

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited**

**v.**

**Republic of Serbia**

**(ICSID Case No. ARB/18/8)**

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**PROCEDURAL ORDER NO. 10**

***Members of the Tribunal***

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal  
Mr. Baiju S. Vasani, Arbitrator  
Prof. Marcelo G. Kohen, Arbitrator

***Secretary of the Tribunal***

Ms. Marisa Planells-Valero

***Assistant to the Tribunal***

Mr. Rahul Donde

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**21 May 2021**

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## **I. PROCEDURAL BACKGROUND**

1. On 15 January 2021, the Claimants submitted a request to file new documents into the record, to which the Respondent replied on 5 February 2021.
2. On 9 February 2021, the Claimants requested leave to file one more document into the record being a public announcement published by BD Agro's bankruptcy trustee in respect of the sale of BD Agro's land. The Respondent commented on this request on 15 February 2021.
3. On 12 March 2021, the Tribunal issued Procedural Order No. 9 dismissing the Claimants' requests ("PO 9").
4. On 9 April 2021, the Claimants requested the Tribunal to direct the Respondent to produce a valuation report of 28 May 2020 prepared or commissioned by the Serbian Tax Authority relating to certain land plots located in Dobanovci (the "Request to Produce"). They also requested the Tribunal to reconsider a part of its rulings in PO 9 (the "Request for Reconsideration") (collectively "the Requests").
5. On 12 April 2021, the ICSID Secretariat, at the Tribunal's behest, invited the Respondent to comment on the Requests, which it did on 22 April 2021 (the "Reply").
6. The Claimants commented on the Reply on 24 April 2021, and the Respondent replied thereto on 28 April 2021.
7. The Parties having thus completed their submissions, the Tribunal now issues its decision on the Requests.

## **II. REQUEST TO PRODUCE**

### **A. Claimants' Position**

8. The Claimants contend that on 26 March 2021, pursuant to a freedom-of-information request submitted on 17 March 2021, the Respondent produced certain documents that

were not previously available to the Claimants (the “Expropriation Documents”) relating to the expropriation in February 2020 of certain land plots for the construction of the Sremska gazela road in Dobanovci.<sup>1</sup> The Expropriation Documents included a reference to a valuation report prepared or commissioned by the Serbian Tax Authority and dated 28 May 2020 (the “Report”). The Report would be “directly” relevant and material to the Claimants’ case on quantum as it set out the Respondent’s own determination of the market price of certain land plots owned by BD Agro in Dobanovci. The Report would also refute the arguments advanced by Serbia and its experts Ms. Ilic and Mr. Cowan and could cause the Claimants to seek to update their claims on quantum. The Claimants needed to review the Report to “fully understand the methodology of Serbia’s valuation” and assess its impact on the disputed issues in this arbitration.

9. For the Claimants, the Expropriation Documents make clear that: “(i) Serbia decided to expropriate certain of BD Agro’s land plots in Dobanovci for the construction of the Sremska gazela road in February 2020; (ii) according to Serbia’s own assessment dated 28 May 2020, the market value of BD Agro’s land plots in Dobanovci was EUR 20 - 22.53 per m<sup>2</sup>; and (iii) in June 2020, the Municipality of Surčin was instructed to offer the EUR 20 per m<sup>2</sup> price for BD Agro’s expropriated land.”<sup>2</sup> However, it is not clear from the Expropriation Documents whether the Respondent valued the expropriated land plots as agricultural or construction land. If the EUR 20-22.53 m<sup>2</sup> market price mentioned in the Expropriation Documents referred to agricultural land, then on the Respondent’s own valuation, BD Agro’s agricultural land was worth 1,900% more than what the Respondent argued in this arbitration. On the other hand, if the EUR 20-22.53 market price referred to

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<sup>1</sup> The Expropriation Documents consist of: (i) “letter from the Zemun Tax Authority to the Belgrade Land Development Public Agency 1 dated 28 May 2020, which sets out the Serbian Tax Authority’s valuation of certain land plots in Dobanovci for the purposes of their expropriation for the construction of the Sremska gazela road by the City of Belgrade” (the “Tax Authority’s Letter”); (ii) “motion for consensual estimation of compensation sent by the Belgrade Land Development Public Agency to the Municipality of Surčin on 12 June 2020” (the “Belgrade Land Development Agency’s Letter”); and (iii) the Belgrade Land Development Public Agency’s disclosure of 2 April 2021 of three decisions on expropriation of certain land plots in Dobanovci dated 15 January 2020, 5 February 2020 and 12 February 2020, respectively (the “Decisions on Expropriation”), as well as a “cover letter by the Municipality of Surčin dated 23 March 2021, confirming the expropriation of certain land plots and attaching the above documents” (the “Surčin Cover Letter”) and a redacted version of the Tax Authority’s Letter produced by the Belgrade Land Development Public Agency, received on 2 April 2021.

<sup>2</sup> Request, p.3.

construction land, then on the Respondent's valuation, BD Agro's construction land was worth 53% more than what Serbia argued in this arbitration. The Report would clarify the position. On receiving the Report, the Claimants would be able to determine whether to update the quantum of their claims.

10. The Claimants further point out that irrespective of whether the EUR 20-22.53 m2 market price referred to construction or agricultural land, the Expropriation Documents "completely" refute the Respondent's argument that the Bankruptcy Trustee's sale of BD Agro to Agrounija in 2019 could represent the land value as to the expropriation date of 21 October 2015. The Respondent's valuation contained in the Report, so say the Claimants, "is yet further evidence that the sale of BD Agro and its land in bankruptcy was purposefully conducted not in a manner to maximize the sales price, but in a manner to benefit Agrounija and its ultimate owner, Mr. Miodrag Kostić."<sup>3</sup>
11. The Claimants note that they have sought the Report from the Surčin Municipality and that they will withdraw the present request if the Municipality produces the Report "in a full and non-redacted form." Nevertheless, they insist that the Tribunal should direct the Respondent to produce the Report as Serbia has employed "dilatory tactics" when responding to the Claimants' freedom-of-information requests and in this arbitration. In addition, the Respondent has systematically opposed the production of materials related to the 2020 expropriation of land plots in Dobanovci. Moreover, the information contained in the Report might require new submissions from the Parties, which would have to be completed sufficiently in advance of the forthcoming hearing.
12. Finally, the Claimants contend that the Expropriation Documents would stand "in a stark contrast" to the Respondent's letter of 5 February 2021 to the Tribunal, in which it implied that it did not know of the expropriation and the market price fixed for the land plots. Indeed, while in that letter the Respondent claimed that it was not clear whether the relevant land plots had been expropriated, the Expropriation Documents show that the Respondent had issued the final expropriation decision almost a year earlier. Further, while the Respondent

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<sup>3</sup> Request, p.5.

claimed that the compensation for the expropriation of the land plots had not necessarily been determined as of 5 February 2021, the Expropriation Documents demonstrate that the Serbian Tax Authority prepared its valuation on 28 May 2020 and that the Belgrade Land Development Public Agency instructed the Surčin Municipality to offer such amount to the previous owners of the expropriated land plots on 12 June 2020, eight months before the Respondent's letter to the Tribunal.

## **B. Respondent's Position**

13. The Respondent submits that the Request should be dismissed as it is another attempt by the Claimants to reargue their case on quantum. The Tribunal had already rejected earlier attempts to this effect, and should again do so.<sup>4</sup> The Request further “manifestly” fails to meet the standards for production of documents at this stage of the arbitration.
14. According to the Respondent, the “Report”<sup>5</sup> is neither relevant nor material to the Claimants' arguments in the arbitration. The Tax Authority's valuation contained in the Report is dated 28 May 2020, more than four and a half years after the Claimants' valuation date of 21 October 2015. Moreover, the underlying data and the purposes of the Claimants' valuation and the Tax Authority's valuation are “fundamentally” different. The Tax Authority's valuation contained in the Report was prepared for the specific purpose of expropriation and was based on tax assessments. It was not a market valuation based on actual open market transactions.
15. The Respondent denies the argument that the Tax Authority's valuations lend credence to the Claimants' position that the bankruptcy sale was conducted to benefit Agrounija and Mr. Kostic. It contends that a bankruptcy sale and an expropriation cannot be compared as they are entirely different processes, each governed by its own rules. In any event, the Claimants' arguments about the bankruptcy sale lack merit as the price achieved in that

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<sup>4</sup> Reply, §4.

<sup>5</sup> The Respondent points out that “what Claimants refer to as a Report are two Records on the Requested Evaluation of Market Value of a Real Estate Without Access of the same date as the Tax Authority's Letter which set the parameters for the Tax Authority's valuation and which were prepared by a tax inspector.” Reply, fn. 8.

sale was determined on the basis of an independent valuation and in accordance with the law, also keeping in mind that Agrounija was the only bidder. Finally, Mr. Rand could have contested the bankruptcy sale, including its price, but chose not to do so.

16. The Respondent equally disputes the Claimants' position that the Report refutes that the bankruptcy sale of BD Agro to Agrounija in 2019 can be used to represent land value on the expropriation date of 21 October 2015. It clarifies that "the information on the actual sale of BD Agro was never referenced in the context of the valuation of BD Agro's land but as an indication of the company's value under the bankruptcy scenario [...] and the difficulties of a bankruptcy sale."<sup>6</sup> The Claimants' argument "makes particularly little sense", so says the Respondent, as it relies on the report of a real-estate expert in respect of the value of BD Agro's land. In any event, the price of the bankruptcy sale of BD Agro cannot be undermined by the Report as there is nothing to indicate that the price paid by Agrounija could have been higher. Serbia further argues that the Tribunal should reject the Claimants' "stretch" to make out a connection between its claims in this arbitration and its argument that the bankruptcy process was orchestrated for Agrounija's benefit. There was no connection between the two, which the Tribunal has also recognized.
17. Additionally, the Respondent denies that it misled the Tribunal or obstructed the Claimants' document requests. The statements made in the Respondent's letter of 5 February 2021 should be read in their proper context. It remains that the very authorities of which the Claimants complain did provide the Claimants with the documents they requested in a timely manner, without any intervention from the Tribunal or the Respondent's counsel.

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<sup>6</sup> Reply, §13.

### C. Analysis

18. The Tribunal has broad powers in evidentiary matters allowing it to order the production of evidence from a Party. Paragraph 17.5 of PO 1 provides in this respect:

“The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).”

19. ICSID Arbitration Rule 34(2) in turn reads as follows:

“(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

(a) call upon the parties to produce documents, witnesses and experts.”

20. Such power is also provided in the IBA Rules for the Taking of Evidence in International Arbitration, to which the Tribunal may turn for guidance:

“[The Tribunal] may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation.”<sup>7</sup>

21. On reviewing the Parties’ submissions, the Tribunal comes to the conclusion that it is not necessary or appropriate to direct the Respondent to produce the Report at this stage of the arbitration.

22. The Claimants contend that the Tax Authority’s valuation contained in the Report is relevant and material to their case on quantum as it establishes whether the Respondent valued the land as agricultural or construction land and, in either case, shows a difference in value between how the Respondent valued the land plots at the time and the valuation provided by the Parties’ experts. They further contend that the Report refutes Respondent’s argument that the bankruptcy sale of BD Agro could be used for valuation as of 21 October 2015 because the Tax Authority’s valuation lends credibility to the Claimants’ argument that the

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<sup>7</sup> Article 3(10) of the IBA Rules for the Taking of Evidence in International Arbitration.



bankruptcy sale was conducted for the benefit of Agrounija and Mr. Kostic, and not to maximize the sales price. The Tribunal disagrees with both these arguments.

23. The Tribunal recalls that the Tax Authority’s valuation in the Report is dated 28 May 2020. This is over four and a half years after the Claimants’ chosen valuation date of 21 October 2015. In PO 9, the Tribunal observed the following with respect to the sale of BD Agro’s land announced in December 2020:

“[Claimants] have not convincingly explained how these documents, all dated after 25 December 2020, would be of relevance when the valuation date in question is 21 October 2015.”<sup>8</sup>

24. Once again, the Claimants have not cogently explained why the Report is relevant to their valuation. The Tribunal is not convinced that a document prepared in May 2020 could be relevant to assess the fair market value of BD Agro in October 2015.<sup>9</sup> This is all the more so as the Report was drawn up in an expropriation context, and it should reasonably be based on tax assessments relevant on the date of the Report, i.e., 28 May 2020<sup>10</sup> as opposed to open market transactions dating five years earlier. The Tribunal is equally unconvinced that the Report is relevant to the bankruptcy sale of BD Agro. An expropriation and a bankruptcy sale are distinct and subject to their own regimes. Moreover, it appears that the price achieved in the bankruptcy sale was determined on the basis of a valuation report which is already in the record<sup>11</sup> and which Mr. Rand did not contest at the relevant time.<sup>12</sup>

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<sup>8</sup> PO 9, §25.

<sup>9</sup> Reply dated 4 October 2019, §§1296-1297 (“It is undisputed between the Parties that the reparation for breaches of the Treaties should be provided under the full reparation standard, which entitles an investor to restitutionary damages, including the fair market value of the unlawfully expropriated investment, as well as consequential losses suffered by the investor, and interest. The only points of contention between the Parties therefore are: (i) the fair market value of BD Agro as of 21 October 2015; and (ii) the amount of interest to be paid by Serbia.”).

<sup>10</sup> This is also borne out from Annex 1 to the Request which states that the land is to be valued on the basis of the “market value established in at least two final decisions of the tax authority [...] closest by date to the moment of commencement of the tax liability that is being determined.” See Request, Annex No. 1, Letter from Tax Administration to Belgrade Land Development Public Agency, 28 May 2020.

<sup>11</sup> Exh. C-511 Report on evaluation of market value of bankruptcy debtor’s property and evaluation of debtor as legal entity “BD AGRO” AD DOBANOVCI IN BANKRUPTCY on the date of 30 June 2018, 24 January 2019.

<sup>12</sup> Respondent’s Rejoinder of January 24, 2020, §§502-504.

25. Nor have the Claimants substantiated that the Report is “highly relevant and material” to rebut the arguments advanced by the Respondent and its experts Ms. Ilic and Mr. Cowan:
- a. The second report of the Respondent’s real estate expert Ms. Ilic provides an alternative valuation of BD Agro’s land based on open market data corresponding to the relevant valuation date in this arbitration, i.e., 21 October 2015.<sup>13</sup> As just observed, the Tax Authority’s valuation contained in the Report is likely based on tax assessments relevant to the valuation date of the Report, i.e., 28 May 2020. In the circumstances, as the data underlying Ms. Ilic’s report and the Report are different, it is not clear how admitting the Report would assist the Claimants in refuting Ms. Illic’s report;
  - b. While it is true that the Respondent’s valuation expert Mr. Cowan has used the bankruptcy sale as a “representative value” of BD Agro for the valuation date of 21 October 2015, the bankruptcy sale was referenced as an indication of BD Agro’s value under the bankruptcy scenario and not in the context of a valuation of BD Agro’s land.<sup>14</sup> The Respondent bases its arguments regarding the value of BD Agro’s land on the reports of its real estate expert Ms. Illic, whom the Claimants will have the opportunity to cross-examine at the hearing. Further, the value at which BD Agro was sold is not the only basis of Mr. Cowan’s testimony.<sup>15</sup>
26. For the foregoing reasons, the Tribunal does not consider that the Report is relevant to the dispute or material to its outcome in such a manner as to require its admission at this late stage of the proceedings. In the circumstances, it denies the Request. The Tribunal

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<sup>13</sup> Second Expert Report of Ms. Danijela Ilic, 16 March 2020, p. 50.

<sup>14</sup> First Expert Report of Mr. Sandy Cowan, 19 April 2019, §8.2 (“The sale of BD Agro implies a value of €nil at 9 April 2019 which can also be used as a representative value for 21 October 2015.”).

<sup>15</sup> Second Expert Report of Mr. Sandy Cowan, 24 January 2020, §3.27. (“In my First Report I said this could be used as a representative value for 21 October 2015. I note that BD Agro was sold approximately three and a half years after the valuation date but the fact BD Agro was sold for an implied value of €nil could be seen to be representative of the value of BD Agro at the valuation date considering the 2013 audit opinion [...], the initiation of bankruptcy proceedings and the significant operational losses made between 2006 and 2014 [...].”).

expresses no view on the Claimants' allegations that the Respondent misled the Tribunal as it is not relevant for its determination of the Claimants' request.

### **III. REQUEST FOR RECONSIDERATION**

#### **A. Claimants' Position**

27. The Claimants submit that the Expropriation Documents and the Report justify the reconsideration of a part of PO 9 in which the Tribunal rejected the Claimants' requests of 15 January and 9 February 2021 for introduction of certain new documents into the record. In particular, the Claimants seek to introduce the following documents into the record:
- a. BD Agro bankruptcy trustee's reports for the third and fourth quarters of 2019 and the first and second quarters of 2020 ("Bankruptcy Trustee's Reports");
  - b. documents related to the sale of BD Agro's land that had been excluded in April 2019 from the bankruptcy sale of BD Agro that took place in January 2021;
  - c. a list of land plots owned by Serbia in the cadastral area of Dobanovci in 2018.
28. The Claimants contend that like the Expropriation Documents and the Report, these documents are relevant to the decision on the quantum of their claim and to the assessment of the Respondent's arguments in that respect. The Claimants due process rights would be prejudiced if they were not admitted into the record. The documents did not exist or were unavailable at the time when the Claimants filed their last submission on 6 March 2020. Their introduction into the record would not prejudice the Respondent as all the documents are publicly available. Further, if the documents were admitted now, the Respondent would have sufficient time to study them before the hearing and could address them at the hearing and through post-hearing submissions.

29. Hence, the Claimants request the Tribunal to reconsider its decision rejecting the admission of each of the following documents:
- i. Bankruptcy Trustee's Reports
30. The Claimants contend that the requirements of Article 17.4 of Procedural Order No. 1 for admitting these documents into the record are met. The reports for the fourth quarter of 2019 and the first two quarters of 2020 did not exist at the time of filing the Claimants' last written submission, which was the Rejoinder on Jurisdiction of 6 March 2020. The Claimants only became aware of the Report for the third quarter of 2019 in September 2020. It was not publicly available earlier.
31. The Claimants agree with the Tribunal's observations in PO 9 that BD Agro's bankruptcy proceedings are still ongoing. However, they contend that this does not alter the relevance of the Bankruptcy Trustee's Reports as those Reports provide an "objective basis" against which the Tribunal can assess Mr. Cowan's estimate of bankruptcy costs as the actual bankruptcy of BD Agro progresses. They point out that on 30 June 2020 the bankruptcy proceedings were fairly advanced, the trustee having already sold a large portion of BD Agro's assets representing approximately 64-70% of the total asset value assessed by Dr. Hern. The remaining costs were not significant.
32. The Claimants further contend that the Bankruptcy Trustee's Reports are relevant and material for their claim that the sale of BD Agro and its land was conducted to benefit Agrounija and its ultimate owner, Mr. Miodrag Kostić. The documents show that the land plots originally excluded from BD Agro's bankruptcy sale in 2019 were excluded on "dubious grounds", a fact that is directly relevant for the quantum of the Claimants' BIT claims. Indeed, the Claimants noted in their Reply that the haphazardly drawn borders for the sale "made the sale attractive especially—and perhaps only—to a buyer who could reasonably hope that it would be able to buy the excluded land at a later stage."<sup>16</sup>

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<sup>16</sup> Request, p.12, citing Reply dated 4 October 2019, §474.

33. Still further, the Claimants argue that the Bankruptcy Trustee’s Reports are relevant for the Parties’ submissions on quantum as they relate to the disputed issue of whether certain land plots owned by BD Agro should be excluded from BD Agro’s valuation because of an alleged court dispute with ZZ Budućnost Dobanovci. They point out that the Bankruptcy Trustee’s Reports show that, contrary to the Respondent’s submissions, the litigation with ZZ Budućnost Dobanovci, which started after the 2015 expropriation of BD Agro, ultimately did not prevent the sale of all of BD Agro’s construction land to Agrounija.
34. Finally, the Claimants note that they did not elaborate their position above for the introduction of the Bankruptcy Trustee’s Report in their letter of 9 February 2021 before the Tribunal’s ruling in PO 9 as they understood that they were not supposed to comment on the Respondent’s opposition to the introduction of the Reports unless the Tribunal invited them to do so. Thus, in their letter of 9 February 2021, the Claimants only sought leave to address a new document into the record and did not address the Respondent’s objections of 5 February 2021, which they have done now.
- ii. Documents related to the sale of BD Agro’s land and public announcement
35. The Claimants submit that they should be allowed to introduce “documents related to sale of BD Agro’s land that had been excluded from the bankruptcy sale of BD Agro in April 2019 that took place in January 2021”<sup>17</sup>, and the public announcement published by the Bankruptcy Trustee as they are directly relevant and material to their quantum claim. For instance, the documents reveal that BD Agro’s bankruptcy sale was “purposefully” conducted not to maximize the sales price, but to benefit Agrounija and its ultimate owner, Mr. Kostić. The documents also show that a large proportion of the land plots excluded from BD Agro’s bankruptcy sale in 2019 were ultimately sold to Agrounija in 2021, exactly as the Claimants predicted in their Reply. The documents further establish that these land plots were sold to Agrounija for the “opening price”, which meant that there was no competition for these land plots.

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<sup>17</sup> Request, p. 9.

36. For the Claimants, these documents will refute the Respondent's claim that the additional land plots should be excluded from BD Agro's valuation in this arbitration. The documents demonstrate that the dispute with ZZ Budućnost Dobanovci did not ultimately prevent the bankruptcy trustee from selling that land to Agrounija in 2021 and that Serbian courts rejected ZZ Budućnost Dobanovcis' challenge to BD Agro's ownership on 8 June 2018. The introduction of these new documents into the record, so say the Claimants, would refute the Respondent's arguments that rely on evidence that post-dates the relevant expropriation date.
37. Finally, the Claimants assert that the documents "will confirm that Mr. Rand's receivables against BD Agro and his remaining indirect shareholding in the company have been rendered worthless."<sup>18</sup> The total proceeds achieved from the sale of BD Agro and its assets amount to approximately EUR 16.9 million, which is insufficient to satisfy Mr. Rand's unsecured receivables, much less to leave any funds for distribution to shareholders at the end of the bankruptcy proceedings. For the Claimants, "[t]he sale documents thus confirm that Serbia cannot be serious when it alleges that Mr. Rand 'should be directed to satisfy its claim in the bankruptcy proceedings.'"<sup>19</sup>
- iii. List of land plots owned by Serbia in the cadastral area of Dobanovci
38. The Claimants point out that in her expert report submitted along with the Respondent's Additional Submission on Quantum dated 16 March 2020, the Respondent's expert Ms. Ilic alleged for the first time that 28 land plots constituting part of the Construction land in Zones A, B and C were not owned by BD Agro, but by Serbia itself and some unspecified "physical entities."<sup>20</sup> In support, she relied on evidence from 11 March 2020, almost four and a half years after the expropriation date of 21 October 2015. The Tribunal decided on 1 June 2020 not to strike this argument and not to allow further written submissions. In the circumstances, as they had no opportunity of doing so earlier, the Claimants now seek to introduce these documents into the record, as they would demonstrate that the Respondent

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<sup>18</sup> Request, p.15.

<sup>19</sup> Request, p.15, citing Counter-Memorial dated 19 April 2019, §813.

<sup>20</sup> Request, p.15.

itself did not claim ownership of the land plots identified by Ms. Ilic, and that it had not done so prior to Ms. Ilic's argument. Here again, the Respondent would have sufficient time to study the document before the hearing and could in any event address it in its post-hearing submissions.

## **B. Respondent's Position**

39. The Respondent argues that the Tribunal should not reconsider its denial of the Claimants' requests for introducing new documents. The requests should be considered in light of the Claimants' prior conduct and the numerous opportunities they had to clarify their position. This is, after all, the fourth application that the Claimants had made to the Tribunal since the submission of the Rejoinder in January 2020 to either cancel some of the Respondent's arguments or allow the Claimants to submit new evidence.
40. The Respondent denies the Claimants' contention that exceptional circumstances exist requiring the admission of the documents on the ground that they would respond to new arguments made by the Respondent in its Submission on Quantum. It points out that the Claimants already raised this issue in April 2020 when they urged the Tribunal to strike these so-called new arguments from the record. The Tribunal rejected the Claimants' requests on 1 June 2020. The Claimants then waited 228 days to raise the issue again, asking in their letter of 15 January 2021 for leave to introduce new evidence allegedly refuting the Respondent's new arguments. The Tribunal once again denied the requests recalling its previous decision. In the present requests, the Claimants have not given any reason for the Tribunal to reopen the issue, beyond once again arguing that the new evidence refutes the Respondent's so-called new arguments – something that the Tribunal has already repeatedly denied.
41. Serbia further challenges the Claimants' arguments that they intentionally did not address the Respondent's arguments regarding the lack of relevance of the Claimants' claims that the bankruptcy sale of BD Agro was conducted to benefit Agrounija, because they did not think they could do so without express invitation from the Tribunal. In their letter of 9 February 2021, the Claimants sought to introduce a completely new document into the

record on the basis that it was relevant and material as it showed the “machinations” in BD Agro’s bankruptcy sale. That was essentially a new submission. The Claimants did not meet the Respondent’s arguments at the time, as the Tribunal had not invited them to do so.

42. The Respondent insists that the “exceptional circumstances” needed to introduce documents at this late stage of the proceedings have not been established. It is not sufficient – so says the Respondent – that documents sought to be introduced became available to the Claimants after they had filed their last written submission. The documents must also be significant enough to the outcome of the case to justify their late submission. For example, the documents must respond to a new argument made by a party to which the opposing party was not able to respond. No such situation exists here.

i. Bankruptcy Trustee’s Reports

43. The Respondent points out that the Claimants acknowledge that the Reports will only allow the Claimants to update what they deem to be the “actual costs of bankruptcy proceedings.” The Reports will thus not provide a comprehensive estimate of bankruptcy costs for the entire proceedings. Besides, while the Claimants contend that the Reports serve as objective basis against which the Tribunal can judge Mr. Cowan’s estimate, they have not given an actual basis for their allegations. Further, while the Claimants suggest that the bankruptcy proceedings end with the sale of the bankruptcy estate, in reality there is no certainty on the duration of the bankruptcy proceedings, especially as there are ongoing court cases relating to BD Agro’s property. Finally and in any event, as the Respondent already argued in its letter of 5 February 2021, the chart on which the Claimants and Dr. Hern rely in the Bankruptcy Trustee’s Reports does not comprehensively reflect the actual bankruptcy costs. For the Respondent “[a]dding further reports to update the amount of bankruptcy costs closer to the Hearing makes little sense when Claimants do not actually



provide the Tribunal with a comprehensive estimate of bankruptcy costs for the entire proceedings.”<sup>21</sup>

44. The Respondent disagrees with the Claimants that the Reports are relevant and material for supporting the latter’s argument that the bankruptcy sale of BD Agro was conducted to benefit Agrounija because the documents show that the Bankruptcy Trustee excluded certain land from the original sale on “dubious” grounds. It is unclear how not buying some of BD Agro’s land during the original sale benefits Agrounija. Further, the Claimants misrepresent Mr. Cowan’s remarks on the bankruptcy sale of BD Agro to overcome the simple point that their assertions are not relevant to any of the claims in this arbitration. In reality, none of the documents that the Claimants seek to introduce are relevant or material to the issues of quantum. Finally, it is “highly unlikely” so says that Respondent, that the Bankruptcy Trustee’s Reports will hold any information that would have “genuine impact” on the damages claimed, as all of the Bankruptcy Trustee’s grounds for exclusion of the land have been already been argued in this arbitration and the relevant documentation is already part of the record.
45. The Respondent also disagrees with the Claimants’ argument that the Reports are relevant and material to BD Agro’s contested ownership of certain land in Zones A, B and C, due to the dispute with ZZ Buducnost. It is already in the record that ZZ Buducnost’s claim was dismissed by the Commercial Court in Belgrade on 21 December 2018. It is therefore “utterly unnecessary” to introduce new Bankruptcy Trustee Reports just to confirm something that is already on record.
46. Finally, with regard to the Claimants’ argument on the availability of the Report for the third quarter of 2019, the Respondent argues that the Claimants’ alleged lack of awareness is insufficient to constitute exceptional circumstances. Further, there is no reason to assume that the Report for the third quarter of 2019 was not available until September 2020 just because the Claimants were unaware of it, especially when the Agency for the Licensing of Bankruptcy Trustees had the obligation to publish reports without delay. The Report

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<sup>21</sup> Reply, §27.

itself is dated 4 February 2020, i.e., prior to the Claimants' last written submission of 6 March 2020. Moreover, Mr. Rand is one of BD Agro's creditors and as such could have been aware of the 2019 Report, which the Bankruptcy Trustee would have submitted to the bankruptcy judge.

ii. Documents related to the sale of BD Agro's land and public announcement

47. Serbia submits that the Claimants' arguments that the sale documentation and public announcement were relevant and material to their quantum claim should have been made earlier. The Claimants had the opportunity to clarify their position on this issue in their letter of 9 February 2021, as, at the time, they were already on notice of the Respondent's objections to the introduction of documents related to the sale of BD Agro's land. In any event, the documents would not add "significantly new information" to Claimants' criticism of the bankruptcy sale. The sale was conducted in accordance with the Law on Bankruptcy and in the same manner as the first sale. For the Respondent, the Claimants' criticisms of the sale are "pure conjecture", unsupported by evidence of any independent criticism of the sale, nor any evidence that anyone else was ever interested in acquiring BD Agro or its assets.
48. The Respondent disputes the Claimants' contention that the documents are relevant and material because they would rebut the Respondent's claims of disputed ownership over BD Agro's land with regard to the dispute with ZZ Buducnost Dobanovci. The documents would not add anything to the record as it was already clear that the sale in question was announced on 25 December 2020, five years after the valuation date. In any event, the Respondent already explained in its earlier submissions that the dispute over ZZ Buducnost Dobanovci's ownership arose before the valuation date of 21 October 2015.
49. The Respondent equally objects to the Claimants' argument that the documents are relevant and material as they confirm that Mr. Rand's receivables against BD Agro and his indirect shareholding in BD Agro have been rendered worthless and cannot be recovered in the bankruptcy proceedings. It points out that BD Agro, together with a majority of its assets was sold in 2019. The information about that sale, including the price, is already on record.

The documents that the Claimants seek to introduce concern the sale of only a portion of the remaining land. For the Respondent, “[s]uch sale in general cannot have much impact on the total value achieved by selling BD Agro and its assets and as such cannot add anything substantive to the discussion on Mr. Rand’s ability to collect his receivables through the bankruptcy proceedings.”<sup>22</sup>

iii. List of land plots owned by Serbia in the cadastral area of Dobanovci

50. The Respondent argues that the Tribunal should not reconsider its refusal to admit the List into the record. The basis of the request – that “new” arguments were advanced by the Respondent in its Submission on Quantum – had already been rejected by the Tribunal in its decision of 1 June 2020. Further, and in any event, the List is not relevant to the dispute or material to its outcome. Whether the Respondent owned certain land plots or not was not a question of “laying a claim on them” as the Claimants’ suggest, but rather one of registered ownership. Moreover, the List was produced by the City of Belgrade, Secretariat of the Economy, Sector for Agriculture. The Claimants wrongly make it appear as a comprehensive register of all state-owned land on the territory of a certain cadastral municipality or as a proof of ownership.

**C. Analysis**

51. Article 44 of the ICSID Convention vests the Tribunal with the discretionary power to decide matters of procedure not covered by the ICSID Convention, the ICSID Arbitration Rules, or an agreement between the Parties:

“Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”

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<sup>22</sup> Reply, §35.

52. It is not contested by the Parties that this power encompasses the possibility to reconsider and, if necessary, amend previous procedural orders. It remains however that this power is to be exercised in a limited fashion in the interest of orderly proceedings concluded in a predictable and efficient manner. The question here is thus whether the Tribunal should reconsider PO 9 because it wrongly denied the Claimants' requests to introduce three categories of documents into the record.

i. Bankruptcy Trustee's Reports

53. The Claimants insist that the Tribunal should reconsider its decision denying the Claimants the opportunity of introducing four reports of the Bankruptcy Trustee into the record as those Reports: (i) will allow the Claimants to update their figure on bankruptcy costs; (ii) are directly relevant and material to show that the bankruptcy sale of BD Agro was conducted to benefit Agrounija; and (iii) are relevant to rebut Respondent's arguments with regard to the dispute with ZZ Buducnost.

54. On (i), the Tribunal rejected the Claimants' argument that the admission of the Bankruptcy Trustee's Reports would allow them to show the actual costs incurred in the bankruptcy proceedings:

“[I]t is not obvious that the Reports will, as the Claimants contend, show ‘the actual bankruptcy costs incurred in the bankruptcy proceedings’, as those proceedings are still ongoing.”

55. The Claimants acknowledge that the bankruptcy proceedings are still ongoing. Nevertheless, they insist that the Tribunal should reopen its ruling as the Reports will provide an objective basis against which the Tribunal can assess Mr. Cowan's “estimate of bankruptcy costs” as the actual bankruptcy of BD Agro progresses. This is because, according to the Claimants, as of 30 June 2020, the bankruptcy proceedings were in an “advanced state” and the Trustee had already sold 64-70% of the total asset value of BD Agro.

56. The Tribunal does not agree. As already observed, the basis of the Tribunal's ruling in PO 9 – that the bankruptcy proceedings are still ongoing – remains unchanged. While the

Claimants insist that the bankruptcy proceedings are in an “advanced state” with 64-70% of the total assets being sold, they have not provided a clear explanation of how they reach this conclusion. This is especially so in circumstances where the Respondent has repeatedly argued that the bankruptcy proceedings do not end with the sale of assets, and where litigations are pending relating to BD Agro’s property. The Claimants and Dr. Hern appear to rely on a chart in the Bankruptcy Trustee’s Reports, but Serbia argued in its letter of 5 February 2021 that this chart does not give a comprehensive view of all bankruptcy costs as required by Serbian law.<sup>23</sup> While the Claimants could have rebutted this argument in their Request for Reconsideration, they chose not to. As a result, because it is not clear that the Bankruptcy Trustee’s Reports will allow the Claimants to significantly update the estimate of bankruptcy costs, the Tribunal denies the request for reconsideration.

57. On (ii), in PO 9, the Tribunal refused to admit the Bankruptcy Trustee’s Reports into the record on the basis that the Claimants had not shown how their allegation that the entire bankruptcy sale was conducted for Agrounija’s benefit was related to the claimed violations of the BITs:

“[W]hile the Reports might show that the bankruptcy sale of BD Agro was conducted in a manner benefiting Agrounija, it remains that the Claimants have not shown how their allegation that the entire bankruptcy sale was conducted for Agrounija’s benefit is related to their claimed violations of the BITs. Indeed, the Claimants mention this issue only in their recital of the factual background of this case, and their present request only points to the recitals. Finally, some of the Reports merely seem to confirm facts that are already on record.”<sup>24</sup>

58. The Tribunal is not convinced that it should revisit this ruling either:
- a. The Claimants have still not established that their allegation that the bankruptcy sale was conducted in Agrounija’s benefit is relevant to their treaty claims. They argue that the Bankruptcy Trustee’s Reports, “show that the land plots originally excluded from BD Agro’s bankruptcy sale in 2019 were excluded based on dubious grounds”<sup>25</sup> and

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<sup>23</sup> Respondent’s letter dated 5 February 2021, §20.

<sup>24</sup> PO 9, §23.

<sup>25</sup> Request, p.12.

- that “[a] large proportion of the excluded land plots were ultimately sold to one and only one buyer, Agrounija, in 2021, exactly as the Claimants had predicted in their Reply”,<sup>26</sup> without indicating the link between these allegations and their BIT claims;
- b. The Claimants insist that the Bankruptcy Trustee’s Reports should be admitted to show that certain land was excluded from the original bankruptcy sale on “dubious grounds” to favor Agrounija. The Bankruptcy Trustee’s grounds for excluding land from the sale have been already been examined in detail by the Parties, citing relevant documents.<sup>27</sup> In the circumstances, the Tribunal is not convinced that the allowing production of the Reports at this stage of the arbitration would add anything substantial to what is already in the record, especially in circumstances where the Claimants have not established that their allegations concerning Agrounija are relevant to their BIT claims;
- c. The Claimants also insist that the Reports should be admitted as they would refute Mr. Cowan’s evidence that the sale of BD Agro to Agrounija represents the value on the expropriation date. The Tribunal has addressed this issue above (§25). As observed, the value at which BD Agro was sold is not the only basis of Mr. Cowan’s testimony.
59. In PO 9, the Tribunal did not expressly rule on item (iii), i.e. that the Reports are relevant to rebut Respondent’s arguments with regard to the dispute with ZZ Budućnost. The question therefore arises whether this ground justifies the admission of these Bankruptcy Trustee’s Reports, within the framework set out by the Tribunal in PO 9.<sup>28</sup>
60. The Tribunal does not find this to be the case. The Claimants specifically allege that “[t]he Bankruptcy Trustee’s Reports are relevant [...] because they relate to the disputed issue of whether certain land plots owned by BD Agro should be excluded from BD Agro’s valuation because of an alleged court dispute with ZZ Budućnost Dobanovci. The Bankruptcy Trustee’s Reports refer to the outcome of this dispute and show that, contrary to Serbia’s submissions, this dispute, which started long after the 2015 expropriation of

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<sup>26</sup> Request, p.12.

<sup>27</sup> Rejoinder on Jurisdiction dated 6 March 2020, §§712-750; Respondent’s Submission on Quantum dated 16 March 2020, §§3-61.

<sup>28</sup> PO 9, §§19 et seq.

BD Agro, ultimately did not prevent the sale of all of BD Agro's construction land to Agrounija."<sup>29</sup> The Respondent's position that a dispute over the ownership of some of BD Agro's land had arisen with ZZ Buducnost prior to the valuation date of 21 October 2015 is already on record,<sup>30</sup> as is the fact that a claim was filed by ZZ Buducnost on 8 June 2018 before the Commercial Court in Belgrade,<sup>31</sup> which the Court dismissed on 21 December 2018.<sup>32</sup> The Tribunal does not see a need to accept the Bankruptcy Trustee Reports just to confirm facts already on record. For all these reasons, the Tribunal denies the Claimants' request to admit these documents into the record.

ii. Documents related to the sale of BD Agro's land announced in December 2020

61. In PO 9, the Tribunal stated as follows:

"Here again, the Tribunal considers that the applicable requirements (§§20-21) have not been fulfilled. The Claimants have not shown that the documents to be introduced would be relevant or material to the Tribunal's assessment of the Respondent's position that this land should be excluded from BD Agro's valuation. More particularly, they have not convincingly explained how these documents, all dated after 25 December 2020, would be of relevance when the valuation date in question is 21 October 2015.

This ruling equally applies in respect of the public announcement concerning the sale of BD Agro's land sought to be filed by the Claimants. Here too, the Claimants have not explained the relevance or materiality of this document. Further, while this document might support the Claimants' allegation that the entire bankruptcy sale was conducted for Agrounija's benefit, as mentioned above, it remains that the Claimants have not explained how this issue is related to the claimed violations of the BITs at issue in this case."<sup>33</sup>

62. The Claimants request the Tribunal to revisit this ruling. According to them, the sale documentation and the public announcement are relevant and material as they: (i) show that parts of the land excluded from the original bankruptcy sale of BD Agro were

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<sup>29</sup> Request, p.13.

<sup>30</sup> See Respondent's Submission on Quantum dated 16 March 2020, §§13-24 ("It is obvious that ZZ Buducnost Dobanovci's claim of ownership over the relevant land predates the alleged expropriation, which is, according to Claimants, set on 21 October 2015. Therefore, it is undoubtedly relevant to the valuation of BD Agro.").

<sup>31</sup> Exh. R-580, Order of the Commercial Court in Belgrade no. 19 P-3039/18 dated 21 December 2018.

<sup>32</sup> Exh. R-580, Order of the Commercial Court in Belgrade no. 19 P-3039/18 dated 21 December 2018.

<sup>33</sup> PO 9, §§25-26.

eventually sold to Agrounija supporting the Claimants' argument that the sale was conducted to benefit Agrounija and Mr. Kostic; (ii) rebut the Respondent's argument that these land plots should be excluded from BD Agro's valuation; (iii) "confirm that Mr. Rand's receivables against BD Agro and his remaining indirect shareholding in the company have been rendered worthless." Items (i) and (ii) have been addressed above (§§ 58 et. seq.). As for item (iii), the Tribunal understands that the Claimants seek to introduce these documents only to substantiate submissions already made in their Reply.<sup>34</sup> Of itself, this is not sufficient to meet the "exceptional circumstances" test required to be satisfied for the late admission of evidence into the record. In the circumstances, the Tribunal denies this request.

iii. List of land plots owned by Serbia in the cadastral area of Dobanovci

63. In PO 9, the Tribunal gave the following reasons:

"Here, the Claimants seek the Tribunal's leave to file an 'excel spreadsheet, which was prepared by the City of Belgrade, Secretariat for the Economy, Sector for Agriculture and lists all land plots owned by Serbia in the Surčin municipality, which includes the cadastral area of Dobanovci where the Construction land in Zones A, B and C is located.' This document will purportedly demonstrate that Serbia owns the land plots identified by Ms. Ilic and not BD Agro. [...]"

The Tribunal is not convinced that the requirements set out above (§§20-21) are satisfied in this case either. It recalls that, on 1 June 2020, it ruled on the Claimants' request to strike certain submissions made by the Respondent in its Additional Submission on Quantum, finding that 'the Contested Issues [including the issue of the land parcels identified by Ms. Ilic] arise out of submissions made in the Rejoinder. It cannot, therefore, exclude the Issues as the Claimants request', and that 'the [Application to Strike] is belated and no cogent reason has been advanced to explain the delay.' The Claimants have not cogently explained what exceptional circumstances would now warrant the admission of new evidence supposedly responsive to issues that the Tribunal had refused to strike from the record over nine months ago. Further and in any event, the Tribunal finds that the Claimants have not identified the documents they intend to

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<sup>34</sup> Request, p. 15 ("the sale documentation and the public announcement also confirm that [...] The sale documents thus confirm that Serbia cannot be serious [...].") citing Reply dated 4 October 2019, §§1413-1422, 1443-1449 and Counter-Memorial dated 19 April 2019, §813 (emphasis added).



produce with sufficient specificity. For instance, they have not identified the date of the excel spreadsheet or the author of the map. In the circumstances, the Tribunal is unable to determine if the documents to be introduced would contain relevant and material information.”<sup>35</sup>

64. Here again, the Claimants request the Tribunal to reconsider its decision. Once again, the Tribunal does not find it appropriate to do so. Indeed, the only reason advanced by the Claimants for reconsideration is that the document responds to a new argument advanced by the Respondent. That reason effectively repeats arguments which the Claimants made in their letter of 15 January 2021<sup>36</sup> and which the Tribunal addressed in PO 9 reproduced above. The Claimants have put forward no other cogent justification for the Tribunal to reconsider its decision. Further and in any event, the Tribunal is not convinced that this list is either relevant or material. For instance, the Claimants have not established that a list produced by the City of Belgrade, Secretariat of the Economy, Sector for Agriculture reflects the actual registered owners of the land plots. Neither have they established why the list would comprehensively enumerate “all land plots owned by Serbia in the Surcin municipality”, as the list was apparently produced by the City of Belgrade as part of the program for managing state owned agricultural land.<sup>37</sup> As a consequence, the Tribunal cannot grant this request.

#### **IV. DECISION**

65. For the reasons set forth above, the Tribunal:

- (i) Denies the Claimants’ request to order the Respondent to produce the Report;
- (ii) Denies the Claimants’ request to reconsider part of Procedural Order No. 9;
- (iii) Reserves costs for a later decision.

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<sup>35</sup> PO 9, §§27-28.

<sup>36</sup> Claimants’ letter dated 15 January 2021, pp.4-5

<sup>37</sup> Reply, §41, Annex No. 8, Article 60 of the Law on Agricultural Land.

On behalf of the Tribunal,

[signed]

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Professor Gabrielle Kaufmann-Kohler  
President of the Tribunal