

**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. 11**

Hearing Organization

***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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**1 July 2021**

**I. PROCEDURAL BACKGROUND**

1. On 27 April 2021, considering the uncertainties related to the current COVID-19 pandemic, the Tribunal invited the Parties to confer on the way they wished to proceed in relation to the hearing scheduled to take place from 12 to 20 July 2021 (the “Hearing”).
2. On 5 May 2021, the Parties informed the Tribunal of their strong preference for an in-person hearing and indicated that they were discussing several alternative venues for the hearing in Europe. The Parties proposed to report back to the Tribunal about their efforts to find a suitable venue for the Hearing by the end of May 2021.
3. On 10 May 2021, pursuant to the Tribunal’s invitation for the Parties to agree on a schedule for the Hearing in Procedural Order No. 1 (“PO1”), as subsequently amended, the Parties proposed two alternative hearing schedules for an in-person hearing. In one scenario, Tuesday 20 July 2021, originally blocked as a reserve day, was to be used for examination of witnesses. In the other scenario, that day was to remain in reserve. The Parties further indicated that given the number of witnesses and experts to be cross-examined during the Hearing, they had a strong preference to adopt the first scenario, where Tuesday 20 July 2021 was used for examination of the witnesses rather than kept in reserve.
4. On 12 May 2021, the Tribunal noted, *inter alia*, that it remained open to consider the possibility of an in-person hearing if less restrictive rules for travel and gathering were to be implemented in Europe before the Hearing and invited the Parties to report back about how they wished to proceed in relation to the Hearing by 28 May 2021.
5. On 29 May 2021, the Parties reaffirmed their strong preference for an in-person hearing in Europe and asked the Tribunal to postpone the decision on the place and format of the hearing until 11 June 2021. In doing so, the Parties also informed the Tribunal about the witnesses and experts that would need to attend a potential in-person hearing remotely. On 3 June 2021, the Tribunal granted the Parties’ request.
6. On 11 June 2021, the Parties indicated that, given the continuously improving situation regarding the COVID-19 pandemic all over Europe, it should be possible to hold the July hearing in-person. The Parties also noted, *inter alia*, that The Hague, in The Netherlands,

appeared to be a convenient location for the Hearing because all hearing participants could be exempt from travel restrictions and quarantine requirements.

7. On 17 June 2021, the Tribunal informed the Parties that in view of their strong preference for an in-person hearing, the improved sanitary situation in Continental Europe, and the absence of health risks for all those who are vaccinated, it had decided that the Hearing was to take place in person on the premises of the Permanent Court of Arbitration (“PCA”) in The Hague. On that same day, the Tribunal circulated the draft of this procedural order for the Parties’ comments.
8. On 22 June 2021, in accordance with PO1, as subsequently amended, the Tribunal and the Parties held a pre-hearing telephone conference to discuss the organization of the Hearing.
9. The following persons attended the conference call:

Members of the Tribunal

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

Assistant to the Tribunal

Mr. Rahul Donde

ICSID Secretariat

Ms. Marisa Planells-Valero, Secretary of the Tribunal

Permanent Court of Arbitration

Ms. Vilmante Blink, Case Manager

Claimants

Mr. Rostislav Pekař, Squire Patton Boggs  
Mr. Stephen Anway, Squire Patton Boggs  
Mr. Luka Misetic, Squire Patton Boggs  
Mr. Matej Pustay, Squire Patton Boggs  
Mr. Nenad Stanković, Stankovic & Partners (NSTLAW)  
Ms. Sara Pendjer, Stankovic & Partners (NSTLAW)  
Mr. William Rand, Rand Investments  
Mr. Erinn Broshko, Rand Investments

Respondent

Ms. Senka Mihaj, Mihaj, Ilic & Milanovic, law office  
Dr. Vladimir Djerić, Mikijelj, Jankovic & Bogdanovic, law office  
Mr. Nemanja Galic, Mihaj, Ilic & Milanovic, law office

10. An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Tribunal and the Parties.
11. The Tribunal and the Parties discussed (i) the Hearing schedules on the basis of the alternatives submitted by the Parties on 10 May 2021, (ii) the outstanding items set out in the draft of this procedural order, which had been circulated on 17 June 2021, and (iii) other matters raised by the Parties and the Tribunal during the conference call.
12. Additional communications regarding the Hearing schedule were received from the Claimants on 27 and 29 June and 1 July 2021 and from the Respondent on 28 and 30 June 2021.
13. On the basis of the above, the Tribunal now issues this order in final form.

## **II. ORGANIZATION OF THE HEARING**

### **A. Location**

14. The Hearing will be held on the premises of the Permanent Court of Arbitration, Carnegieplein 2, 2517 KJ The Hague, The Netherlands.
15. The ICSID Secretariat has reserved a hearing room and break out rooms for each Party and the Tribunal.
16. Given the exceptional circumstances created by COVID-19 pandemic, the PCA will also set up a Zoom session to facilitate the participation of the attendees connecting to the Hearing remotely (“Hearing Platform”). The Hearing Platform shall be operated by a technical team located at the PCA. The details and link to the Zoom session shall be provided to the remote participants prior to the commencement of the Hearing.

### **B. Schedule**

17. The Hearing shall take place from 12 to 20 July 2021.
18. The Hearing shall normally commence at 9:00 (CET) and proceed until approximately 18:00 (CET), subject to any adjustment required by the course of the examinations, with a one-hour lunch break and at least two coffee breaks. On 16 July 2021, the Hearing shall commence at 10:00 (CET).

19. The content of, and sequence to be followed during the Hearing will be as indicated in the Hearing Schedule incorporated as Annex A.
20. The Hearing Schedule established in Annex A shall be subject to any such modification as the Tribunal may deem necessary or appropriate in the course of the Hearing, in particular, on account of any delay or interruption due to technical difficulties.

**C. Attendance**

21. The Parties provided their lists of participants in the Hearing **on 28 June 2021**.

**D. Oral Statements**

22. The Parties may present opening statements of at most 3h each. There shall be no closing oral arguments.
23. The Parties may use slide presentations during their opening statements. They shall provide paper copies of such presentations to the opposing Party, the Tribunal Members, the Secretary and interpreters<sup>1</sup> prior to the commencement of each presentation. They shall send electronic copies of such presentations before the start of each presentation to the persons listed in the preceding sentence and to the Assistant to the Tribunal and the court reporter.<sup>2</sup>

**E. Documentation**

24. The Parties may use demonstrative exhibits (such as charts, tabulations, etc. compiling information which is on record but not presented in such form), provided that they (i) identify the source in the record from which the information is derived, (ii) do not contain information not in the record, and (iii) are filed in electronic format by **10 July 2021 at 18:00 (CET)** if they are part of the opening statements or by **20:00 (CET)** on the eve of the day of their use if used in the course of examination of the fact and expert witnesses.
25. In addition, paper copies shall be submitted prior to their use (in the number specified in paragraph 23. For the avoidance of doubt, the power point slides used for the opening arguments or the expert presentations are not considered to constitute demonstrative exhibits. However, if a power point presentation includes one or several slides with demonstrative

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<sup>1</sup> The interpreters will be attending the hearing in person.

<sup>2</sup> The court reporter and the Assistant to the Tribunal will be connecting to the hearing remotely via Zoom.

exhibits (as described in paragraph 24), such slides are subject to the rules set out in that paragraph.

26. At the outset of the Hearing, the Parties shall provide each Member of the Tribunal, the Secretary and the Assistant to the Tribunal with a USB key containing the full record of the case.
27. At the start of each cross-examination, the cross-examiner shall provide a cross-examination bundle (i) in electronic format to the opposing Party, each Member of the Tribunal, the Secretary and the Assistant to the Tribunal, and the court reporter via the BOX folder created for this case, and (ii) in paper copy to the witness or expert and the interpreters. Witnesses and experts testifying remotely will only receive an electronic version of the cross-examination bundle, which shall be transmitted to them by the Party presenting the witness or expert
28. Documents that do not form part of the record may not be presented at the Hearing, unless otherwise agreed by the Parties or authorized by the Tribunal.

**F. Witnesses and Experts**

29. Witness and expert examinations shall be governed by sections 19 and 20 of PO1, subject to any different rule in this Order. Non-legal experts may make a presentation (using PowerPoint slides and demonstrative exhibits if useful) lasting no longer than thirty minutes, before the start of their cross-examination, summarizing their methodology and conclusions.
30. The following specific arrangements will apply to ensure the integrity of testimony given by witnesses and experts testifying remotely:
  - a. Each Party shall be responsible for ensuring that the persons participating in the examination (the “Participants”) connect to the Hearing Platform through a stable internet connection, offering sufficient bandwidth (a minimum bandwidth of 8 Mbps download and 1.5 Mbps upload speed is recommended), and use a camera, microphone, and speaker of good quality. All active Participants are required to use good quality microphones and cameras, as tested by ICSID and the PCA before the start of the examination. In particular:

- i. Each Party shall instruct its witness/expert to testify from a quiet room, to the extent possible with a white or plain coloured background, avoiding light sources (such as windows) behind them.
  - ii. Witnesses/Experts shall give evidence sitting at an empty desk or table, and their face shall be clearly visible on the video. To the extent possible, the camera should be positioned at face level, relatively close to the witness/expert, who shall speak directly to the camera while testifying and avoid making quick movements.
  - iii. The witness/expert shall use a computer set-up on which no programs other than the videoconference platform and the real-time transcript are open and running. Except for an unannotated copy of his/her witness statement(s)/expert report(s) and the documents which will be shown on the screen during the examination, the witness/expert shall not be aided by any other documents, notes or otherwise, unless permitted by the Tribunal upon application by a Party.
  - iv. During testimony, the witness/expert shall switch his/her mobile phone to flight mode and shall have no access to emails, chat programs, or other means of communication.
  - v. Witnesses/Experts are to be alone in the room from where they participate except that one technician may be in the same room. At any time, the Tribunal may ask the witness/expert to orient his/her camera to provide a 360-degree view of the room in which he/she is sitting.
- b. Counsel shall not be permitted to communicate with witnesses/experts during their examination by any means other than communication on the record.
  - c. The Parties shall (i) provide their respective witnesses/experts with the contact details of the PCA representative to be contacted (off Platform) in the event of a disconnection or other technical failure, and (ii) instruct their witnesses/experts that it is impermissible to record the examination and to allow unauthorized observers, i.e. persons who are not Participants, to attend.
  - d. The videoconference platform will also offer a dial-in telephone audio connection as a backup option should a witness/expert experiences a temporary technical difficulty with a

computer online connection. The Parties are advised that the dial-in back up telephone connection provides access to the “floor” audio channel only, not to the interpretation channels.

- e. Cross-examining counsel will display the documents on which questions are asked of the witness/expert through the screen-sharing function of the Hearing Platform. Witnesses/Experts testifying remotely are encouraged to have at least two screens to facilitate simultaneous viewing of the video connection, the online real time transcripts, and documents.

31. The witnesses and experts shall appear in the following order as reflected in Annex A:

(i) Claimants’ fact witnesses:

- Mr. William Rand
- Mr. Djura Obradovic
- Mr. Aksel Azrac
- Mr. Robert Jennings [by videoconference]
- Mr. Igor Markicevic
- Mr. Erinn Broshko

(ii) Respondent’s fact witnesses:

- Ms. Branka Radovic Jankovic
- Ms. Julijana Vuckovic
- Mr. Vladislav Cvetkovic
- Mr. Dragan Stevanovic

(iii) Claimants’ legal experts:

- Ms. Bojana Tomic Brkusanin (Serbian law)
- Mr. Milos Milosevic (Serbian law)
- Mr. Ugljesa Grusic (Serbian and private international law)
- Mr. Robert J.C. Deane (British Columbia law) [by videoconference]
- Mr. Agis Georgiades (Cypriot law)
- Mr. Krzysztof Grzesik (Real estate)

(iv) Respondent’s legal experts:

- Professor Dr Mirjana Radovic (Serbian law)
- Mr. Achilles Emilianides (Cypriot and private international law) [by videoconference]
- Mr. Thomas Papadopoulos (Cypriot law) [by videoconference]



- Ms. Danijela Ilic (Real estate)
  - (v) Claimants' quantum expert:
    - Mr. Richard Hern
  - (vi) Respondent's quantum expert:
    - Mr. Sandy Cowan
32. In principle, witnesses and experts will have to be available one-half day before and after the time they are scheduled to be examined.
33. In accordance with paragraph 19.16 of PO1, subject to a different agreement by the Parties, a fact witness shall not be present in the hearing room during oral testimony and arguments, or read the transcript of oral testimony or argument, prior to his or her examination. This limitation does not apply to expert witnesses. Parties and Party representatives who are also fact witnesses may be present during opening submissions.
34. Experts may attend the Hearing at any time.

#### **G. Allocation of Time**

35. Each Party will have a total time allocation to be used over the entire hearing (including opening arguments, but without answers to possible questions from the Tribunal to be put at the end of the Hearing) of 19 hours each. If the circumstances so require and the remaining time until the end of the Hearing so permits, the Tribunal may grant a short extension. The Parties will do their best to follow the examination time estimates which they have provided and which are reproduced in Annex A, without however being strictly bound by them as long as they comply with their overall time allocation.
36. Time spent on direct and re-direct examination shall be counted toward the time account of the Party presenting the witness or expert. Time spent on cross-examination shall be counted toward the time account of the Party conducting the cross-examination.
37. Time spent on questions from the Tribunal, answers to those questions, and procedural interventions by the Tribunal shall not be counted against each Party's time. Time spent dealing with objections from a Party shall not be counted against any Party's time.

38. The Secretary of the Tribunal shall keep a record of each Party's use of time in accordance with the chess clock method and shall report at the end of each day.

### **III. LOGISTICS**

#### **A. Language**

39. The hearing shall be conducted in English.
40. None of the Claimants' witnesses or expert require interpretation. Except for Mr. Vladislav Cvetkovic, all of the Respondent's witnesses will require interpretation. Of the Respondent's experts, only Ms. Danijela Illic will require interpretation.
41. The ICSID Secretariat shall arrange for interpretation during the Hearing starting from 14 July 2021.

#### **B. Transcripts and Sound Recordings**

42. Transcripts and sound recordings shall be governed by paragraphs 24.1 to 24.3 of PO1.
43. Testimony given in Serbian will be transcribed from the English translation and sound recorded in both Serbian and English.
44. The ICSID Secretariat shall arrange for sound recording and for court reporting services and shall liaise with the Parties accordingly.
45. The court reporter will be connecting to the Hearing remotely via Zoom. The Hearing Participants shall have real-time access to the English transcripts through an online connection provided by the court reporter. Participants shall access the transcript from their own devices. The details to access the transcript shall be provided by ICSID before commencement of the first Hearing day.

#### **C. Attendance of the Non-Disputing Party**

46. On 24 September 2020, the Government of Canada informed the Tribunal of its intention to exercise its right to attend the Hearing as the Non-Disputing Party (NDP) in accordance with Article 29.2 of the Agreement between Canada and the Republic of Serbia for the Protection and Promotion of Investments. On 18 June 2021, following its decision to hold the hearing on the premises of the Permanent Court of Arbitration, the Tribunal invited the NDP to

indicate whether it wished to attend the Hearing in-person or remotely via Zoom. On 22 June 2021, the NDP responded indicating that it would attend the Hearing remotely via Zoom. An additional communication from the NDP with the names of their representatives attending the Hearing was received on 30 June 2021.

**D. Transparency and Video Recordings**

47. In accordance with Section IV of the Transparency Rules, the Hearing is public. It will be video recorded, and the video recording will be streamed in the English language on the ICSID website shortly after the conclusion of the Hearing. An announcement to this effect will be published on the ICSID website.
48. Pursuant to Section VI of Procedural Order No.5, upon completion of this arbitration, video recordings of hearings and documents referred to in Section III of the Transparency Rules shall continue to be available on the ICSID website.

**E. Entry Ban and Self-Quarantine Exemption**

49. The PCA has confirmed that, upon certification by the Ministry of Foreign Affairs of the Netherlands, participants in this Hearing will be considered as guests of the PCA for whom similar treatment in respect of COVID-19 restrictions of the Dutch authorities as for participants in PCA-hearings proper is justified. As such, all participants in the Hearing shall be exempted from (i) the entry ban imposed by the Netherlands for most categories of travellers from outside the European Union or the Schengen area and (i) self-quarantine requirements upon arrival to The Netherlands.
50. In order to proceed with the requisite certification by the Ministry of Foreign Affairs of the Netherlands at the PCA's request, the Parties shall provide the following information, together with a copy of the first page of their passport or personal ID, for all participants attending the Hearing in person:

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| <ul style="list-style-type: none"><li>- <b>Name:</b></li><li>- <b>Nationality:</b></li><li>- <b>ID Card/Passport Number:</b></li><li>- <b>Date of Issue:</b></li><li>- <b>Date of Expiry:</b></li><li>- <b>Personal ID number:</b></li></ul> |
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| <ul style="list-style-type: none"><li>- <b>Scheduled Arrival Date &amp; Time to NL:</b></li><li>- <b>Arrival Flight:</b></li><li>- <b>From: City/Airport</b></li><li>- <b>Scheduled Departure Date &amp; Time from NL:</b></li><li>- <b>Departure Flight:</b></li><li>- <b>To: City/ Airport</b></li></ul> |
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51. Additionally, the PCA has provided the attached sanitary protocol applicable to the use of the Peace Palace at the present time.

**F. Technical Testing**

52. There shall be technical tests in advance of the Hearing with the legal teams and the witnesses and expert connecting to the hearing remotely to test connectivity to the Zoom platform. For the efficient conduct of these tests, remote participants are advised to replicate the technical conditions in which they will participate in the Hearing (location and equipment).

**G. Other logistical aspects**

53. The ICSID Secretariat will liaise with the Parties on other logistical aspects (set up, catering, etc.).

**IV. POST-HEARING BRIEFS AND COST STATEMENTS**

54. There will be post-hearing briefs, for which, in consultation with the Parties, the Tribunal will determine the time limits, length, format, and content at the end of the Hearing.

55. In accordance with paragraph 25.2 of PO1, the Tribunal will issue directions on the Parties' statements of costs at the end of the hearing.

On behalf of the Tribunal,

[signed]

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Professor Gabrielle Kaufmann-Kohler  
President of the Tribunal

**ANNEX A – HEARING SCHEDULE**

<b>12 July 2021 (Monday) (09:00-18:00)</b>
<b>House-keeping matters and Claimants’ Opening Statement (3h maximum)</b>
<b>Lunch Break</b>
<b>Respondent’s Opening Statement (3h maximum)</b>
<b>13 July 2021 (Tuesday) (09:00-18:00)</b>
<b>Claimants’ Fact Witness Mr. William Rand</b>
<b>Claimants’ Fact Witness Mr. Djura Obradovic</b>
<b>Lunch Break</b>
<b>Claimants’ Fact Witness Mr. Aksel Azrac</b>
<b>Claimants’ Fact Witness Mr. Robert Jennings</b>
<b>14 July 2021 (Wednesday) (09:00-18:00)</b>
<b>Claimants’ Fact Witness Mr. Igor Markicevic</b>
<b>Claimants’ Fact Witness Mr. Erinn Broshko</b>
<b>Lunch Break</b>
<b>Respondent’s Fact Witness Ms. Branka Radovic Jankovic</b>
<b>15 July 2021 (Thursday) (09:00-18:00)</b>
<b>Respondent’s Fact Witness Ms. Julijana Vuckovic</b>
<b>Respondent’s Fact Witness Mr. Vladislav Cvetkovic</b>
<b>Lunch Break</b>
<b>Respondent’s Fact Witness Mr. Dragan Stevanovic</b>

<b>16 July 2021 (Friday) (10:00-18:00)</b>
<b>Claimants' Expert Witness Ms. Bojana Tomic Brkusanin</b>
<b>Claimants' Expert Witness Mr. Milos Milosevic</b>
<b>Lunch Break</b>
<b>Claimants' Expert Witness Mr. Ugljesa Grusic</b>
<b>Claimants' Expert Witness Mr. Robert J.C. Deane</b>
<b>17 July 2021 (Saturday) (09:00-18:00)</b>
<b>Respondent's Expert Witness Professor Dr Mirjana Radovic</b>
<b>Lunch Break</b>
<b>Claimants' Expert Witness Mr. Agis Georgiades</b>
<b>Respondent's Expert Witness Mr. Achilles Emilianides</b>
<b>19 July 2021 (Monday) (09:00-18:00)</b>
<b>Respondent's Expert Witness Mr. Thomas Papadopoulos</b>
<b>Claimants' Expert Witness Mr. Krzysztof Grzesik</b>
<b>Lunch Break</b>
<b>Respondent's Expert Witness Ms. Danijela Ilic</b>
<b>20 July 2021 (Tuesday) (09:00-18:00)</b>
<b>Claimants' Expert Witness Mr. Richard Hern</b>
<b>Respondent's Expert Witness Mr. Sandy Cowan</b>
<b>Lunch Break</b>

**20 July 2021 (Tuesday) (09:00-18:00)**

**Respondent's Expert Witness Mr. Sandy Cowan**

**Conclusion of the Hearing**