INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WILLIAM ARCHIBALD RAND

Applicant

– v –

REPUBLIC OF SERBIA

Respondent

(ICSID Case No. ARB/18/8)

MEMORIAL ON ANNULMENT

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19 July 2024

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I. INTRODUCTION

A. Preliminary statement

1. Mr. William Archibald Rand ("**Mr. Rand**") files for annulment because the Tribunal[1] failed to state reasons with respect to most aspects of its decision on quantum and the Tribunal manifestly exceeded its powers when it refused to exercise jurisdiction over a part of Mr. Rand's claims. Failure to state reasons and manifest excess of powers are annullable errors under Article 52 of the ICSID Convention. Thus, the Award[2] must be annulled in the relevant parts.

2. The Tribunal's decision on quantum follows from Tribunal's correct determination that it has jurisdiction under the Canada-Serbia BIT with respect to Mr. Rand's 75.87% beneficial shareholding in BD Agro ("**Beneficially Owned Shares**"), that Serbia's seizure of the Beneficially Owned Shares violated the standard of fair and equitable treatment under Article 6 of the Canada-Serbia Treaty and that, as a result, Serbia must fully compensate Mr. Rand for the harm caused to him by the illegal seizure.[3] The Tribunal further correctly stated that such compensation must correspond to the equity value of Mr. Rand's shareholding and that BD Agro's equity value shall be calculated as the difference between the fair market value of BD Agro's assets and the total value of BD Agro's liabilities, both as of the valuation date of 21 October 2015 ("**Valuation Date**").[4] Mr. Rand does not seek annulment of any of these determinations.

3. The Tribunal's annullable error with respect to its decision on quantum is that when calculating the value of BD Agro's assets and liabilities, the Tribunal failed to provide *any* reasoning, or provided contradictory, irreconcilable and/or insufficient reasoning for most of its conclusions. According to settled case law of ICSID annulment committees, both the absence of any reasoning and the provision of contradictory,

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

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

[3] Award, ¶ 672.

[4] Award, ¶ 699.

irreconcilable and/or insufficient reasoning constitute a failure to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention.[5]

4. First and foremost, the Tribunal failed to state reasons for its conclusions on the value of BD Agro's most valuable asset—*i.e.* 279 hectares of prime land designated for construction of business and commercial areas ("**Construction Land**"). The Construction Land is located in Dobanovci, at the outskirts of the Serbian capital Belgrade, close to the Belgrade international airport.

5. The Tribunal failed to state reasons for its conclusions on the value of the Construction Land because its reasoning was clearly contradictory, irreconcilable and/or insufficient. In a nutshell, the Tribunal rejected expert evidence submitted by Claimants because it allegedly conflicted with certain valuation principles adopted by the Tribunal—and then the Tribunal based its valuation *entirely* on expert evidence submitted by Serbia that clearly conflicted with these same principles.

6. To give just one example, the Tribunal rejected several contemporaneous valuations and other evidence relied on by Mr. Rand's valuation expert, Dr. Richard Hern, because the evidence was not based on actual comparable transactions—and then the Tribunal agreed with the evidence proposed by Serbia even though that evidence was also not based on any comparable transactions.

7. The Tribunal compounded its blatant contradictions with respect to the importance of actual comparable transactions when it chose to ignore, without a word of explanation, key evidence on two actual comparable transactions with construction land located in the immediate vicinity of the Construction Land—with one of the transactions relating to land actually *abutting* BD Agro—that had taken place only a few months before the

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5 *E.g. CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 97, **RLA-152**; *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, 141, **CLA-189**; *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, **CLA-184**; Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, ¶ 107, **CLA-183**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶¶ 173-191, **CLA-188**; *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶¶ 122-123, **CLA-190**; *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 21, **CLA-187**.

Valuation Date.[6] These two transactions indicated a total value of the Construction Land of EUR 87 million, *i.e.* EUR 45 million more than the value eventually adopted by the Tribunal.[7]

8. The Tribunal's reasoning on the valuation of BD Agro's remaining assets unfortunately fares no better. In fact, there is no reasoning at all—the Tribunal did not provide *any* reasons for its valuation of BD Agro's other assets. All that the Tribunal did was to include in the Award a table with values that it assigned to individual categories of BD Agro's assets. The Tribunal, however, did not provide any explanation for how it arrived at the individual values and why it considered these values reasonable.

9. The Tribunal's reasoning with respect to its valuation of BD Agro's liabilities is also contradictory and insufficient. For example, while the Tribunal refused to rely on evidence post-dating the Valuation Date when valuing BD Agro's assets, the Tribunal repeatedly relied on such post-valuation evidence to calculate BD Agro's liabilities.

10. The parts of the Tribunal's decision on quantum that suffer from absent, contradictory, irreconcilable and/or insufficient reasoning should be annulled for failure to state reasons. These parts are clearly identified in Mr. Rand's Request for Relief and Annex A to this Memorial on Annulment.

11. In addition to the failure to provide reasons for its decision on quantum, the Tribunal manifestly exceeded its powers when it refused to exercise its jurisdiction over: (*i*) Mr. Rand's 3.9% indirect shareholding in BD Agro ("**Indirect Shareholding**"); and (*ii*) loans that Mr. Rand provided to BD Agro for: (*A*) the purchase and transport of BD Agro's new herd (approximately EUR 2.2 million); and (*B*) the payment to herd management experts for services provided to BD Agro (approximately EUR 160,000) ("**Loans**").

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[6] The Tribunal's failure to provide any comments on key evidence extensively discussed by both Parties is an annullable error on its own. *See TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 131, 135, **CLA-186**.

Here, the Tribunal's error was even worse because it occurred in the context of the Tribunal's contradictory reasoning on comparable transactions.

[7] Danijela Ilić First Expert Report dated 23 January 2020 ("**Ilić First ER**"), Appendix 2, table 2.6; Award, ¶ 707.

12. The Tribunal refused to exercise jurisdiction over Mr. Rand's indirect shareholding in BD Agro because, according to the Tribunal, "*[t]he Claimants have proffered no evidence whatsoever of Mr. Rand's alleged contribution of EUR 0.2 million to acquire [his indirect] 3.9% stake in BD Agro.*"[8] The Tribunal's decision constitutes a manifest excess of powers for three independent reasons.

13. *First*, the Tribunal completely neglected to take account of and apply the Canada-Serbia BIT, which defines investment as "*a share, stock or other form of equity participation in an enterprise*".[9] Instead, the Tribunal elevated the typical characteristics of an investment under the controversial *Salini* test into firm jurisdictional requirements under Article 25 of the ICSID Convention. The Tribunal, thus, departed from established case law providing that there is no need to investigate whether the claimant satisfies additional conditions to the ownership of shares.[10]

14. *Second*, the Tribunal failed to inform Mr. Rand that it would apply the *Salini* test and require evidence of his "*contribution*" with respect to the Indirect Shareholding. The Tribunal did not inquire about the existence of such "*contribution*" during Mr. Rand's oral testimony at the hearing, nor did it invite the Parties to address this issue in their post-hearing briefs, even though the Tribunal went into great detail of other areas where they wanted the parties to elaborate upon.

15. *Third*, the Tribunal ignored the existence of numerous contributions made by Mr. Rand towards BD Agro in relation to his Indirect Shareholding, despite clearly recognizing these contributions in relation to his 75.87% interest in BD Agro through the Beneficially Owned Shares.

16. The Tribunal refused to exercise its jurisdiction over Mr. Rand's claims related to the Loans because the Loans allegedly: (*i*) are excluded from the definition of investment

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8 Award, ¶ 273.

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

10 *E.g. The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **CLA-198**; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542, **CLA-199**; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 148, **CLA-091**; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 158, **CLA-160**.

under the Canada-Serbia BIT; and (*ii*) lack the minimum duration required under the ICSID Convention. Neither of these arguments is tenable.

17. The Canada-Serbia BIT specifically lists "*loan[s] to an enterprise*" as an investment under letter (d) in the definition of "investment" in Article 1.[11] The Tribunal's analysis should have stopped there. BD Agro is an enterprise within the meaning of Article 1 of the Canada-Serbia BIT because it is "*an entity constituted or organized under applicable law*".[12] Therefore, Mr. Rand's Loans manifestly are a protected investment under the Canada-Serbia BIT.

18. The Tribunal's conclusion that the Loans allegedly do not represent an "*investment*" under the ICSID Convention is equally manifestly incorrect. According to the Tribunal, this is because the Loans lack the duration allegedly required by the controversial *Salini* test.[13] However, the ICSID Convention does not prescribe any specific duration for an investment to exist.[14] 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.[15] As explained above, in line with the case law of other ICSID tribunals, the Tribunal should not have applied the *Salini* test in the present case.[16]

19. In any case, Mr. Rand has held a major part of the Loans since 2008, *i.e.* he had been holding them for *seven years* as of the Valuation Date and for *a decade* as of the date when the arbitration started. The smaller remaining part of the Loans has been held by Mr. Rand since 2013, *i.e.* Mr. Rand had been holding them for more than *two years* as of the Valuation Date and for more than *five years* as of the commencement of the

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

12 Canada-Serbia BIT, Article 1, **CLA-001**.

13 Award, ¶ 274.

14 *E.g., Philippe Gruslin v. Malaysia,* ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **CLA-087**; *Lanco Int'l, Inc. v. Argentine Republic,* ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 4, **CLA-088**; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 159-60, **RLA-034**; *Ambiente Ufficio SPA and others v. The Argentine Republic,* ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **CLA-089**.

15 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012, ¶ 303, **CLA-067**; *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, **RLA-034**.

16 *Supra* ¶ 13.

arbitration. Clearly, by any measure, Mr. Rand held the Loans for a substantial duration. The Tribunal, however, completely failed to assess the actual duration of the Loans.

20. Indeed, while the Tribunal stated that it was "*not convinced that [the Loans] satisfy the duration criteria of the objective definition of investment in Article 25(1) of the Convention*",[17] it did not provide *any* explanation for this conclusion. The Tribunal did not explain what it considered to be sufficient duration, nor why Mr. Rand's Loans did not satisfy such duration—whatever it might be.

21. Thus, the Tribunal manifestly exceeded its powers when it refused to exercise jurisdiction under the Canada-Serbia BIT and the ICSID Convention with respect to Mr. Rand's claims related to the Indirect Shareholding and the Loans. These jurisdictional decisions should be annulled in their entirety.

B. Organization of the Memorial

22. This Memorial is structured as follows:

    a. Section I is this Introduction;

    b. Section II sets out the Factual Background of the case;

    c. Section III describes the Award and the grounds for its annulment;

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

    e. Section V explains that the Tribunal has manifestly exceeded its powers by refusing to exercise jurisdiction over certain claims;

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

    g. Section VII sets out Mr. Rand's Request for Relief.

23. This Memorial annexes a number of exhibits (*e.g.* **CE-[x]**) and legal authorities (*e.g.* **CLA-[x]**) numbered consecutively following those submitted in the arbitration. Claimants also re-submit exhibits and legal authorities submitted with the Application for Partial Annulment of the Award dated 24 February 2024 ("**Application**").

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[17] Award, ¶ 274.

II. FACTUAL BACKGROUND

A. Mr. Rand's purchase of initial share in BD Agro

24. BD Agro was a dairy farm located at the outskirts of Serbia's capital Belgrade, close to the Belgrade international airport. Once a model farm of the communist regime, it found itself in serious difficulties in the 1990s and early 2000s. It suffered from significant underinvestment, with its equipment being outdated and its buildings in dire need of a major overhaul.

25. Despite these issues, BD Agro had a great potential as both a dairy farm and real estate investment. This is because it owned 1,690 hectares of land—including several hundred hectares of land located near the town of Dobanovci, an area with strong potential for future commercial development.[18]

26. When Serbia put BD Agro up for privatization, the Deputy Minister of Economy wrote to Mr. Rand and advertised the potential for development of BD Agro's land, touting its unique location as follows:

    a. just 20 km from Belgrade and 5 km from the Belgrade international airport;[19]

    b. close to the E70 highway, which runs through the so-called Pan-European Corridor X, and to which it was supposed to be connected by a planned road called "Sremska gazela";[20] and

    c. proximity to the Danube river.[21]

27. The strategic location of BD Agro's land (denoted as "*BD Agro A/B/C*") is depicted in red on the following map:[22]

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[18] Award, ¶ 691.

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

[20] *European route E70,* Wikipedia, accessed on 9 December 2018, **CE-150**; Official Gazette of the City of Belgrade Year LII Number 59 (31 December 2008), General Regulation Plan for the "BD Agro" Complex, Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin, section B.2.1, p. 59, **CE-143**.

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

[22] Igor Markićević Third Witness Statement dated 3 October 2019 ("**Markićević Third WS**"), ¶ 107; First Dr. Richard Hern First Expert Report dated 16 January 2019 ("**Hern First ER**"), ¶¶ 58, 66.

28. In 2005, Mr. Rand purchased 70% of the shares in BD Agro ("**Privatized Shares**"),[23] which had been put up for a sale in a public auction organized by the Privatization Agency of the Republic of Serbia and Montenegro ("**Privatization Agency**").[24] 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.[25]

29. 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**").[26] 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 make an additional investment in BD Agro of approximately EUR 2 million.

30. The EUR 2 million additional investment in BD Agro was made by October 2006,[27] through an in-kind contribution of assets against the issuance of new shares in BD

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[23] William Rand First Witness Statement dated 5 February 2018 ("**Rand First WS**"), ¶¶ 13, 22.

[24] Rand First WS, ¶¶ 13-22.

[25] Rand First WS, ¶ 17; Djura Obradović First Witness Statement dated 20 September 2017 ("**Obradović First WS**"), ¶ 7.

[26] Privatization Agreement with Annexes dated 4 October 2005, **CE-017**.

[27] Privatization Agreement with Annexes dated 4 October 2005, Article 5.2.1, **CE-017**; Confirmation of the Privatization Agency of the Completion of Investment dated 10 October 2006, **CE-018**.

Agro. With the new shares, Mr. Rand's beneficial shareholding in BD Agro increased to 75.87%.[28]

31. The purchase price was fully paid by 8 April 2011.[29] As a result, and as confirmed by the Tribunal in the Award, the Privatization Agreement was fully consummated.[30]

32. The Tribunal correctly concluded that Mr. Rand was the beneficial owner of the Beneficially Owned Shares nominally owned by Mr. Obradović.[31] The Tribunal also correctly concluded that Mr. Rand was an investor within the meaning of Article 25 of the ICSID Convention because he "*was the one bearing the financial burden of the investment*"[32] and "*the funds for the acquisition of the Beneficially Owned Shares came from Mr. Rand*".[33]

B. Mr. Rand's overhaul of BD Agro's facilities

33. After entering into the Privatization Agreement in October 2005, Mr. Rand was appointed to the Board of Directors of BD Agro and became personally involved in its management. The farm was in a dire condition. As Mr. Rand put it at the hearing:[34]

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28 Rand First WS, ¶ 28.

29 Confirmation of the Privatization Agency on the Buyer's Full Payment of the Purchase Price dated 6 January 2012, **CE-019**.

30 Award, ¶ 612.

31 Award, ¶ 708.

32 Award, ¶ 238.

33 Award, ¶ 240.

34 Transcript, Hearing on Jurisdiction and Merits, Day 2, dated 13 July 2021, 3:15-4:09 (Rand).

15 Q. Mr Rand, could you please describe to the Tribunal the
16 conditions of the farm that you witnessed before the
17 privatization of BD Agro?
18 A. When I first went out to the farm, prior to the auction,
19 the farm was in a very decrepit state. I was shocked by
20 first of all the way the animals were treated, because
21 they were yoked and kept in one spot their whole life,
22 standing on concrete. They were milked there, fed there
23 and when we finally re-organised it and they could walk,
24 some of them were not able to walk, their hooves were
25 totally broken.

PAGE 4 (09:08)

01 The kitchen, where all the people that worked there
02 were given lunch, the kitchen had about six or seven
03 inches of water, the people in the kitchen all were
04 wearing rubber boots because of the water. The food was
05 something that was terrible, the workers were all --
06 they were never given any clothes, gloves, overalls,
07 boots, so they were dressed very, very poorly in what
08 later in the year, when the cold came, was absolutely
09 terrible conditions. It was very sad.

34. In March 2006, Mr. Rand had BD Agro adopt a new business plan, calling for an investment of more than EUR 12 million into the development and modernization of BD Agro's facilities over the next three years.[35] In furtherance of its business plan, BD Agro purchased state-of-the-art equipment, such as an automated milking parlor and equipment to increase the production of crops used to feed the cows. In addition, BD Agro completely overhauled its buildings, stables and barns and put in place a new system of connections between stables and pastures.[36]

35. The below photographs taken during Mr. Rand's visit of BD Agro in July 2008 show just a few examples of the tremendous improvements made under Mr. Rand's ownership:[37]

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35 Rand First WS, ¶¶ 26-29; William Rand Second Witness Statement dated 3 October 2019 ("**Rand Second WS**"), ¶ 29.

36 Rand First WS, ¶¶ 26-29; Rand Second WS, ¶ 29.

37 Photographs from Mr. Rand's visit of BD Agro, July 2008, **CE-415**.

36. In addition to these improvements, 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 on chartered Boing 747 aircraft.[38]

37. Mr. Rand's commitment and continuous investments enabled BD Agro to become one of the biggest dairy farms in the Balkans, recognized as "*the most modern cow farm not only in Serbia, but also in Europe*"[39] and "*the largest European installation of this type*":[40]

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38 Rand First WS, ¶ 29.

39 K. Živanović, *Where cows listen to Beethoven,* Plave strane, 27 November 2010, **CE-026**.

40 K. Živanović, *Where cows listen to Beethoven,* Plave strane, 27 November 2010, **CE-026**.

Visiting the most modern farm in Serbia, BD Agro

Where Cows Listen To Beethoven

[…]

38. As a result of its modernization program, BD Agro was transformed into one of the leading raw milk producers in the region. Imlek—the largest milk processing company in Serbia and the entire Balkans region—repeatedly recognized BD Agro as one of its most important suppliers of raw milk.[41]

39. The value of BD Agro further increased in 2008, when Serbia adopted the General Regulation Plan that officially designated the Construction Land—the strategic position of which was described above—for construction of business and commercial areas (such as plants, warehouses, administrative business facilities, malls and hotels).[42]

C. Mr. Rand's further investments in BD Agro

40. The purchase of the Beneficially Owned Shares and successful overhaul of BD Agro was financed, in part, by further investments made by Mr. Rand. In 2008, Mr. Rand financed the purchase and transport of BD Agro's new herd in the amount of approximately EUR 2.2 million.[43] BD Agro never repaid that amount to Mr. Rand.

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41 *Record Holding Farmer's day,* Privredni pregled, 5 March 2012, **CE-027**.

42 Hern First ER, ¶ 57; Official Gazette of the City of Belgrade Year LII Number 59 (31 December 2008), General Regulation Plan for the "BD Agro" Complex, Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin, sections B.1.2, C.2 and C.3, pp. 57, 66 and 67, **CE-143**.

43 Confirmation of wire transfer from W. Rand to Willjill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from W. Rand to Willjill Farms Inc. for CAD 607,759.50 executed on 21 October 2008; Confirmation of wire transfer from W. Rand to Willjill Farms Inc. for

Later, in 2013-2015, Mr. Rand paid approximately EUR 160,000 for services provided to BD Agro by herd management experts.[44] These direct expenses of EUR 2.2 million and EUR 160,000 constituted the Loans, which were provided to BD Agro by Mr. Rand.

41. Between October 2008 and October 2012, Mr. Rand also acquired the Indirect Shareholding, which he purchased and held through his wholly-owned company, Marine Drive Holding d.o.o. ("**MDH Serbia**").[45]

D. Dispute with the Privatization Agency and its effects on BD Agro's operations

42. In February 2011, the Privatization Agency started to allege various violations of the Privatization Agreement by Mr. Obradović and threatened to terminate the Privatization Agreement.[46] The allegations were unfounded. Further, the threat of termination was unlawful. The Tribunal confirmed in the Award that the Privatization Agency was not entitled to terminate the Privatization Agreement after it was fully consummated in April 2011:

> 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.[47]

43. Messrs. Rand and Obradović repeatedly explained to the Privatization Agency that there had been no violation of the Privatization Agreement, but such efforts were to

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CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from W. Rand to Willjill Farms Inc. for CAD 460,216.00 executed on 24 December 2008, **CE-021**; 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, **CE-022**; Confirmation of wire transfer from W. Rand to Trudeau International Livestock for CAD 443,080.00 executed on 21 October 2008, **CE-023**; Confirmation of wire transfer from W. Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-024**.

[44] Overview of Payments to Mr. David Wood dated April 2013-January 2014, **CE-062**; Overview of Payments to Mr. Gligor Calin dated May 2013-January 2015, **CE-068**. As concluded by the Tribunal, these payments were made by Mr. Rand through Rand Investments. *See* Award, ¶ 274.

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

[46] Notice of the Privatization Agency on Additional Time Period, 24 February 2011, **CE-031**.

[47] Award, ¶ 615 (emphasis added).

no avail. The Privatization Agency did not genuinely nor meaningfully engage with Messrs. Rand and Obradović and simply repeated its allegations and threats.

44. The Privatization Agency also arbitrarily refused to remove its pledge over the Privatized Shares, despite being required to do so. The Tribunal found that "*the record bears out that the Agency well knew that on payment of the full purchase price on 8 April 2011, it was bound to release the pledge*."[48]

45. Meanwhile, due to its extensive investments and temporary adverse market conditions,[49] BD Agro found itself in a position where it needed to improve its liquidity and decrease its financing costs. Mr. Rand hired new experienced management[50] and tried to establish strategic partnerships to address this situation.[51] However, these efforts were hampered by the uncertainty created by the Privatization Agency's continuing arbitrary and illegal refusal to remove the pledge over the Privatized Shares. Potential partners approached by BD Agro were concerned about the pledge and were unwilling to enter into a cooperation with BD Agro and deploy substantial capital unless the pledge was released, and the Beneficially Owned Shares were transferred into the nominal ownership of Mr. Rand or his family.[52]

46. Therefore, to shore up its liquidity, BD Agro decided to adopt a so-called pre-pack reorganization plan to decrease its financing costs.[53] Under Serbian law, pre-pack reorganization plans provide for the implementation of creditor-approved measures designed to strengthen the financial situation of a company. A pre-pack reorganization

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48 Award, ¶ 620.

49 *See* Claimants' Memorial dated 16 January 2019 ("**Claimants' Memorial**"), ¶ 127.

50 Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, **CE-072**.

51 *E.g.* Email from I. Markićević to W. Rand dated 3 September 2013, **CE-276**; Email from I. Markićević to B. Bogdan dated 23 September 2013, **CE-277**; Email from W. Rand to M. Bogićević and I. Markićević dated 27 September 2013, **CE-278**; Email from I. Markićević to S. Živanović dated 6 October 2013, **CE-279**; Email from I. Markićević to E. Broshko dated 28 November 2013, **CE-280**.

52 *E.g.* Igor Markićević Second Witness Statement dated 16 January 2019 ("**Markićević Second WS**"), ¶¶ 42, 45; Erinn Broshko Second Witness Statement dated 16 January 2019 ("**Broshko Second WS**"), ¶¶ 25-26.

53 Claimants' Reply dated 4 October 2019 ("**Claimants' Reply**"), ¶¶ 260, 261.

plan needs to be approved by a majority of creditors, voting in classes depending upon the nature of their receivables, and also by the competent courts.[54]

47. On 25 November 2014, BD Agro submitted its pre-pack reorganization plan to the Commercial Court in Belgrade.[55] Then, on 6 March 2015, BD Agro submitted an amended pre-pack reorganization plan, containing an updated valuation of BD Agro's real estate. This valuation was prepared by Mr. Pero Mrgud, a Serbian licensed court expert ("**Mrgud Valuation**").[56] Mr. Mrgud estimated the value of the Construction Land to be **EUR 87 million**.[57]

48. On 25 June 2015, the Commercial Court in Belgrade held a hearing where the required majority of creditors voted in favor of the amended pre-pack reorganization plan.[58]

E. Serbia's wrongful termination of the Privatization Agreement

49. Mr. Rand's efforts came to naught when, on 28 September 2015, the Privatization Agency unlawfully terminated the Privatization Agreement[59] and, on 21 October 2015, seized the Beneficially Owned Shares.[60] By doing so, the Privatization Agency took over majority ownership and control over BD Agro. The Tribunal confirmed that "*Serbia was in control of BD Agro from 21 October 2015*."[61]

50. The Privatization Agency's conduct was not only harmful to BD Agro and its business, but also unlawful under international law. As the Tribunal found in the Award, the Privatization Agency's conduct constituted a breach of the fair and equitable treatment standard provided in Article 6 of the Canada-Serbia BIT.[62]

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54 Claimants' Memorial, ¶ 150.

55 BD Agro's submission accompanying the Pre-pack Reorganization Plan received by the Commercial Court in Belgrade on 25 November 2014, **CE-085**.

56 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, December 2014, p. 4, **CE-175**.

57 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, December 2014, p. 14, **CE-175**.

58 Claimants' Memorial, ¶ 175; Court hearing minutes dated 25 June 2015, **CE-039**.

59 Notice on Termination of the Privatization Agreement dated 28 September 2015, **CE-050**.

60 Decision of the Privatization Agency on the Transfer of BD Agro's Capital dated 21 October 2015, **CE-105**.

61 Award, ¶ 399.

62 Award, ¶ 623.

F. Contemporaneous valuations commissioned by BD Agro under the Privatization Agency's control

51. Following the seizure of the Beneficially Owned Shares, the Privatization Agency took over control of BD Agro. In November 2015, the Privatization Agency directed BD Agro to commission a valuation of the company. This new valuation was prepared by Confineks d.o.o. Beograd ("**Confineks**"), another Serbian licensed court expert.

52. Confineks submitted its valuation on 5 December 2015 ("**First Confineks Valuation**"). According to the First Confineks Valuation, the value of BD Agro's Construction Land was **EUR 66 million**.[63] BD Agro's fair market value as of 31 December 2014, calculated as the total value of its assets less the total value of its liabilities, was **EUR 57 million**.[64]

53. Serbia accepted the First Confineks Valuation on several occasions. To begin with, BD Agro—controlled by Serbia at the time—submitted a new reorganization plan on 11 January 2016, which fully relied on the First Confineks Valuation.[65] This reorganization plan was approved by BD Agro's shareholders, with the Privatization Agency voting its expropriated 75.87% shareholding in the company.[66]

54. Furthermore, the First Confineks Valuation was used in the preparation of BD Agro's financial statements for 2015 and the following years. The 2015 financial statements were again approved by BD Agro's shareholders, including the Privatization Agency exercising, once again, the decisive vote.[67]

55. In January 2016, *i.e.* at the time when BD Agro continued to be controlled by Serbia, BD Agro tasked Confineks to prepare an updated valuation as of 31 December 2015. Confineks submitted this updated valuation on 4 February 2016 ("**Second Confineks Valuation**"). According to the Second Confineks Valuation, the value of BD Agro's

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63 Hern First ER, ¶ 78; Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015, section 4, pp. 45-48, **CE-142**.

64 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015, p. 15, **CE-142**.

65 Second pre-pack reorganization plan, 11 January 2016, p. 24, **CE-369**.

66 Minutes from the General Assembly of BD Agro AD Dobanovci dated 27 February 2016, pp. 1, 6-7 (pdf), **CE-370**.

67 Minutes from the General Assembly of BD Agro Dobanovci dated 30 June 2016, p. 4, **CE-366**.

Construction Land was **EUR 68 million**.[68] BD Agro's fair market value as of 31 December 2015, calculated as the total value of its assets less the total value of its liabilities, was **EUR 56 million**.[69]

56. The Second Confineks Valuation was also accepted by Serbia. For example, on 17 February 2016, BD Agro—still controlled by Serbia—wrote to the Commercial Court in Belgrade in response to a creditor's request for the initiation of bankruptcy proceedings. It submitted to the court the Second Confineks Valuation and noted that it "***undoubtedly demonstrates that the appraised value of capital of the company is significantly positive and amounts to 56,358,939.00 euros***."[70]

G. Serbia drove BD Agro into bankruptcy

57. On 30 August 2016, *i.e.* less than a year after the Privatization Agency taking over control and management of BD Agro, Serbian courts declared BD Agro's bankruptcy.[71] As a result of the Privatization Agency's utter mismanagement of BD Agro, all employees lost their jobs and livelihoods and the creditors received only a small fraction of their receivables.

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

59. Despite seizing the Beneficially Owned Shares and destroying Mr. Rand's other investments in BD Agro, Serbia did not offer to pay any compensation to Mr. Rand, 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 arbitration proceedings.

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68 Hern First ER, ¶ 79; Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci dated January 2016, section 4, pp. 96-102, **CE-172**.

69 Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, January 2016, p. 5, **CE-172**.

70 Letter from BD Agro to the Commercial Court in Belgrade dated 17 February 2016, p. 2 (emphasis added), **CE-372**.

71 Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, **CE-109**.

III. THE AWARD AND THE GROUNDS FOR ITS ANNULMENT

A. The Award

60. On 29 June 2023, the Tribunal issued the Award. As a starting point, the Tribunal correctly upheld its jurisdiction over Mr. Rand's investment in the Beneficially Owned Shares, by a majority decision. The Award concluded that "*the evidence […] unequivocally demonstrates that Mr. Rand was the investor involved in BD Agro's acquisition and operation*".[72] It was Mr. Rand who made the entire contribution towards the acquisition of the Beneficially Owned Shares,[73] and who bore the full risk associated with the investment into the Beneficially Owned Shares.[74]

61. The Tribunal, however, inexplicably declined jurisdiction *ratione materiae* over Mr. Rand's remaining investments in BD Agro—the Indirect Shareholding and the Loans.[75] As Mr. Rand explains in detail further in this Memorial, the Tribunal committed several annullable errors when arriving at these conclusions.

62. On the merits, the Tribunal 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*".[76]

63. The Award further concluded that, on 28 September 2015, the Privatization Agency wrongfully terminated the Privatization Agreement for an alleged violation of its Article 5.3.4. The alleged violation of Article 5.3.4, however, could not justify the termination because Article 5.3.4 only applied during the term of the Privatization Agreement:

> The Buyer will not encumber with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards the subject accrued based on regular business activities of the subject, that is, except for the purpose of acquiring of the funds to be used by the subject.[77]

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[72] Award, ¶ 239.

[73] Award, ¶¶ 240, 250, 263.

[74] Award, ¶ 268.

[75] Award, ¶ 277.

[76] Award, ¶¶ 491, 493.

[77] Privatization Agreement, 4 October 2005, Art. 5.3.4, **CE-017**.

64. The Award correctly held that the prohibition contained in Article 5.3.4 ceased to exist in April 2011, when the purchase price was fully paid. Thus, the Privatization Agency was not entitled to terminate the Privatization Agreement in September 2015,[78] *i.e.* almost *four and a half years* after the obligation set out in Article 5.3.4 ceased to apply:[79]

> 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.

65. The Award also correctly concluded that the subsequent seizure of the Beneficially Owned Shares by the Privatization Agency on 21 October 2015[80] represented a breach of the fair and equitable treatment standard provided in Article 6 of the Canada-Serbia BIT:[81]

> 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.

66. The Award stated that "*the Agency's seizure of the Beneficially Owned Shares deprived Mr. Rand of the entirety of his investment [therein].*"[82] The Tribunal then proceeded to quantify Mr. Rand's damages. By doing so, the Tribunal upheld Mr. Rand's alternative claim that the entire compensation due for the fair market value of the Beneficially Owned Shares be awarded to Mr. Rand (as opposed to the other Claimants in the arbitration).[83]

67. On quantum, the Tribunal calculated the amount of compensation due to Mr. Rand as that part of BD Agro's equity value corresponding to Mr. Rand's 75.87% share in BD

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78 Award, ¶ 609.

79 Award, ¶¶ 612, 615.

80 This was the date chosen by the Tribunal (and the parties) as the valuation date. *See* Award, ¶ 682.

81 Award, ¶ 623.

82 Award, ¶¶ 490, 606.

83 Claimants' First Post-Hearing Brief dated 27 September 2021 ("**Claimants' First PHB**"), ¶ 353.

Agro, plus interest accrued from the Valuation Date.[84] 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.[85]

68. When calculating the equity value, the Tribunal correctly concluded that BD Agro was a going concern as of the Valuation Date and rejected the bankruptcy sales discount proposed by Serbia.[86] The Tribunal also correctly identified relevant categories of assets and liabilities entering into the valuation.

69. However, the Tribunal then either failed to provide *any* reasons, or provided contradictory reasons, for how it arrived at the value of BD Agro's assets and liabilities. In addition, the Tribunal also ignored evidence that was highly relevant for the valuation of BD Agro's most valuable asset—the Construction Land. As already explained in the Application and as Mr. Rand further demonstrates below, the Tribunal's failure to state reasons and to consider relevant evidence are annullable errors.

70. 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.[87] 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—*i.e.* the date of the breach.[88]

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

B. Grounds for annulment

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

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84 Award, ¶ 682.

85 Award, ¶ 699.

86 Award, ¶ 685.

87 Award, ¶ 717(d).

88 Decision on the Claimants' Request for a Supplementary Decision dated 27 October 2023, ¶ 47(a).

73. *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 whatsoever* for the valuation of six out of seven main categories of BD Agro's assets valued by the Tribunal.[89] Mr. Rand addresses these issues in detail in **Section IV.C** below.

74. 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. To provide just one example, while the Tribunal first rejected the use of information originating after the Valuation Date, stating it was "*well accepted that the information used for valuation should originate on or before the valuation date*",[90] it subsequently repeatedly relied on such evidence.[91] Mr. Rand addresses contradictions in the Tribunal's reasoning in detail in **Sections IV.B.1 and IV.D** below.

75. Finally, the Tribunal failed to consider crucial evidence put forward by the Parties in connection with the valuation of BD Agro's most valuable asset—the Construction Land.[92] The evidence omitted by the Tribunal clearly shows that the value of the Construction Land was much higher than the value estimated by the Tribunal.[93] Mr. Rand addresses this error in **Section IV.B.2** below.

76. As Mr. Rand demonstrates in **Section IV.A** 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).

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

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

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[89] Award, ¶ 707.

[90] Award, ¶ 693 (third bullet point)(ii).

[91] *E.g.* Award, ¶ 699(i).

[92] Award, ¶ 693.

[93] Hern First ER, ¶¶ 68, 70.

b. Mr. Rand's claims related to the Loans provided to BD Agro.

78. As Mr. Rand demonstrates in **Sections V.B** and **V.C** below, the Tribunal did so even though it clearly had jurisdiction over these claims. As Mr. Rand explains in **Section V.A** 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, as explained in **Section V.C**.

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

A. Failure to state reasons is a ground for annulment

79. 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* ***state the reasons***" on which the award is based.[94]

80. 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*."[95] The MINE *ad hoc* committee—a leading authority on the issue—held that the requirement to state reasons can be satisfied only if the award enables the reader to follow the tribunal's reasoning:

> [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.[96]

81. Other *ad hoc* committees have expressed similar views.[97]

82. Pursuant to Article 52(1)(e) of the ICSID Convention, a failure to state the reasons on which an award is based requires its annulment:

> Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the

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94 ICSID Convention, Article 48(3) (emphasis added), **CLA-017**.

95 Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, ¶ 105, **CLA-183**.

96 *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), **CLA-184**.

97 *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, **RLA-155**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, ¶¶ 79, 81, **CLA-185**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 87, 124, **CLA-186**; *Mr. Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 21, **CLA-187**; *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, ¶ 118, **RLA-002**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 163, **CLA-188**.

following grounds: […] (e) that *the award has failed to state the reasons on which it is based*.[98]

83. It is widely accepted in ICSID annulment jurisprudence that an award falls short of the requirement to state reasons in the following circumstances, among others:

a. absence of reasons for an award or its particular aspect;[99]

b. contradictory reasons;[100]

c. insufficient or inadequate reasons;[101] and

d. failure to observe relevant evidence.[102]

84. All of these circumstances arise in the present case. In this **Section IV**, Mr. Rand addresses the instances where the Tribunal failed to state reasons with respect to its conclusions on quantum. The Tribunal's failure to state reasons with respect to its conclusions on jurisdiction over Mr. Rand's claims related to the Indirect Shareholding and the Loans is addressed in **Section V**, together with an explanation

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98 ICSID Convention, Article 52(1)(e) (emphasis added), **CLA-017**.

99 *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, **RLA-152**. The *ad hoc* committee found a breach of Article 52(1)(e) of the ICSID Convention on the basis that "*there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point*"; *see also Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, ¶ 141, **CLA-189**.

100 *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*."), **CLA-184**; *see also* Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, ¶ 107, **CLA-183**; *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, **CLA-189**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶¶ 173-191, **CLA-188**.

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

102 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, **CLA-186**.

that the Tribunal's denial of jurisdiction over these claims also represents a manifest excess of powers.

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

85. ICSID annulment jurisprudence shows that an award falls short of the requirement to state reasons if the reasons provided are contradictory.[103] Reasons are contradictory when they effectively cancel each other out, thereby not permitting the parties to understand the decisions of ICSID tribunals.[104]

86. 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 and of themselves, be a reasonable basis for the solutions arrived at.[105]

87. The Tribunal's reasoning was clearly contradictory, irreconcilable and/or insufficient with respect to its conclusions on both the value of the Construction Land, being BD Agro's most valuable asset, and certain liabilities of BD Agro. Mr. Rand addresses these deficiencies with the Tribunal's reasoning in detail below.

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

88. The Tribunal failed to state reasons for its valuation of the Construction Land because its reasoning regarding the valuation of the Construction Land and the choice of

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103 *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, **CLA-184**; *see also* Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, ¶ 107, **CLA-183**; *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, **CLA-189**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶¶ 173-191, **CLA-188**.

104 *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, **CLA-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, **CLA-192**.

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

evidence relevant for the valuation thereof is contradictory. Therefore, the Tribunal's decision on the value of the Construction Land should be annulled.

89. When deciding on the value of the Construction Land, the Tribunal had available the following types of evidence:[106]

a. evidence from actual transactions involving parts of the Construction Land, which implied a value of **EUR 15 to 23 per square meter**,[107] giving a total value of the Construction Land of **EUR 42 million to EUR 64 million**;

b. comparable transactions, namely:

i. Dobanovci transactions, implying a value of **EUR 20 per square meter**,[108] giving a total value of **EUR 56 million**;

ii. additional two Dobanovci transactions submitted by Serbia, implying an average value of **EUR 31.17 per square meter**,[109] giving a total value of **EUR 87 million**;

iii. Pazova transactions, implying a value of **EUR 20 to 27 per square meter**,[110] giving a total value of **EUR 56 million to EUR 75 million**; and

iv. Batajnica transactions, implying a value of **EUR 28 to 37 per square meter**,[111] giving a total value of **EUR 78 million to EUR 103 million**;

c. contemporaneous valuations of comparable construction land prepared by the Serbian Tax Authority, implying a value of **EUR 22 per square meter**,[112] giving a total value of **EUR 61 million**; and

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106 *E.g.* Claimants' Memorial, ¶ 542; Hern First ER, ¶ 62; Ilić First ER, ¶¶ 9.21, 9.88-9.91.

107 Hern First ER, ¶ 65.

108 Hern First ER, ¶ 67.

109 Ilić First ER, Appendix 2, table 2.6.

110 Hern First ER, ¶ 68.

111 Hern First ER, ¶ 69.

112 Hern First ER, ¶ 73.

d. contemporaneous valuations of BD Agro's land prepared by various Serbian valuators, namely:

   i. the First Confineks Valuation, estimating the value at **EUR 24 per square meter**,[113] giving a total value of **EUR 67 million**;

   ii. the Second Confineks Valuation, estimating the value at **EUR 24 per square meter**,[114] giving a total value of **EUR 67 million** in total; and

   iii. the Mrgud Valuation, estimating the average value at **EUR 30 per square meter**,[115] giving a total value of **EUR 84 million** in total.

90. Despite all the evidence listed above, Serbia argued that the Tribunal should base its decision *solely* on so-called asking prices, *i.e.* prices that are not from actual sale transactions but, instead, are only prices derived from advertisements of land for sale.[116] Serbia's real estate expert, Ms. Ilić, identified five—and only five—such asking prices,[117] and these asking prices were—without any further analysis—adopted by Serbia's quantum expert, Mr. Cowan.[118]

91. The Tribunal's treatment of this evidence was entirely contradictory. The Tribunal:

   a. stated that land located in the Batajnica area was not comparable to the Construction Land—but then accepted Serbia's reliance on an asking price for land in the same area;[119]

   b. rejected Dr Hern's reliance on the Batajnica transactions post-dating the Valuation Date, but accepted Serbia's reliance on asking prices with unknown dates;[120]

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113 Hern First ER, ¶ 78.

114 Hern First ER, ¶ 79.

115 Hern First ER, ¶ 81.

116 Award, ¶¶ 692-694.

117 Ilić First ER, p. 145(pdf).

118 Sandy Cowan Second Expert Report dated 24 January 2020 ("**Cowan Second ER**"), ¶ 6.5.

119 *See infra* ¶¶ 93-102; Award, ¶ 693(third bullet point); Ilić First ER, p. 145(pdf).

120 *See infra* ¶¶ 103-108; Award, ¶ 693(third bullet point); Ilić First ER, Appendix 2, table 2.6, p. 145(pdf).

c. refused Dr. Hern's reliance on the First Confineks Valuation because it was not based on "*comparable transactions*"—but then accepted Serbia's valuation, which was only based on five asking prices and no comparable transactions;[121]

d. rejected Dr. Hern's use of the Mrgud Valuation because Mr. Mrgud relied on asking prices—but then accepted Serbia's valuation based solely on asking prices;[122]

e. provided insufficient and contradictory reasoning for its acceptance of a 30% discount to the value of the Construction Land;[123] and

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

92. These contradictions in the Tribunal's reasoning constitute a failure to state reasons and warrant annulment of its decision on the valuation of the Construction Land. Each of the Tribunal's contradictions is explained in greater detail below.

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

93. One type of evidence that Claimants relied on in the arbitration were the so-called "*Batajnica transactions*". These transactions reflected market value assessments made by the Serbian Tax Administration based on comparable transactions for several land plots in the Batajnica area.[124]

94. Claimants' valuation expert, Dr. Hern, concluded that the land in Batajnica was comparable to the Construction Land.[125] The same was also confirmed by Claimants' real estate valuations expert, Mr. Grzesik.[126]

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121 *See infra* ¶¶ 109-114; Award, ¶ 693(first bullet point).

122 *See infra* ¶¶ 115-121; Award, ¶¶ 692-694; Ilić First ER, ¶¶ 9.89-9.1 (correctly should be 9.93).

123 *See infra* ¶¶ 122-143; Award, ¶¶ 695-697.

124 Hern First ER, ¶ 69.

125 Hern First ER, ¶ 69.

126 First Expert Report of Krzystof Grzesik dated 3 October 2019, ¶¶ 6.14.-6.16.

95. The Tribunal rejected Dr. Hern's reliance on the Batajnica transactions, stating that, in the Tribunal's opinion, "*[t]here are […] major differences between the Batajnica land and [the Construction Land] that make the former an unsuitable comparator*".[127]

96. However, the Tribunal then based its valuation solely on five asking prices identified by Ms. Ilić—even though one of these five asking prices was for land in Batajnica:[128]

Asking prices

No	Type of land	City	Municipality	Cadastral Municipality	Address	Size (m²)	Asking price (€)	Asking price (€/m²)	Adjusted asking price* (€/m²)	Description	Year	Date	Source	Link
1	Cosntruction land	Beograd	Surčin	Dobanovci	Dobanovačka petlja	30,000	700,000	23.33	21.00	Plot in the industrial zone, on the right side when going from Belgrade, asphalt to the plot	2015	n/a	asking prices	www.imovina.net
2	Cosntruction land	Beograd	Surčin	Dobanovci	Beogradska obilaznica	36,100	450,000	12.47	11.22	Near corridor 10 and loop, along the highway. OMV pump is 1km away. The plot is in an industrial area. Ownership 1/1. On 8.12.2013 at the price of 542.000eur (15.01 eur / m2) while on 16.5.2014 price was lowered to 450.000eur (12.47eur / m2)	2015	n/a	asking prices	www.srbijaspace.com
3	Cosntruction land	Beograd	Surčin	Dobanovci		71,500	1,072,500	15.00	13.50	Agricultural land in an industrial area, close to the Nelt and Pepsi factories. Land road to the plot, there is water, electricity, sewage.	2014	jan.14	asking prices	www.imovina.net
4	Cosntruction land	Beograd	Zemun	Batajnica		4,300	103,000	23.95	21.56	Plot in the industrial zone of Certa blithe near the railway line to Zemun, asphalt to the plot.	2013	feb.13	asking prices	www.realitica.com
5	Cosntruction land	Beograd	Surčin	Dobanovci		16,000	400,000	25.00	22.50	Plot in the industrial zone. Ownership 1/1. The plot is 1km away from the highway, 15km from Belgrade, 7km airport	2014	mar.14	asking prices	www.srbija-nekretnine.org

* Adjustment is applied for negotiation and willignes of seller to reduce the starting asking price

97. Thus, while the Tribunal refused to rely on prices of land in Batajnica identified by Claimants because they were, allegedly, not comparable to the Construction Land, the Tribunal accepted asking prices *from the same area* identified by Serbia. The Tribunal did so without *any* explanation whatsoever.

98. 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 then "***it has fixed the amount in contradiction to these elements***."[129]

99. 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.[130]

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127 Award, ¶ 693(third bullet point).

128 Ilić First ER, p. 145(pdf)(emphasis added).

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

130 *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 186, **CLA-188**.

100. 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.*"[131] 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.*"[132]

101. The Tribunal's valuation of the Construction Land is a key input in its valuation of BD Agro as a whole. The difference between the value of the Construction Land adopted by the Tribunal and the value calculated based on the price per m^2 implied by the Batajnica transactions is between **EUR 36 million and 61 million**.[133]

102. An absence of reasoning by a tribunal on an outcome-determinative aspect of an award requires an annulment of the respective part.[134] In the words of the *Pey Casado v. Chile I* committee, "*as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow*".[135]

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

103. Another reason for which the Tribunal rejected the use of the Batajnica transactions was that the Tribunal categorically refused to rely on any evidence post-dating the Valuation Date, *i.e.* 21 October 2015:[136]

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

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

133 Award, ¶¶ 691, 707; Hern's updated analysis, Land ABC TRX, **CE-908**.

134 *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, **RLA-152**. The *ad hoc* committee found a breach of Article 52(1)(e) of the ICSID Convention on the basis that "*there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point*"; *see also Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, ¶ 141, **CLA-189**.

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

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

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]

104. After rejecting Claimant's evidence (including the Batajnica transactions), the Tribunal then accepted the valuation of the Construction Land by Mr. Cowan, which incorporates, with no adjustments, Ms. Ilić's valuation of the Construction Land. Ms. Ilić's—and thus Mr. Cowan's—valuation is based on only five asking prices, two of which are represented by Ms. Ilić as being from 2015, without further specification:

Asking prices

No	Type of land	City	Municipality	Cadastral Municipality	Address	Size (m²)	Asking price (€)	Asking price (€/m²)	Adjusted asking price* (€/m²)	Description	Year	Date	Source	Link
1	Cosntruction land	Beograd	Surčin	Dobanovci	Dobanovačka petlja	30,000	700,000	23.33	21.00	Plot in the industrial zone, on the right side when going from Belgrade, asphalt to the plot	2015	n/a	asking prices	www.imovina.net
2	Cosntruction land	Beograd	Surčin	Dobanovci	Beogradska obilaznica	36,100	450,000	12.47	11.22	Near corridor 10 and loop, along the highway. OMV pump is 1km away. The plot is in an industrial area. Ownership 1/1. On 8.12.2013 at the price of 542.000eur (15.01 eur / m2) while on 16.5.2014 price was lowered to 450.000eur (12.47eur / m2)	2015	n/a	asking prices	www.srbijaspace.com

105. Nowhere in the alleged advertisements does it state that the listings are from 2015, and Ms. Ilić's unsubstantiated representation to that effect is insufficient to conclude whether this evidence pre-dates or post-dates the Valuation Date of 21 October 2015. Thus, the Tribunal contradicted itself when it accepted this evidence after having rejected the Batajnica transactions as post-dating the Valuation Date.

106. In addition, Ms. Ilić did not offer any support for her representation that the two asking prices were published in 2015. In fact, the documentary evidence provided by Ms. Ilić in support of these two asking prices does not include any indication of the date when the respective announcements were published.[137]

107. The Tribunal's reasoning is thus once again contradictory—the Tribunal first ruled out any evidence post-dating the Valuation Date, but then accepted Serbia's valuation of the Construction Land based on evidence with unknown dates. As the *Tidewater* committee correctly concluded, if a tribunal provides contradictory reasoning on the same point, the corresponding part of its award "*must be annulled*."[138]

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[137] Asking prices for KO Dobanovci, **RE-561**.

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

108. The Tribunal's contradictory reasoning related to the price of the Construction Land goes to the core of the valuation of the Construction Land and is, thus, a pivotal and outcome-determinative point.[139] Enough to say, the difference between the valuation of the Construction Land using the Batajnica transactions and the Tribunal's valuation is between **EUR 36 million and EUR 61 million**.[140]

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

109. Dr. Hern supported his EUR 22 per m^2 lower bound valuation of the Construction Land by reference to the First Confineks Valuation, which valued the Construction Land at EUR 24 per m^2.[141]

110. The First Confineks Valuation was commissioned by BD Agro, based on directions from the Privatization Agency in November 2015 and valued the Construction Land at approximately EUR 67 million.[142]

111. Since seizing the Beneficially Owned Shares and taking control of BD Agro, Serbia accepted the First Confineks Valuation on at least the following four occasions:

a. BD Agro submitted a new reorganization plan on 11 January 2016, which fully relied on the First Confineks Valuation;[143]

b. BD Agro's shareholders, with the Privatization Agency exercising the decisive vote, approved the reorganization plan at BD Agro's shareholders' meeting;[144]

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

140 Award, ¶¶ 691, 707; Hern's updated analysis, Land ABC TRX, **CE-908**.

141 Hern First ER, ¶ 89, A.

142 Hern First ER, ¶ 78; *See supra,* ¶ 89(d)(ii).

143 Second pre-pack reorganization plan, 11 January 2016, p. 24, **CE-369**.

144 Minutes from the General Assembly of BD Agro AD Dobanovci dated 27 February 2016, pp.1, 6-7 (pdf), **CE-370**.

c. BD Agro used the First Confineks Valuation in the preparation of its financial statements for 2015 and the following years;[145] and

d. the 2015 financial statements were again approved by BD Agro's shareholders, with the Privatization Agency exercising the decisive vote.[146]

112. Despite Serbia's contemporaneous acceptance of the First Confineks Valuation, the Tribunal refused to rely on the First Confineks Valuation because it "*does not refer to evidence of comparable transactions*".[147] However, the Tribunal's valuation of the Construction Land is not based on comparable transactions either. On the contrary, the Tribunal adopted the valuation proposed by Ms. Ilić—which is based *solely* on five asking prices and no comparable transactions.[148]

113. Thus, again, much like in *Tidewater,* "*the Tribunal contradicted its own analysis and reasoning by quantifying its estimation using one concrete criterion […] which it had rejected as unreasonable.*"[149]

114. The First Confineks Valuation valued the Construction Land at approximately EUR 67 million*, i.e.* **EUR 25 million** *more* than the EUR 42 million valuation accepted by the Tribunal.[150]

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

115. Dr. Hern relied on the Mrgud Valuation for his EUR 30 per m^2 upper bound valuation of the Construction Land.[151] The Mrgud Valuation valued the Construction Land at

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145 Minutes from the General Assembly of BD Agro Dobanovci dated 30 June 2016, p. 4, **CE-366**.

146 Minutes from the General Assembly of BD Agro Dobanovci dated 30 June 2016, p. 4, **CE-366**.

147 Award, ¶ 693(first bullet point).

148 *See supra* ¶ 90.

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

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

151 Hern First ER, ¶ 89, B. 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, **CE-175**. *See also* Claimants' Memorial, ¶ 520.

approximately EUR 84 million, corresponding to EUR 30 per m^2.[152] The Mrgud Valuation relied exclusively on asking prices.[153]

116. The Tribunal rejected Dr. Hern's reliance on Mr. Mrgud's contemporaneous valuation. In support of its decision, the Tribunal cited Mr. Grzesik's testimony at the hearing, pursuant to which "*asking prices are the lowest level of evidence that you can use in a valuation.*"[154]

117. That asking prices carry the lowest evidentiary value was, in fact, undisputed between the Parties. Serbia's expert, Ms. Ilić, also accepted in her reports that asking prices have the lowest evidentiary value[155] and should be used only in absence of appropriate actual transaction data.[156] Ms. Ilić agreed that only actual transaction data represents "*primary evidence*"[157] and "*primary market evidence*",[158] which is of the "*highest relevance*".[159]

118. However, the Tribunal then based its valuation of the Construction Land on the valuation proposed by Ms. Ilić, which was also based *solely* on five and only five asking prices,[160] even though appropriate actual transaction data was available. Specifically, Ms. Ilić presented in her reports—but excluded from her valuation—evidence of two actual transactions with two land plots in Dobanovci. One land plot, which actually abuts BD Agro's property, sold at EUR 28.4 per m^2 in July 2015 (*i.e.*

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152 *Supra* ¶ 89(d)(iii). Pero Mrgud (December 2014), Report on the Valuation of the Market Value of Building Land in the BD Agro Complex Zones A, B and C in the Town of Dobanovci, section 6, pp.16-20 (English translation), **CE-175**.

153 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, p. 15, **CE-175**.

154 Award, ¶ 693(second bullet point); Tr., Hearing on Jurisdiction and Merits, Day 7, 80:24-81:2 (Grzesik).

155 Ilić First ER, ¶ 4.9; Danijela Ilić Second Expert Report dated 16 March 2020, ¶ 5.3.

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

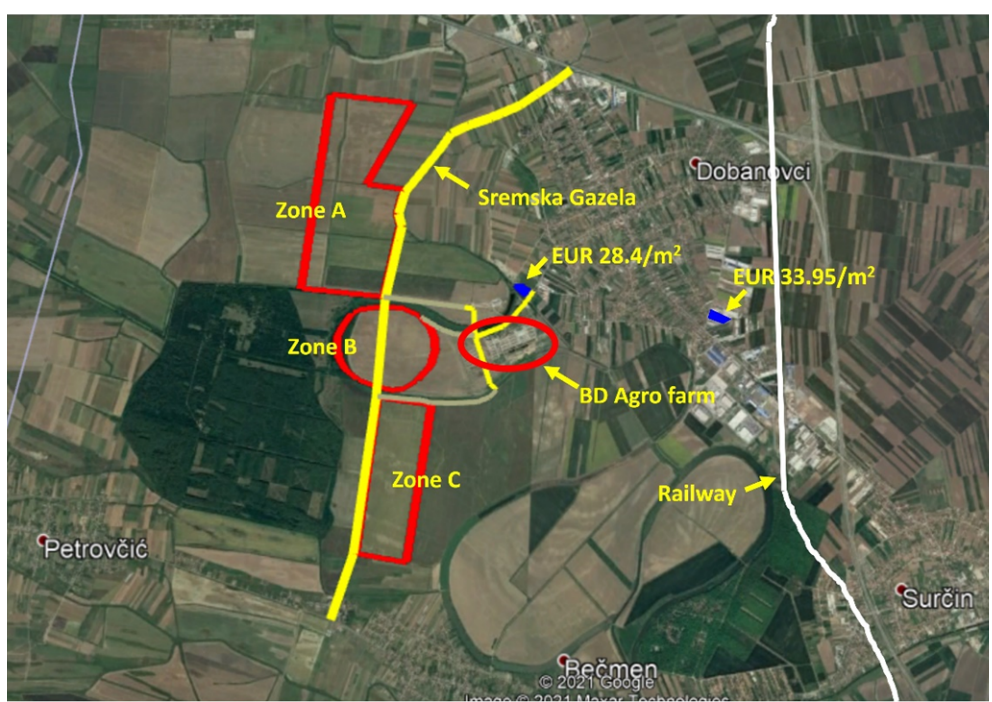
157 Ilić First ER, ¶ 4.27 ("*Dr. Hern simply disregards the primary evidence- actual sale prices from the exhibit CE-182 (min = 2 €/m2) and applies information that cannot be considered market evidence, such as Dec 2015 Confineks report*").

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

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

160 Award, ¶¶ 694, 696; Ilić First ER, ¶ 9.92 and Appendix 2, table 2.6.

only *three months* before the Valuation Date).[161] The other land plot, which is located in another industrial zone in the close vicinity of BD Agro, sold at EUR 33.95 per m^2 in August 2015 (*i.e.* only *two months* before the Valuation Date).[162]



119. Thus, the Tribunal rejected Dr. Hern's EUR 30 per m^2 valuation that was "*based on weighted average price used in Mr. Mrgud's valuation*" because the Mrgud Valuation relied on asking prices, which the Tribunal found to carry the lowest evidentiary weight. However, the Tribunal then accepted Ms. Ilić's valuation, even though it relied solely on five asking prices. The Tribunal's approach is even more contradictory because Ms. Ilić relied on asking prices despite the existence of highly relevant actual transaction data, which Ms. Ilić herself recognized as "*appropriate for comparison to BD Agro construction land*"[163]—but inexplicably chose to disregard.[164]

120. As a result, the Tribunal made the same annullable error as the *Tidewater* tribunal, *i.e.* it "*contradicted its own analysis and reasoning by quantifying its estimation using one*

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

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

163 Ilić First ER, ¶ 9.92.

164 Ilić First ER, ¶ 9.90.

concrete criterion [...] which it had rejected as unreasonable."[165] Akin to the annullable errors in *Tidewater*, the Tribunal first refused to rely on asking prices, but then accepted Ms. Ilić's valuation based *solely* on asking prices. The Tribunal's contradictory reasons are irreconcilable and warrant annulment of the respective part of the Award.

121. This error had a material impact on BD Agro's valuation. Mr. Mrgud estimated, based on asking prices, that the market value of BD Agro's Construction Land was EUR 87 million.[166] The Tribunal rejected Mr. Mrgud's valuation for his reliance on asking prices and then accepted Serbia's valuation, also based on asking prices, of EUR 42 million.[167] The difference is **EUR 45 million**.[168]

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

122. In the Award, the Tribunal accepted a 30% discount to the value of the Construction Land[169] proposed by Ms. Ilić, which she admitted had no support besides her "*experience in valuation of land*."[170] Mr. Rand will show in this section that: (*i*) the Tribunal has not provided sufficient reasoning for the magnitude of the discount; (*ii*) the Tribunal itself suggested that a discount based solely on an expert's judgement is arbitrary; and (*iii*) the Tribunal's reasoning for applying any discount is insufficient, inadequate and contradictory.

123. *First*, the Tribunal's only attempt at justifying the magnitude of the discount was that "*[f]ailing more precise indications in the record about the size of this deduction, it appears reasonable to the Tribunal to accept the 30% discount applied by Ms. Ilić*."[171]

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

166 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, December 2014, p. 14, **CE-175**.

167 Award, ¶ 707.

168 Award, ¶ 707; 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, December 2014, p. 14, **CE-175**.

169 Award, ¶¶ 696-697.

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

171 Award, ¶ 697.

124. The Tribunal did not provide any further reasoning for its decision that the discount should be 30%, rather than any other percentage. The only reasoning of the Tribunal is, therefore, that it disagrees with Claimants, who argued that no discount should be applied. However, having found that there should be *some* discount, the Tribunal is expected to provide an understandable analysis of what the exact percentage of the discount should be. Instead, the Tribunal completely resigned on its seminal duty to provide reasoning on this point.

125. The 30% size of the discount applied by the Tribunal is therefore without explanation. The Tribunal's lack of reasoning can be likened to the case of *Perenco v. Ecuador*, where the *ad hoc* committee partially annulled the underlying award for insufficient reasoning with respect to the tribunal's valuation of a loss of opportunity.

126. The *Perenco* tribunal disregarded all approaches to calculation of damages proposed by the claimant[172] and then "*simply 'acknowledged' that it has discretion and decided to award 'a nominal value.'*"[173] 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.*"[174] Therefore, the *ad hoc* committee concluded that the tribunal failed to state reasons for its decision to award compensation for a loss of profit, and for the amount of that compensation.[175]

127. In the present case, like in *Perenco*, the Tribunal failed to provide any explanation for why a 30% discount, rather than "*any other value*", should apply. By applying the insufficiently explained 30% discount, the Tribunal lowered the value of BD Agro's assets by up to approximately **EUR 25 million**.[176]

128. *Second,* during the hearing, the President of the Tribunal stated that a discount based solely on an expert's judgement is arbitrary:

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172 *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶¶ 462-464, **CLA-193**.

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

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

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

176 Hern's updated analysis, Assets, **CE-908**.

> 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%?[177]

129. Ms. Ilić did not refer to *any* factors—much less any evidence—that she considered in coming to her determination.[178] By accepting Ms. Ilić's arbitrary 30% discount, the Tribunal directly contradicted the position it took during the hearing.

130. *Third,* the Tribunal did not provide any tenable reasons for its acceptance of *any* discount. The purported reasons for a discount set forth in the Award were twofold:

 a. that "*the representative comparables chosen by Ms. Ilić and BD Agro's land were of a different size*" and "*the large area of BD Agro's land on sale may have pushed the price down*";[179] and

 b. that "*[w]hile the comparators had access to the roads and other infrastructure, this was not the case for BD Agro's land*".[180]

131. Neither of these reasons justifies the Tribunal's decision.

132. The justification of a discount by the difference in size of the comparable land plots was originally proposed by Serbia's real estate expert Ms. Ilić, who originally seemed to justify the discount by the size of her comparators being smaller than the size of individual cadastral parcels constituting the Construction Land.[181] However, the size of the parcels constituting the Construction Land is actually smaller than the median size of the comparators used by Ms. Ilić:[182]

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

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

179 Award, ¶ 697.

180 Award, ¶ 697.

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

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

When comparing construction land sale transactions with construction land in Dobanovci, owned by BD Agro, I use representative (median) transacted size and median price (eur/m2). Given that median size of BD Agro construction land cadastral parcels in Dobanovci is 17,372m2[263] and median transacted size of construction land is 30,000m2 m2 with a median price of 21eur/m2. I apply downward adjustment of 30%

133. Thus, during cross-examination, Ms. Ilić abandoned her position, confirmed that the size of the Construction Land was *not* a reason for the 30% discount, and tied the discount to an alleged absence of infrastructure:

Ms. Ilić: (Interpreted)	It is correct, the last sentence, it says I applied an adjustment of 30% as a reflection of my experience in valuation of land. This relates to the existence of infrastructure and access road.
Mr. Pekař:	So you apply no discount or bonus or premium, I should have said, based on the size of land, do you?
Ms. Ilić: (Interpreted)	No, I was of the opinion here, since this is construction land, that this is a median, approximate median size.[183]

134. The Tribunal's reliance on the principle that smaller land plots are more valuable per m^2 than larger land plots therefore does not justify its decision to apply a discount to the value of the Construction Land established on the basis of Ms. Ilić's comparators. In fact, following the Tribunal's logic, the cadastral parcels constituting BD Agro's Construction Land—being smaller than the comparators—should be more valuable than the comparators chosen by Ms. Ilić, and no discount was warranted.

135. Furthermore, the Tribunal's reliance on the principle that smaller land plots are more valuable per m^2 than larger land plots is contradictory also because the Tribunal admitted that "*BD Agro may have been able to split its land in smaller parcels before selling it, making any discount on the sale of the land as a whole inapposite.*"[184] Thus, the Tribunal itself stated that there is no reason to apply any discount on the basis of the size of the land plots.

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183 Transcript, Hearing on Jurisdiction and Merits (Ilić), Day 7, dated 19 July 2021, 166:04-166:12.

184 Award, ¶ 697.

136. The Tribunal also failed to state reasons with respect to the second purported justification given for a discount, *i.e.* the alleged difference in access to infrastructure. This is because the Tribunal's reasoning with respect to that purported justification is insufficient and inadequate.

137. The Tribunal purported to justify its conclusion that Mr. Cowan's and Ms. Ilić's comparators had access to infrastructure by reference to Serbia's exhibit including the respective five announcements. Mr. Cowan, Serbia's quantum expert, admitted at the hearing that it is not possible to identify the specific location of the land plots from these announcements.[185] As a result, it is impossible to establish where exactly these land plots are located, and whether they have infrastructure comparable to the Construction Land.

138. The Tribunal attempted to overcome that admission by stating that the description of the land plots in the announcements explained that they had access to infrastructure. However, that is not the case:

a. the first announcement only states that an asphalt road leads to the plot—it does not mention any infrastructure on the plot;

b. the second announcement only states that infrastructure is in the vicinity of the plot;

c. the third announcement states that there is a dirt road leading to the plot and infrastructure is 100 meters away;

d. the fourth announcement states that there is an asphalt road leading to the land plot and that there is electricity, but it does not mention any other infrastructure; and

e. the fifth announcement only mentions a highway 1 km away from the plot.[186]

139. Ms. Ilić admitted at the hearing that BD Agro's farm has access to infrastructure and the Construction Land is adjacent to it.[187] Thus—same as with respect to Ms. Ilić's

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185 Transcript, Hearing on Jurisdiction and Merits (Cowan), Day 8, dated 20 July 2021, 143:17-146:19.

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

187 Transcript, Hearing on Jurisdiction and Merits (Ilić), Day 7, dated 19 July 2021, 155:19.

asking prices—infrastructure is in the vicinity of the Construction Land. Therefore, no discount on the basis of availability of infrastructure is justified.

140. *Finally*, the clear arbitrariness of the discount is confirmed by the fact that the Tribunal applies the same discount also to BD Agro's Other Construction Land in Dobanovci, which–as Ms. Ilić admitted—has access to the roads and other infrastructure:[188]

> At the Valuation Date, BD Agro owned, in total, 736 hectares of land in cadaster municipality Dobanovci, municipality Surčin[243]. All land is registered as agricultural and at the Valuation Date it was used as agricultural land. BD Agro Farm is predominantly built on parts of parcels nos. 5521/1 and 5522/2 and on parts of parcels nos. 4684, 5416, 5415, and 5527, and although they are registered as agricultural land, this is construction land, since these parcels have access from public road and they are serviced with necessary infrastructure for operation of the farm. All other BD Agro cadastral parcels are not serviced with infrastructure and do not have access from public roads.

141. An award must be annulled in case of insufficient or inadequate reasons, which are such reasons that *"are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal"*.[189]

142. This flaw is clearly present in the Tribunal's reasoning in relation to the discount. The only purported reasons given for the discount—*i.e.* the size of the Construction Land and its access to infrastructure—are not capable of justifying the Tribunal's acceptance of the discount. The Tribunal's reasoning implies that a smaller surface area and better access to infrastructure increase the value of land plots. However, the comparators used in the valuation adopted by the Tribunal are *larger* land plots than the individual land plots constituting the Construction Land. Similarly, the comparators do not have better access to infrastructure. Therefore, these reasons are insufficient and inadequate to justify the Tribunal's decision to apply a discount. Following the reasoning of the *Soufraki* committee,[190] the Tribunal's decision to apply a discount must be annulled.

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188 Ilic First ER, ¶ 9.79.

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

190 *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶¶ 122-123, **CLA-190**.

143. It follows from the above that the Tribunal's reasoning concerning the 30% discount applied by the Tribunal to the value of the Construction Land is seriously flawed—both with respect to the need to apply the discount as such, as well as with respect to the magnitude of the discount. The Tribunal's flawed reasoning is also clearly outcome-determinative. Even accepting the price per meter squared of the Construction Land proposed by Ms. Ilić based on asking prices, *i.e.* EUR 21 per m^2, the 30% discount lowers the value of the Construction Land by **EUR 18 million**.[191]

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

144. As shown above, the Tribunal concluded that the proper methodology for the valuation of the Construction Land must comply with the following key principles:

1. the valuation should be based on actual comparable transactions as the primary, most relevant, evidence;[192]

2. asking prices have the lowest evidentiary value and the valuation should not rely on asking prices with no corresponding information about dates and sources of these prices;[193]

3. the valuation should only rely on evidence from comparable areas—the Tribunal specifically identified Batajnica as a noncomparable area;[194]

4. the valuation should only rely on evidence pre-dating the Valuation Date;[195]

5. a discount is justified where evidence used in the valuation relates to comparable land with better access to infrastructure;[196] and

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

192 Award, ¶ 693(first bullet point).

193 Award, ¶ 693(second bullet point).

194 Award, ¶ 693(third bullet point).

195 Award, ¶ 693(third bullet point).

196 Award, ¶ 697.

6. smaller land plots are more valuable per m^2 than comparable larger land plots.[197]

145. Contradicting itself, the Tribunal accepted Ms. Ilić's valuation—*even though it does not comply with any of the above key principles*.

146. *First*, Ms. Ilić's valuation does not comply with the first key principle because it does not rely on *any* actual comparable transactions. Ms. Ilić's valuation is based on five, and only five, asking prices—even though Ms. Ilić herself identified highly relevant actual comparable transactions.[198] As explained above, Ms. Ilić presented in her reports evidence of two actual transactions with two land plots: one for land that actually abuts BD Agro's property, sold at EUR 28.4 per m^2 in July 2015 (only *three months* before the Valuation Date),[199] and the other for land located in another industrial zone in the close vicinity of BD Agro, sold at EUR 33.95 per m^2 in August 2015 (only *two months* before the Valuation Date).[200]

147. Ms. Ilić excluded these transactions from her valuation because, according to Ms. Ilić, the land plots subject to these transactions are not comparable to the Construction Land due to their location.[201] Ms. Ilić reached this, clearly incorrect, conclusion even though one of these land plots actually abuts BD Agro's property and the other land plot is located in another industrial zone in the close vicinity of BD Agro.[202]

148. The Tribunal did not address these two actual comparable transactions in the Award at all—even though the Tribunal concluded that actual comparable transactions represent primary, most relevant, evidence and Claimants repeatedly relied on these two transactions and stressed their importance for the valuation of the Construction Land.[203]

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197 Award, ¶ 697.

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

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

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

201 Ilić First ER, ¶ 9.90.

202 Tr., Hearing on Jurisdiction and Merits, Day 7, 149:25-150:21 (Ilić).

203 Award, ¶ 693(first bullet point); Transcript, Hearing on Jurisdiction and Merits, Day 7, dated 19 July 2021, 62:2-62:12 (Grzesik); Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021,

149. Thus, the Tribunal contradicted its own first key valuation principle when it ignored, without any explanation, these two actual comparable transactions and accepted Ms. Ilić's valuation which relied solely on five asking prices to the exclusion of available highly relevant actual comparable transactions.

150. *Second*, Ms. Ilić's valuation does not comply with the Tribunal's second key principle because it relies solely on five asking prices, *i.e.* the evidence with the lowest evidentiary value, even though relevant comparable market evidence was available.

151. Moreover, Ms. Ilić relies on these five asking prices without providing proper information about their dates and sources. To begin with, the links provided by Ms. Ilić do not lead to the specific advertisements she relies upon. Moreover, these advertisements also cannot be found on individual websites and, thus, cannot be verified.

152. Furthermore, with respect to the first two listings in Ms. Ilić's table highlighted below, Ms. Ilić represents that these asking prices are allegedly from "*2015*". However, the corresponding listings submitted by Ms. Ilić do not include *any* date. Ms. Ilić's claim that these two asking prices are from 2015 is, thus, completely unsupported:[204]

Asking prices

No	Type of land	City	Municipality	Cadastral Municipality	Address	Size (m^2)	Asking price (€)	Asking price (€/m^2)	Adjusted asking price* (€/m^2)	Description	Year	Date	Source	Link
1	Cosntruction land	Beograd	Surčin	Dobanovci	Dobanovačka petlja	30,000	700,000	23.33	21.00	Plot in the industrial zone, on the right side when going from Belgrade, asphalt to the plot	2015	n/a	asking prices	www.imovina.net
2	Cosntruction land	Beograd	Surčin	Dobanovci	Beogradska obilaznica	36,100	450,000	12.47	11.22	Near corridor 10 and loop, along the highway. OMV pump is 1km away. The plot is in an industrial area. Ownership 1/1. On 8.12.2013 at the price of 542.000eur (15.01 eur / m2) while on 16.5.2014 price was lowered to 450.000eur (12.47eur / m2)	2015	n/a	asking prices	www.srbijaspace.com
3	Cosntruction land	Beograd	Surčin	Dobanovci		71,500	1,072,500	15.00	13.50	Agricultural land in an industrial area, close to the Nelt and Pepsi factories. Land road to the plot, there is water, electricity, sewage.	2014	jan.14	asking prices	www.imovina.net
4	Cosntruction land	Beograd	Zemun	Batajnica		4,300	103,000	23.95	21.56	Plot in the industrial zone of Certa blithe near the railway line to Zemun, asphalt to the plot.	2013	feb.13	asking prices	www.realitica.com
5	Cosntruction land	Beograd	Surčin	Dobanovci		16,000	400,000	25.00	22.50	Plot in the industrial zone. Ownership 1/1. The plot is 1km away from the highway, 15km from Belgrade, 7km airport	2014	mar.14	asking prices	www.srbija-nekretnine.org

153. Finally, the location of the land plots relating to the advertisements relied upon by Ms. Ilić cannot be determined based on the evidence provided by Ms. Ilić.[205] Mr. Cowan,

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15:13-16:1 (Hern); Claimants' First PHB, ¶¶ 296, 308-312; Claimants' Second Post-Hearing Brief dated 22 October 2021 ("**Claimants' Second PHB**"), ¶ 120(b).

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

[205] Asking prices for KO Dobanovci, **RE-561**.

Serbia's quantum expert, specifically confirmed this fact during his cross-examination.[206]

154. By accepting Ms. Ilić's valuation of the Construction Land, based solely on five asking prices with no verifiable information about the dates of two of these asking prices and location of the land plots related to *any* of these prices, and no access to original versions of individual listings, the Tribunal contradicted its second valuation principle.

155. *Third*, Ms. Ilić's valuation does not comply with the Tribunal's third key principle because it relies on evidence from areas that the Tribunal concluded were not comparable to the Construction Land. Specifically, one of the five asking prices used by Ms. Ilić concerns a land plot located in Batajnica—even though the Tribunal identified Batajnica as non-comparable area.[207] By accepting Ms. Ilić's valuation based on evidence from the Batajnica area, the Tribunal clearly contradicted its third key principle for valuation of the Construction Land.

156. *Fourth*, Ms. Ilić's valuation does not comply with the Tribunal's fourth key principle—rejection of evidence post-dating the Valuation Date—because the date of two out of five asking prices used by Ms. Ilić cannot be determined.[208] Therefore, it is impossible to discern whether this evidence pre-dates or post-dates the Valuation Date. By accepting Ms. Ilić's valuation of the Construction Land—based on evidence with an unclear date—the Tribunal contradicted its fourth valuation principle.

157. *Fifth*, Ms. Ilić's valuation does not comply with the Tribunal's fifth key principle. This is because her valuation of the Construction Land includes a 30% discount, even though there is no evidence of differences between the Construction Land and asking prices used by Ms. Ilić that would warrant such a discount.

158. Ms. Ilić's entire valuation of the Construction Land relies on five asking prices. The only evidence submitted by Ms. Ilić to support these asking prices are screenshots of purported real estate advertisements. However, as explained above, these advertisements reveal that the land plots offered therein do not have better access to

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[206] Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 143:17-146:18 (Cowan).

[207] Ilić First ER, Appendix 2, table 2.6, p. 145(pdf).

[208] *See supra,* ¶ 104-106.

infrastructure than the Construction Land.[209] The advertisements also do not point to any other differences that would warrant the discount applied by Ms. Ilić.

159. By accepting the 30% discount applied by Ms. Ilić without any evidence of differences in the infrastructure available on land plots subject to Ms. Ilić's asking prices and on those of the Construction Land, and without evidence of any other differences warranting such discount, the Tribunal clearly contradicted its fifth valuation principle.

160. *Finally*, Ms. Ilić's valuation does not comply with the Tribunal's sixth key principle, because it applies a discount to the value of BD Agro's Construction Land, even though the size of the parcels constituting the Construction Land is actually smaller than the median size of the comparators used by Ms. Ilić.[210] The median size of the land plots advertised in the announcements used as evidence by Ms. Ilić is 30,000 m^2, while the median size of the plots constituting the Construction Land is 17,000 m^2.[211]

161. Thus, under the Tribunal's sixth principle, a premium, rather than a discount, should be applied to valuation of the Construction Land. By accepting the 30% discount, the Tribunal clearly contradicted its sixth key valuation principle.

162. The above makes it clear that the Tribunal's acceptance of Ms. Ilić's valuation of the Construction Land is irreconcilable with the Tribunal's own conclusions on key principles to be applied to the Construction Land's valuation. Thus, same as in the *Tidewater*, the tribunal "*contradicted its own analysis and reasoning by quantifying its estimation using one concrete criterion […] which it had rejected as unreasonable.*"[212] In fact, the Tribunal did so with respect to *all six* valuation principles it identified as relevant for valuation of the Construction Land. This is yet another reason for which the Tribunal's decision on valuation of the Construction Land should be annulled.

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[209] Asking prices for KO Dobanovci, **RE-561**. *See supra*, ¶ 138-139.

[210] Ilić First ER, ¶ 9.1 (correctly should be 9.93).

[211] Ilić First ER, ¶ 9.1 (correctly should be 9.93).

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

163. Indeed, if the Tribunal followed the first four valuation principles it itself formulated, it would have necessarily concluded that *none* of the five asking prices identified by Ms. Ilić should be relied upon in valuating the Construction Land. This fact is demonstrated by the following table summarizing contradictions between the individual asking prices and the Tribunal's valuation principles:

	Breach of the 1st valuation principle?	**Breach of the 2nd valuation principle?**	**Breach of the 3rd valuation principle?**	**Breach of the 4th valuation principle?**	**Result**
Asking price 1 (Dobanovci, EUR 21/m2)	**Yes** Not an actual comparable transaction.	**Yes** Evidence with the lowest value, even though relevant comparable market evidence available. Unsupported information about the date and missing information about the exact location.	**Yes** Impossible to confirm whether the area is comparable due to missing information about the location.	**Yes** Impossible to confirm whether it pre-dates the Valuation date due to unsupported information about the date.	X
Asking price 2 (Dobanovci, EUR 11.22/m2)	**Yes** Not an actual comparable transaction.	**Yes** Evidence with the lowest value, even though relevant comparable market evidence available. Unsupported information about the date and missing information about the exact location.	**Yes** Impossible to confirm whether the area is comparable due to missing information about the location.	**Yes** Impossible to confirm whether it pre-dates the Valuation date due to unsupported information about the date.	X
Asking price 3 (Dobanovci, EUR 13.50/m2)	**Yes** Not an actual comparable transaction.	**Yes** Evidence with the lowest value, even though relevant comparable market evidence available. Missing information about the exact location.	**Yes** Impossible to confirm whether the area is comparable due to missing information about the location.	**No**	X
Asking price 4 (Batajnica, EUR 21.56/m2)	**Yes** Not an actual comparable transaction.	**Yes** Evidence with the lowest value, even though relevant comparable market evidence available.	**Yes** Located in Batajnica, which the Tribunal identified as noncomparable area.	**No**	X

	Breach of the 1st valuation principle?	Breach of the 2nd valuation principle?	Breach of the 3rd valuation principle?	Breach of the 4th valuation principle?	Result
		Missing information about the exact location.			
Asking price 5 (Dobanovci, EUR 22.50/m2)	**Yes** Not an actual comparable transaction.	**Yes** Evidence with the lowest value, even though relevant comparable market evidence available. Missing information about the exact location.	**Yes** Impossible to confirm whether the area is comparable due to missing information about the location.	**No**	✗

164. In addition, even if the Tribunal correctly relied on the asking prices identified by Ms. Ilić (*quod non*), but followed its fifth and/or sixth valuation principle, it would have necessarily concluded that no discount should be applied to these asking prices.

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

165. In the Award, the Tribunal addressed evidence on which Claimants relied for their upper and lower bound of the Construction Land's value.[213] Specifically, the Tribunal addressed the evidence from the Serbian tax authorities, the First Confineks Valuation, BD Agro's actual transactions, the Mrgud Valuation and the Batajnica transactions.[214] The Tribunal's rejection of this evidence clearly suffers from a lack of reasoning, as explained above.

166. In addition, the Tribunal completely ignored—*without any explanation*—other relevant evidence relied on by Claimants for valuation of the Construction Land. Specifically, the Tribunal ignored:

a. documents from the Serbian Tax Administration based on actual comparable transactions in the Nova Pazova and Stara Pazova regions;[215]

b. the Second Confineks Valuation;[216] and

213 Award, ¶ 693.

214 Award, ¶¶ 692-694.

215 Hern First ER, ¶¶ 64, 68.

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

c. the two highly relevant actual comparable transactions with construction land at Dobanovci from 2015 presented by Ms. Ilić (these transactions were described in detail in paragraph 118 above).[217]

167. This evidence supports 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 per m^2,[218] much higher than the 14.7 EUR per m^2 adopted by the Tribunal.[219] Dr. Hern explained that he used the Pazova transactions in his valuation because they were comparable to the Construction Land:[220]

> The transactions labelled as "Pazova" relate to acquisitions of land in the Nova Pazova and Stara Pazova regions (as highlighted in yellow in Figure 3.2).[48] The Pazova areas are broadly comparable to BD Agro's land in Dobanovci: they are fully developed[49] with access to the E70 and E75 roads,[50] but are further away from Belgrade and the airport. Based on data from 2013 and 2016, the Pazova transactions support prices in a range of 20 to 27 EUR/m^2.

168. Similarly, the Second Confineks Valuation valued the Construction Land at 24 EUR per m^2.[221] The Tribunal ignored the Second Confineks Valuation when deciding on the value of the Construction Land, but then used the Second Confineks Valuation in its valuation of BD Agro's liabilities.[222]

169. Finally, the two actual comparable transactions in Dobanovci from 2015 presented by Ms. Ilić support an average price of 31.17 EUR per m^2.[223] This is again significantly higher than the 14.7 EUR per m^2 adopted by the Tribunal.[224]

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

218 Hern First ER, ¶ 68.

219 Award, ¶ 694.

220 Hern First ER, ¶ 68.

221 Hern First ER, ¶ 79.

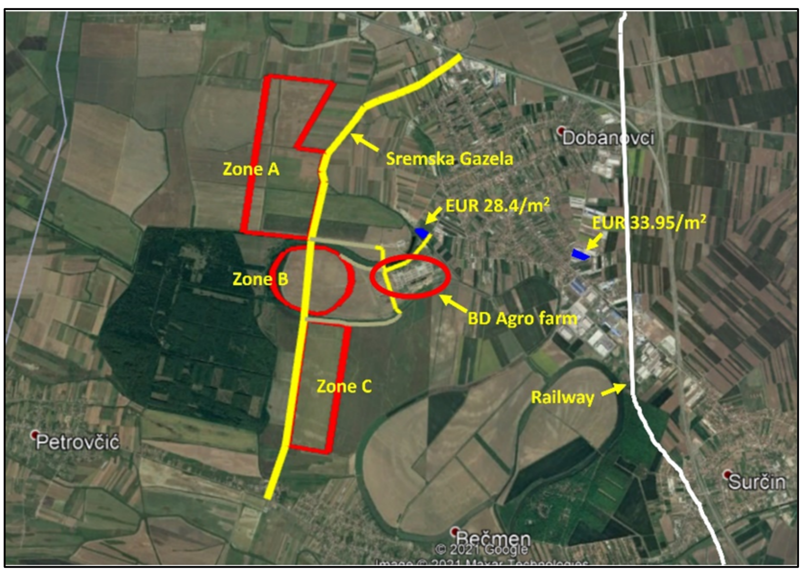
222 Award, ¶ 699.

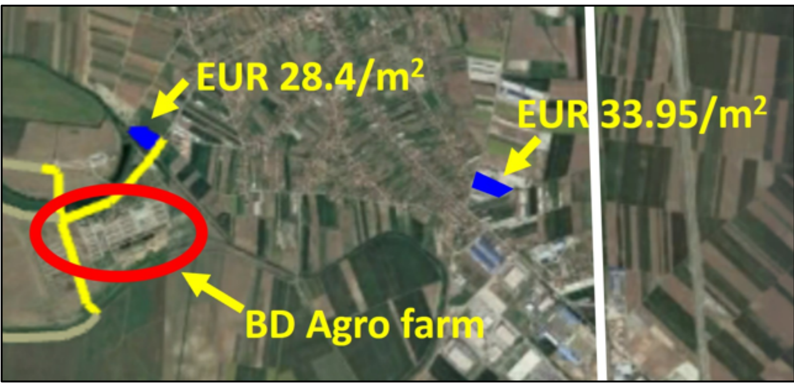
223 Ilić First ER, Appendix 2, table 2.6 at p. 142(pdf).

224 Award, ¶ 694.

170. Importantly, Claimants repeatedly relied on this part of Ms. Ilić's evidence.[225] Dr. Hern expressly stressed the importance and relevance of these transactions during his presentation at the hearing:[226]

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





225 Transcript, Hearing on Jurisdiction and Merits, Day 7, dated 19 July 2021, 62:2-62:12 (Grzesik); Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 15:13-16:1 (Hern); Claimants' First PHB, ¶¶ 296, 308-312; Claimants' Second PHB dated 22 October 2021, ¶ 120(b).

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

171. Claimants also referred to this evidence in their post-hearing submissions, explaining that Ms. Ilić incorrectly excluded the evidence because the two transactions were allegedly close to a residential area—but then she admitted at the hearing that there were in fact no residential buildings next to them:[227]

> Curiously, the Dobanovci transactions were identified—and then unjustifiably disregarded—by Serbia's expert, Ms. Ilić. In her reports, Ms. Ilić claimed that she excluded these two transactions because they were allegedly close to a residential area.[329] However, during her cross-examination, Ms. Ilić admitted that the land subject to one of these transactions was actually right next to the land on which BD Agro's farm is located[330] and that there were no residential buildings next to it.[331]

172. Indeed, Ms. Ilić admitted at the hearing that the land plot close to BD Ago's premises was surrounded by fields to the north and west, by non-residential buildings to the east and by BD Agro's premises to the south:[228]

> 23 Q. If we just look in greater detail, so would you agree
> 24 with me, the north and west of point C, there are
> 25 fields?

> 01 A. (Interpreted) Yes.
> 02 Q. Across the street to the east, we can see some pretty
> 03 substantial roofs which definitely do not belong to
> 04 residential buildings, would you agree with that?
> 05 A. (Interpreted) Yes.
> 06 Q. And south, we have the complex of the farm, don't we?
> 07 A. (Interpreted) Yes.

173. In their post-hearing submissions, Claimants also explained that, after Ms. Ilić's original position proved untenable, she changed her position and argued that the land plot next to BD Agro's farm was allegedly not comparable to the Construction Land because it was connected to a municipal road. However, Ms. Ilić eventually conceded that the very same road extended also to the Construction Land:[229]

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227 Claimants' First PHB, ¶ 309.

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

229 Claimants' First PHB, ¶ 310.

310.	Probably aware that her position was untenable, Ms. Ilić changed her position and argued during the Hearing that the land plot next to BD Agro's farm was allegedly not comparable to the Construction Land in Zones A, B and C because it was connected to a small municipal road.[332] However, Ms. Ilić eventually conceded that the very same road actually extends also to Zones B and C:

> Mr. Pekař: *Are you aware, Ms Ilic actually, that this asphalt road, which is here named as Ulica Ive Lole Ribara, then extends to Zones B and C?*
>
> Ms. Ilić: *Yes,* it does not extend to the entire zones. It goes partly through the farmland, but not until the end of the plot.[333]

174. Thus, Claimants clearly concluded in their post-hearing submissions that this actual comparable transaction dealing with a land plot *literally across the street from BD Agro* from July 2015, *only three months before the Valuation Date*, was—by far—the most relevant piece of evidence for the valuation of the Construction Land:[230]

> As a result—and as explained by Dr. Hern—the EUR 28.4 per m^2 price for the land plot in the immediate vicinity of BD Agro shows that the market price for the Construction Land in Zones A, B and C should be even higher because the latter will be connected to a major road with direct access to the E70 highway.[335]

175. The Tribunal simply ignored this evidence and did not comment on it *at all* in the Award. Had the Tribunal done so, it would have had to recognize that its valuation of the Construction Land of EUR 14.7 per m^2 is seriously understated and unjustifiable.

176. The *ad hoc* committee in *Teco* v. *Guatemala* confirmed that tribunals commit an annullable error when they ignore relevant evidence. The *Teco ad hoc* committee 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.*"[231] 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*

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230 Claimants' First PHB, ¶ 312.

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

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.[232]

177. On this basis, the *Teco ad hoc* committee concluded that a tribunal cannot simply gloss over evidence emphasized by the parties, without any analysis and without explaining why it found that evidence insufficient or unpersuasive:

> *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.* 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.[233]

178. In a similar vein, when assessing the price per m^2 of the Construction Land, the Tribunal ignored the evidence described above, and primarily the Dobanovci transactions—*introduced by Serbia and accepted by Claimants*. As explained above, that evidence clearly had "*the potential to be relevant to the final outcome of the case*" because it suggested a significantly higher valuation of the Construction Land than that adopted by the Tribunal in the Award. For example, the two Dobanovci transactions indicate a value of comparable land of **EUR 31.17 per square meter**,[234] giving a total value of the Construction Land of **EUR 87 million**—*i.e.* EUR 45 million higher than the Tribunal's valuation of **EUR 42 million**.[235]

* * *

179. In conclusion, the Tribunal's valuation of the Construction Land is clearly based on contradictory reasoning and ignores highly relevant contemporaneous evidence.

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232 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 135-136 (emphasis added), **CLA-186**.

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

234 Ilić First ER, Appendix 2, table 2.6.

235 Award, ¶ 707.

Importantly, the Tribunal's contradictory and insufficient reasoning with respect to its valuation of the Construction Land is profoundly outcome-determinative.

180. For example, according to the evidence rejected by the Tribunal based on contradictory reasons, the value of the Construction Land would be between EUR 67 and 103 million. This is between **EUR 25 and 61 million** more than the actual value adopted by the Tribunal, being EUR 42 million.[236] Similarly, with no other changes made, application of a 30% discount to the value of the Construction Land, for which the Tribunal also provided contradictory and insufficient reasons, lowered the value of BD Agro's assets by up to **EUR 25 million**.[237]

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

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

182. 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.[238] Therefore, in the quantum part of the Award, the Tribunal had to decide on the compensation due to Mr. Rand for the loss of his 75.87% beneficial shareholding in BD Agro.

183. The Tribunal first determined the value of BD Agro's equity as of the Valuation Date and then awarded 75.87% of that value (plus interest) to Mr. Rand:[239]

> Accounting for these adjustments, the value of 100% of the shares in BD Agro on 21 October 2015 was 19.7 million.[594] Mr. Rand indirectly owned 75.87% of BD Agro's shares, through Rand Investments (in which he had a 100% shareholding) and Sembi (in which he held a 97.5% shareholding),[595] resulting in a valuation of EUR 14,572,730. To this figure, interest should be added at 6-month average EURIBOR + 2%, compounded semi-annually until the date of payment (see above, §706).

[236] *See supra*, ¶¶ 101, 108, 114, 121; Award, ¶ 707.

[237] *See supra*, ¶ 127; Award, ¶ 707.

[238] Award, ¶ 672.

[239] Award, ¶ 708.

184. 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 as of the Valuation Date.[240] 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.[241] The farm assets included: (*a*) agricultural land; (*b*) "*other fixed assets*"; (*c*) "*current assets*"; and (*d*) deferred tax assets.[242] The non-farm assets included: (*e*) "*Dobanovci Development Land*", which is designated as the Construction Land in this Memorial; (*f*) "*other construction land*"; and (*g*) "*Novi Becej*".[243]

185. The Tribunal assigned the following values to these categories of assets:[244]

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**

186. The Tribunal did so without providing *any* reasons for how it calculated the value of the six highlighted categories of assets.

240 Award, ¶ 699.

241 Award, ¶ 707.

242 Award, ¶ 707.

243 Award, ¶ 707.

244 Award, ¶ 707.

187. A complete absence of reasons for an award is undisputably a reason for annulment of the respective part.[245] In the words of the *Pey Casado v. Chile (I)* committee, "*as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow*".[246]

188. 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.[247]

189. This being said, the Tribunal's failure to state reasons with respect to its valuation of (*i*) agricultural land; (*ii*) "*other fixed assets*"; (*iii*) "*other construction land*"; and (*iv*) deferred tax assets could be excused by the fact that the Parties' valuations of these categories of assets were not widely different and the Tribunal's valuation was always between the values advocated by the Parties. Therefore, Mr. Rand does not request annulment of the parts of the Award addressing the valuation of these assets.

190. Mr. Rand, however, requests annulment of the parts of the Award addressing the valuation of the remaining two categories of assets for which the Tribunal did not state any reasons: (*i*) "*current assets*"; and (*ii*) "*Novi Becej*". These two categories are discussed in detail below.

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[245] *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, **RLA-152**. The *ad hoc* committee found a breach of Article 52(1)(e) of the ICSID Convention on the basis that "*there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point*"; *see also Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, ¶ 141, **CLA-189**.

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

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

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

191. The Tribunal's list of assets includes a category labelled "*Novi Becej*" valued at EUR 0.2 million.[248] The Tribunal did not provide any explanation of the assets included in that category, nor did it provide any reasoning on their EUR 0.2 million value.[249]

192. The utter lack of the Tribunal's reasoning makes it impossible to discern what specific assets are supposed to be included in the category. This lacuna is important because the Parties' valuations of BD Agro's assets in Novi Bečej significantly diverged.

193. Claimants' position was that, as of the Valuation Date, BD Agro's assets in Novi Bečej included co-ownership of a building of cultural significance, the Dundjerski castle, and agricultural, forest and construction land surrounding the castle.[250] Claimants argued that at all of the above assets should be included in the valuation of BD Agro. Relying on contemporaneous valuations approved by Serbia,[251] Claimants valued these assets at EUR 0.8 million.[252]

194. Conversely, Serbia's valuation did not take into account BD Agro's ownership of the castle. Although Serbia's real estate valuation expert, Ms. Ilić, recognized the castle's existence and BD Agro's ownership, she failed to reflect it in her calculations.[253] Ms. Ilić estimated the value of BD Agro's *land* in Novi Bečej, without the castle, at EUR 0.2 million.[254] Serbia's quantum expert, Mr. Cowan, then simply adopted the number calculated by Ms. Ilić—thus again ignoring BD Agro's ownership of the castle.[255]

195. Due to the Tribunal's lack of reasoning, it cannot be known whether the Tribunal's valuation included all categories of assets pleaded by Claimants or not. Furthermore, the Tribunal did not explain why it valued "*Novi Becej*" at EUR 0.2 million. As

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248 Award, ¶ 707.

249 Award, ¶ 707.

250 *E.g.* Hern First ER, ¶ 116.

251 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, **CE-142**.

252 Hern First ER, ¶ 118.

253 Ilić First ER, ¶¶ 9.75-9.78.

254 Ilić First ER, ¶ 10.2.

255 Cowan Second ER, ¶ 4.3.

explained above, EUR 0.2 million represent the value assigned to BD Agro's land at Novi Bečej—*without the castle*—by Serbia's expert. It is unclear whether the Tribunal simply adopted this value,[256] in which case it would be unclear why the Tribunal decided to exclude the castle from the valuation, or whether the Tribunal arrived at the EUR 0.2 million value in another manner.

2. The "*Current assets*"

196. As of the Valuation Date, BD Agro also owned other assets, including receivables from sales, inventories, short-term financial investments and cash, as reported in its balance sheet.[257] Mr. Cowan valued the "*current assets*" at EUR 5 million, using the Second Confineks Valuation.[258]

197. Claimants' valuation expert, Dr. Hern, valued BD Agro's current assets as a part of a wider category, which he labelled "*Other Current and Non-Current Assets*" and valued at EUR 7.4 million:[259]

Other Current and Non-Current Assets	Net Book Value (EUR million)
Receivables from sales	3.8
Receivables from specific operations	1.0
Inventories	0.6
Accrued Expenses	0.0*
Other Receivables	0.1
Short-term financial investments	0.4
Value Added Tax	0.0*
Cash and Cash Equivalents	0.7
Intangible Assets	0.0*
Immovables, plant and equipment under construction	0.8
Other immovables, plant and equipment	0.0*
Advances for immovables, plant and equipment	0.0*
Total Value of Other Current and Non-Current Assets	**7.4**

*Note: * Values reported as 0.0 reflect positive values which rounded to EUR million; I convert the values reported in RSD to EUR using the EUR/RSD rate as of 21 October 2015 of 119.9, as reported by the National Bank of Serbia.*
Source: BD Agro AD Dobanovci Original Financial Statements for 2015, dated 31 December 2015 (English translation), ***CE-140****; NBS exchange rate data,* ***CE-137****.*

198. The "*current assets*" consist of the first eight subcategories on Mr. Hern's list and are valued at EUR 6.6 million. The "*non-current assets*" consist of the last four

[256] Ilić First ER, ¶ 10.2; Cowan Second ER, ¶ 4.3.

[257] Hern First ER, ¶ 120.

[258] Sandy Cowan Third Expert Report dated 16 March 2020 ("**Cowan Third ER**"), ¶ 4.4.

[259] Hern First ER, ¶ 121.

subcategories and are valued at EUR 0.8 million.[260] Mr. Cowan included the "*non-current assets*" in his valuation of "*other fixed assets*."

199. The Tribunal valued the "*Current assets*" at EUR 5 million.[261] Again, the Tribunal did not provide any reasoning for this decision. It, therefore, cannot be known whether the Tribunal simply adopted the valuation of Mr. Cowan—which is flawed and based on evidence post-dating the Valuation Date (*i.e.* the Second Confineks Report)[262]—or whether the Tribunal calculated this value in some other way. In addition, it cannot be known what specific assets the Tribunal intended to include in this category.

* * *

200. As explained above, the *Pey Casado (I)* and *CMS ad hoc* committees found that where there is "*a significant lacuna in the Award*",[263] or in other words "*no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow*".[264] These findings are directly applicable to the absence of the Tribunal's reasoning with respect to the "*Novi Becej*" and "*current assets*" categories.

201. Similarly, the *ad hoc* committee in *Watkins Holdings v. Spain* confirmed that "*[a] mere statement by the tribunal of its findings without more would not constitute reasons in an award.*"[265] While the *Watkins Holdings* committee eventually did not annul the award in question, it was because the committee concluded that the tribunal's

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260 Hern First ER, ¶ 121. As explained above, these assets were included by Mr. Cowan in the "*Other fixed assets*" category, except the "*Intangible Assets*".

261 Award, ¶ 707.

262 The issues with Mr. Cowan's reliance on the Second Confineks Valuation is that it is not correct, because Confineks applies certain write-offs to receivables without any reason. Dr. Hern addressed this problem in his reports. *See* Hern First ER, ¶ 122.

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

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

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

reasoning could be followed based on other parts of the award[266] or found the lack of reasons not to be outcome determinative.[267]

202. The Tribunal in the present case did not provide any "*express rationale for the conclusions*" regarding the value of individual categories of BD Agro's assets discussed above, thus creating "*a significant lacuna in the Award*". Furthermore, the Tribunal's decision regarding the value of BD Agro's assets is evidently outcome-determinative, as it has a direct impact on the valuation of Mr. Rand's claim. The difference in valuation of these two categories of assets by the Parties was approximately **EUR 2.2 million**.[268]

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

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

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

203. 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:[269]

> 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]

204. The Tribunal then used this conclusion as one of the reasons for its rejection of the Batajnica comparable transactions, relied upon by Claimants.[270] The Tribunal further

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[266] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, ¶¶ 158, 229, **CLA-207**.

[267] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, ¶¶ 178, 208, **CLA-207**.

[268] *See supra*, ¶¶ 193, 195, 198-199.

[269] Award, ¶ 693(third bullet point)(ii).

[270] Award, ¶ 693(third bullet point)(ii).

applied this principle—that evidence post-dating the Valuation Date should not be taken into account—in other parts of the Award, namely:

a. when determining that BD Agro is a going concern:[271]

> International valuation standards define a going concern as "a business enterprise that is expected to continue operations for the foreseeable future."[525] While it is true that BD Agro was experiencing financial difficulties, on the valuation date, it was not in bankruptcy. Its Amended pre-pack reorganization plan had been adopted by a majority of creditors, including a number of companies experienced in the dairy business.[526] By voting in favour of the reorganization, these companies expressed that they considered that BD Agro's business would continue to operate for the foreseeable future. The Agency too appears to have recognized this fact when it approved BD Agro's 2015 financial statements.[527] The Tribunal thus finds that, on the valuation date, BD Agro was a going concern.

b. when rejecting Serbia's arguments relating to court proceedings initiated in 2018:[272]

> Serbia excludes certain lands subject to court disputes with [ZZ] Buducnost Dobanovci and Inter Kop. These court proceedings were initiated in 2018,[531] almost three years after the valuation date. Serbia has not advanced a cogent reason why events occurring after the valuation date should be taken into account. Its own expert, Ms. Ilić, testified that only reasons existing at the time of the valuation could present a potential reason for excluding land from valuation;[532]

205. However, the Tribunal then completely disregarded its own refusal to use evidence post-dating the Valuation Date and used such evidence to make several determinations related to the value of BD Agro's liabilities. Specifically, the Tribunal:

a. accepted Serbia's correction to the value of BD Agro's debt *vis-à-vis* Banca Intesa, which was based solely on events and evidence post-dating the Valuation Date;[273]

b. relied on the Second Confineks Valuation—prepared in January 2016, *i.e.* several months after the Valuation Date—for the value of BD Agro's

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271 Award, ¶ 685.

272 Award, ¶ 690, first bullet point.

273 Award, ¶ 699(i).

liabilities, specifically its court proceedings liabilities[274] and its total estimated liabilities:[275]

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

c. relied on BD Agro's 2015 financial statements, prepared as of 31 December 2015 and approved on 30 June 2016, being well after the Valuation Date, to value the total estimated liabilities[276] and the court proceedings liabilities:[277]

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

206. The two different positions taken by the Tribunal regarding the use of post-valuation evidence cannot logically coexist with one another. Indeed, 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.

207. Specifically, the *Pey Casado (I)* 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 the expropriation. The *ad hoc* committee concluded that the tribunal failed to

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

275 Award, ¶ 699(i).

276 Award, ¶ 699(i).

277 Award, ¶ 699(iv).

state reasons, as the reasons were contradictory—and annulled the part of the award addressing 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*.[278]

208. 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 the parties' damages theories. According to the *MINE* committee, 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*."[279]

209. The conclusions of the *Pey Casado (I)* and *MINE ad hoc* committees are clearly applicable also in the present case. Same as in those cases, the Tribunal contradicted itself when it used in its valuation evidence post-dating the Valuation Date, even though it previously rejected reliance on such evidence.

210. The impact of the evidence post-dating the Valuation Date on the Tribunal's valuation is consequential and significant. The correction to the value of BD Agro's debt *vis-à-vis* Banca Intesa inflated the Tribunal's valuation of BD Agro's liabilities by **EUR 1.8 million**.[280] The Tribunal's use of the evidence post-dating the Valuation Date for the valuation of BD Agro's total estimated liabilities inflated the result by **EUR 4.4**

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[278] *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), **CLA-192**.

[279] *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), **CLA-184**.

[280] Award, ¶ 699(i).

million.[281] Finally, the Tribunal's use of evidence post-dating the Valuation Date for the valuation of BD Agro's liabilities related to court proceedings inflated the valuation of liabilities by **EUR 0.2 million**.[282]

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

211. When assessing BD Agro's liabilities, the Tribunal included in its calculation the so-called "*redundancy payments*". These are payments that BD Agro's government-appointed management voluntarily agreed to make to BD Agro's employees whose employment was terminated under a redundancy program adopted by that management *after* Serbia seized the Beneficially Owned Shares of BD Agro—*i.e.* after the Valuation Date.[283]

212. The Tribunal, however, concluded that the redundancy payments were mandatory to BD Agro also on the Valuation Date—pursuant to Annex 1 of the Privatization Agreement:

> 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.[284]

213. This conclusion is in direct contradiction to the Tribunal's finding that the Privatization Agreement ceased to apply upon the full payment of the purchase price in 2011.[285] These two conclusions simply cannot stand together—if the Privatization Agreement ceased to apply in 2011, then BD Agro could not have had any obligations under the Privatization Agreement as of the Valuation Date of 21 October 2015.

214. 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.[286] Claimants' valuation expert referred to authorities which clearly prove the opposite:

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281 Award, ¶ 699(i).

282 Award, ¶ 699(iv).

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

284 Award, ¶ 699(vi).

285 Award, ¶ 612.

286 Award, ¶ 699(vi).

> 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*.[287]

215. By including in its calculation of BD Agro's liabilities the redundancy payments made *after* the Valuation Date, the Tribunal clearly contradicted its previous conclusion that BD Agro's valuation should not rely on any evidence post-dating the Valuation Date.[288] The Tribunal also provided contradictory reasoning because it concluded that the redundancy payments were due, on the Valuation Date, under the Privatization Agreement—even though it previously stated that the Privatization Agreement ceased to apply in April 2011.[289]

216. By disregarding Claimants' evidence and incorrectly including the redundancy payments in BD Agro's valuation, the Tribunal artificially decreased BD Agro's equity value by **EUR 0.7 million**.[290]

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

217. In the Award, the Tribunal stated that the conversion fee "*must be calculated on the basis of the previous year's tax assessment*".[291] However, the Tribunal then accepted Serbia's calculation of the conversion fee, which was *not* based on the previous year's tax assessment.

218. It was undisputed in the arbitration that the valuation of the Construction Land needed to reflect a conversion fee payable to Serbia for formally changing the status of the

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[287] Hern Second ER, ¶ 182 (emphasis added).

[288] Award, ¶ 693(third bullet point)(ii).

[289] Award, ¶ 612.

[290] Award, ¶ 707.

[291] Award, ¶ 699(ii).

Construction Land in the real estate registry. 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.[292]

219. Claimants' expert, Dr. Hern, calculated the value of equivalent agricultural land based on his valuation of BD Agro's own agricultural land in a range of 0.7 to 2.9 EUR per m^2.[293] Respondent's expert, Ms. Ilić, claimed to have used the previous year's tax assessments of the Serbian Tax Authority to determine the value of equivalent agricultural land.[294]

220. The Tribunal stated that it accepted the position of Serbia's expert, Ms. Ilić, that the average price of equivalent agricultural land should be based on the *previous year's tax assessment*.[295] The Tribunal also stated that it accepted Ms. Ilić's calculation of the conversion fee—amounting to EUR 3.1 million.[296]

221. However, in her calculation of the conversion fee, Ms. Ilić did *not* use the previous year's tax assessment for all the valued land. Specifically:

    a. for the land in Bečmen, Ms. Ilić used her own calculation of market value of the average price of equivalent agricultural land of EUR 4.3 per m^2 as the basis for her calculation of the conversion fee—while the tax assessment was

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

293 Hern First ER, ¶ 93.

294 Tr., Hearing on Jurisdiction and Merits, Day 7, 178:10-178:16 (Ilić).

295 Award, ¶ 699(ii).

296 Award, ¶ 707.

EUR 0.72 per m^2.[297] Ms. Ilić, thus, clearly did *not* use the previous year's tax assessment—as is clear from her report:[298]

> When comparing agricultural land sale transactions with land owned by BD Agro, I use representative (median) transacted size and median price (€/m2). Given that agricultural cadastral parcel in Bečmen, owned by BD Agro is of size of 227,021m2 and median transacted size of agricultural land is 1,920 m2 with a median price of 6.1 €/m2[214], I applied downward adjustment for the size of 30% as a reflection of my experience in valuation of agricultural land.
>
> Having regard to the content of this valuation, I am of the opinion that the Market Value of the BD Agro owned agricultural land in Becmen, of 227,021m2, is 4.3 €/m2

[…]

> Having regard to the contents of this valuation, I am of the opinion that the Market Value of the BD Agro owned construction land in Becmen, of 150,280m2[217], is 6.7 €/m2
>
> **or 1,006,876 €**
>
> minus fee for change of use[218]
>
> 80,631m2 x 4.3 €/m2 x 0.5 = 173,357€
>
> **MV 833,519 €**

b. for the Construction Land, Ms. Ilić used a price of EUR 3.4 per m^2, which does not correspond to the previous year's tax assessment—the tax assessment was

[297] *See* the price for agricultural land in zone 7 from the Secretariat of Finance decision of RSD 87 - Official Gazette of the City of Belgrade Year LIX Number 70 (30 November 2015), Decision on Determining the Amount of Average Price of Square Meter of Appropriate Immovable for Zones in the Territory of the City of Belgrade for the Purpose of Determining Property Tax for the Year 2016, **CE-166**. This price was converted to EUR using the average monthly EUR/RSD rate from January 2015 to September 2015 of 120.7, as reported by the National Bank of Serbia - NBS exchange rate data, **CE-137**. BD Agro's construction land in Bečmen is located in Zone 7 – *see* 2015 zoning decision, Official Gazette of the City of Belgrade, no. 55/2013, 87/2014 and 69/2015 (2015), Decision on Determining the Zones and most Equipped Zones in the Territory of the City of Belgrade for the Purpose of Determining Property Tax, **CE-168**.

[298] Ilić First ER, ¶¶ 9.48-9.49.

EUR 1.94 per m^2 [299]—and in fact is not explained anywhere in her reports.[300] Based on this arbitrary number, Ms. Ilić arrived at a value of the conversion fee of EUR 2,910,425:[301]

> **Having regard to the contents of this valuation, I am of the opinion that the Market Value of the BD Agro owned construction land in Dobanovci, of 2,852,015 m2[264], is 14.7 eur/m2**
>
> **or 41,924,620 eur**
>
> minus fee for change of use[265]
>
> 1,712,015m2 x 3.4eur/m2 x 0.5 = 2,910,425 eur
>
> **MV 39,014,194 eur**

222. Given that the Tribunal simply adopted Ms. Ilić's 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 the previous year's tax assessment; and on the other hand, it accepted Ms. Ilić's valuation that did *not* follow this approach.

223. This error of the Tribunal is again akin to the *Tidewater* case, where the Tribunal contradicted the valuation element that it previously stated should be used (in that case the country risk premium). Like in *Tidewater*, "*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.*"[302]

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[299] *See* the price for agricultural land in zone 5 from the Secretariat of Finance decision of RSD 234 - Official Gazette of the City of Belgrade Year LIX Number 70 (30 November 2015), Decision on Determining the Amount of Average Price of Square Meter of Appropriate Immovable for Zones in the Territory of the City of Belgrade for the Purpose of Determining Property Tax for the Year 2016, **CE-166**, converted to EUR using the average monthly EUR/RSD rate from January 2015 to September 2015 of 120.7, as reported by the National Bank of Serbia - NBS exchange rate data, **CE-137**. BD Agro's construction land in Dobanovci is located in Zone 5 – *see* 2015 zoning decision, Official Gazette of the City of Belgrade, no. 55/2013, 87/2014 and 69/2015 (2015), Decision on Determining the Zones and most Equipped Zones in the Territory of the City of Belgrade for the Purpose of Determining Property Tax, **CE-168**.

[300] Ilić First ER, ¶ 9.1 (correctly should be 9.93).

[301] Ilić First ER, ¶ 9.1 (correctly should be 9.93).

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

224. The Tribunal's contradictory reasoning is further exacerbated by the fact that, when describing its approach to calculation of the conversion fee, the Tribunal referred to values of agriculture land that were never used by either of the Parties:[303]

> the agricultural price as basis. In his expert report, 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. In her first report[579] and at the hearing, Ms. Ilić furnished a detailed explanation for her approach[580] and explained why the fee must be calculated on the basis of the previous year's tax assessment.[581] Mr. Cowan then used Ms. Ilić's conversion fee amount in his expert report. [582] The Tribunal finds Ms. Ilić's reasons plausible. In the absence of any contrary indications provided by the Claimants, it adopts the conversion fee used by the Respondent's experts;

225. Importantly, same as with respect to the previous issues, the impact of the Tribunal's decision on the conversion fee is significant. Compared to Claimants' valuation, the Tribunal inflated the conversion fee and thus decreased the damages awarded to Mr. Rand by up to **EUR 2.4 million**, *i.e.* representing approximately 17% of the total amount awarded to Mr. Rand.[304]

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

226. Another item included by the Tribunal in BD Agro's liabilities was a category of liabilities labeled by the Tribunal as "*court proceedings*". 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***."[305]

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[303] Award, ¶ 699(ii).

[304] Award, ¶ 707; Hern's updated analysis, Assets, **CE-908**.

[305] Award, ¶ 699(iv) (emphasis added).

227. 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:[306]

405	5. Provisions for litigation expenses	0430		50		

228. To add to the overall confusion, in the footnote to its aforementioned statement, the Tribunal refers to the Second Confineks Valuation, rather than to the financial statements as such.[307] As in BD Agro's 2015 financial statements, the Second Confineks Valuation also estimates the court proceeding costs at RSD 50,000, *i.e.* approximately EUR 417:[308]

(in thousands of dinars)

Group of accounts, accounts	POSITION	ADP	Book value	Estimated market value on December 31, 2015
[…]				
404	4. Provisions for employee salaries and other benefits	0429		
405	5. Provisions for litigation costs	0430	50	50
402 and 409	6. Other long-term provisions	0431		

229. The Tribunal's decision on this point is, therefore, again contradictory. In fact, as shown above, the very documents which the Tribunal identifies as the basis for its decision show that the Tribunal inflated the value of liabilities related to court proceedings by approximately 48,000%.

230. Furthermore, as another inconsistency, both the Second Confineks Valuation and the 2015 financial statements post-date the Valuation Date and, as explained above, the

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

307 Award, p. 214, fn. 584.

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

Tribunal made it clear that it would not rely on any evidence post-dating the Valuation Date.

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

231. 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.[309] 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:[310]

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**

232. The Tribunal did not provide sufficient reasons for its valuation of the total estimated liabilities and the capital gains tax at EUR 5.7 million.

233. The capital gains tax was deduced from the value of BD Agro's assets by both Mr. Cowan and Dr. Hern to reflect the capital gains tax that BD Agro would have to pay if it were to sell its assets.[311] The Parties agreed that the tax should correspond to 15% on any increase in the value relative to the original purchase price for these assets.[312]

[309] Award, ¶ 699.

[310] Award, ¶¶ 699, 707.

[311] Hern First ER, ¶ 144; Cowan Second ER, ¶ 6.12.

[312] Hern First ER, ¶ 150; Cowan Second ER, ¶ 6.12.

234. However, the experts disagreed on the actual amount of the tax. Dr. Hern argued that, given the lack of all information required to calculate the capital gains tax,[313] the most appropriate approach is to proxy the value of the capital gain tax by deferred tax liabilities reported in BD Agro's 2015 annual accounts. This approach led to capital gain tax of EUR 3.1 million.[314] Mr. Cowan, on the other hand, attempted to calculate the capital gain tax himself—even though he admitted he did not have all necessary information to do so[315]—and estimated its value at EUR 5.7 million.[316]

235. The Tribunal accepted the value of the capital gains tax calculated by Mr. Cowan (EUR 5.7 million) because, in the Tribunal's words, Mr. Cowan's approach to the calculation of the capital gains tax was "*objective and logical*".[317] The Tribunal, however, failed to provide any explanation for why that was supposedly the case. Indeed, the following is the only reasoning provided by the Tribunal for this decision:

> v. *Capital gains tax*: Dr. Hern and Mr. Cowan disagree on the applicable capital gains tax. Dr. Hern calculates capital gains tax by using the "deferred tax liabilities" in BD Agro's 2015 balance sheet as a proxy for the
>
> capital gains, based on the Claimants' instruction.[585] By contrast, Mr. Cowan deducts the book value of BD Agro's tangible assets (*i.e.* BD Agro's land, plant, equipment and biological assets) as of 31 December 2013 as a proxy for the purchase price, from the value of land according to Ms. Ilić and applies a 15% capital gain tax rate.[586] The Tribunal adopts Mr. Cowan's approach, which it finds objective and logical.

236. The Tribunal 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,

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313 In their Reply, Claimants explained that requested the production of relevant documents by Serbia during the document production process. However, while Serbia produced certain documents, a number of documents were missing. Without the missing documents, Claimants were unable to calculate applicable taxes that should be reflected in the valuation of BD Agro's assets. *See* Claimants' Reply, ¶¶ 1376-1379.

314 Hern First ER, ¶ 34.

315 Cowan Second ER, ¶ 6.11.

316 Cowan Second ER, ¶ 6.12.

317 Award, ¶ 699(v).

prevents Mr. Rand (or any other reader) from following—much less understanding—the Tribunal's conclusion.

237. Adopting an expert's opinion without any explanation, especially where the other party specifically takes an issue therewith, constitutes a failure to provide reasons.[318] In *Teinver v. Argentina*, the *ad hoc* committee concluded that not addressing the parties' argument that "*was so important that it would clearly have been determinative of the outcome*" warranted annulment of the award.[319]

238. And this is exactly the case here—the Tribunal simply adopted Mr. Cowan's number, without any relevant explanation as to why it did so, even though there was a dispute between the Parties about the number.[320] The Tribunal did not address any of the arguments raised by Claimants in relation to Serbia's calculation of the capital gains tax even though these arguments were clearly determinative for the calculation of the tax.

239. The Tribunal thus committed an annullable error. Once again, this error is clearly outcome-determinative. The difference between the Parties' calculation of the capital gains tax is **EUR 2.6 million**, *i.e.* approximately 18% of the total amount awarded to Mr. Rand (without interest).[321]

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

240. When explaining its approach to valuation of BD Agro's liabilities, the Tribunal clearly stated that it was calculating the amount of total estimated liabilities "*excluding deferred tax liabilities*", *i.e.* taxes that are expected to be owed and payable as of a later date.[322]

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

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

320 *Infra* ¶¶ 248-250.

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

322 Award, ¶ 699(i).

> **7. Liabilities**
>
> 699. It is common ground that liabilities must be deducted from assets to get to the near asset value of BD Agro. The Parties' experts had different opinions, however, on a number of elements of BD Agro's liabilities and, consequently, on their total amount:
>
> i. *Total estimated liabilities (excluding deferred tax liabilities)*: Relying on the

241. Later on in the Award, the Tribunal included a table with values it decided to assign to BD Agro's assets and liabilities. However, this table no longer makes it clear whether the value of "*total estimate liabilities*" calculated by the Tribunal includes "*deferred tax liabilities*" or not:[323]

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**

242. Thus, it is unclear whether the final value of "*total estimate liabilities*" adopted by the Tribunal included "*deferred tax liabilities*" or not. Importantly, this is not a mere theoretical question. If the final value of "*total estimate liabilities*" adopted by the Tribunal includes "*deferred tax liabilities*", it would mean that the Tribunal contradicted its previous conclusion that "*total estimate liabilities*" should be calculated without "*deferred tax liabilities*".

243. In addition, it would also mean that the Tribunal double-counted the value of the capital gains tax. Indeed, the capital gains tax would be included in the Tribunal's calculation twice: first, as a separate item valued at EUR 5.7 million; and, then again, (*ii*) as a part of "*deferred tax liabilities*", which in BD Agro's case represent deferred payments of the capital gains tax.[324]

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[323] Award, ¶ 707.

[324] Notes to Financial Statements of BD Agro for year 2008, point 40, **CE-419**; Notes to Financial Statements of BD Agro for year 2009, point 40, **CE-593**; BD Agro's financial statements for 2013, point 24, **CE-828**.

244. Specifically, the Tribunal included in its calculation of liabilities a separate EUR 5.7 million for "*Capital Gains Tax*".[325] This amount of the capital gains tax was, thus, added to the EUR 42.2 million value that the Tribunal assigned to the "*total estimated liabilities*" and that, according to the Tribunal, was taken from: (*i*) the Second Confineks Valuation;[326] and (*ii*) BD Agro's 2015 financial statements:[327]

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**

245. However, the EUR 42.2 million liability figure, set out in the Second Confineks Valuation and BD Agro's 2015 financial statements, already included EUR 3.1 million of deferred tax liability. As explained above, this deferred tax liability corresponded to the contemporaneously estimated amount of the capital gains tax.[328]

246. As a result, if the EUR 42.2 million value that the Tribunal assigned to the "*total estimated liabilities*" includes "*deferred tax liabilities*", the Tribunal would have double-counted the value of the capital gains tax. By doing so, the Tribunal would have artificially inflated BD Agro's liabilities by the value of "*deferred tax liabilities*", *i.e.* **EUR 3.1 million**.

247. Importantly, potential double-counting of the capital gains tax would not represent only an error in the Tribunal's computations. It would also represent a reason for an annulment.

248. Dr. Hern, Claimants' valuation expert, explained the double-counting issue in his reports—when addressing the calculation of the capital gains tax by Mr. Cowan,

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325 Award, ¶ 707.

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

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

328 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, **CE-172**; Hern Second ER, ¶¶ 15, 172-173.

Serbia's quantum expert. Mr. Cowan, same as the Tribunal, relied on the Second Confineks Valuation and included in his valuation total liabilities in the amount of EUR 42.2 million. At the same time, and again same as the Tribunal, Mr. Cowan added to this value EUR 5.7 million for capital gains tax.

249. Dr. Hern explained in his expert report that Mr. Cowan's calculation represented double counting:[329]

> 6.1.1.1. Mr Cowan double counts capital gains tax
>
> 172. Mr Cowan uses the value of net assets reported in the February 2016 Confineks report of EUR 56.4 million as a starting point of his valuation. He then subtracts EUR 3.1 million of capital gains tax, approximated by the deferred tax liabilities reported in the February 2016 Confineks report. However, the deferred tax liability is already included as part of the liabilities in the February 2016 Confineks report which Mr Cowan subtracts from the value of assets to calculate the net asset value as the starting point.[130] Mr Cowan therefore double counts the capital gains tax: once by subtracting the deferred tax (proxy of capital gains tax) as part of the liabilities included in the February 2016 Confineks report to derive a net asset (equity) value and a second time by subtracting again the same value of deferred tax liability from the equity value calculated in the first step.

250. If the Tribunal indeed calculated BD Agro's liabilities in the same way as Mr. Cowan, which seems to be the case, Dr. Hern's observations directly apply also to the Tribunal's calculation. Yet, the Tribunal did not deal with Dr. Hern's comments in any way.

251. The Tribunal's decision is thus annullable because of the Tribunal ignored an outcome-determinative argument. As explained above, the *Teinver ad hoc* committee confirmed that not addressing the parties' argument that "*was so important that it would clearly have been determinative of the outcome*" warrants annulment.[330] As explained above, potential double counting inflates BD Agro's liabilities by EUR 3.1 million. Arguments related to this double-counting thus clearly represent arguments that "*would clearly have been determinative of the outcome*".

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

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

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

A. Manifest excess of powers is a ground for annulment

252. 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*."[331] It is widely accepted that the manifest excess of powers includes an ICSID tribunal's failure to exercise jurisdiction.[332]

253. 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.*"[333]

254. With regard to the term "*manifest*", there are two approaches taken by ICSID *ad hoc* committees.

255. On one hand, some committees have interpreted "*manifest*" to mean "*substantial*" or "*serious*", *i.e.* such excess of powers that has serious consequences.[334] For example, the committee in *Vivendi v. Argentina* assessed a decision rejecting jurisdiction on the basis that the claims were contractual in nature. The *Vivendi* committee concluded

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[331] ICSID Convention, Article 52(1)(b), **CLA-017**.

[332] *E.g. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 86, **RLA-155**; *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/07, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, ISCID Case No. ARB/02/7, 5 June 2007, ¶ 43, **CLA-190**; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, ¶ 80, **CLA-194**; *Lucchetti v Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, ¶ 99, **CLA-209**; *Helnan International Hotels A/S v. Arab Republic of Egypt,* ICSID Case No. ARB/05/19, Decision on Annulment, June 14, 2010, ¶ 41 **CLA-116**; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application, February 21, 2014, ¶ 75, **CLA-016**; Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds. Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. 3rd ed. Cambridge University Press; 2022, Article 52, ¶ 196, **CLA-206**.

[333] *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/07, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, ISCID Case No. ARB/02/7, 5 June 2007, ¶ 43, **CLA-190**.

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

that the tribunal manifestly exceeded its powers by declining jurisdiction over contractual claims that could have—in the committee's view—given rise to a Treaty breach.[335] The *Vivendi* committee did so even though the excess of powers was not obvious, in the sense that committee had to go into significant analysis to explain the excess of powers committed by the tribunal.

256. This approach is in line with the opinion of the committee in *Pey Casado*, which found that "*an extensive argumentation and analysis do not exclude the possibility of concluding that there is a manifest excess of power, as long as it is sufficiently clear and serious*".[336]

257. On the other hand, some *ad hoc* committees interpret the term "*manifest*" as meaning "*clear, obvious and without need for further debate or investigation*".[337] According to this view, the excess does not have to be serious, but must be "*discerned with little effort and without deeper analysis*".[338]

258. While Mr. Rand recognizes these differences, the above-described discussion is purely academic with respect to the present case. The Tribunal had—and should have exercised—jurisdiction over all claims of Mr. Rand under both the Canada-Serbia BIT and the ICSID Convention. The Tribunal's failure to do so was both substantial and serious, as required under the first approach, and clear and obvious, as required under the second approach.

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

259. Besides being a beneficial owner of the Beneficially Owned Shares, Mr. Rand also held a 3.9% shareholding in BD Agro through his 100% owned Serbian company,

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[335] *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, ¶¶ 104–112, 115, **RLA-155**.

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

[337] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, ¶ 76, **CLA-207**.

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

MDH Serbia. The Indirect Shareholding qualifies as a covered investment under Article 1 of the Canada-Serbia BIT, which defines "*investment*" as, among other things, "*(b) a share, stock or other form of equity participation in an enterprise*".[339] Serbia did not dispute this fact in the arbitration.

260. Nonetheless, 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.*"[340]

261. The Tribunal's decision constitutes a manifest excess of powers for three reasons:

a. *first*, the Tribunal completely neglected to take account of and apply the Canada-Serbia BIT, which defines investment as "*a share, stock or other form of equity participation in an enterprise*".[341] Instead, the Tribunal elevated the typical characteristics of an investment under the controversial *Salini* test into firm jurisdictional requirements under Article 25 of the ICSID Convention. The Tribunal, thus, departed from established case law providing that there is no need to investigate whether the claimant satisfies additional conditions to the ownership of shares;

b. *second*, the Tribunal failed to inform Mr. Rand that it would apply the *Salini* test and require evidence of his "*contribution*" with respect to the Indirect Shareholding. The Tribunal did not inquire about the existence of such "*contribution*" during Mr. Rand's oral testimony at the hearing nor invited the Parties to address this issue in their post-hearing briefs; and

c. *third*, the Tribunal ignored the existence of numerous contributions made by Mr. Rand towards BD Agro in relation to the Indirect Shareholding, despite recognizing these contributions in relation to the Beneficially Owned Shares.

262. Each of these reasons is discussed *seriatim* below.

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

340 Award, ¶ 273.

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

1. The Tribunal departed from the definition of "investment" in the Canada-Serbia BIT and established case law providing that there is no need to investigate whether the claimant satisfies additional conditions to the ownership of shares

263. The Tribunal rejected jurisdiction over Mr. Rand's Indirect Shareholding on the grounds that Mr. Rand did not prove the existence of any "*contribution*" in relation to the Indirect Shareholding.[342] The Tribunal considered the existence of a contribution necessary, because it chose to apply the so-called *Salini* test. According to the Tribunal, the word "*investment*" in Article 25(1) of the ICSID Convention has its inherent meaning, which includes "*a contribution or allocation of resources*".[343]

264. The Tribunal's recourse to the *Salini* test to establish whether Mr. Rand's indirect ownership of the Indirect Shareholding constitutes an investment within the meaning of Article 25 of the ICSID Convention constitutes an annullable error.

265. It is undisputed that subparagraph (b) of the definition of "investment" in Article 1 of the Canada-Serbia BIT defines an "investment" as "*a share, stock or other form of equity participation in an enterprise*".[344] It is equally undisputed that the Indirect Shareholding meets that definition.

266. The analysis under Article 25 of the ICSID Convention is no different. 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.*"[345]

267. To provide just one example, the tribunal in *Lopez-Goyne v. Nicaragua* addressed a case where claimants acquired shares in a company, which held the investment in Nicaragua. The claimants acquired the shares in the holding company for consideration and some of them subsequently made substantial disbursements and

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342 Award, ¶ 273.

343 Award, ¶ 228.

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

345 *See e.g. The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **CLA-198;** *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542, **CLA-199**; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 148, **CLA-091**; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 158, **CLA-160**.

personal non-monetary contributions related to the holding company and, by extension, to the investment.[346] However, the claimants were unable to reconstruct the paper-trail regarding their payment for the shares in the holding company.[347]

268. The *Lopez-Goyne* tribunal stated that it did not need to investigate whether the claimants satisfied any conditions beyond evidencing their indirect ownership of the shares in the investment.[348] The tribunal concluded that "*[a]s a matter of fact, ownership of shares generally is considered sufficient, save in special circumstances*."[349] The "*special circumstances*" would be, according to the tribunal, "*a risk of abuse or circumvention of the jurisdictional requirements"*.[350] No such "*special circumstances*" exist in this case and the Tribunal did not point to any such circumstances in the Award. To the contrary, the Tribunal rejected Serbia's objection based on alleged abuse of process.[351]

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346 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 321, **CLA-198**.

347 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 321, **CLA-198**.

348 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **CLA-198**.

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

350 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **CLA-198** citing *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542, **CLA-199**; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 148, **CLA-091**; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 158, **CLA-160**.

351 Award, ¶ 470.

269. Other tribunals also expressly rejected the suggestion that an investment would need to satisfy any requirements other than those stated in the relevant investment treaty.[352] For example, the tribunal in *M.C.I. Power v. Ecuador* concluded that it was a deliberate decision of the drafters of the ICSID Convention to leave the definition of "*investments*" to the state-parties to the Treaties:

> From a simple reading of Article 25(1), the Tribunal recognizes that the ICSID Convention does not define the term "investments". The Tribunal notes that numerous arbitral precedents confirm the statement in the Report of the Executive Directors of the World Bank that the Convention does not define the term "investments" because it wants to leave the parties free to decide what class of disputes they would submit to the ICSID.[353]

270. Indeed, an over-reliance on the so-called *Salini* test in interpretation of Article 25(1) of the ICSID Convention has been heavily criticized by a number of tribunals.[354] The pertinent issue with this approach was notably articulated by the tribunal in *Awdi v. Romania,* which explained that "*the Salini criteria may be useful to describe typical characteristics of an investment, but they cannot, as a rule, override the will of the parties, given the undefined and somewhat flexible term used by the drafters of the ICSID Convention.*"[355]

271. The Tribunal in *Garanti Koza v. Turkmenistan,* following the decisions of *SGS v. Paraguay* and *BIVAC v. Paraguay,* further clarified that the definition of "*investment*" in the BIT should apply as long as "*the nature of the Claimant's investment itself nor the definition of 'investment' in the BIT 'exceed[s] what is permissible under the*

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

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

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

[355] *Mr. Hassan Awdi, Enterprise Business Consultants Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 197, **CLA-026**.

Convention' or is 'absurd or patently incompatible with [the] object and purpose' of the ICSID Convention."[356]

272. Neither the definition of "*investment*" in the BIT, nor the nature of Mr. Rand's Indirect Shareholding, contradicts the limits or object and purpose of the ICSID Convention. It cannot be seriously argued that considering an indirect shareholding in a Serbian joint stock company as an "*investment*" would be in any manner incompatible with the ICSID Convention.

273. The Tribunal's reference to the *Quiborax* and *Caratube II* cases, stating that "*mere ownership*" of shares is not a proof of actual commitment of resources, is inapposite.[357] These cases are inapplicable to the case at hand because of significant differences in the factual background.

274. 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.[358] It does not set out the findings of the *Caratube II* tribunal. 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.[359] Moreover, unlike Mr. Rand, Mr. Hourani did not make any non-monetary contributions towards his investment.[360]

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356 *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 241, **CLA-211**; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 93, **CLA-041**; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 94, **CLA-212**.

357 Award, ¶¶ 271-272.

358 Award, ¶ 272; *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, **CLA-028**.

359 *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, **CLA-028**.

360 *Caratube International Oil Company LLP v. Republic of Kazakhstan (I),* ICSID Case No. ARB/08/12, Award, 5 June 2012 ¶ 451, **RLA-011**.

275. The *Quiborax* case referred to by the Tribunal is easily distinguishable from the present case because the circumstances in *Quiborax* were extremely peculiar.[361] The decisive ground for the *Quiborax* tribunal's denial of jurisdiction over one of the claimants was that the claimant: (*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.[362]

276. In contrast, Mr. Rand's investment in the Indirect Shareholding was not made to comply with any legal formality, but instead made to increase his equity interest in BD Agro. In addition, Mr. Rand made significant personal non-monetary contributions to BD Agro throughout the duration of his investment—as the Tribunal itself confirmed.[363] These key differences make the *Quiborax* decision inapplicable.[364]

277. Most importantly, the *ad hoc* committee in *Malaysian Historical Salvors v. Malaysia* fittingly observed that it is the underlying investment treaties that bestow jurisdiction upon ICSID—not the other way around—and their importance should not be ignored by questionable interpretations of the term "*investment*" under Article 25(1) of the ICSID Convention:

> It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term "investment" as found in Article 25(1) of the Convention, risks crippling the institution.[365]

278. The *Malaysian Historical Salvors* committee concluded that the tribunal exceeded its powers when it ignored the fact that the relevant Treaty interpreted the term

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[361] *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶¶ 319-321, **CLA-198** 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, **RLA-024**.

[362] *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, **RLA-024**.

[363] Award, ¶ 238.

[364] *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶¶ 319-321, **CLA-198**.

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

"*investment*" broadly, and instead elevated the typical characteristics of an investment into jurisdictional conditions of Article 25(1) of the ICSID Convention and ignored the intention of the drafters of the ICSID Convention to leave the definition of "*investment*" to the underlying investment treaties:

> It is [the committee's] considered conclusion that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it "manifestly" did so, for these reasons:
>
> > (a) it altogether failed to take account of and apply the Agreement between Malaysia and the United Kingdom defining "investment" in broad and encompassing terms but rather *limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) of the ICSID Convention*;
> >
> > (b) *its analysis of these criteria elevated them to jurisdictional conditions*, and exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature; [and]
> >
> > (c) *it failed to take account of the preparatory work of the ICSID Convention* and, in particular, reached conclusions not consonant with the travaux in key respects, notably the decisions of the drafters of the ICSID Convention to reject a monetary floor in the amount of an investment, to reject specification of its duration, to leave 'investment' undefined, and to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID.[366]

279. In the present case, the Tribunal also incorrectly elevated the typical characteristics of an investment to jurisdictional conditions, in conflict with the will of the contracting parties to the Canada-Serbia BIT and the ICSID Convention. Much like in *Malaysian Historical Salvors,* such excess of the Tribunal's powers must therefore be considered manifest.

280. Thus, for this reason alone, the Tribunal manifestly exceeded its powers when it declined jurisdiction over Mr. Rand's Indirect Shareholding in BD Agro and such jurisdictional decision must be annulled.

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

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

281. In the Award, the Tribunal correctly concluded that it "*is required to apply the law on its own motion, provided always that it gives the Parties an opportunity to comment if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate*."[367] However, the Tribunal then surprisingly rejected jurisdiction over Mr. Rand's Indirect Shareholding because Mr. Rand did not provide any evidence of his "*contribution*" in relation to that investment,[368] even though the Tribunal never inquired about this issue with Mr. Rand and never informed Mr. Rand that he was required to make such a showing.

282. Mr. Rand was a witness in the arbitration and was examined at the hearing for over 1.5 hours both by Serbia's counsel and by all Members of the Tribunal.[369] Yet, at no point was Mr. Rand asked by either Serbia or the Tribunal about how he acquired the Indirect Shareholding and how much he paid for it. 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 Tribunal went into great detail of other areas where they wanted the parties to elaborate upon.[370]

283. *Had the Tribunal asked Mr. Rand to prove the existence of his contribution to acquire the Indirect Shareholding, he would have been more than happy to provide oral testimony and conclusive documentary evidence showing the existence of such contribution.*

284. Instead, the Tribunal took Mr. Rand by surprise when it deviated from established case law that does not require proof of the existence of contribution with respect to shares owned by the investor and, without any warning, concluded that Mr. Rand failed to carry his burden of proof with respect to the existence of his "*contribution of EUR 0.2*

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367 Award, ¶ 188.

368 Award, ¶ 273.

369 Transcript, Hearing on Jurisdiction and Merits, Day 2, dated 13 July 2021, pp. 1-60 (Rand).

370 Transcript, Hearing on Jurisdiction and Merits, Day 8, dated 20 July 2021, 174:09-176:02.

million to acquire MDH Serbia's 3.9% stake in BD Agro," for whatever that may mean.[371]

285. Mr. Rand respectfully submits that the Tribunal's approach constitutes an independent instance of the Tribunal's manifest excess of powers with respect to its denial of jurisdiction over the Indirect Shareholding and, thus, an independent ground for annulment of this jurisdictional decision.

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

286. Finally, even if the Tribunal's unexpected decision to require evidence of Mr. Rand's "*contribution*" in relation to the Indirect Shareholding was somehow justified, and it is not, such evidence was clearly on the record.

287. In the Award, the Tribunal concluded that contribution exists where the investor bears the financial burden of an investment.[372] When concluding that Mr. Rand bore the financial burden, and thus made contribution, with respect to the Beneficially Owned Shares, the Tribunal pointed out, *inter alia*, the following elements:[373]

a. through MDH, Mr. Rand could exercise the voting rights in BD Agro, nominate the members of BD Agro's Board of Directors, and give instructions as to BD Agro's managements;[374]

b. the fact that in 2005, Mr. Rand's investment was recognized by the Assistant Minister of Economy who congratulated Mr. Rand for the "*farm acquisition*";

c. Mr. Rand's management, evidenced by Mr. Rand's appointment to BD Agro's Board and his control over its operations, including:

i. between 2006 and 2007 "*receiving financial reports and discussing BD Agro's financing needs with senior management*";[375]

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371 Award, ¶ 273.

372 Award, ¶ 237.

373 Award, ¶ 238.

374 Share Purchase Agreement, 19 September 2005, Art.5, **CE-015**.

375 Award, ¶ 238 and fn. 114.

ii. between February 2006 and January 2008 "*receiving reports on a number of other issues affecting BD Agro*",[376]

iii. in 2006 "*visiting BD Agro himself to control its operations*",[377] and

iv. between 2006 and 2010 "*communicating with external consultants and business partners*".[378]

d. through Mr. Rand's management of BD Agro *via* Sembi over the course of 2008-2010, "*the Board of Directors of Sembi repeatedly discussed BD Agro matters, including issues such as progress on farm construction work and the status of BD Agro's herd and crops. It approved strategic decisions, including the sale of BD Agro's land, the acquisition and reconstruction of the Sokolac farm, and the reconstruction of BD Agro's premises*."[379]

e. financial contribution made between April and December 2008, as "*Mr. Rand paid EUR 2.2 million directly to Canadian suppliers and vendors for the purchase and transport of heifers from Canada to BD Agro*";[380] and

f. Mr. Rand's management of BD Agro's affairs, evidenced by the following:

i. in March 2013, "*Mr. Rand advised BD Agro's management […] that Mr. Wood would arrive to Belgrade in the upcoming week 'to take over supervision of cattle and farm operations and assist [Mr. Jovanović] with all other farm issues' and instructed them to make appropriate logistical arrangements*";[381]

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376 Award, ¶ 238 and fn. 115.

377 Award, ¶ 238 and fn. 116.

378 Award, ¶ 238 and fns. 117 and 118.

379 Award, ¶ 238 and fns. 121-123.

380 Award, ¶ 238 and fn. 124.

381 Award, ¶ 238 and fn. 127.

ii. in April 2013, "*Mr. Rand sent BD Agro's management […] the agenda for an upcoming meeting of BD Agro's Management Board, which included important matters*";[382]

iii. in 2013, "*Mr. Rand, who was not sitting on BD Agro's Board at the time, instructed Mr. Obradović to step away from the management of BD Agro. Further, he caused Mr. Igor Markićević to be appointed as Chairman and Mr. David Wood as member of the Board of Directors*";[383] and

iv. in 2013, "*Mr. Rand directed Mr. Obradović to assign the Privatization Agreement to Coropi*".[384]

288. Inexplicably, the Tribunal concluded that all of the above-listed contributions pertained solely to Mr. Rand's investment in the Beneficially Owned Shares—even though it is clear that at least points (c)(iv), (d), (e) and (f) are equally linked to Mr. Rand's Indirect Shareholding, which Mr. Rand had acquired between October 2008 and October 2012.[385] By failing to consider Mr. Rand's investment in the Beneficially Owned Shares together with his Indirect Shareholding, the Tribunal reached the untenable conclusion that his contributions towards BD Agro are relevant and sufficient for one part of his shareholding, but not for the other.

289. The Tribunal's failure to consider any of the above contributions as a contribution related to the Indirect Shareholding is a clear and obvious fallacy, discernable with very little effort. Given that the consequence of this error is denial of jurisdiction that the Tribunal undisputably had, this excess also seriously impacted the outcome of the case.

290. Indeed, the Indirect Shareholding represents a 3.9% share in BD Agro. Even accepting the Tribunal's flawed valuation of BD Agro's equity, the Tribunal's refusal to exercise

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382 Award, ¶ 238 and fn. 128.

383 Award, ¶ 238 and fns. 129-131.

384 Award, ¶ 238 and fn. 132.

385 Award, ¶ 270.

jurisdiction over claims related to the Indirect Shareholding decreased compensation awarded to Mr. Rand by almost **EUR 800 thousand**.[386]

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

291. The Tribunal declined jurisdiction over the Loans provided by Mr. Rand to BD Agro.[387] These Loans consisted of approximately EUR 2.2 million provided by Mr. Rand to BD Agro in 2008 to finance purchases of new cows and their transport from Canada to Serbia, as well as another EUR 160,000 provided by Mr. Rand to BD Agro in 2013 to finance the services of herd management experts.

292. Mr. Rand's EUR 2.2 million payment on behalf of BD Agro was recognized as Mr. Rand's claim in the bankruptcy of BD Agro.[388] As such, it clearly represents an investment in the form of "*a loan to an enterprise*", covered under letter (d) of Article 1 of the Canada-Serbia BIT.[389]

293. The same holds true for Mr. Rand's EUR 160,000 payment to herd management experts. These payments were made by Mr. Rand in BD Agro's stead.[390] As a result, Mr. Rand acquired a corresponding claim against BD Agro, which the Tribunal recognized in the Award.[391]

294. The Tribunal's refusal to exercise jurisdiction over claims related to the Loans represents a manifest excess of power because the Tribunal:

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

    b. *second*, incorrectly departed from: (*i*) the definition of "*investment*" in the Canada-Serbia BIT; and (*ii*) established case law, providing that there is no

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386 Award, ¶ 708.

387 Award, ¶¶ 274-275.

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

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

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

391 Award, ¶ 344.

need to investigate whether Mr. Rand's investment in the Loans satisfies requirement of "*duration*"; and

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

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

295. As regards jurisdiction under the Canada-Serbia BIT, "*loan[s] to an enterprise*" are specifically listed as an investment under letter (d) in the definition of "investment" in Article 1.[392] The Tribunal's analysis should have stopped there. BD Agro is an enterprise within the meaning of Article 1 of the Canada-Serbia BIT because it is "*an entity constituted or organized under applicable law*".[393] Therefore, the Loans are a protected investment under the Canada-Serbia BIT.

296. The Tribunal, instead, focused on a carve-out from the protection of the Canada-Serbia BIT set out in Articles 1(k) and 1(l) thereof, which excludes claims to money arising from simple commercial loans, commercial sales and otherwise not in connection with another investment:[394]

> 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)***.[395]

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

393 Canada-Serbia BIT, Article 1, **CLA-001**.

394 Award, ¶¶ 344-345.

395 Canada-Serbia BIT, Article 1, definition of "*investment*", items (k) and (l) (emphasis added), **CLA-001**.

297. The Tribunal completely ignored the plain meaning of that provision, which carves out claims to money stemming from commercial transactions. The Tribunal also ignored the last sentence, emphasized above, which makes it clear that the carve-out in subparagraphs (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].*"

298. The Tribunal had correctly concluded that Mr. Rand held a protected investment in the Beneficially Owned Shares under subparagraph (b). The Loans were clearly linked to and involved that investment. Thus, the last sentence applies and the Loans are—without any doubt—not subject to the exclusion under Articles 1(k) and (l) of the Canada-Serbia BIT.

299. The same conclusion stems from the nature of the Loans. The Loans do not arise from a one-off commercial contract for the sale of a good or service between Mr. Rand and BD Agro. Mr. Rand made the payments to the benefit of BD Agro and, hence, his equity interest therein. There was no exchange of money, goods or services between Mr. Rand and BD Agro.

300. The Loans 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 intermediary which has no other interest in the investment. Mr. Rand provided the Loans only because of his investment in the Beneficially Owned Shares and the Indirect Shareholding. The Loans were intended to increase the value of the Beneficially Owned Shares and the Indirect Shareholding by making it possible for BD Agro to acquire new cows and more effectively manage its herd. Thus, the Loans "*involved*" the Beneficially Owned Shares and the Indirect Shareholding within the meaning of the last sentence of the definition of investment under Article 1 of the Canada-Serbia BIT.

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

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

302. The tribunals interpreting this NAFTA clause in *Canadian Cattlemen v. USA, Apotex v. USA* and *Koch Industries v. Canada* confirmed that the carve-out constitutes an exclusion of "*mere cross-border trade interests*" from treaty protection.[396] All of these three tribunals concurred that "*something more permanent is necessary, such as a commitment of capital or other resources in the territory of a Party to economic activity in such territory,*" in order for a claim to be treated as an investment.

303. The Loans were certainly not "*a mere cross-border trade interest.*" They were part of Mr. Rand's long-term investment in BD Agro, and were clearly a "*commitment of capital […] to economic activity*" in the territory of Serbia.

304. Therefore, the Loans cannot be excluded from investment protection by virtue of Articles 1(k) and (l) of the Canada-Serbia BIT. If the Tribunal's reasoning to the contrary was accepted, all shareholder loans made by an investor would be excluded as well. That is clearly not the intention of the Canada-Serbia BIT, which explicitly defines as an investment "*a loan to an enterprise*".[397]

305. The Tribunal's decision to reject jurisdiction over the Loans under the Canada-Serbia BIT amounts to a manifest excess of powers. It is "*manifest*" in that the rejection has

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

[397] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1(d), **CLA-001**.

"*clear and serious implications*" as required in the *Vivendi* case,[398] because it contradicts the plain wording of Article 1 of the Canada-Serbia BIT with the consequence of the wrongful rejection of jurisdiction. Moreover, it is also "*manifest*" in that it is "*clear, obvious and without need for further debate or investigation*" as required in the *Watkins* case,[399] because the contradiction is evident from a brief and superficial reading of the Award, the Canada-Serbia BIT and established case law.

306. As a result, the Tribunal's decision to deny jurisdiction over the Loans under the Canada-Serbia BIT should be annulled.

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

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

307. The Tribunal's conclusion that the Loans allegedly do not represent an "*investment*" under the ICSID Convention is equally manifestly incorrect. According to the Tribunal, this is because the Loans lack the duration allegedly required by the controversial *Salini* test.[400]

308. As explained above, in line with the case law of other ICSID tribunals, the Tribunal should not have applied the *Salini* test in the present case.[401] Neither the relevant definition of "*investment*" in the BIT, nor Mr. Rand's Loans, contradict the limits or object and purpose of the ICSID Convention and are, thus, an "*investment*".

309. In any case, the ICSID Convention does not prescribe any specific duration for an investment to exist.[402] At best, duration can be viewed as a common characteristic of

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[398] *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, ¶ 115, **RLA-155**.

[399] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, ¶ 76, **CLA-207**.

[400] Award, ¶ 274.

[401] *Supra* ¶¶ 263-280.

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

an investment, but not as an element that is necessarily required for the existence of an investment.[403]

310. The Canada-Serbia BIT is clear that an investment covered under letter (d) of Article 1 is "*a loan to an enterprise*", without requiring any specific duration of such a loan.[404]

311. As concluded by the committee in *Malaysian Historical Salvors*, the Tribunal's failure to observe the jurisdictional scope of a BIT and elevating typical characteristics of an investment to jurisdictional requirements, both resulting in an erroneous denial of jurisdiction, constitute a manifest excess of powers annullable under Article 52 of the ICSID Convention.[405]

312. The only explanation that the Tribunal gave for the requirement of duration was that "*[a]s held by many investment awards*", investment must be "*made for a duration*".[406] The Tribunal did not specify what duration would have been sufficient—it only stated that the Loans did not meet the alleged requirement of "*a duration*."[407]

313. However, even a cursory review of the decisions of the "*other tribunals*" referred to by the Tribunal shows that, even if the criterion of "*duration*" applied, it was met in the present case because the duration of the Loans was sufficient.

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403 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012, ¶ 303, **CLA-067**; *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, **RLA-034**.

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

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

406 Award, ¶ 228.

407 Award, ¶ 274.

314. For example, the *Deutsche Bank v. Sri Lanka* tribunal found that a hedging agreement for *twelve months* satisfied the alleged requirement of "*duration*". The *Deutsche Bank* 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 that is necessarily required for the existence of an investment, but is to be considered a mere example of a typical characteristic.[408]

315. In contrast to the duration of twelve months in *Deutsche Bank*, Mr. Rand held the EUR 2.2 million bulk of the Loans since 2008, *i.e.* he held them for *seven years* as of the Valuation Date and for *a decade* as of the date when the arbitration started. The remaining EUR 160,000 part of the Loans were held by Mr. Rand since 2013, *i.e.* Mr. Rand held them for more than *two years* as of the Valuation Date and for more than *five years* as of the commencement of the arbitration. Clearly, by any measure, Mr. Rand held the Loans for a substantial duration. The Tribunal, however, completely failed to assess the actual duration of the Loans.

316. The Tribunal also failed to consider that the payments made by Mr. Rand on BD Agro's behalf were part of an overall economic venture—*i.e.* Mr. Rand's investment in the Indirect Shareholding and Beneficially Owned Shares. In *CSOB v. Slovak Republic*, a loan was considered to be an investment because the tribunal found 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

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[408] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012, ¶ 303 (emphasis added), **CLA-067**.

> Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[409]

317. 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 business purpose, as they in fact were, there is no reason to exclude them from the protected investment.[410]

* * *

318. In conclusion, the Tribunal's rejection of jurisdiction over the Loans is annullable for the Tribunal's manifest excess of powers. The decision of the Tribunal represents a "*manifest*" excess of power because it: (*i*) has "*clear and serious implications,*" as required in the *Vivendi* case;[411] and (*ii*) contradicts and disregards the plain wording of Article 1 of the Canada-Serbia BIT.

319. Moreover, the Tribunal's decision is also "*manifest*" because it is "*clear, obvious and without need for further debate or investigation*" as required in the *Watkins* case.[412] The Tribunal applied Articles 1(k) and (l) of the Canada-Serbia BIT even though this provision clearly cannot apply to the Loans due to their nature and their clear link to Mr. Rand's other investments in BD Agro, which were clearly recognized by the Tribunal.

320. The Tribunal's refusal to exercise jurisdiction over the Loans had a significant impact on the damages. By refusing to exercise its jurisdiction over the Loans, the Tribunal

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

410 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶¶ 214-215, **CLA-052**.

411 *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, ¶ 115, **RLA-155**.

412 *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, ¶ 76, **CLA-207**.

decreased the amount of compensation due to Mr. Rand by the value of these loans, being **EUR 2.4 million**.

b. The Tribunal failed to state reasons with respect to Mr. Rand's investment in the form of the Loans

321. Besides manifestly exceeding its powers, the Tribunal failed to state *any reasons* for its conclusion that the Loans allegedly do not represent an "*investment*" under the ICSID Convention:[413]

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

322. The last two sentences are the only commentary given by the Tribunal in the entire Award with respect to its decision on the alleged lack of duration of the Loans. Not only did the Tribunal completely neglect its key duty to provide reasoning for its decision, it did not state what duration would have been required.

323. The annulment committee in *MINE v. Guinea* made it clear that "*the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of **fact and law***".[414] Because of the Tribunal's absence of any explanation, the Award does not allow the reader to follow the Tribunal's reasoning on either the points of fact, or the points of law. The Tribunal did not state what duration it believes is required under Article 25 of the ICSID Convention. The Tribunal also did not state on which facts it relied upon to conclude that the Loans did not meet the alleged requirement for a "*duration*". This absence of reasoning is all the more striking because the Loans would clearly have met the duration required by all other ICSID tribunals that applied the requirement.[415]

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413 Award, ¶ 274.

414 *Maritime International Nominees Establishment v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, ¶ 5.08 (emphasis added), **CLA-184**.

415 *E.g. Salini v Morocco,* ICSID Case no. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶ 54: "*The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from*

324. Consequently, the Tribunal's failure to explain the alleged duration criterion, and its failure to consider the actual duration of the Loans, represents a failure to state reasons and, thus, constitutes a ground for annulment under the ICSID Convention.[416]

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2 to 5 years", **CLA-020**; *RFCC v Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, ¶ 62: "*L'opération satisfait ainsi à la durée minimale observée par la doctrine qui est de 2 à 5 ans*", **CLA-195**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶¶ 93–95, **CLA-217**; *Malaysian Historical Salvors v Malaysia*, Award, 17 May 2007, ¶¶ 110, 111, **CLA-216**.

416 *See* Section IV.A above.

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

325. The Tribunal's decision on costs must be annulled because it is based on other annullable parts of the Award. Specifically, the Tribunal ordered the Parties to each bear half of the costs of the proceedings and bear their own legal and other costs.[417] The Tribunal based its decision *inter alia* on the fact that: (*i*) Mr. Rand was successful with only some of his claims; and (*ii*) Mr. Rand was awarded only a small part of the damages that he claimed in the arbitration.[418]

326. Thus, the Tribunal's decision on costs is based on the Tribunal's decisions on jurisdiction and quantum, which are annullable for failure to state reasons and manifest excess of powers. As a result, the decision on costs must follow the same fate and be annulled as well.

327. This principle was confirmed, for example, by the *ad hoc* committee in *MINE v. Guinea,* which stated that "*[t]he award of costs cannot survive the annulment of that portion of the Award with which it is inextricably linked*."[419] The same approach was followed by the committee in *Teco* v. *Guatemala,* where the award on costs was based on Guatemala having been partially successful on quantum. Because the committee annulled the decision on quantum, which was the basis for the tribunal's decision on costs, the tribunal's decision on costs was annulled as well.[420]

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417 Award, ¶ 716.

418 Award, ¶ 716.

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

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

VII. REQUEST FOR RELIEF

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

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

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

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

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

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

Submitted on behalf of Mr. William Archibald Rand

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Helena Švandová
SQUIRE PATTON BOGGS

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STANKOVIC & PARTNERS

ANNEX TO THE MEMORIAL ON ANNULMENT – LIST OF PARAGRAPHS OF THE AWARD TO BE ANNULLED

Paragraph of the Award	Grounds for annulment	Reasons	Paragraphs in this Memorial
228	Manifest excess of powers	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention.	¶¶ 263-280, 308
232 second sentence	Manifest excess of powers	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention.	¶¶ 263-280, 308
237 first, second and last sentence	Manifest excess of powers	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention.	¶¶ 263-280, 308
270-273	Manifest excess of powers	The Tribunal incorrectly denied jurisdiction over Mr. Rand's Indirect Shareholding, even though it clearly qualifies as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention.	¶¶ 259-290
274 third and last sentence	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over Mr. Rand's Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention. The Tribunal did not provide reasons for this decision.	¶¶ 307-324
275	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over Mr. Rand's Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention. The Tribunal also did not provide reasons for this decision.	¶¶ 307-324
277 first sentence after "*Beneficially Owned Shares*"	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID	¶¶ 259-324

		Convention. The Tribunal also did not provide reasons for its decision to deny jurisdiction over the Loans.	
the word "*only*" in first and second sentence of paragraph 281	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention. The Tribunal also did not provide reasons for its decision to deny jurisdiction over the Loans.	¶¶ 259-290, 307-324
the word "*only*" in paragraph 290	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention. The Tribunal also did not provide reasons for its decision to deny jurisdiction over the Loans.	¶¶ 259-290, 307-324
333	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over Mr. Rand's Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention. The Tribunal also did not provide reasons for this decision.	¶¶ 295-306
343 third sentence	Manifest excess of powers	The Tribunal incorrectly denied jurisdiction over Mr. Rand's Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention.	¶¶ 295-306
344-345	Manifest excess of powers	The Tribunal incorrectly denied jurisdiction over Mr. Rand's Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention.	¶¶ 295-306
471 the second part of the first sentence starting with the word "*but*"	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention. The Tribunal also did not provide reasons for its decision to deny jurisdiction over the Loans.	¶¶ 252-324
693-697	Failure to state reasons	The Tribunal provided contradictory, irreconcilable and insufficient reasons for its valuation of the Construction Land.	¶¶ 85-181

699 (i), (ii) and (iv) – (vi)	Failure to state reasons	The Tribunal provided contradictory, irreconcilable and insufficient reasons for its valuation of BR Agro's liabilities.	¶¶ 203-251
707 except items "*Other Construction Land*", "*Agricultural land*", "*Other fixed assets*", "*Deferred tax assets*" and "*Payment to Canadian suppliers*"	Failure to state reasons	The Tribunal failed to state any reasons or provided contradictory, irreconcilable and insufficient reasons for its valuation of BR Agro's assets and liabilities.	¶¶ 79-251
708 first sentence, the second part of the second sentence starting with "*resulting*" and the last sentence	Failure to state reasons	The Tribunal's conclusion on the valuation of BD Agro, based on lacking and contradictory reasoning providing with respect to the valuation of BD Agro's assets and liabilities.	¶¶ 79-251
716	Dependency on annullable parts of the Award	The Tribunal's decision on costs must be annulled because it is based on other annullable parts of the Award.	¶¶ 325-327
717 (b) to the extent it relates to Mr. Rand's claims under the Canada-Serbia BIT	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID Convention. The Tribunal also did not provide reasons for its decision to deny jurisdiction over the Loans.	¶¶ 252-324
717 (d) before "*together*"	Failure to state reasons	The Tribunal failed to state any reasons or provided contradictory, irreconcilable and insufficient reasons for its valuation of BR Agro's assets and liabilities.	¶¶ 79-251
717 (e) and (f)	Dependency on annullable parts of the Award	The Tribunal's decision on costs must be annulled because it is based on other annullable parts of the Award.	¶¶ 325-327
717 (g) to the extent it relates to (*i*) claims for damages and (*ii*)	Manifest excess of powers and failure to state reasons	The Tribunal incorrectly denied jurisdiction over the Indirect Shareholding and Loans, even though they clearly qualify as "*investment*" under both the Canada-Serbia BIT and the ICSID	¶¶ 79-251, 252-324

Mr. Rand's claims under the Canada-Serbia BIT		Convention. The Tribunal also did not provide reasons for its decision to deny jurisdiction over the Loans. The Tribunal failed to state any reasons or provided contradictory, irreconcilable and insufficient reasons for its valuation of BR Agro's assets and liabilities.	