

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES AND UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

CHINA MACHINERY ENGINEERING CORPORATION

CLAIMANT

AND

THE REPUBLIC OF TRINIDAD AND TOBAGO

RESPONDENT

**CLAIMANT'S WRITTEN SUBMISSIONS ON
REQUEST FOR BIFURCATION OF DAMAGES**

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**C L I F F O R D
C H A N C E**

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A. BRIEF BACKGROUND

A.1 Factual Background

1. On 27 March 2023, China Machinery Engineering Corporation (**CMEC** or **Claimant**) submitted its Request for Arbitration against the Republic of Trinidad and Tobago (**Trinidad and Tobago** or **Respondent**) to the International Centre for Settlement of Investment Disputes (**ICSID**). The underlying dispute between the Parties concerns an abandoned 125,000 metric-tonne-per-year aluminium smelter complex located in La Brea, Trinidad and Tobago (**Project**), in respect of which CMEC performed engineering, procurement and construction works as contractor.
2. In essence, and as detailed in the Request for Arbitration, CMEC's claim relates to the Respondent's (a) wrongful shut-down of the Project in 2012, and (b) failure to pay any compensation to CMEC in connection with or following the termination of the Project despite its repeated assurances to do so. In conducting itself in this way, the Respondent has breached multiple obligations toward CMEC under the *Agreement between the Government of the Republic of Trinidad and Tobago and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments (BIT)*.
3. Four key breaches of the BIT by Trinidad and Tobago form the core of CMEC's case either alternatively or cumulatively:¹
 - 3.1 unlawful expropriation in breach of Article 6 of the BIT;
 - 3.2 failure to accord fair and equitable treatment in breach of Article 3(2) of the BIT;
 - 3.3 failure to observe the non-impairment obligation under Article 3(3) of the BIT; and
 - 3.4 failure to observe the umbrella clause under Article 13(2) of the BIT.
4. In relation to the compensation sought, CMEC estimates that the losses it has sustained as a result of these breaches amount to over US \$300 million.² Having invested in the Project since 2005, the heads of loss that make up CMEC's total claimed amount are multiple and complex, including, non-exhaustively, the following:³
 - 4.1 value of various works completed, a substantial portion of which concerns the design and engineering of the Project as documented in voluminous⁴ technical literature, proprietary drawings, and other design documents;
 - 4.2 value of equipment and materials delivered to the construction site;

¹ Request for Arbitration, Section E. CMEC reserves the right to amend, supplement, and/or expand its claims in the Memorial.

² Request for Arbitration, para. 70.

³ See **C-0035**, Letter from J. Duo to C. Murray (with attachments) dated 17 May 2013 (CMEC's submission of consolidated final claim in respect of the Project).

⁴ In multiple thousands.

- 4.3 downtime costs;
 - 4.4 site maintenance costs;
 - 4.5 demobilisation and associated costs;
 - 4.6 overhead costs;
 - 4.7 loss of profit;
 - 4.8 loss on the exchange rate; and
 - 4.9 overdue interest.
5. As is evident, the assessment of damages in this case would be a time-consuming and complicated endeavour as it covers various costs of different types over a very extended period of time (incurred prior to, upon, and after the termination of the Project), involves many technical, economic, and financial aspects, and will be informed by the Tribunal's decision on liability and related findings.

A.2 Procedural Background

6. On 10 January 2024, the Tribunal was constituted. On 29 January 2024, the Secretary of the Tribunal circulated the draft Procedural Order No. 1 for the Parties' comments.
7. In connection with the preparation of Procedural Order No. 1, relevantly:
- 7.1 Both Parties accept that the conduct of this arbitration is governed by the ICSID Arbitration Rules in force as of 1 July 2022,⁵ which contain specific procedures regarding bifurcation.
 - 7.2 The Respondent notified pursuant to ICSID Arbitration Rule 43 its intended preliminary objections and confirmed that it will not request bifurcation of any preliminary objections.⁶ The Claimant had no objection to this approach.
 - 7.3 The Claimant requested pursuant to ICSID Arbitration Rule 42 that the determination of damages be bifurcated and addressed in a separate phase of the proceeding to take place subsequent to the Tribunal's decision on jurisdiction and liability. The request was opposed by the Respondent.⁷
8. In accordance with the time limits fixed by the Tribunal pursuant to ICSID Arbitration Rule 42(3)(c), CMEC now submits these written submissions in support of its request for bifurcation of damages.

⁵ **C-0059**, Draft Procedural Order No. 1 (with party comments) dated 22 March 2024, para. 1.1.

⁶ *Id.* paras. 28.1-28.2.

⁷ *Id.* paras. 27.1-27.2.

A.3 Overview of Claimant's Written Submissions

9. As will be elaborated below, CMEC's request should be granted as it will promote the overall procedural efficiency, economy, and fairness in this arbitration. The economic and efficiency benefits of the requested bifurcation include not least the following:
 - 9.1 bifurcation of damages, if granted, would materially shorten and accelerate the briefing schedule in the jurisdiction and liability phase;⁸
 - 9.2 a determination on liability in favour of the Claimant will allow an opportunity, and create an impetus, for the Parties to discuss and possibly agree compensation without an expensive second phase;
 - 9.3 a determination on liability prior to drafting submissions on damages and instructing quantum and/or other specialist experts will enhance the ability of the Parties to focus those submissions and that evidence on the real issues in dispute (and avoid assumptions underlying submissions and expert reports that do not coincide with the conclusions in relation to liability and related factual findings), thereby saving unnecessary arguments, expenses and associated delay; and
 - 9.4 as issues of jurisdiction and liability will be heard and decided together in accordance with the Parties' agreement, there is no potential risk that this case will be trifurcated.
10. The Claimant recognises that it is typically the respondent which seeks bifurcation. It is surprising that the Respondent in this arbitration has rejected the offer to defer damages and instead insists on both Parties incurring costs presenting and debating their cases on damages before jurisdiction and liability have been decided. The Respondent is being perverse, seeking some tactical advantage, rather than having regard to economy and efficiency, as further explained in paragraphs 19 to 24 below.
11. The remaining sections of these submissions are organised in the following manner:
 - 11.1 **Section B** highlights some general observations on the ICSID jurisprudence in relation to bifurcation of damages and some distinct features of the present case that warrant the bifurcation;
 - 11.2 **Section C** proceeds to specifically address the relevant circumstances identified in ICSID Arbitration Rule 42(4) and some past ICSID decisions, in light of the particular facts of this case; and
 - 11.3 **Section D** concludes CMEC's submissions on bifurcation.

B. GENERAL OBSERVATIONS ON BIFURCATION OF DAMAGES

12. Bifurcation is by no means a rarity. As ICSID's data show, 115 decisions on bifurcation have been rendered from 2000 to 2017. Such widespread acceptance of bifurcation within the ICSID system is reflected in the 2022 edition of the ICSID Arbitration

⁸ This is agreed in principle between the Parties: **C-0059**, Draft Procedural Order No. 1 (with party comments) dated 22 March 2024, p. 24 (joint note to Annex B).

Rules.⁹ In particular, the newly introduced Rule 42 (in addition to Rule 44 which addresses bifurcation between jurisdiction and merits) codifies the existing ICSID practice on other forms of bifurcation and expressly permits the Tribunal to decide on a request for bifurcation in its discretion after considering all relevant circumstances.¹⁰

13. Compared to bifurcation between jurisdiction and merits which has been attracting increased scepticism about its influence on procedural economy, bifurcation between liability and quantum is often seen as desirable since quantification tends to be a lengthy, technical, and costly exercise for the parties, more often than not requiring substantial involvement of experts in compiling reports and providing oral testimony.¹¹ It would be more expedient and less expensive to resolve issues of liability first, thereby potentially avoiding the need to incur time and costs on quantum issues that the tribunal determines in the merits phase to be irrelevant. This is all the more so when the underlying disputes have to do with construction – as is the case here – because quantification of damages in such disputes can be a "*major exercise*".¹²
14. Recently, the ICSID tribunal in *Coropi v. Serbia*¹³ provided helpful guidance and practical observations on the bifurcation of damages. This case is instructive to the Tribunal's decision on CMEC's request, not least because (a) it is one of the few public decisions that elaborated at length the tribunal's reasoning on damages bifurcation, and (b) as will be demonstrated below, there are apparent similarities between the legal and factual circumstances of both cases that warrant the taking of the same or similar approach to bifurcation.
15. The *Coropi* tribunal sought the parties' views on the question of whether to bifurcate the liability and damages phases at the start of its proceedings¹⁴ and afterwards granted Serbia's request for such bifurcation "*for efficient case management reasons*".¹⁵ The following excerpts from its decision are particularly relevant (with emphases added):

⁹ **CL-0004**, C. Esteban, *Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy*, in S. Brekoulakis (ed.), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Vol. 87 (2021) Issue 1), p. 6 (citing ICSID Working Paper 1 (2 August 2018) in relation to the Proposals for Amendment of the ICSID Rules).

¹⁰ **CL-0005**, S. Koh and A. Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures [Rules 41-49]*, in R. Happ and S. Wilske (eds.), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (2022), Rule 42 Bifurcation, paras. 5-7 (History of the Rule).

¹¹ **CL-0006**, B. Vasani and S. Vasani, *Bifurcation of Investment Disputes*, in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn., 2021), para. 12.14.

¹² **CL-0004**, C. Esteban, *Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy*, in S. Brekoulakis (ed.), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Vol. 87 (2021) Issue 1), pp. 14-15 (citing Redfern and Hunter).

¹³ **CL-0007**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 4 (Bifurcation of Liability and Damages Phases), 21 August 2023. Note that this proceeding is conducted in accordance with the 2006 ICSID Arbitration Rules.

¹⁴ *Id.* paras. 1 and 19.

¹⁵ *Id.* para. 6.

Para. 1 (citing the tribunal's comments during the first 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 [...]"

Para. 19: "[T]he 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."

Para. 23: "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."

Para. 25: "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.**"

16. The *Coropi* tribunal commented that it appreciated that its assessment might be "*readily amenable to adoption*" by any investment tribunal faced with a damages bifurcation decision at the outset of its proceedings, but went on to emphasise that questions of bifurcation would come down to "*case-management decisions that turn on the*

individual circumstances of each case".¹⁶ Notably, the key factors that shaped the *Coropi* tribunal's appreciation of the "*appropriate case-management balance in [that] case*"¹⁷ – as is consistent with other prior ICSID tribunals' approach to bifurcation¹⁸ – related to circumstances in which (a) the claimants' case on expropriation did not concern the adequacy of the compensation paid but rather the requirement to compensate at all (quantum/ valuation evidence was therefore not an essential component in the liability phase); and that (b) the claimants also advanced a range of other allegations of treaty breaches "*in respect of which an assessment of liability may have a bearing on the quantification of damages that may be warranted*".¹⁹

17. Much the same applies to the present case. As shown in the summary table below, the circumstances of the two cases are similar and comparable for the purposes of assessing damages bifurcation (only that CMEC's case is even larger in amount and much more complex). In particular, CMEC's claims likewise involve multiple treaty breaches based on multiple State acts, leading to diverse variables of liability scenarios. The resulting impact on the time and cost of the arbitration will be further discussed in **Section C** against the relevant circumstances under ICSID Arbitration Rule 42(4).

	<i>Coropi v. Serbia</i>	<i>CMEC v. Trinidad and Tobago</i>
Measures at issue	Centred on two²⁰ • The State's adoption of "2013 DRP" that designated the claimants' invested premises for use of traffic infrastructure	Centres on two (see paragraph 2 above) • The State's termination of the Project in respect of which CMEC invested as contractor

¹⁶ *Id.* para. 26.

¹⁷ *Ibid.*

¹⁸ See, e.g., **CL-0008**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, para. 6 (the tribunal re-made its decision to postpone the damages phase in view of "*the possibility that the Tribunal's decisions as to the jurisdictional or liability issues may directly impact issues as to damages*"); **CL-0009**, *Peteris Pildegovics and Sia North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Procedural Order No. 5 (Decision on Respondent's Renewed Request for Bifurcation), 6 December 2021, para. 22 (the tribunal granted the respondent's request to bifurcate damages, noting the crucial consideration is that "*the range of possible outcomes*" of the conclusions in relation to liability could potentially "*make a very substantial difference to the way in which the issue of quantum would have to be approached*"); **CL-0010**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation), 17 January 2020, para. 35 (the tribunal in granting the respondent's request to bifurcate jurisdiction commented in relation to potential subsequent bifurcation between liability and damages that "*sufficient efficiencies*" might be gained from it "*in cases where challenges are brought to multiple different government acts, and the quantum analysis may differ depending on which (if any) acts eventually are found to violate which (if any) treaty articles*").

¹⁹ **CL-0007**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 4 (Bifurcation of Liability and Damages Phases), 21 August 2023, para. 24.

²⁰ **CL-0007**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 4 (Bifurcation of Liability and Damages Phases), 21 August 2023, para. 13. See also **CL-0011**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Claimant's Memorial, 31 March 2023, paras. 126-129

	• The State's express refusal to pay <u>any</u> compensation to the claimants after the measures	• The State's failure to pay <u>any</u> compensation to CMEC in connection with or following the termination despite assurances to do so
Treaty breaches at issue	Four²¹ • Expropriation • Denial of fair and equitable treatment • Unreasonable discrimination • Breach of umbrella clause	Four (see paragraph 3 above) • Expropriation • Denial of fair and equitable treatment • Impairment by unreasonable or discriminatory measures • Breach of umbrella clause
Losses claimed	Over EU €30 million²² Consisted of more than six heads of loss²³	Over US \$300 million Consists of more than nine heads of loss (see paragraph 4 above)

18. It also bears noting that the *Coropi* tribunal's observations on damages being oftentimes incapable of being addressed with proper focus and finality in non-bifurcated investment proceedings – which ends up causing greater delay, inefficiency, and wasted costs – are corroborated by a host of cases involving tribunals that in effect bifurcated arbitrations (years after the commencement of the proceedings) by issuing decisions on jurisdiction and/or liability that stop short of assessing damages and explain that a separate quantum phase will follow, even though such a phase was not previously scheduled or sought by the parties. By way of some examples:

18.1 In *Suez v. Argentina*, after "*lengthy hearings and voluminous pleadings*" where the parties extensively argued damages with the assistance of financial specialists who prepared extensive reports and testified at the merits hearing, the tribunal decided to first issue a decision on liability and thereafter create a separate procedural phase devoted to damages given the "*complexity involved in ascertaining damages*" and the parties' "*widely differing conclusions*".²⁴ In this separate damages phase, the tribunal appointed its own independent expert and directed the parties to submit additional pleadings and documentation with respect to damages, as well as revise their original pleadings to take into account

²¹ **CL-0007**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 4 (Bifurcation of Liability and Damages Phases), 21 August 2023, paras. 11(a) and 24.

²² **CL-0011**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Claimant's Memorial, 31 March 2023, paras. 406.c and 406.d.

²³ **CL-0007**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 4 (Bifurcation of Liability and Damages Phases), 21 August 2023, para. 11(a).

²⁴ **CL-0012**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 April 2015, paras. 6-7.

the tribunal's finding that Argentina had violated one treaty standard out of the three alleged by the claimants.²⁵ It culminated in an extra quantum hearing.²⁶

- 18.2 In *Total v. Argentina*, the tribunal likewise deferred the determination of damages to a further quantum phase after issuing the decision on liability²⁷ because "*the calculations submitted by [the claimant] regarding quantum are based on different premises for Argentina's liability*"²⁸ (i.e. the ambit and basis of the breach found by the tribunal were different from those originally assumed by the claimant).
- 18.3 In *Infracapital v. Spain* (and a series of other cases involving claims of Spain's breaches of the Energy Charter Treaty due to regulatory changes in its renewable energy sector²⁹), the tribunal stated that it was unprepared to conclude the task of determining damages after it found against Spain on some of the claims of breach, "*despite the efforts of both the experts to provide relevant information*".³⁰ As a way forward, the tribunal directed "*in the spirit of efficiency*"³¹ that the parties attempt to reach an agreement on the amount of compensation due from Spain within three months of its decision on liability, failing which the tribunal would fix a briefing schedule for further damages submissions.³²
19. Relatedly, another notable point in the present case is the somewhat unusual attitude of the Respondent towards bifurcation. In the vast majority of investment arbitrations, it is the respondents who file a request for bifurcation, be it to separate jurisdiction from the merits, to separate liability and damages, or both. Respondents prefer such approach because they hope to defeat the claimants' case on jurisdiction or liability and therefore render moot the need to quantify damages. In contrast, claimants typically oppose a request for bifurcation, because, confident of succeeding on the claims, bifurcation will delay payment of compensation.
20. What has occurred in these proceedings is however the opposite of the typical scenario – the Respondent opposes the Claimant's request to defer the damages phase.
21. On the basis of the Respondent's approach to bifurcation, it would be reasonable to assume that the Respondent well appreciates that its arguments on jurisdiction and liability lack strength and its best prospects lie instead on disputing the Claimant's

²⁵ *Id.* para. 13.

²⁶ *Id.* para. 17.

²⁷ **CL-0013**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 485.d).

²⁸ *Id.* para. 182.

²⁹ See the partial list summarised in **CL-0014**, *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, fn. 1000.

³⁰ **CL-0014**, *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para. 806.

³¹ *Id.* para. 807.

³² *Id.* paras. 822(7)-(10).

quantification of damages. This is evident from the Respondent's notification of its (limited) preliminary objections, where it asserts, albeit plainly irrelevant to jurisdiction, that the Claimant's "*quantified contractual claims*" are "*grossly exaggerated*" and "*plainly unsupported as presented*".³³

22. Needless to say, CMEC takes issue with such unfounded assertions. Having persistently pursued its claims for over a decade, CMEC is primarily interested in not only succeeding on the merits but also in receiving (thorough and comprehensive) damages to compensate for being kept completely out of its funds for years.
23. Issues of damages are therefore foreseeably a main area of contention in this arbitration. This militates in favour of dedicating a separate phase to damages where the Parties are required to focus solely on quantum issues.³⁴ Further, without a prior Tribunal determination on the ambit and basis of the Respondent's breach(es), there is every likelihood that – as flagged in past ICSID cases – the conclusions (or parts thereof) of each Party's quantum experts may ultimately be of limited assistance to the Tribunal.
24. All these circumstances warrant dividing this arbitration into two phases that sequentially deal first with issues of jurisdiction and liability and thereafter address issues relating to damages. It will streamline the arbitration process, make avenue for fully-fledged damages submissions, yet avoid unnecessary, premature, and/or wasted works, thereby reducing costs for all. The Respondent will not suffer any prejudice by bifurcation, as it will still have more than ample opportunity to present its case or refute CMEC's case on damages in the second phase of the arbitration, if necessary.

C. SPECIFIC RELEVANT CIRCUMSTANCES

25. Further to the general observations above, CMEC adds in this section further comments specific to the relevant circumstances listed in ICSID Arbitration Rule 42(4) (and some past ICSID decisions). ICSID's list in Rule 42(4) is non-exhaustive, thus preserving the discretion afforded to earlier ICSID tribunals in making bifurcation decisions.³⁵

C.1 Relevant Circumstances under ICSID Arbitration Rule 42(4)

(a) Overall procedural efficiency and economy (Rule 42(4)(a))

26. Rule 42(4)(a), which focuses on the effect of bifurcation on the time and cost of the arbitration, is the "*overarching factor*" in determining whether to order bifurcation.³⁶ The other relevant circumstances in Rules 42(4)(b) and 42(4)(c) can be distilled as

³³ **C-0059**, Draft Procedural Order No. 1 (with party comments) dated 22 March 2024, para. 28.1.2(c).

³⁴ **CL-0004**, C. Esteban, *Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy*, in S. Brekoulakis (ed.), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Vol. 87 (2021) Issue 1), p. 15 (citing Carlson and Childress, who noted the need to "*ensure that Parties have sufficient opportunity to develop their damages theories*").

³⁵ **CL-0005**, S. Koh and A. Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures [Rules 41-49]*, in R. Happ and S. Wilske (eds.), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (2022), Rule 42 Bifurcation, para. 20.

³⁶ *Id.* Rule 42 Bifurcation, para. 21.

forming aspects in the assessment of procedural efficiency and economy.³⁷

27. Bifurcating damages will likely materially reduce the time and cost of the arbitration in view of the following:

First phase: Expedited procedure on jurisdiction and liability; avoidance of premature, unnecessary or unduly complex work on damages

- 27.1 It is obvious that the arbitration will proceed much more quickly and be less costly in the first phase on jurisdiction and liability if damages are bifurcated: resulting not only from the shortened time required to prepare written submissions and supporting documents and a shorter hearing,³⁸ but also from the reduction of the complexity and therefore the length of the deliberations and drafting of the Tribunal's more limited decision.³⁹

- 27.2 The Parties are also spared from prematurely incurring significant costs in relation to work on damages, especially considering that quantification of damages can be particularly complex and costly in this case:

27.2.1 quantification of damages in construction disputes (in this case, relating to the engineering, procurement and construction of an aluminium smelter complex in Trinidad and Tobago) itself tends to be more time- and cost-consuming than other types of disputes, and often implicates the substantial involvement of specialist experts reviewing a large variety and number of documents and assessing highly technical matters;⁴⁰ and

27.2.2 as damages may differ from claim to claim or overlap in complex ways across claims,⁴¹ there will be a significant number of alternative damages scenarios based on different liability theories and valuation methodologies. It will be unduly burdensome if not impossible for the Parties to address every such possibility (further discussed in subsection (b) below).

³⁷ **CL-0005**, S. Koh and A. Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures [Rules 41-49]*, in R. Happ and S. Wilske (eds.), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (2022), Rule 42 Bifurcation, paras. 26-27. See also **CL-0004**, C. Esteban, *Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy*, in S. Brekoulakis (ed.), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Vol. 87 (2021) Issue 1), p. 17.

³⁸ **CL-0015**, *Marvo Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Procedural Order No. 2, 13 September 2013, para. 11.

³⁹ **CL-0016**, *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, para. 25.

⁴⁰ *Supra* paragraph 13. See also **CL-0004**, C. Esteban, *Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy*, in S. Brekoulakis (ed.), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Vol. 87 (2021) Issue 1), pp. 14-15 (citing Redfern and Hunter).

⁴¹ See, e.g., **CL-0017**, M. Kinnear, *Damages in Investment Treaty Arbitration*, in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (1st edn., 2010), pp. 557, 571.

Between the phases: Potential window for early settlement

- 27.3 After the Tribunal issues the decision on jurisdiction and liability, it will conceivably create an impetus for the Parties, in light of the Tribunal's findings, to resolve the remaining dispute directly.⁴² The Parties might be able to agree quantum, or agree a procedure for determining quantum that is more efficient and inexpensive than arbitrating a damages phase, or at least try and narrow the scope of their differences (for example, by developing a joint list of expert issues and/or joint instructions to experts).

Second phase: Efficiency of focus in the damages arguments and evidence

- 27.4 If the Parties fail to settle, the arbitration will proceed to a second phase on damages. It is conceivable that the Tribunal will in consultation with the Parties lay down an appropriate and shorter procedure for the determination of damages as the findings in relation to liability will allow more precise debate (and more concise evidence) on quantum on the basis of established breach and related facts.⁴³

Overall time- and cost-saving effect as compared to non-bifurcated proceedings

- 27.5 Overall, given that (a) there is no obvious overlap between issues of jurisdiction and liability and those of damages (further discussed in sub-section (c) below) such that no material time-savings can be gained from hearing all issues together, and that (b) bifurcation will serve to reduce the scope, complexity and therefore duration of both phases (as discussed above), it will streamline and likely expedite the entire proceeding.
- 27.6 Bifurcation will also likely achieve meaningful and substantial cost-savings by virtue of the avoidance of unnecessary, premature, and/or wasted work and expenditure on damages submissions and related factual and/or expert evidence, and the potential shortened total length of the proceeding. Relatedly, there will also be significant improvement in terms of costs effectiveness and resources optimisation (e.g. more precise quantum arguments and more useful supporting evidence).
- 27.7 In contrast, addressing damages simultaneously with – and before the Tribunal's findings on – issues of liability may well prolong and complicate the proceeding in the circumstances of the case. This is mainly because there is a wide range of possible damages scenarios depending on the Tribunal's findings on parts of the liability case. In the likely event that the Parties proceeded on basis different from the Tribunal's liability finding, it may result in the Tribunal remitting the matter back to the Parties for additional and/or revised submissions and

⁴² **CL-0016**, *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, para. 25. See also **CL-0014**, *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 (as discussed in paragraph 18.3 above).

⁴³ **CL-0016**, *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, para. 25; **CL-0007**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 4 (Bifurcation of Liability and Damages Phases), 21 August 2023, para. 27.

evidence on damages (i.e. *de facto* bifurcation after a much longer and counter-productive first phase).

- 27.8 For completeness, in the unlikely event that CMEC's case is defeated entirely on jurisdiction and/or liability, both Parties could save significant time and costs in relation to issues of damages.

(b) Reduction of the scope, complexity, and duration of the damages phase (Rule 42(4)(b))

28. While CMEC does not believe that the Respondent's defence on jurisdiction or liability has any potential of disposing of its entire case, it is reasonably foreseeable that a fully-fledged phase on liability will meaningfully define the scope of the investigations with respect to the determination of damages and reduce the scope or complexity of the relevant analysis and evidential record.
29. Postponing damages until after determination of liability will therefore save the Parties (and the Tribunal) from expending unnecessary time and resources and dealing with unnecessary complexity. This is especially considering that the factual and/or expert evidence on damages will be relatively independent from the issues of liability, yet will entail considerable financial and logistical burdens for the Parties if required prematurely.
30. It is helpful to borrow the words of the ICSID tribunal in *Pildegovics v. Norway* to conclude this point:

"For the purposes of deciding on the present request, the Tribunal considers that what matters most is the range of possible outcomes in which the Claimants' case is defeated only in part. Those outcomes have the potential to make a very substantial difference to the way in which the issue of quantum would have to be approached. That raises the possibility that either each of these different possibilities will have to be debated by the Parties, so that argument on quantum would have to cover a significant number of different permutations, or that the Tribunal, having reached its conclusion on jurisdiction and merits, might have to revert to the Parties for further argument and perhaps seek additional evidence and expert testimony. That consideration argues in favour of a decision to hive the quantum issues off to a second stage of the proceedings (if such a stage is necessary) and not to have them considered at a single hearing on jurisdiction, merits and quantum."⁴⁴

(c) Distinction of issues of jurisdiction and liability on the one hand and issues of damages on the other (Rule 42(4)(c))

31. It is not conceivable how issues relating to the damages to which CMEC is entitled will impact the Tribunal's jurisdiction over CMEC's claims (which is not contingent on any monetary threshold).

⁴⁴ **CL-0009**, *Peteris Pildegovics and Sia North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Procedural Order No. 5 (Decision on Respondent's Renewed Request for Bifurcation), 6 December 2021, para. 22.

32. As to issues between liability and damages, there is no obvious overlap between either their legal arguments or the supporting factual evidence.
33. As already highlighted in paragraphs 16-17 above, CMEC's case on expropriation (that the Respondent failed to pay any compensation to CMEC in connection with or following the termination of the Project thereby effectively expropriating CMEC's investment⁴⁵) – in this respect all similar to the *Coropi* case – is not about the adequacy of the compensation paid but rather the requirement to compensate at all. It therefore does not require addressing quantum as part of the liability assessment. Issues are not intertwined but separate.

C.2 Other Relevant Circumstances Considered in Case Law

34. Lastly, we briefly address some other relevant circumstances discussed in past ICSID decisions (including the point of time at which a request for bifurcation arises for decision and the consideration of fairness between the parties), and where necessary, distinguishing those decisions from CMEC's case.
35. Where a party raises the request for damages bifurcation relatively late in the proceedings, and/or contrary to the prior agreement reached at the first session in relation to the procedural timetable, tribunals tend to be more cautious and may require "*compelling reasons*" to justify the request.⁴⁶ This is particularly so if there is already a separate phase on jurisdiction, and thus bifurcating the merits phase into liability and damages would in reality be trifurcation.⁴⁷ But CMEC's case is nothing like it. Here, CMEC timely raises the request for bifurcation at the outset of the arbitration, and there is no risk of overly long trifurcated proceedings (in respect of which see paragraph 7 above). The timeliness of the request also adds to the fairness of the proceedings because each Party is given proper advance notice as to when their pleadings are due at each stage and therefore has ample opportunity to plan the preparation of those pleadings.
36. Finally, it has been observed that bifurcation of damages issues, if ordered after a claimant's memorial (and accompanying quantum evidence), will result in (unfair) one-sided saving for the respondent.⁴⁸ The imbalance is to be avoided where possible. An early decision should be made to avoid unnecessary expenses for both parties.

⁴⁵ Request for Arbitration, paras. 89-91.

⁴⁶ **CL-0018**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 116. This case is also discussed and distinguished by the *Coropi* tribunal in **CL-0007**, *Coropi Holdings Limited et al. v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 4 (Bifurcation of Liability and Damages Phases), 21 August 2023, para. 18.

⁴⁷ **CL-0019**, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 8, 22 April 2014, para. 15.

⁴⁸ **CL-0009**, *Peteris Pildegovics and Sia North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Procedural Order No. 5 (Decision on Respondent's Renewed Request for Bifurcation), 6 December 2021, para. 25.

D. CONCLUSION

37. For all aforesaid reasons, CMEC respectfully requests that the Tribunal grant its request to address damages in a separate phase of the proceeding.

Clifford Chance

Audley Sheppard KC

Shi Lei

Romesh Weeramantry

Rodolphe Ruffié-Farrugia

Hazel He

LIST OF EXHIBITS

Exhibit No	Description
C-0035	Letter from J. Duo to C. Murray (with attachments) dated 17 May 2013
C-0059	Draft Procedural Order No. 1 (with party comments) dated 22 March 2024
CL-0004	C. Esteban, <i>Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy</i> , in S. Brekoulakis (ed.), <i>Arbitration: The International Journal of Arbitration, Mediation and Dispute Management</i> (Vol. 87 (2021) Issue 1)
CL-0005	S. Koh and A. Yeo, <i>Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures [Rules 41-49]</i> , in R. Happ and S. Wilske (eds.), <i>ICSID Rules and Regulations 2022: Article-by-Article Commentary</i> (2022)
CL-0006	B. Vasani and S. Vasani, <i>Bifurcation of Investment Disputes</i> , in K. Yannaca-Small (ed.), <i>Arbitration Under International Investment Agreements: A Guide to the Key Issues</i> (2nd edn., 2021)
CL-0007	<i>Coropi Holdings Limited et al. v. Republic of Serbia</i> , ICSID Case No. ARB/22/14, Procedural Order No. 4 (Bifurcation of Liability and Damages Phases), 21 August 2023
CL-0008	<i>Apotex Holdings Inc. and Apotex Inc. v. United States of America</i> , ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013
CL-0009	<i>Peteris Pildegovics and Sia North Star v. Kingdom of Norway</i> , ICSID Case No. ARB/20/11, Procedural Order No. 5 (Decision on Respondent's Renewed Request for Bifurcation), 6 December 2021
CL-0010	<i>Gran Colombia Gold Corp. v. Republic of Colombia</i> , ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation), 17 January 2020
CL-0011	<i>Coropi Holdings Limited et al. v. Republic of Serbia</i> , ICSID Case No. ARB/22/14, Claimant's Memorial, 31 March 2023
CL-0012	<i>Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/19, Award, 9 April 2015
CL-0013	<i>Total S.A. v. Argentine Republic</i> , ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010
CL-0014	<i>Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain</i> , ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021

Exhibit No	Description
CL-0015	<i>Marvo Gavazzi and Stefano Gavazzi v. Romania</i> , ICSID Case No. ARB/12/25, Procedural Order No. 2, 13 September 2013
CL-0016	<i>Lidercón, S.L. v. Republic of Peru</i> , ICSID Case No. ARB/17/9, Award, 6 March 2020
CL-0017	M. Kinnear, <i>Damages in Investment Treaty Arbitration</i> , in K. Yannaca-Small (ed.), <i>Arbitration Under International Investment Agreements: A Guide to the Key Issues</i> (1st edn., 2010)
CL-0018	<i>Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt</i> , ICSID Case No. ARB/05/15, Award, 1 June 2009
CL-0019	<i>Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia</i> , ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 8, 22 April 2014