

**IN THE MATTER OF INVESTMENT DISPUTE UNDER THE AGREEMENT
BETWEEN CANADA AND THE REPUBLIC OF SERBIA FOR THE PROMOTION
AND PROTECTION OF INVESTMENTS AND UNDER THE AGREEMENT
BETWEEN SERBIA AND MONTENEGRO AND THE REPUBLIC OF CYPRUS
ON RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS**

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RAND (CANADA)**

AND

SEMBI INVESTMENT LIMITED

(CYPRUS)

CLAIMANTS

- v -

THE REPUBLIC OF SERBIA

RESPONDENT

**REPLY TO REQUEST FOR
BIFURCATION**

17 May 2019

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1. In accordance with Annex A to the Tribunal’s Procedural Order No. 1, as revised on 19 December 2018, the Claimants respectfully submit this Reply to Serbia’s Request for Bifurcation dated 19 April 2019.¹

I. BIFURCATION WOULD HINDER PROCEDURAL ECONOMY IN THIS ARBITRATION

2. The Claimants oppose Serbia’s request for bifurcation because it would hinder rather than promote procedural economy in these arbitration proceedings.
3. *First*, bifurcation would dramatically increase the time of this arbitration if the Tribunal rejects any of Serbia’s objections and upholds jurisdiction over any of the Claimants’ claims. The Parties’ submissions, the hearing and the Tribunal’s deliberations on the merits and quantum could easily take two to three years after the issuance of the Tribunal’s award on jurisdiction. Thus, the final award could come as late as at the end of 2024. This would effectively double the length of the non-bifurcated proceedings under the current schedule.
4. Conversely, bifurcation would not reduce the time of this arbitration even in the highly unlikely event that all of Serbia’s objections were to be successful and all of the Claimants’ claims were to be dismissed on jurisdictional basis. This is because the hearing is scheduled to take place at the end of March 2020 whether the case is bifurcated or not. Therefore, the Tribunal’s hypothetical dismissal of all claims on jurisdictional grounds would be issued at the same time under both the bifurcated and the non-bifurcated scenarios.
5. As a result, Serbia’s request for bifurcation does not even present the typical dilemma between the potential to save time if all claims are dismissed for lack of jurisdiction and the risk of significantly extending the length of the proceedings if they are not. Simply put, from a timing perspective, bifurcation would only create a significant downside risk for no upside potential.
6. The downside risk of a significant increase in the length of this arbitration is of particular concern to Mr. William A. Rand (“**Mr. Rand**”), one of the Claimants and the Claimants’

¹ All capitalized terms used but not defined herein shall have the meaning ascribed thereto in Claimants’ Memorial.

key witness. Mr. Rand would be almost 80 years old at the time of the hearing on the merits and quantum if that hearing were delayed by three years as a result of bifurcation.

7. *Second*, bifurcation would dramatically increase the cost of this arbitration if the Tribunal rejects any of Serbia's objections and upholds jurisdiction over any of the Claimants' claims because the alleged factual basis for most of Serbia's objections is inextricably intertwined with the merits of the case.
8. In its Counter-Memorial, Serbia raised a number of objections to jurisdiction, alleging that:
 - i. the Tribunal lacks jurisdiction *ratione materiae* under the Treaties because the Claimants never acquired ownership of the Beneficially Owned Shares and Mr. Rand never controlled the Beneficially Owned Shares;
 - ii. the Tribunal lacks jurisdiction *ratione voluntatis* under the Treaties because the investments were made in violation of Serbian law and regulations;
 - iii. the Tribunal lacks jurisdiction *ratione voluntatis* under the Canada-Serbia Treaty over claims relating to Mr. Rand's 3.9% shareholding in BD Agro held indirectly through MDH Serbia because MDH Serbia did not waive its right to pursue domestic remedies;
 - iv. the Tribunal does not have jurisdiction *ratione temporis* under the Canada-Serbia BIT;
 - v. the Claimants do not meet the jurisdictional requirements under the ICSID Convention because they never acquired ownership over the Beneficially Owned Shares and they were not parties to the Privatization Agreement;
 - vi. the Claimants do not meet the jurisdictional requirements under the ICSID Convention because, even if they owned or controlled the Beneficially Owned Shares, this would fail to satisfy the so-called *Salini* test;
 - vii. the Tribunal lacks jurisdiction *ratione personae* over Sembi because Sembi purportedly does not have its seat in Cyprus; and

- viii. the Claimants abused the process of ICSID arbitration by “engineering” their beneficial ownership over the Beneficially Owned Shares.
9. Even a cursory review of these objections shows that they are based on facts that allegedly occurred during the entire lifetime of the investment and that they are inseparable from the merits of the dispute. The only two objections that could arguably be separated from the merits are, indeed, the objection to jurisdiction *ratione personae* over Sembi (objection (vii) above), and the objection to jurisdiction *ratione voluntatis* over Mr. Rand’s claims relating to his shareholding in BD Agro held through MDH Serbia (objection (iii) above).
10. The remaining six objections are all intertwined with the merits, as is outlined below:
- i. Serbia’s objections focusing on the alleged non-existence and illegality of the Claimants’ investments (objections (i), (ii), (v) and (vi) above) address at length the initial privatization of BD Agro in 2005 and the restructuring of the Claimants’ beneficial ownership in 2008. While Serbia’s objections seem to ignore Mr. Rand’s additional investments made in the following years, these additional investments will also need to be discussed in the assessment of these objections. The Tribunal will also need to assess the repeated disclosures of Mr. Rand’s control and beneficial ownership, which were made throughout the entire lifetime of the investment. Therefore, the discussion of Serbia’s objections in (i), (ii), (v) and (vi) above will necessarily focus on the entire history of Claimants’ investments in Serbia and it will fully overlap with the merits of the case;
 - ii. the time period relevant for Mr. Rand’s alleged lack of control over the Beneficially Owned Shares (objection (i) above) is necessarily the entire lifetime of the investment from its making in October 2005 to its expropriation in October 2015. The discussion will be necessarily intertwined with the merits because the Claimants have shown that Mr. Rand had control over BD Agro’s and Mr. Obradović’s business decisions, but also over their conduct vis-à-vis the Privatization Agency, which is primarily relevant for the Tribunal’s assessment of the merits of this case;
 - iii. in its objection against jurisdiction *ratione temporis* (objection (vi) above), Serbia submits that the real cause of the dispute arose with the Privatization

Agency's requests to remedy alleged breaches of the Privatization Agreement in 2011, rather than with the Privatization Agency's decisions to terminate the Privatization Agreement and to appropriate the Beneficially Owned Shares in September and October 2015. Again, these facts relate primarily to the merits of this case;

- iv. the objection regarding the alleged abuse of process (objection (viii) above) appears to be based on the Claimants' conduct throughout the entire lifetime of the investment, including in the negotiations with the Privatization Agency in 2013 to 2015. These facts also relate primarily to the merits of this case.
11. If the proceedings were bifurcated, the Parties would have to plead virtually all of the facts of the case at the jurisdictional stage—and then again at the merits stage if the Tribunal upholds its jurisdiction. Most of the witnesses and experts would need to be heard at both the jurisdictional and the merits hearings, triggering unnecessary expenses for their preparation, travel and accommodation for two hearings rather than one.
12. The risk of a substantial increase in costs is compounded by the fact that each of the eight Claimants advances very similar claims based on the same factual matrix. The scope of evidence and arguments to be pleaded by the Parties and examined by the Tribunal in the merits phase will thus remain almost identical to those pleaded in the jurisdictional stage, unless the Tribunals upholds all of Serbia's objections and dismisses all of the Claimants' claims.
13. *Third*, bifurcation may be appropriate where early adjudication of a relatively narrow set of jurisdictional issues may remove the need to consider questions of merits and liability that are more time-consuming to hear and decide. Serbia's strategy in this arbitration is exactly the opposite. Serbia raised every jurisdictional objection imaginable and devoted far more space in its Counter-Memorial to the issues of jurisdiction than to its defenses on the merits and quantum. Its appeal to the alleged efficiency of a bifurcated schedule thus rings hollow.
14. Simply put, the Tribunal's adjudication on jurisdictional objections should not be separated from its adjudication on merits and quantum where, as here, the Tribunal can adjudicate on all of these issues together at no extra cost in time and at only a minimally increased financial cost. The minimal upside potential for a slight decrease in the

Parties' financial costs in the unlikely event that all of the Claimants' claims are dismissed on jurisdictional grounds is incomparable to the significant downside risk of greatly increased costs in both time and money if the Tribunal upholds jurisdiction over any of the Claimants' claims.

15. Under these circumstances, bifurcation would hinder rather than promote procedural efficiency. Therefore, it should be rejected because, as observed by the ICSID tribunal in *Churchill Mining v. Indonesia*, the standard for bifurcating preliminary issues in ICSID arbitration is “*the furtherance of the efficiency of dispute resolution.*”²
16. Serbia proposes that the Tribunal focus on the three factors identified by the tribunal in *Glamis Gold v. US*:
 - Is the request substantial or frivolous?
 - Would the request, if granted, lead to a material reduction in the scope and complexity of the case?
 - Is the bifurcation impractical in the sense that the issues are too intertwined with the merits so that a reduction of time and costs cannot be expected?³
17. However, the factors identified by the *Glamis Gold* tribunal are far from being universally accepted, let alone accepted as exhaustive considerations for the assessment of a request for bifurcation. A number of tribunals have decided on the overarching question of procedural efficiency of bifurcation without following the *Glamis Gold* analysis.⁴
18. In particular, the ICSID tribunal in *Gavrilovic v. Croatia* expressly refused to be limited by the *Glamis Gold* factors, because they may distract from the ultimate question, i.e. whether bifurcation, in light of facts of each particular case, promotes or hinders efficiency and fairness of the proceeding:

² *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 15, 12 January 2015, ¶ 26, **CLA-68**.

³ *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12, **RLA-99**.

⁴ See e.g. *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, **CLA-59**; *United Utilities (Tallinn) B.V. and Aktiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Procedural Order No. 2 dated 17 June 2015, **CLA-60**; *MetLife Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No. 2, 21 December 2018, **CLA-61**.

Third, the Tribunal considers that little assistance is gained by seeking to identify, if it may exist, the common practice of international arbitral tribunal.

[...]

What is clear is that each case must turn on its own facts. And, this being so, the Tribunal does not consider that it should be placed in the “straightjacket” of considering this question by reference to the Glamis Gold factors, and nothing further. To do so would be to overlook what can be discerned from relevant cases, namely a governing principle that **a decision on an application for bifurcation, like other procedural orders, must have regard to the fairness of the procedure to be invoked and the efficiency of the Tribunal’s proceedings. To identify, and discuss in turn, only certain identified factors may distract from the task at hand.**⁵

19. To create a false impression of consensus, Serbia cites *Cairn v. India* as one of the “[r]ecent decisions us[ing] the three-part test.”⁶ While the *Cairn* tribunal did point out that the three factors identified in *Glamis Gold* should be taken into consideration, it also expressly held that “it does not consider that these factors constitute a stand-alone test.”⁷ The *Cairn* tribunal also observed that it should *not* necessarily bifurcate a jurisdictional objection even if all three factors are satisfied.⁸
20. Accordingly, investment tribunals do not consider that bifurcation should be decided by mechanically applying a universal “test.” Instead, the Tribunal should follow the principle of procedural economy as applied to the case at hand—and reject Serbia’s request for bifurcation because it would hinder rather than promote procedural efficiency in this arbitration.

⁵ *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, ¶ 63, ¶ 66, **CLA-62**.

⁶ Serbia’s Counter-Memorial, ¶ 527.

⁷ *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-7, Decision on the Respondent Application for Bifurcation (Procedural Order No. 4), 19 April 2017, ¶ 77, **RLA-101**.

⁸ *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-7, Decision on the Respondent Application for Bifurcation (Procedural Order No. 4), 19 April 2017, ¶ 77, **RLA-101**.

II. IN ANY EVENT, SERBIA’S REQUEST FOR BIFURCATION DOES NOT MEET THE *GLAMIS GOLD* FACTORS

21. Serbia’s request for bifurcation ought to be rejected even if the Tribunal’s analysis were to rely exclusively on the three *Glamis Gold* factors—and the Claimants respectfully submit that it should not.

22. The Claimants will explain below that Serbia failed to discharge its burden of establishing procedural economy because its jurisdictional objections are: (A) intertwined with the merits; (B) not individually capable of disposing of the entirety of Claimant’s claims, or even materially reducing the scope and complexity of the proceeding; and (C) in many cases, outright frivolous.

1. Serbia’s objections to jurisdiction are intertwined with the merits

23. The Claimants have shown above that most of Serbia’s objections to jurisdiction are intertwined with the merits of the case and relate to the entire lifespan of the investment. The only objections that could be addressed separately from the merits are the objection to jurisdiction *ratione personae* over Sembi and the objection to jurisdiction *ratione voluntatis* over Mr. Rand’s claims relating to his shareholding in BD Agro held through MDH Serbia.

24. The close link between Serbia’s objections and the merits of the case is evident from the evidence that Serbia purports to rely on in support of its objections. For example, when alleging Mr. Rand’s purported failure to disclose his beneficial ownership in the Beneficially Owned Shares, Serbia refers to a great number of factual exhibits⁹ and four witness statements¹⁰ that are all also—and often primarily—relevant for assessing the merits of the case.

⁹ Serbia refers e.g. to: E-mail from W. Rand to P. Bubalo dated 4 June 2005, **CE-14**; E-mail from Neda Galić to Erinn Broshko of 9 November 2014, **CE-70**; Letter from BD Agro to the Privatization Agency of 13 August 2014, p. 1, **CE-316**; E mail from Mr. Jakovljevic to the Privatization Agency of 16 April 2013, **RE-108**; Letter from D. Obradović to the Privatization Agency of 1 August 2013, **CE-273**; Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited; **CE-274**; Email from I. Markićević to the Privatization Agency attaching letter to Ms. Uzelac, **CE-309**; Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, **CE-38**; Letter from Rand Investments to I. Markićević dated 7 May 2015, **CE-350**.

¹⁰ Djura Obradović Witness Statement dated 20 September 2017; William Rand Witness Statement dated 5 February 2018; Igor Markićević Second Witness Statement dated 16 January 2019; Erinn Broshko Witness Statement dated 5 February 2018.

25. As another example, when contesting Mr. Rand’s control over BD Agro, Serbia contends that “*the record in this arbitration shows that it was in fact Mr. Obradović who controlled the business of BD Agro*”¹¹ or that Mr. Cowan’s expert report establishes that “*the economic reality [...] unequivocally proves Mr. Obradović’s position of BD Agro’s owner.*”¹² Again, “*the record in this arbitration*” and Mr. Cowan’s report obviously address primarily the merits and quantum of this case.

26. In *AIY v. Czech Republic*, the tribunal considered, when assessing the third of the *Glamis Gold* factors, that even a partial overlap of evidence between preliminary and merits issues is sufficient to deny bifurcation:

In respect of the third criterion, the Tribunal is of the view that it would be impractical to bifurcate Objection 2 as it is clearly intertwined with the merits. The Tribunal notes that the Respondent accepts this in its Counter-Memorial: “The question of whether an investment was made is mostly relevant only for jurisdictional questions. Merely the point (sic) which knowhow should be involved in the case could also be considered during the merits of the case.” In respect of that objection, the Tribunal finds that, if it was bifurcated, it would not result in any reduction of time or costs.¹³

27. Serbia’s reliance on documentary and witness evidence that is primarily relevant for the merits—and even quantum—means that if the Tribunal upholds jurisdiction over any of the Claimants’ claims, the same evidence would have to be examined again in the merits and quantum phase in the event of bifurcation.

28. In *Gavrilovic*, the tribunal rejected Croatia’s request for bifurcation precisely due to the potential examination of the same evidence and witnesses in both the jurisdictional and merits phase of the proceeding:

Put simply, a ruling on at least three of the four preliminary objections would in all likelihood require a detailed examination of the same evidence that will ultimately need to be examined at the stage of determining the merits. There is no procedural or other advantage with bifurcating the proceeding, so as to require not only the Tribunal to consider the same, or similar, evidence on two occasions, but so as to require witnesses to appear on two

¹¹ Serbia’s Counter-Memorial, ¶ 292.

¹² Serbia’s Counter-Memorial, ¶ 291; Expert Report of Sandy Cowan, Appendix 7.

¹³ *AIY Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Procedural Order No. 2 Decision on Bifurcation, 5 October 2015, ¶ 61, **CLA-63**.

occasions, submissions to be prepared which canvass the same, or similar, matters, and the consequential cost and expense.¹⁴

29. As in *Gavrilovic* and *AIY*, Serbia’s jurisdictional objections in this arbitration are intertwined with the merits and quantum. Serbia’s request for bifurcation should be dismissed on that basis alone.

2. Serbia’s objections are not individually capable of materially reducing the scope of the proceedings

30. Serbia alleges that “*if any of the jurisdictional objections raised by Respondent would be granted this would lead to substantial reduction in the scope and complexity of the case or outright dismissal of the case.*”¹⁵

31. Despite this sweeping statement, Serbia specifically refers to only two objections that, if accepted, would allegedly have such a profound effect on the scope of the proceedings. According to Serbia, its objection *ratione materiae* would allegedly “*dispose of the entire case,*” and the “no seat” objection would purportedly “*result in substantial reduction of cost in time.*”¹⁶

32. The Claimants disagree.

33. *First*, Serbia’s objection *ratione materie* in fact consists of two separate objections: that the Claimants did not beneficially own the Beneficially Owned Shares, and that Mr. Rand did not control the Beneficially Owned Shares. Serbia would need to prevail on both limbs of the objection to reduce the scope of the Claimants’ claims.

34. However, even if the Tribunal upheld cumulatively both limbs of this objection, Mr. Rand would still have the standing to bring claims based on his ownership of 3.9% shareholding in BD Agro held by Mr. Rand indirectly through MDH Serbia. While the damages sought could be reduced, the factual and legal complexity of the case would remain unaltered.

35. *Second*, according to Serbia, the cost-saving potential of its objection *ratione personae* against Sembi lies in the prospect of removing the non-impairment claim and the

¹⁴ *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, ¶ 93, **CLA-62**.

¹⁵ Serbia’s Counter-Memorial, ¶ 530.

¹⁶ Serbia’s Counter-Memorial, ¶ 532.

umbrella clause claim, which were only raised by Sembi and not by the Canadian Claimants.¹⁷ While this assertion is facially correct, the non-impairment and umbrella clause claims partially overlap with the claims for the breach of other substantive standards, which have been pursued by both Sembi and the Canadian Claimants. The *ratione personae* objection is thus incapable of achieving any significant reduction of the scope of the claims put before this Tribunal.

36. *Third*, as shown in the table below, none of Serbia’s objections may lead, individually, to an outright dismissal of the entire case, or even a substantial reduction in its complexity:

Serbia’s jurisdictional objection	Remaining claims if the objection is upheld
Objection <i>ratione materiae</i> due to the Claimants allegedly not owning the Beneficially Owned Shares	All of Mr. Rand’s claims based on his: (i) control over the Beneficially Owned Shares; and (ii) indirect ownership of 3.9% ownership in BD Agro held through MDH Serbia
Objection <i>ratione voluntatis</i> due to alleged illegality of the Claimants’ investment in the Beneficially Owned Shares	
Objections based on alleged failure to meet the jurisdictional requirements under the ICSID Convention	
Objection based on alleged abuse of process	
Mr. Rand allegedly did not <i>control</i> the Beneficially Owned Shares	All of the claims of each Claimant
Objections <i>ratione temporis</i> under the Canada-Serbia BIT	All of Sembi’s claims
Objection <i>ratione voluntatis</i> regarding Mr. Rand’s claims relating to his 3.9% share in BD Agro held through MDH Serbia	All of the claims based on each Claimant’s beneficial ownership of the Beneficially Owned Shares and Mr. Rand’s control over the same
Objection <i>ratione personae</i> against Sembi	All of the claims of each Canadian Claimant

37. Thus, Serbia’s objections would dispose of the case only if the Tribunal simultaneously upheld all of Serbia’s objections. The Claimants respectfully submit that the Tribunal’s simultaneous upholding of all of Serbia’s jurisdictional objections is highly unlikely.

¹⁷ Serbia’s Counter-Memorial, ¶ 532.

The low probability of such outcome thus cannot justify the downside risk of a very substantial increase in the time and costs of this arbitration if it is bifurcated and the Tribunal then upholds jurisdiction over any of the claims.

3. Serbia's objections are frivolous

38. Most of Serbia's objections to jurisdiction are simply frivolous. The Claimants understand that they are not expected to address the merits on Serbia's objections in this Reply on Serbia's Request for Bifurcation. Nonetheless, since the frivolousness of Serbia's objections is one of the three *Glamis Gold* factors, the Claimants will briefly comment on it also in this submission. This discussion of the merits of Serbia's frivolous objections is by no means intended to be exhaustive, and the Claimants expressly reserve their right to fully develop, supplement and amend their factual and legal arguments in the Reply or the Answer on Jurisdiction.

a. Serbia's objection *ratione personae* against Sembi

39. Serbia's *ratione personae* objection against Sembi, based on its alleged lack of "seat" in Cyprus as required under Article 1(3)(b) of the Serbia-Cyprus BIT, is frivolous because the Claimants have already established that Sembi has its "seat" in Cyprus as conclusively evidenced by the Certificate of Registered Office issued by the Cyprus Registry of Companies.¹⁸ That it is all what is required under the Serbia-Cyprus BIT, as confirmed recently in *Mera v. Serbia*.¹⁹

40. The Claimants have also demonstrated that Sembi meets the more onerous requirements for a "seat," which were incorrectly proposed by the tribunal in *CEAC v. Montenegro*, by: (i) Sembi's registered office being accessible to the public for purposes of inspecting the company's registers; (ii) the company being amenable to service at that address; (iii) the company's records being kept there; and (iv) that such address bears an outside plate with Sembi's name in a conspicuous and visible location.²⁰

¹⁸ Certificate of Registered Office of Sembi dated 8 June 2017, **CE-54**.

¹⁹ *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, ¶ 93 **CLA-22**.

²⁰ Claimants' Memorial, ¶¶ 292-294; *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶¶ 198-199, **CLA-21**.

41. Serbia’s objection is based on the theory that Sembi does not have its seat in Cyprus because it is “*effectively managed*” from Canada. Suffice it to say that the text of the Serbia-Cyprus BIT—and the investment arbitration practice at large—lends no support to Serbia’s theory that a company is seated at a place from where it is “*effectively managed*.”
42. In fact, Serbia’s theory would exclude all foreign-controlled companies from the protection of Cypriot investment treaties. Such outcome would be at odds with the long-standing status of Cyprus as a leading offshore jurisdiction. As stated by the *Mera* tribunal:

According to the Respondent it is “*usual practice in Cyprus as it has been known for years as a popular offshore jurisdiction, and one need only google ‘Cyprus offshore’ to find a plethora of links to various law and consultancy firms offering services of incorporating and maintaining companies on Cyprus.*”

If the Respondent is of this viewpoint, then when it negotiated the BIT in question it could have required that in order for a legal entity to qualify as an investor under the BIT, it would need to be managed and controlled in the place of incorporation. It is not for the Arbitral Tribunal to insert additional requirements into the BIT which could have easily been inserted by the negotiators at the time of drafting, but were not.²¹

43. Accordingly, Serbia’s “*effective management*” theory must be rejected, and its objection *ratione personae* based thereon is frivolous.

b. Serbia’s objections *ratione temporis*

44. Serbia’s objections *ratione temporis* under the Canada-Serbia BIT fare no better.
45. Serbia’s first objection *ratione temporis* alleges that the three-year limitation period under Article 22(2)(e)(i) of the Canada-Serbia BIT was triggered on 1 March 2011, when Mr. Obradović received from the Privatization Agency a written notice vaguely alleging certain breaches of the Privatization Agreement. On that date, Serbia contends, the Claimants “*first acquired knowledge of the alleged breach that now figures as the ground for their claim in this arbitration.*”²²

²¹ *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 88, CLA-22.

²² Serbia’s Counter-Memorial, ¶ 400.

46. Serbia's theory is premised on the incorrect notion that the term "*alleged breach*" in Article 22(2)(e)(i) of the Canada-Serbia BIT refers to the *investor's* breach of its obligations alleged by Serbia. It does not. Instead, Article 22(2)(e)(i) obviously refers to Serbia's breach of its obligations under the Treaty as alleged by the investor.
47. Thus, Serbia's ten-page-long search for the date on which Mr. Obradović first acquired knowledge of his *own* alleged breach of the Privatization Agreement is entirely pointless. To state the obvious: the Claimants do not allege that Mr. Obradović's purported breach of the Privatization Agreement, or the Privatization Agency's vague allegations thereof, constituted Serbia's breach of the Canada-Serbia BIT. Instead, the Claimants maintain that the measures constituting Serbia's breach of the Canada-Serbia BIT were primarily the Privatization Agency's Notice on Termination of 28 September 2015 declaring the Privatization Agreement terminated, and the subsequent Decision on Transfer of Capital of 21 October 2015 transferring the Beneficially Owned Shares to the Privatization Agency. ICSID received the Claimants' Request for Arbitration on 14 February 2018, and thus well within the three-year limitation period.
48. Serbia's second objection to jurisdiction *ratione temporis* alleges that the general principle of non-retroactivity prevents the Tribunal from exercising jurisdiction over the Canadian Claimants' claims because "*Claimants allege BIT breaches on the basis of acts and facts that occurred before the effective date of the BIT [on 27 April 2015].*"²³ According to Serbia, such acts and facts would be the "*real cause of the dispute,*" as discussed in *EuroGas v. Slovakia*.²⁴ However, Serbia's reliance on *EuroGas* is entirely inapposite.
49. In *EuroGas*, the mining rights of the investor's Slovak company were revoked when Slovak administrative authorities reassigned the mining rights to another company approximately seven years before the entry into force of the relevant BIT. Slovak courts subsequently quashed the reassignment and revocation on procedural grounds. The administrative authorities corrected the procedural mistakes and reissued the same decision very shortly thereafter. The *EuroGas* tribunal held that the dispute over the reissuance of the reassignment and revocation, which occurred after the entry into force

²³ Serbia's Counter-Memorial, ¶ 421.

²⁴ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award of the Tribunal, 18 August 2017, ¶ 453, **RLA-43**.

of the BIT, was a simple continuation of the pre-existing dispute over the original reassignment and revocation.

50. The *EuroGas* tribunal, however, acknowledged that a new dispute may arise after the entry into force of the applicable treaty on the basis of a new, separate act of the respondent state. In a sentence immediately following the remark quoted by Serbia in its Counter-Memorial,²⁵ the *EuroGas* tribunal states that “[i]n this case, there has been no separate act by a Slovak State organ that could be deemed to have crystallized a new dispute.”²⁶

51. In the case at hand, the real cause of the dispute raised by the Canadian Claimants is the Notice on Termination of 28 September 2015 and the Decision on Transfer of Capital of 21 October 2015. Even if the Privatization Agency’s allegations of a breach of the Privatization Agreement could somehow qualify as a dispute for the purposes of the Canada-Serbia BIT—and they cannot—the Notice and the Decision would be separate acts crystallizing a new dispute. Serbia’s second objection *ratione temporis* is as frivolous as the first one.

c. Serbia’s objection *ratione voluntatis* regarding Mr. Rand’s claims relating to his 3.9% indirect shareholding in BD Agro held through MDH Serbia

52. Another of Serbia’s frivolous objections is the objection *ratione voluntatis* based on an alleged nullification of Serbia’s consent to arbitrate claims with respect to Mr. Rand’s 3.9% shareholding in BD Agro held through MDH Serbia. Serbia argues that Mr. Rand’s waiver is deficient because he provided a written waiver only for himself, and not on behalf of MDH Serbia.

53. Serbia’s objection is frivolous because the Canada-Serbia BIT does not require any waiver by or on behalf of MDH Serbia. The Notice of Intent, the Request for Arbitration and the Memorial all make clear that Mr. Rand raises his own claim under Article 21(1) of the Canada-Serbia BIT for a loss in value of his indirect 3.9% shareholding in BD Agro, held through MDH Serbia. Mr. Rand does not—and is not required to—raise this claim on behalf of MDH Serbia under Article 21(2). Such claim is also not a claim for

²⁵ Serbia’s Counter-Memorial, ¶ 419.

²⁶ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award of the Tribunal, 18 August 2017, ¶ 454, **RLA-43**.

a loss or damage to Mr. Rand’s interest in MDH Serbia, but to his interest in BD Agro, within the meaning of Article 22(2)(e)(iii).

54. Furthermore, even if Serbia’s objection *ratione voluntatis* were founded in the text of the Canada-Serbia BIT—and it is not—Serbia’s raising such objection would amount to an abuse of a right. In fact, the waiver is a meaningless formality because Mr. Rand has never pursued any domestic remedies through MDH Serbia and no such remedies are available. Mr. Rand would have been—and still is—happy to provide the MDH Serbia’s waiver regardless of whether it is required. However, Serbia never informed Mr. Rand that it would like to receive such waiver.

55. Instead, Serbia violated its obligation under the Canada-Serbia BIT to conduct good faith settlement negotiations by simply ignoring the Claimants’ offer to meet. Similarly, Serbia kept entirely silent when the ICSID Secretariat expressly inquired about the Canadian Claimants’ compliance with Article 22(2)(e)(iii) prior to registration of this arbitration.

56. Simply put, Serbia blames Mr. Rand for not providing a waiver that is not required under the Canada-Serbia BIT and that Serbia had never asked for.

d. Serbia’s objection that the Claimants do not meet the jurisdictional requirements under the ICSID Convention because they were not parties to the Privatization Agreement

57. Serbia alleges that because “*none of the Claimants has ever been a party to [the Privatization Agreement]*”,²⁷ the Claimants allegedly lack standing to bring any claim under the ICSID Convention in relation to the Privatization Agreement. Serbia reaches this incorrect conclusion by fabricating a purported principle that “*if an investor is not a contracting party in a contract forming a basis of his investment, the investor has no right of standing before an ICSID tribunal.*”²⁸

58. No such principle exists under the ICSID Convention. Quite the opposite, ICSID tribunals routinely adjudicate on treaty claims relating to a contract signed by the

²⁷ Serbia’s Counter-Memorial, ¶ 486.

²⁸ Serbia’s Counter-Memorial, ¶ 486.

claimant investors' subsidiaries.²⁹ As observed by the ICSID tribunal in *Gas Natural v Argentina*:

The assertion that a claimant under a bilateral investment treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT has been made numerous times, never, so far as the Tribunal has been made aware, with success.³⁰

59. In any event, Serbia's objection misses the point also because the primary basis of their investment is their interest in BD Agro—and not only their interest in the Privatization Agreement.

60. Serbia's objection contradicts a wealth of arbitral precedent and is nothing but frivolous.

e. Serbia's objection that the Claimants do not meet the jurisdictional requirements under the ICSID Convention because their investment fails to satisfy the *Salini* test

61. Serbia alleges that the Claimants failed to make an investment as required by Article 25(1) of the ICSID Convention, because their investment in BD Agro allegedly does not meet the so-called *Salini* test.³¹ According to Serbia, the *Salini* test “encompasses four criteria: (1) the existence of a substantial contribution by the foreign national, (2) a certain duration of the economic activity in question, (3) the assumption of risk by the foreign national, and (4) the contribution of the activity to the host State's development.”³²

62. The Claimants disagree with both Serbia's absurd application of these criteria to the facts of this case and its inclusion of the controversial fourth criterion.

63. *First*, the Claimants made substantial contributions, including, but not limited to:

(a) the EUR 5,549,000 purchase price for the Privatized Shares;

²⁹ See e.g. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award on Jurisdiction, 8 December 2003, ¶¶ 65-66, **CLA-64**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction, 17 July 2003, ¶ 68, **CLA-65**.

³⁰ *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, ¶ 50, **CLA-66**.

³¹ Serbia's Counter-Memorial, ¶ 492.

³² Serbia's Counter-Memorial, ¶ 492.

- (b) EUR 2 million additional investment in BD Agro;
 - (c) the EUR 0.2 million purchase price for Mr. Rand’s 3.9% shareholding in BD Agro held through MDH Serbia; and
 - (d) Mr. Rand’s EUR 2.2 million financing of the replacement of BD Agro’s herd and other payments and loans made for the benefit of BD Agro.
64. While Serbia does not even allege that the commitment of such resources would be insufficient for the purposes of ICSID Convention, it claims that the contributions noted in (a) and (b) above should be disregarded because they were made by Mr. Obradović rather than the Claimants.³³
65. Mr. Obradović made the payments because he was the buyer under the Privatization Agreement and the nominal owner of the Beneficially Owned Shares. The Serbian Government was fully aware that the ultimate beneficial owner was Mr. Rand.³⁴ Mr. Rand had also secured the financing from his long-time business partners, the Lundin family.³⁵
66. In February 2008, Sembi agreed to repay Mr. Obradović’s debt to the Lundins in the agreement concluded between Mr. Obradović, the Lundin Family, Mr. Rand and Sembi.³⁶ In exchange, Mr. Obradović committed to transfer to Sembi “*all of his right, title and interest in and to [the Privatization Agreement]*”³⁷ as well as any other assets held by Mr. Obradović and related to the business of BD Agro, which included the Beneficially Owned Shares. Sembi eventually paid EUR 5.6 million to the Lundins,³⁸

³³ Serbia’s Counter-Memorial, ¶ 498.

³⁴ Claimant’s Memorial, ¶ 72, ¶¶ 305-306

³⁵ Claimants’ Memorial, ¶¶ 88-95.

³⁶ Agreement between Mr. Djura Obradović, The Lundin Family, Mr. William Rand and Sembi 22 February 2008, **CE-28**.

³⁷ Agreement between Mr. Djura Obradović and Sembi dated 22 February 2008, **CE-29**.

³⁸ Confirmation of wire transfer from Sembi to Mr. Ian Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-57**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-58**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-59**.

using funds advanced to Sembi by Mr. Rand.³⁹ The EUR 5.6 million payment to the Lundins was another contribution, this time by Sembi.

67. The existence of all these contributions is confirmed by the witness testimony of Mr. Obradović,⁴⁰ Mr. Rand⁴¹ and Mr. Azrac,⁴² the long-term banker of the Lundin Family. They are also confirmed by contemporaneous documentary evidence.⁴³
68. *Second*, the duration of the Claimants' investment was ten years with respect to Mr. Rand and seven years for the remaining Claimants. This is of course amply sufficient, and Serbia does not even claim otherwise.
69. *Third*, the Claimants' investment in BD Agro involved not only risks inherent to the volatile agricultural business, but also significant risks connected with the unpredictable legal and business environment in Serbia—which ultimately materialized when Serbia committed the breaches of the Treaties claimed in this arbitration.
70. *Fourth*, as confirmed by numerous investment tribunals, the “*contribution to the development*” criterion is not part of the *Salini* test.⁴⁴ Even if it were, the Claimants significantly contributed to Serbia's development by turning BD Agro, a socialist-style farm with outdated equipment and a disease-stricken herd, into “*the most modern cow farm not only in Serbia, but also in Europe*”⁴⁵ and one of the main milk producers in Serbia. There can be no doubt that the Claimants contributed to Serbia's economy.

³⁹ Confirmation of EUR 3,610,000.00 wire transfer from Mr. William Rand to Sembi executed on 3 August 2008, **CE-60**; Confirmation of EUR 2,001,000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-61**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-56**; Register of Directors of Indonesian Developments Co. Ltd., **CE-75**.

⁴⁰ Obradović WS, ¶ 11.

⁴¹ W. Rand WS, ¶¶ 16-17; ¶¶ 30-33

⁴² Aksel Azrac Witness Statement dated 16 January 2019, ¶¶ 9-16.

⁴³ Confirmation of wire transfer from Sembi to Mr. Ian Lundin for EUR 1,200,000.00 executed on 16 July 2008, **CE-57**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed on 16 July 2008, **CE-58**; Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 executed on 15 October 2010, **CE-59**; Confirmation of EUR 3,610,000.00 wire transfer from Mr. William Rand to Sembi executed on 3 August 2008, **CE-60**; Confirmation of EUR 2,001,000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi executed on 13 October 2010, **CE-61**; Central Securities Register of Indonesian Developments Co. Ltd., **CE-56**; Register of Directors of Indonesian Developments Co. Ltd., **CE-75**.

⁴⁴ See e.g. *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 295, **CLA-67**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 187, **CLA-32**.

⁴⁵ News Article “*Where cows listen to Beethoven*” published on 27 November 2010, **CE-26**.

71. Accordingly, the Claimants investment in BD Agro clearly satisfies all criteria of the *Salini* “test” and Serbia’s objection to the contrary is frivolous.

f. Serbia’s objection that the Claimant’s claims amount to abuse of process

72. Serbia alleges that “*that Claimants initiated the present proceedings with full awareness of the fact that they are not entitled to protection under the Treaties and the ICSID Convention, thereby committing an abuse of process.*”⁴⁶ This is absolutely incorrect.

73. To begin with, this purported objection has no basis because the Claimants are firmly convinced that they are entitled to protection under the Treaties and the ICSID Convention—and Serbia obviously offers no evidence to support its false accusations that they are not.

74. Further, this objection does not add anything to Serbia’s other objections because it does not set forth a new, independent ground for the alleged lack of this Tribunal’s jurisdiction. If Serbia’s other objections fail and the Tribunal upholds jurisdiction over the Claimants’ claims, this objection loses its purported factual basis and automatically fails too.

75. More fundamentally, Serbia’s misunderstands the definition of an abuse of process. A claimant may commit an abuse of process when it purports to claim protection under international law based on forged documents or fictitious transactions. An abuse of process can also be committed if a claimant restructures its investment only *ex post*, in order to obtain protections under international law after it suffers harm.⁴⁷

76. The Claimants have done nothing of the sort. They claim protection under the Treaties based on transactions made well before Serbia’s violations of the Treaties. For example, the Share Purchase Agreement between MDH and Mr. Obradović⁴⁸ was entered into in 2005. The Sembi Agreements were entered into three years later in 2008.⁴⁹ This was

⁴⁶ Serbia’s Counter-Memorial, ¶ 508.

⁴⁷ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 106, **RLA-5**.

⁴⁸ Share Purchase Agreement dated 19 September 2005, **CE-15**.

⁴⁹ Agreement between Mr. Djura Obradović, The Lundin Family, Mr. William Rand and Sembi dated 22 February 2008, **CE-28**; Agreement between Mr. Obradović and Sembi dated 22 February 2008, **CE-29**.

years before Serbia expropriated the Claimants' investments and committed the other breaches of the Treaties in the fall of 2015.

77. Importantly, Serbia does not even allege that these agreements were forged or fictitious. In fact, Serbia only claims that these agreements failed to achieve their intended purpose because they allegedly had no effect under Serbian law. The Claimants have established by contemporaneous documentary evidence and witness testimony that the contracting parties always considered these agreements as fully legal, valid and binding and duly performed in accordance with their terms.
78. Therefore, the Claimants clearly did not act in bad faith and did not abuse the process by raising their claims in the present arbitration. It is simply frivolous for Serbia to claim the opposite.

79. For all the foregoing reasons, Claimants respectfully submit that the Tribunal should deny Serbia's Request for Bifurcation.

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



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