INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Coropi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko

v.

Republic of Serbia

(ICSID Case No. ARB/22/14)

PROCEDURAL ORDER NO. 4
(BIFURCATION OF LIABILITY AND DAMAGES PHASES)

Members of the Tribunal
Sir Daniel Bethlehem KC, Presiding Arbitrator
Mr. Andrés Jana, Arbitrator
Prof. Zachary Douglas KC, Arbitrator

Secretary of the Tribunal
Mr. Oladimeji Ojo

Assistant to the Tribunal
Professor Philippa Webb

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21 August 2023

I. Procedural Background

1. The question of whether to bifurcate the liability and damages phases of the proceedings was addressed in written submissions by the Parties in advance of the First Session and thereafter in oral submissions by the Parties in the course of the First Session held on 22 March 2023. Addressing the issue for the Tribunal, the presiding arbitrator made the following observations in the course of the session:

> "It is often the case that once the liability decision is reached, and there is a finding of liability, the tribunal is left with an unenviable position of trying to make sense of quantum submissions, expert reports, that have been put in at the beginning without any appreciation of how the liability phase is going to fall out. We are increasingly seeing circumstances … in which tribunals are remitting matters back to the parties for further submissions on quantum, which goes to the issue of delay, goes to the issues of efficiency, goes to the issues of whether expert reports on quantum right at the outset are useful to the tribunal. We also have in these proceedings multiple claimants and multiple allegations of breach ..."[1]

2. Having heard the Parties' submissions on the issue, the Tribunal addressed the matter in Paragraph 15 of Procedural Order No. 1, dated 31 March 2023, under the heading "Bifurcation of Liability and Damages Phases of proceedings", as follows:

> "15.1 A determination of the question of the bifurcation of the liability and damages phases of the proceedings is deferred for decision by the Tribunal on a reasoned application, if any, to be submitted by the Respondent within one month of receipt of the Claimants' Memorial. In the event of such an application, the Claimant will be afforded a reasonable opportunity to submit observations in response.
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> 15.2 The issue having been addressed in the First Session, and in written submissions filed by the Parties in advance thereof, the Claimants' Memorial may include, at the Claimants' discretion, evidence and argument

[1] First Session, 22 March 2023, recording, 30:45 – 31:52.

> on the question of damages, without prejudice to the determination of the question of bifurcation in due course."

3. On 1 April 2023, the Tribunal wrote to the Parties, *inter alia*, in the following terms:

> "The Tribunal acknowledges receipt of the Claimants' Memorial, dated 31 March 2023, and associated documents, but notes that a procedural schedule had not yet been set down, with the Tribunal waiting to hear from the Parties on whether they have been able to reach agreement on this matter. Given this, and to avoid any prejudice to the Respondent, the Tribunal, having regard to §6 of Procedural Order No. 1, directs that, unless the Parties have agreed otherwise, time will not begin to run against the Respondent on any issue addressed in PO1 until such time as the Tribunal has, by a Procedural Order, laid down a procedural calendar or has otherwise directed that a given time period is deemed to be running. This direction includes, *inter alia*, the time periods specified in §§15.1 and 16.3 of PO1."

4. By Paragraph 7 of Procedural Order No. 2, dated 26 May 2023, setting out the procedural schedule of the case, the Tribunal directed (*inter alia*) as follows:

> "Third, the annexed procedural schedule is without prejudice to any question that may arise pursuant to Paragraph 15 of Procedural Order No. 1 concerning the possible bifurcation of the liability and damages phases of the proceedings. Having regard to the Tribunal's correspondence to the Parties dated 1 April 2023, noted in paragraph 4 above, the date by which any bifurcation application under Paragraph 15 of Procedural Order No. 1 must be submitted is 26 June 2023."

5. Pursuant to the preceding directions, the Respondent submitted a Request for Bifurcation of Damages on 20 June 2023 ("**Bifurcation Request**"). By correspondence dated 21 June 2023, the Tribunal invited the Claimants to submit their comments, if any, on the Bifurcation Request by 7 July 2023. By a filing dated 7 July 2023, the Claimants submitted their Observations on Request for Bifurcation ("**Bifurcation Reply**").

6. By correspondence dated 21 July 2023, the Tribunal wrote to the Parties (*inter alia*) as follows:

> "The Tribunal has given careful consideration to the Respondent's application to bifurcate the liability and damages phases of the proceedings, and to the Claimants' submissions in response to that application.
>
> For reasons that will be elaborated in a procedural order in due course, the Tribunal has determined that the bifurcation of the liability and damages phases would be appropriate for efficient case management reasons. Having regard to the timeline for the submission of the Respondent's counter-memorial [on 29 September 2023], the Tribunal considers that it is appropriate that the Parties are informed of the Tribunal's decision in respect of bifurcation as soon as possible."

7. This Procedural Order sets out the Tribunal's reasoning for its determination to bifurcate the liability and damages phases of the proceedings.

II. The Parties' Submissions in Outline

A. The Respondent's Bifurcation Request

8. In summary, the Respondent contends as follows:

> "Respondent's request is justified and satisfies considerations of fairness and procedural economy. Far from being straightforward and intertwined with the merits, Claimants' case on damages is complex, comprising over 25% of their Memorial as well as an 86-page expert report which features multiple scenarios and calculations based on various instructions and relies on 117 factual exhibits. Respondent respectfully submits that deferring the question of damages until after the Tribunal's finding on jurisdiction or liability is made will narrow the scope of Claimants' damages case and spare the Parties considerable costs, resulting in more efficient proceedings overall."[2]

9. Submitting that it is undisputed that the Tribunal has the power to bifurcate the proceedings, the Respondent contends that, for purposes of deciding on bifurcation,

[2] Bifurcation Request, paragraph 2.

tribunals have had regard to considerations of efficiency, procedural fairness and cost-conscious case management on the basis of an assessment of such factors as:

- the time and costs associated with the preparation of submissions on quantum;
- whether bifurcation would materially reduce the time and cost of the proceedings;
- the costs associated with the length of the hearing that would be required to address expert evidence on quantum; and
- the burden associated with having to develop damages models to address multiple possible liability scenarios.

10. The Respondent prays in aid of each of the above investor-State jurisprudence that it says supports the contention that such factors are properly taken into account for purposes of a bifurcation decision.[3] Notable amongst the cases relied upon are the bifurcation decisions in *Gavazzi v. Romania* and *Lao Holdings v. Lao People's Democratic Republic*, both of which bifurcated the liability and damages phases of the proceedings on grounds of costs and timing efficiencies.[4]

11. Setting out its submissions on why bifurcation is warranted in the present case, the Respondent contends that, the Claimants' case on damages "is multifaceted, far from straightforward and heavily dependent on the Tribunal's findings on jurisdiction and liability."[5] It goes on to develop four reasons in support of its bifurcation request:

(a) "Claimants raise at least six separate heads of claims (different for each Claimant), alleging violation of four investment protection standards, under two BITs";[6]

[3] Bifurcation Request, paragraphs 9 – 11.
[4] Respectively *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Procedural Order No. 2, 13 September 2013; *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2, Procedural Order No. 2, 23 October 2017.
[5] Bifurcation Request, paragraph 13.
[6] Bifurcation Request, paragraphs 14 – 18.

(b) "Claimants case on damages is complex, as it yields four alternative damages calculations, based on two alternative but-for scenarios and two alternative interest rates";[7]

(c) "bifurcation of quantum will lead to considerable cost savings on both sides";[8] and

(d) "Claimants would not be in any way prejudiced by bifurcation. If they succeed on liability, any delay can be compensated with interest in any award of damages."[9]

B. The Claimants' Bifurcation Reply

12. Contending that the bifurcation of the liability and damages phases of proceedings "is an exception to the normal conduct of ICSID proceedings [and] … should be ordered cautiously and only if there are compelling reasons to do so",[10] the Claimants contend that there are no such reasons in the present case.[11] In support of its "compelling reasons" standard, the Claimants site *Siag v. Egypt*.[12]

13. In summary, the Claimants contend as follows:

> "Rather than reducing the time and costs of the proceedings, bifurcation of damages would greatly prolong this arbitration and would lead to no material costs savings unless the Tribunal rejected all claims on jurisdiction or merits. This is mainly because the present case is straightforward with respect to damages and does not require the development of various damages models to address multiple possible counter-factual scenarios that are dependent on which impugned measures are found to constitute a violation of the applicable investment treaties and which are not. …

[7] Bifurcation Request, paragraphs 19 – 24.
[8] Bifurcation Request, paragraph 25.
[9] Bifurcation Request, paragraph 26.
[10] Bifurcation Reply, paragraphs 1 and 6 – 9.
[11] Bifurcation Reply, paragraphs 1 and 10 *et seq.*
[12] Bifurcation Reply, paragraph 8. *Waguih Elie George Siag and Corinda Vecchi v. The Arab Republic of Egypt* ICSID Case No. ARB/05/15, Award, 1 June 2009 citing the tribunal's Procedural Order No. 3 (at paragraph 116).

> The interrelatedness of the two impugned measures means that the methodology for the calculation of damages will be identical regardless of whether the Tribunal upholds its jurisdiction fully or partially, and regardless of whether the Tribunal concludes that both or only one of the measures constitutes a breach of one or several standards of the applicable investment treaties. …
>
> As a result, the Tribunal will be able to rely on the damages calculation presented in Claimants' Memorial regardless of how it decides on jurisdiction and merits—as long as it upholds jurisdiction over at least one Claimant and at least one breach of the applicable investment treaties."[13]

14. Elaborating on these submissions, the Claimants contend (*inter alia*) as follows:

(a) The bifurcation of damages could greatly prolong the proceedings and that delay cannot simply be resolved by awarding interest to the Claimants;[14]

(b) The quantum analysis in this case is relatively straightforward;[15]

(c) Bifurcation would create a risk of substantially higher costs;[16]

(d) The Claimants' case on quantum is not complex and does not require preparation of multiple damages models addressing various scenarios;[17] and

(e) The appropriate remedy, in circumstances in which a claimant's case is rejected on jurisdiction and/or merits, is to award the defendant its costs.[18]

15. In support of the last of these contentions, the Claimants relies on the decision of the

[13] Bifurcation Reply, paragraphs 2 – 4.
[14] Bifurcation Reply, paragraphs 15 – 16; and generally at paragraphs 13 – 23.
[15] Bifurcation Reply, paragraphs 18 – 19.
[16] Bifurcation Reply, paragraphs 24 – 33.
[17] Bifurcation Reply, paragraphs 30 and 34 – 48.
[18] Bifurcation Reply, paragraphs 32 – 33.

tribunal in *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*.[19]

III. Analysis and Conclusions

16. As an initial matter, the Tribunal notes that there is no contention about the Tribunal's competence to order the bifurcation of the liability and damages phases of the proceedings. For the avoidance of doubt, the Tribunal affirms that it considers that it is indeed competent to order such bifurcation as it considers appropriate for the fair, efficient and effective conduct of the proceedings. Such competence resides, *inter alia*, in Article 44 of the ICSID Convention, which in turn reflects a tribunal's inherent case-management competence in respect of the conduct of the proceedings of which it is seised.

17. In turning to the issues before it, the Tribunal emphasises that its consideration of the merits of the Respondent's application is not driven in any way by a view of the substance of the quantum evidence filed with the Claimants' Memorial. An evaluation of the substance of that evidence, and the submissions advanced on the basis thereof, will have to await any finding of liability that the Tribunal may reach and, in such eventuality, the Parties' fully pleaded quantum submissions. That the Claimants filed quantum evidence along with their Memorial, prior to determination of the question of the bifurcation of the damages phase, reflects the fact that the Claimants' first round written case was fully prepared and finalised prior to the First Session and the Claimants' request that they be permitted to submit evidence and argument on the question of damages in their Memorial, without prejudice to the determination of the question of bifurcation in due course. This appreciation is reflected in Paragraph 15.2 of Procedural Order No. 1.

18. The Tribunal has given careful consideration to the Parties' bifurcation submissions. While it has also had careful regard to the caselaw cited by the Parties in those submissions, it is not immediately assisted by it. The Claimants' "compelling reasons" proposition, for

[19] Bifurcation Reply, paragraph 32. *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Procedural Order No. 8, 22 April 2014.

example, which draws on the decision in *Siag v. Egypt*, addresses circumstances in which, in the *Siag* tribunal's words, "it was previously agreed that the merits case be heard as a whole, and a timetable had been directed to give effect to that agreement."[20] This is not the circumstance in this case. The Tribunal also notes that, while damages bifurcation may not be the norm in ICSID arbitral proceedings, there is nothing in either the ICSID Convention or the ICSID Arbitration Rules that precludes such an approach, this being a matter that is left for determination by the tribunal, in the absence of agreement by the parties.

19. In the present case, the Tribunal sought the Parties' views on the issue of damages bifurcation at the start of the proceedings, in the First Session, prior to sight of the Claimants' Memorial, for the reasons expressed by the presiding arbitrator, as set out in paragraph 1 above. While the members of the Tribunal had not formed a concluded view on the matter in advance of the Parties' written bifurcation submissions, the individual experience of the members of Tribunal in other investment proceedings – a point addressed in the First Session – is that quantum evidence seldom survives a liability finding intact. Parties typically instruct their quantum experts to prepare their quantum reports on the basis of assumptions that reflect the position they intend to advance on liability. For understandable but nonetheless (to a tribunal) frustrating reasons – as respondents are usually unwilling to proceed, in their quantum submissions, on the basis of a "counterfactual" in which the claimant succeeds on liability – a respondent's quantum evidence is frequently limited to challenging the methodology and conclusions of the claimant's quantum evidence, rather than advancing an alternative valuation aimed at assisting the tribunal's quantum evaluation.

20. This said, there are also cases in which quantum evidence will be an essential component of a party's case at the liability phase. The clearest example of this will be in circumstances in which a claimant contends the breach of a non-expropriation provision of an investment

[20] *Saig v. Egypt*, *op.cit.*, note 12, at paragraph 17 of the tribunal's Procedural Order No. 3.

treaty on the basis of the inadequate offer or payment of compensation. In such a case, the claimant's valuation evidence is likely to go to the core of the claimant's liability case.

21. In circumstances in which the issues are less clearcut, however, the Tribunal considers that, in the absence of an affirmative rule of procedure governing the matter, the issue of whether or not to bifurcate the liability and damages phases of a case is a case-management decision for tribunals to assess and address on a case-by-case basis having regard to the issues of which they are seised. While a tribunal will, in this task, be influenced by timing and costs considerations – as was the case, for example, in *Gavazzi v. Romania* and *Lao Holdings v. Lao People's Democratic Republic*, two of the cases prominently cited by the Respondent – such considerations will not always be amenable to ready assessment at an early stage in the proceedings. Also material, therefore, will be the tribunal's perception of the efficiency of the proceedings going forward and the utility of experts reports on quantum in due course in the face of a tribunal finding on liability.

22. In the present case, the Tribunal has sight of the Claimants' expert report on quantum prepared by Dr Richard Hern of NERA UK Ltd. Emphasising that it has not formed, and does not express, a view on the substance of that report, or the submissions advanced on the basis thereof, the Tribunal notes that the expert report is framed by detailed instructions provided to Dr Hern by Claimants' counsel, which Dr Hern sets out in the opening paragraphs of his report as follows:[21]

> "9. In preparing this expert report, I have been instructed by Squire Patton Boggs ('Counsel') on behalf of the Claimants to:
>
> A. Estimate the reduction in the fair market value (FMV) of the Claimants' interest in Obnova (i.e., losses to the Claimants) as a result of the adoption of the 2013 DRP, using the date of the award as the valuation date. For practical purposes, I have been instructed to use the date of 31 December 2022 as a proxy for the valuation

[21] Expert Report of Dr Richard Hern, 31 March 2023, paragraphs 9 – 11.

date in this report. This is in line with the cut-off date for the available inputs into my valuation.

B. I have been further instructed to carry forward the Claimants' losses from the valuation date of 31 December 2022 to the date of this report 31 March 2023, using two alternative approaches: i) applying an interest rate in accordance with the Serbian Law on Default Interest ("Serbian LDI"), with simple interest calculated based on the key interest rate of the European Central Bank (ECB) for main refinancing operations plus eight percentage points; and ii) apply an interest rate equal to Euribor plus two percentage points per annum, compounded semi-annually.

10. In my calculations of the Claimants' losses, I have been further instructed to:

A. Present two scenarios for calculating losses:

i. one which assumes that as of 31 December 2022, Obnova had full ownership rights to the buildings and land at Dunavska 17-19 and 23; and

ii. a second one which assumes that as of 31 December 2022, Obnova had full ownership rights to the buildings at Dunavska 17-19 and 23 and a right of use over the land at Dunavska 17-19 and 23.

B. Assume that the Claimants' interest in the equity of Obnova is 70 per cent for the Cypriot Claimants and 10 per cent for Mr Broshko.

C. Present my estimate of the Claimants' losses on a post-tax basis, taking into account the applicable taxes.

11. Counsel has also provided to me additional instructions relevant for the calculation of the Claimants' losses."

23. In their submissions on bifurcation, the Claimants address why, in their contention, the assumptions in Dr Hern's report do not give rise to undue complexity. The Respondent contests this. It is not for the Tribunal to reach a view on this difference at this stage. What

is of concern to the Tribunal, however, is that, absent damages bifurcation, there is every likelihood that the Claimants' instructions to their quantum expert would be matched by different instructions to the Respondent's expert/s and that in due course, following two rounds of written expert evidence on quantum, there is an elevated likelihood that the expert evidence presented to the Tribunal, before liability has even been addressed, will be less focused and useful than the Tribunal might otherwise wish.

24. The Tribunal notes, further, that the Claimants' case is not an expropriation case about the *adequacy* of compensation paid – an issue that would require addressing quantum as part of the liability assessment – but goes rather to the requirement to compensate at all. The Claimants also advance a range of other allegations, including fair and equitable treatment, unreasonable discrimination and umbrella clause breaches, in respect of which an assessment of liability may have a bearing on the quantification of damages that may be warranted.

25. Having regard to these factors, the Tribunal considers that the efficiency of the proceedings would be aided, in case-management terms, by the bifurcation of the liability and the damages phases of the proceedings. While the Tribunal does not exclude the possibility that bifurcation could increase the length of the proceedings, it does not consider that this would necessarily have a negative bearing on the overall costs of the case. Indeed, were the Tribunal to find against the Claimants in due course on jurisdiction and/or merits, whether in whole or in part, damages bifurcation may well lead to overall costs savings. The Tribunal also considers that any extension of the proceedings in consequence of bifurcation would be offset by a countervailing efficiency of focus in the quantum evidence and argument that would be submitted to the Tribunal for purposes of its damages assessment.

26. The Tribunal appreciates that the assessment just expressed may be readily amenable to adoption by any investment tribunal faced with a damages bifurcation decision at the outset of its proceedings. The Tribunal emphasises, however, that, in its view, questions of

bifurcation, in the absence of a controlling procedural rule or the agreement of the parties, must necessarily be case-management decisions that turn on the individual circumstances of each case – the allegations advanced, the complexity of the claims, considerations of timing and cost efficiencies, the point at which the question of bifurcation arises for decision, considerations of fairness between the parties, etc. The Tribunal's decision in this case is thus driven by the Tribunal's appreciation of the appropriate case-management balance in this case. The Tribunal does not purport to express a principle of general application.

IV. Decision

27. Having regard to the preceding, the Tribunal decides that the liability and damages phases of the present case should be bifurcated with the (alternative schedule 3) procedural timetable laid down in Procedural Order No. 2 being applicable to the determination of questions of jurisdiction, if any, and liability only. In the event of a finding of liability, the Tribunal will consult with the Parties for purposes of laying down an appropriate expedited procedure for the determination of damages, such procedure to include, on the application of the Claimants, a revised expert report by the Claimants' quantum expert or an addendum to the expert report already filed.

On behalf of the Tribunal,

[signed]
Sir Daniel Bethlehem KC
President of the Tribunal

Date: 21 August 2023