Tribunal concluded that "*the contribution was either made by one Claimant or by another*"[181] and decided that it was only made by Mr. Rand.

156. However, the origin of the funds used by Sembi is irrelevant. The *Caratube* award cited by the Tribunal makes it clear that "*[t]he capital can come from the investor's own funds located in any country, **from its subsidiaries or affiliates** located in any country, from loan, credit or other arrangements.*"[182] Indeed, accepting the Tribunal's conclusion would exclude all legitimate investments made from funds provided to an investor company by its parent company or its shareholders or ultimate beneficial owners.

157. The case law relied upon by the Tribunal is inapposite. To begin with, the Tribunal cited the case of *KT Asia v Kazakhstan,* where the tribunal rejected jurisdiction because it found that KT Asia had made no contribution with respect to its alleged investment and the contribution was made by its ultimate owner, Mr. Ablyazov. However, the *KT Asia* tribunal made it clear that "*the factual matrix of the present case [was] relevant for the assessment of [contribution]*".[183] Indeed, the factual matrix was key in that decision and was completely different from the present case:

a. unlike Mr. Rand, the ultimate beneficial owner, Mr. Ablyazov, was a Kazakh national and, therefore, himself not a protected investor;[184]

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179 Award, ¶¶ 238, sixth bullet point, 256, **A-001**.

180 Award, ¶¶ 240, 256, **A-001**.

181 Award, ¶ 256, **A-001**.

182 Award, ¶ 236 (emphasis added), **A-001**.

183 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 175, **ALA-036**.

184 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶¶ 7, 176, **ALA-036**.

b. unlike Sembi, the price that KT Asia paid for the investment was significantly lower than the market value;[185]

c. unlike Sembi, KT Asia never actually paid the price for the investment;[186] and

d. unlike in the present case, the contribution behind the investment of KT Asia was made long before the restructuring by entities other than, and unrelated to, KT Asia.[187]

158. The Tribunal's reliance on *Doutremepuich v Mauritius* is equally unhelpful. In *Doutremepuich*, one of the two shareholders of a holding company had not made any contribution.[188] This is completely different from a shareholder making a contribution through a holding company.

159. Finally, the Tribunal relied on *Orascom v Algeria* even though it itself admitted that "*unlike in this dispute, in Orascom v. Algeria the entities had brought separate arbitrations and that the objection turned on abuse of right and admissibility, as opposed to contribution and jurisdiction.*"[189] There is no doubt that Claimants were not attempting to abuse process in any way and there can, therefore, be no parallel to *Orascom.*

* * *

160. Unlike in the case law erroneously cited by the Tribunal, Claimants were not attempting to obtain double recovery, and they structured their damages pleadings accordingly.[190] Claimants also have not engaged in any form of treaty shopping, all

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185 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 182, **ALA-036**.

186 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶¶ 183-186, **ALA-036**.

187 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 192, **ALA-036**.

188 *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, ¶¶ 130-131, **ALA-041**.

189 Award, ¶261, **A-001**.

190 Claimants' Memorial, ¶ 564, **A-031**; Claimants' Reply dated 4 October 2019, ¶ 1412, **A-039**.

being nationals of Canada or Cyprus.[191] Failing to recognize those key distinctions, it is clear that the Tribunal manifestly exceeded its powers when declining jurisdiction over Sembi's claims.

5. The Tribunal manifestly exceeded its powers when it declined jurisdiction over Rand Investments' claims

161. In case of Rand Investments, the Tribunal also rejected jurisdiction stating that "*Mr. Rand was the one bearing the financial burden of the investment*".[192] However, the Tribunal chose to ignore that Mr. Rand made and bore the financial burden of the investment through his shareholding in Rand Investments. The Tribunal limited its analysis concerning Rand Investments to the following:

> As far as Claimant 1 is concerned, the Claimants do not allege that Rand Investments contributed towards the acquisition of an interest in BD Agro through the Beneficially Owned Shares separately from Mr. Rand's contributions. *For the reasons set out below, the Tribunal regards this contribution as Mr. Rand's contribution, not as a separate contribution of Rand Investment Ltd.*[193]

162. However, it is unclear to what "*reasons set out below*" the Tribunal referred, as there is no further discussion of Rand Investments' contribution anywhere in the Award. If the "*reasons set out below*" were supposed to mean the reasons mentioned in relation to Sembi, those reasons are incorrect for the reasons mentioned above.

163. Given the above, the Tribunal manifestly exceeded its powers also when it refused to exercise its jurisdiction of Rand Investments' claims.

6. The Tribunal manifestly exceeded its powers when it declined jurisdiction over Mr. Rand's Children's claims

164. The Tribunal's decision to deprive Mr. Rand's Children of protection under the Canada-Serbia BIT is equally wrong. Again, the Tribunal concluded that Mr. Rand's Children made no contribution and cannot rely on the contribution made by their father, Mr. Rand, or by Sembi.[194]

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191 Award, ¶ 199, **A-001**.

192 Award, ¶ 238, **A-001**.

193 Award, ¶ 252 (emphasis added), **A-001**.

194 Award, ¶ 254, **A-001**.

165. However, it is completely acceptable for Mr. Rand's Children to rely on contributions made for their benefit. As was the case in *Renée Rose Levy de Levi v. Peru*, where the tribunal expressly stated that the "*initial investment made by the Claimant's relatives*" satisfies the *Salini* criteria despite its subsequent gracious assignment to the claimant.

166. The Tribunal's attempt to distinguish the present case from *Levy de Levi v. Peru* cannot succeed. Specifically, the Tribunal tried to distinguish the *Levy de Levi v. Peru* case on the basis that, in that case, "*[t]he initial investment […] was made by the claimant's relatives and was later transferred to Ms. Levy de Levi*" and "*[n]either her father nor any other relative brought claims in the arbitration*".

167. To accept the Tribunal's reasoning would mean that the Tribunal would have had jurisdiction over the claims of Mr. Rand's Children if Mr. Rand was not a claimant. This cannot be the case—and the Tribunal did not provide any relevant reason for why it should. On the contrary, as explained above, ICSID awards confirm that "*there is no need to investigate how a shareholder acquired its interest in the entity holding the investment or whether it satisfies additional conditions to the ownership of shares*."[195]

168. It follows that, much like in the case of Sembi and Rand Investments, the Tribunal exceeded its powers when it declined to exercise its jurisdiction over the claims of Mr. Rand's Children.

C. The Tribunal's decision on costs must be annulled because it is based on other annullable parts of the Award

169. The Tribunal ordered the parties to each bear half of the costs of the proceedings and bear their own legal and other costs.[196] The Tribunal based its decision *inter alia* on the fact that: (*i*) only Mr. Rand was successful with some of his claims given the Tribunal's negative decision on jurisdiction in relation to the other claims and

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195 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **ALA-025** citing *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542, **ALA-027**; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 148, **ALA-028**; *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, ¶ 158, **ALA-029**; *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015, ¶ 207, **ALA-044**.

196 Award, ¶ 716, **A-001**.

Claimants; and (*ii*) Mr. Rand was awarded only a small part of the damages that he claimed in the arbitration.[197]

170. Since the Tribunal's decision on costs is based, in part, on the Tribunal's decisions on jurisdiction and quantum, which are annullable for failure to state reasons and manifest excess of powers, the decision on costs must follow the same fate and be annulled as well.

197 Award, ¶ 716, **A-001**.

IV. REQUEST FOR RELIEF

171. Based on the above, Claimants request 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*" 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 and to claims under the Serbia-Cyprus BIT;

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, 251-265, 270-273, 274 third and last sentence, 275-277, 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) and 717(g) to the extent it relates to claims under the Serbia-Cyprus 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 Claimants' costs of this annulment proceeding, together with the Centre's costs.

172. Claimants reserve the right to modify the request for relief, including the list of specific paragraphs that should be annulled, in their further pleadings.

Submitted on behalf of Rand Investments Ltd., Mr. William Archibald Rand, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand, Mr. Robert Harry Leander Rand and Sembi Investment Limited

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