CASE REPORT

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IACL International Arbitration Case Law

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Award Name and Date: Rand Investments Ltd., Allison Ruth Rand, Kathleen Elizabeth Rand and others v. Republic of Serbia (ICSID Case No. ARB/18/8) – Award – 29 June 2024.

Case Report by: Marco Primo**, Editor Ignacio Torterola***.

Summary: Claimants, Rand Investments Ltd. and others, brought an action for relief against the Republic of Serbia pursuant to the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments (Canada-Serbia BIT) and the Agreement between Serbia and Cyprus on Reciprocal Promotion and Protection of Investments (Cyprus-Serbia BIT) (together, "the Treaties"). Claimants alleged that Serbia had breached, *inter alia*, obligations related to expropriation, fair and equitable treatment, full protection and security, and other protections under the aforementioned treaties. The Tribunal addressed Serbia's jurisdictional objections and determined that it had jurisdiction over the dispute, while reserving the decision on costs for a later stage.

Main Issues: The case centers on Serbia's consent to international arbitration under the Canada-Serbia BIT and the ICSID Convention, as well as the legal question of whether the Claimants had made an investment under these frameworks. A key issue involved the alleged expropriation of shares in BD Agro and breaches of the fair and equitable treatment standard. Another significant matter was the role of beneficial ownership and indirect shareholding in

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*** Marco Primo is an LLB graduate with honors from the Universidad de Buenos Aires (Argentina). With a solid academic background, distinguished participation in international arbitration competitions, and prior experience in consulting, he nowadays develops as an Associate at Martínez de Hoz & Rueda law firm. IACL's case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Mr. Primo can be contacted at marcoprimomaiaru@gmail.com
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determining the Claimants' standing, as the Claimants argued they indirectly owned BD Agro through various contractual and corporate structures.

Tribunal: Professor Gabrielle Kaufmann-Kohler (President), Mr. Baiju S. Vasani (Arbitrator) and Professor Marcelo G. Kohen (Arbitrator).

Claimant's Counsel: Mr. Rostislav Pekař, Mr. Matej Pustay, Mr. David Seidl (Squire Patton Boggs s.r.o., Prague), Mr. Stephen Anway, Mr. Douglas Pilawa (Squire Patton Boggs, Washington, D.C.), Mr. Luka Misetic (Squire Patton Boggs, New York), Mr. Nenad Stankovič, and Ms. Sara Pendjer (Stankovic & Partners, Belgrade).

Respondent's Counsel: Ms. Olivera Stanimirović (State Attorney of the Republic of Serbia), Ms. Senka Mihaj (Attorney at Law, Belgrade), Prof. Petar Djundic (Faculty of Law, University of Novi Sad), and Dr. Vladimir Djeric (Attorney at Law, Belgrade).

Digest:

1. Relevant facts

BD Agro AD ("BD Agro"), a dairy farm near Belgrade, Serbia, was originally a state-owned company, transformed in 1989 into a socially-owned entity under the control of the State (¶ 6). In 2005, Serbia sought to privatize 70% of BD Agro's shares through an auction. The remaining 30% of the shares were held by small shareholders, primarily employees of BD Agro (¶ 8).

On September 19 2005, before the public auction for BD Agro, Marine Drive Holdings Inc. ("MDH"), a company majority-owned by Mr. William Rand, entered into an agreement with Mr. Djura Obradović (the "MDH Agreement"). According to the MDH Agreement, Mr. Obradović would participate in the public auction for BD Agro, and if successful, would hold the Privatized Shares (the 70% of BD Agro shares) on behalf of MDH. The agreement gave MDH a call option to acquire the shares for a nominal amount of EUR 1,000 (¶ 9). The MDH Agreement thus stipulated that Mr. Obradović was acting on behalf of MDH and that MDH would bear the risk associated with the investment in BD Agro.

On October 4 2005, following his successful bid at the auction, Mr. Obradović entered into a Privatization Agreement with the Privatization Agency of Serbia. Under this agreement, Mr. Obradović agreed to purchase 70% of BD Agro's shares for EUR 5,548,996.46, payable in six annual installments. He was also obligated to invest EUR 2 million in BD Agro within a year of the agreement (¶ 10). A Share Pledge Agreement was concluded the same day, whereby the shares purchased by Mr. Obradović were pledged to the Privatization Agency as security until the full purchase price was paid (¶ 11). The Privatization Agreement was amended twice in 2006, extending deadlines and increasing the required investment amount to EUR 1,998,554 (¶¶ 12-13).

The Claimants argued that Mr. Rand became the beneficial owner of 75.87% of BD Agro's shares (the "Beneficially Owned Shares") as a result of the combined effect of the MDH Agreement and the Privatization Agreement. This included the 70% Privatized Shares and additional shares issued to Mr. Obradović following a capital increase in 2006 (¶ 16). Furthermore, Mr. Rand also indirectly owned 3.9% of BD Agro through his wholly-owned

Serbian company, Marine Drive Holding d.o.o. ("MDH Serbia"), bringing his total beneficial interest to 79.77% (¶ 17).

In 2008, after obtaining funds from the Lundin family to finance the BD Agro project, Mr. Rand decided to restructure the holding of BD Agro's shares. He acquired a Cypriot company, Sembi Investment Ltd. ("Sembi"), and used it as the vehicle to hold the Beneficially Owned Shares. Mr. Rand transferred the shares to Sembi, a company owned by a family trust, with the beneficial interests held by his children (¶¶ 19-20). On 22 February 2008, Mr. Obradović and Sembi entered into the Sembi Agreement, where Sembi assumed Mr. Obradović's obligations, including payments to the Privatization Agency (¶ 23).

Despite investments, BD Agro faced significant financial challenges between 2005 and 2011, resulting in growing tensions between the company and the Serbian government. The government alleged that BD Agro was mismanaged, while the Claimants maintained that their investments in the company were substantial and that liquidity issues arose due to market conditions (¶¶ 25-27). BD Agro also entered into several loan agreements, including one in 2010 with Agrobanka, where BD Agro's assets, including real estate, were pledged as security (¶¶ 28-30).

On February 25 2011, the Privatization Agency issued a notice stating that Mr. Obradović had breached the Privatization Agreement due to pledges made on BD Agro's assets in connection with loan agreements. The Agency granted him 60 days to remedy the breaches (¶ 32). Subsequent communications extended this deadline, but the final installment of the purchase price under the Privatization Agreement was paid by Mr. Obradović on 8 April 2011 (¶ 34). Despite this, the Agency continued to claim breaches, and by 2015, Serbia began investigating the privatization process through the Ministry of Economy and the Serbian Ombudsman (¶¶ 43-44).

On September 21 2015, the Privatization Agency terminated the Privatization Agreement with Mr. Obradović, citing his failure to comply with contractual obligations. Shortly after, on October 212015, the Agency transferred the Beneficially Owned Shares to itself, effectively expropriating the Claimants' shares in BD Agro (¶ 59). The Claimants alleged that this constituted an unlawful expropriation under international law and filed for arbitration.

Following the termination of the Privatization Agreement and the transfer of shares, BD Agro was declared bankrupt on 30 August 2016 (¶ 61).

2. Procedural History

Claimants submitted their Request for Arbitration to ICSID on 9 February 2018, invoking the Canada-Serbia BIT and the ICSID Convention (¶ 62). ICSID registered the case on 22 March 2018. The arbitral tribunal was constituted on 2 October 2018, with Professor Gabrielle Kaufmann-Kohler as President, Mr. Baiju S. Vasani appointed by the Claimants, and Professor Marcelo Kohen appointed by the Respondent (the "Tribunal") (¶ 66). ICSID was the administering authority for the proceedings, which were conducted under the ICSID Arbitration Rules (¶ 64).

The first procedural consultation was held on November 23, 2018, and on November29 2018, the Tribunal issued Procedural Order No. 1, establishing the procedural calendar and defining

other procedural aspects (¶¶ 69-70). Claimants filed their Memorial on the Merits on 17 January 2019 (¶ 71), and Respondent submitted its Counter-Memorial, which included a request for bifurcation, on 19 April 2019 (¶ 75).

The Tribunal denied the request for bifurcation on May 312019, opting to proceed with jurisdiction and merits together (¶ 79).

The hearing on jurisdiction, merits, and quantum was ultimately scheduled for July 2021 (¶ 134), with post-hearing submissions permitted by the Tribunal. The Tribunal deferred a decision on costs (¶ 140).

3. Position of the Parties

3.1 Respondent's Position

Respondent challenged the Tribunal's jurisdiction on the grounds that, inter alia, the Claimants' alleged contributions to BD Agro did not qualify as protected investments under the ICSID Convention and the Canada-Serbia BIT, as these contributions lacked direct financial investment by the Claimants themselves (¶ 92, ¶ 324, ¶ 388). Furthermore, the Respondent argued that Mr. Rand's indirect shareholding and control of BD Agro through Sembi Investment Ltd. did not meet the required threshold of ownership or control for the purposes of invoking investment protections (¶ 326, ¶ 327, ¶ 388). Respondent also contended that the operational payments made by Mr. Rand for the benefit of BD Agro were not protected investments but rather commercial expenses, not covered under the BIT's investment definition (¶ 354, ¶ 358, ¶ 388).

3.1.1 Respondent's Jurisdictional Position

3.1.1.1 First Jurisdictional Objection: existence of an investment under the ICSID Convention

3.1.1.1.1 The lack of direct financial contribution and control

According to Respondent, the Claimants did not make a direct financial contribution to BD Agro, a key requirement for an investment under the ICSID Convention. The Republic emphasized that the funds used for the purchase of BD Agro were provided by the Lundin family, not by Mr. Rand or his entities, as evidenced by the lack of financial documentation directly linking Mr. Rand to the payments (¶ 324, ¶ 388). The Republic also emphasized that the indirect interest Mr. Rand held through Sembi Investment Ltd. did not constitute an investment, as Sembi did not contribute resources independently (¶ 324, ¶ 326).

3.1.1.1.2 Ownership and control through informal mechanisms

Respondent argued that Mr. Rand's informal influence over BD Agro, exercised through instructions given to Mr. Obradović, did not meet the required threshold of ownership or control under international investment law. The informal agreements and indirect influence were insufficient to establish substantial control, which must be clearly documented and directly linked to the investor (¶ 326, ¶ 327, ¶ 388). Respondent maintained that such control must be documented in formal agreements, which were absent in this case (¶ 326).

3.1.1.2 Second jurisdictional objection: characterization of payments as commercial expenses

According to Respondent, Mr. Rand's payments for the benefit of BD Agro, including EUR 2.2 million for livestock purchases and other operational expenses, were not protected investments under the Canada-Serbia BIT. Respondent maintained that these payments were merely commercial expenses aimed at maintaining the operations of BD Agro, and did not qualify as loans or capital investments (¶ 354, ¶ 358, ¶ 388). The Serbian authorities viewed these payments as commercial, weakening the Claimants' argument that they constituted an investment (¶ 388, ¶ 401).

3.1.1.3 Third jurisdictional objection: protection of indirect investments under the BIT

Respondent argued that the Canada-Serbia BIT does not protect indirect investments or investors unless expressly stated in the treaty, and in this case, the treaty contains no such provision. Serbia contended that the treaty's broad definition of investment applied only to assets owned directly by the investor, and thus did not extend protection to indirect shareholders like Mr. Rand (¶ 201, ¶ 203).

3.1.2 Respondent's Merits Position

3.1.2.1 Termination of the Privatization Agreement

Respondent argued that the termination of the Privatization Agreement with BD Agro was justified due to the Claimants' failure to meet their obligations under the Agreement. Specifically, Respondent asserted that Mr. Obradović, acting on behalf of the Claimants, did not comply with certain contractual terms, such as ensuring the financial stability of BD Agro and fulfilling the required investments (¶151). As a result, Serbia lawfully terminated the Agreement in accordance with Serbian law (¶151).

3.1.2.2 Seizure of the Beneficially Owned Shares

Respondent contended that the seizure of the beneficially owned shares was a lawful measure due to the Claimants' breaches of the Privatization Agreement. The Republic maintained that the transfer of ownership to the State was consistent with Serbian privatization laws and did not amount to an expropriation (¶160). Respondent emphasized that the measures taken were necessary to protect public interests and to ensure the continuation of BD Agro's operations (¶160).

3.1.2.3 Refusal to release the pledge and assign the Privatization Agreement

Respondent argued that it was justified in refusing to release the pledge on the shares or approve the assignment of the Privatization Agreement, as the Claimants had not fulfilled their obligations under the Agreement. Specifically, Serbia contended that the financial mismanagement of BD Agro by the Claimants did not warrant the release of the pledge or assignment (¶161, ¶162).

3.1.2.4 Intervention of the Serbian Ombudsman

Respondent acknowledged the Ombudsman's intervention in the case but argued that the Ombudsman's recommendations did not affect the legality of the measures taken by the Republic in enforcing the Privatization Agreement. Serbia maintained that the Ombudsman's involvement was limited to reviewing procedural aspects, and did not alter the substantive basis for terminating the Agreement and seizing the shares (¶162).

3.2 Claimant's Position

Claimants asserted that the dispute fell within the jurisdiction and competence of the Tribunal, requesting the dismissal of Respondent's jurisdictional objections (¶ 73). Claimants argued that the investments made in BD Agro, including indirect ownership through Sembi Investment Ltd., qualified as protected investments under the ICSID Convention and the Canada-Serbia BIT (¶ 67). They emphasized that the broad definitions of investment and investor in the BIT covered both direct and indirect investments, thus protecting Mr. Rand's indirect ownership of BD Agro through intermediary entities (¶ 67, ¶ 207).

Claimants further contended that Mr. Rand's payments on behalf of BD Agro, including those made for operational expenses and livestock purchases, were critical to maintaining the company and thus constituted protected investments under the BIT (¶ 207). They also submitted that Respondent's consent to arbitration was unambiguous, as provided by the Treaty, and did not depend on any additional agreements or conditions post-dispute (¶ 69).

Additionally, Claimants invoked the Most-Favoured-Nation (MFN) clause within the BIT, arguing that it extended protection to indirect investors like Mr. Rand and confirmed Serbia's consent to arbitration (¶ 66).

3.2.1 The Canada-Serbia BIT contains Respondent's consent to international arbitration

Claimants argued that the Canada-Serbia BIT provided Serbia's unequivocal consent to international arbitration, granting investors immediate access to arbitration without requiring further state approval after a dispute arises (¶ 73). Claimants maintained that the ICSID Convention and the BIT were sufficient to establish jurisdiction, and no additional consent or procedural step from Serbia was needed once arbitration was initiated (¶ 67). They emphasized that the BIT's definitions of "investment" and "investor" included both direct and indirect ownership, covering Mr. Rand's indirect control of BD Agro through intermediary companies (¶ 67, ¶ 207).

3.2.2 Payments made by Claimants constitute qualifying investments

Claimants contended that Mr. Rand's payments to support BD Agro's operations, including EUR 2.2 million for livestock purchases and other operational expenses, qualified as protected investments under the Canada-Serbia BIT (¶ 207). They argued that these payments were critical for maintaining and improving BD Agro's business, and thus met the criteria for an investment under the BIT (¶ 207). Claimants rejected Respondent's characterization of these payments as merely commercial expenses, asserting that they were substantial contributions essential for BD Agro's continued operation and development (¶ 207).

3.2.3 The Treaty protects indirect investments and indirect investors

Claimants argued that the Canada-Serbia BIT provided broad protection to both direct and indirect investments and investors. They emphasized that the Treaty's clear and unambiguous wording covered indirect shareholding, such as Mr. Rand's ownership of BD Agro through Sembi Investment Ltd. (¶ 207). Claimants contended that the Treaty was intended to protect all forms of investment, including those held through intermediary entities, and that the drafters sought to include indirect investors within its scope (¶ 67, ¶ 207).

3.2.4 Application of the Most-Favoured-Nation (MFN) Clause

Claimants invoked the MFN clause in the Canada-Serbia BIT to support their claim that Mr. Rand's indirect investments were entitled to the same protections as direct investments. They argued that the MFN clause ensured that Claimants would receive equal treatment and access to arbitration as direct investors from other nations with which Serbia had BITs (¶ 66). This provision, according to Claimants, reinforced Serbia's consent to arbitration and further established the Tribunal's jurisdiction over the dispute (¶ 66).

4. Tribunal's Position

4.1 The Claimants' payments qualify as investments under the Canada-Serbia BIT

The Tribunal agreed with the Claimants that the payments made by Mr. Rand, including EUR 2.2 million for livestock purchases and other operational expenses, constituted protected investments under the Canada-Serbia BIT. The Tribunal rejected the Respondent's argument that these payments were merely commercial expenses, finding instead that they were integral to BD Agro's continued operation and development, thus meeting the criteria for an investment under the BIT (¶354, ¶358, ¶388). The Tribunal emphasized that the contributions made by Mr. Rand provided substantial support to BD Agro, confirming their status as qualifying investments (¶207).

4.2 Indirect investments are protected under the Canada-Serbia BIT

The Tribunal found that the Canada-Serbia BIT does indeed protect indirect investments and indirect investors. It noted that the broad language of the Treaty's definitions of "investment" and "investor" was designed to cover both direct and indirect forms of investment. The absence of an explicit exclusion for indirect investments in the BIT led the Tribunal to conclude that such investments were protected under the treaty (¶ 207). The Tribunal cited cases like Cemex v. Venezuela to support this conclusion (¶ 212).

4.3 The Tribunal's jurisdiction under the ICSID Convention

The Tribunal rejected the Respondent's objections to jurisdiction, holding that the Claimants had established the existence of a qualifying investment under both the ICSID Convention and the Canada-Serbia BIT. The Tribunal confirmed that Mr. Rand's indirect shareholding in BD Agro, through Sembi Investment Ltd., was sufficient to invoke ICSID jurisdiction. It emphasized that the broad definition of investment under the BIT included indirect ownership structures and that the payments made by Mr. Rand strengthened the existence of the investment (¶ 67, ¶ 324, ¶ 388).

4.4 The Respondent's termination of the Privatization Agreement

The Tribunal reviewed the termination of the Privatization Agreement and found that while Serbia acted in accordance with its domestic laws, it needed to evaluate whether the termination and subsequent actions violated the fair and equitable treatment (FET) standard under the BIT. The Tribunal highlighted that compliance with local law does not exempt a State from its international obligations, requiring analysis of the treatment of investors under international standards (¶ 151, ¶ 160).

4.5 The seizure of the beneficially owned shares

The Tribunal did not find that the seizure of the beneficially owned shares constituted an expropriation under the Canada-Serbia BIT. The Tribunal acknowledged that the measures taken by Serbia were in response to breaches of the Privatization Agreement and were conducted in accordance with Serbian privatization laws. Nonetheless, the Tribunal noted that the impact of these measures on the investors had to be carefully examined to ensure compliance with Serbia's treaty obligations (¶160, ¶180).

The Tribunal concluded that the seizure of the beneficially owned shares did not amount to expropriation under the Canada-Serbia BIT. While the Tribunal acknowledged the legality of the measures under Serbian privatization law, it emphasized the need to ensure that the impact on the investors complied with Serbia's treaty obligations (¶ 160, ¶ 180).

4.6 The Tribunal's final determination on liability

After reviewing the facts and legal arguments, the Tribunal found that Serbia's actions were largely consistent with its domestic legal framework, but there were potential violations of the BIT in the treatment of the Claimants. The Tribunal decided that further examination of the specific circumstances surrounding the seizure of shares and the termination of the Agreement was necessary to determine whether Serbia had breached its international obligations (¶ 166, ¶ 180, ¶ 181).

4.7 Dissenting opinion

Professor Marcelo G. Kohen dissented from the majority opinion, which suggested that the absence of explicit legality requirements in the BIT implies that illegal investments can be protected. Kohen emphasized that treaty interpretation, particularly under good faith, demands that domestic legal requirements are respected, as parties to the BIT cannot be presumed to have agreed to protect illegal investments (¶2-5). He underscored that the promotion of foreign investment cannot come at the expense of disregarding a state's domestic legal framework, arguing that the principle of *ex injuria jus non oritur* should apply—meaning no legal right can arise from an unlawful act (¶3).

Kohen took issue with the Tribunal's treatment of Mr. Rand's ownership, criticizing the majority for not adequately addressing the question of the "*real*" investor. He argued that Serbia must know the true identity of the investor to properly apply its BIT obligations. According to Kohen, Mr. Rand's use of a complex web of ownership structures and intermediaries, including Mr. Obradović, undermined transparency in the privatization process (¶6-8). Kohen emphasized that concealing the real ownership of BD Agro to bypass local ownership

restrictions violated the spirit of Serbia's privatization laws, which were designed to favor domestic bidders (¶8). This lack of transparency, in his view, should disqualify Mr. Rand from benefiting from BIT protections (¶22).

The dissenting opinion highlighted Kohen's dissatisfaction with the evidence provided to support Mr. Rand's claim of ownership and control over BD Agro. Kohen pointed out that several key agreements, including the MDH and Sembi Agreements, were insufficient to prove that Mr. Rand was the beneficial owner of BD Agro (¶9). He noted that the MDH Agreement was a declaration of intent rather than proof of ownership, and the Lundin Agreement indicated that Mr. Obradović, not Mr. Rand, financed the acquisition of BD Agro (¶9-10). Kohen emphasized that without concrete documentary evidence, such as bank transfers proving that Mr. Rand provided the funds for the acquisition, **the Claimants had not met the required legal standard of proof** (¶9-11). In addition, Kohen rejected the majority's reliance on informal communications and emails, arguing that these did not conclusively establish ownership or control (¶10).

Professor Kohen argued that transparency in financial transactions is essential, particularly to ensure the integrity of the investment protection regime. In his view, the majority's dismissal of the relevance of the capital's origin was legally flawed and contrary to contemporary efforts in international law to combat money laundering and ensure that investments are made with legitimately sourced funds (¶18). Kohen stressed that the lack of documentary evidence proving the legitimate origin of the funds used for the investment undermined the Tribunal's conclusions (¶20).

Kohen also expressed concerns regarding the Tribunal's treatment of the Sembi Agreement. He argued that this private contract, governed by Cypriot law, could not create legally enforceable rights against Serbia (¶19). Kohen contended that the agreement was designed to circumvent Serbian law, particularly local ownership requirements in the privatization process. As such, it was not opposable to Serbia, and any claims based on this agreement should have been directed at Mr. Obradović, not the Serbian government (¶19-20). He criticized the Tribunal's distinction between the transfer of shares and the transfer of beneficial interests, asserting that this was an attempt to bypass Serbian securities law (¶20).

Kohen found Mr. Rand's reasons for concealing his ownership of BD Agro unconvincing and argued that such conduct should disqualify him from BIT protection. He rejected Mr. Rand's argument that the concealment was merely for reasons of convenience and efficiency, stating that transparency and fairness are fundamental principles in the privatization process (¶21). Kohen maintained that Mr. Rand's actions amounted to an abuse of rights, particularly as they circumvented the purpose of Serbia's privatization laws, which were designed to ensure national ownership and transparency (¶22-23).

In reviewing the termination of the Privatization Agreement, Kohen concluded that Serbia acted lawfully. He emphasized that the termination was based on multiple breaches of the Agreement, including the improper use of BD Agro's assets by Mr. Obradović (¶24). Kohen also noted that Mr. Obradović, the official bidder and party to the agreement, did not challenge the termination in Serbian courts, which further supported the legality of Serbia's actions (¶25). He argued that the Tribunal's focus on procedural aspects, such as the timing of the termination, missed the broader context of Serbia's legitimate concerns about the conduct of the privatization (¶24-25).

In conclusion, Professor Kohen disagreed with the majority's findings regarding the ownership and control of BD Agro, the legality of the investment, and the applicability of the BIT. He emphasized that Mr. Rand had not sufficiently proven his beneficial ownership or compliance with Serbian law. Kohen reiterated that the lack of transparency, the concealment of ownership, and the questionable origin of funds undermined Mr. Rand's claim to protection under the BIT (¶27). He supported Serbia's actions, concluding that they were consistent with both domestic law and the relevant international investment agreements (¶28).

5. Costs

Claimants and Respondent submitted their statements on costs on 27 September 2021 and 22 October 2021, respectively (¶ 219). The Tribunal reserved its decision on costs for a subsequent stage of the proceedings (¶ 221).