

CHINA MACHINERY ENGINEERING CORPORATION Claimant

and

THE REPUBLIC OF TRINIDAD AND TOBAGO Respondent

(ICSID Case No ARB/23/8)

**THE RESPONDENT’S SUBMISSIONS ON THE CLAIMANT’S REQUEST
FOR BIFURCATION OF LIABILITY AND DAMAGES**

1. The Claimant has requested, pursuant to ICSID Arbitration Rule 42, that the question of damages be bifurcated and addressed in a separate phase of the proceeding: see paragraph 27.1 of draft Procedural Order No 1.
2. The Respondent resists the Claimant’s request for bifurcation.
3. The Respondent’s submissions are set out in the following sections:
 - I. Law on bifurcation
 - II. Summary of Respondent’s case on bifurcation
 - III. Liability issues are “intertwined” with damages issues
 - IV. Bifurcation should not be allowed to mask a weak damages claim
 - V. Resolution of damages issues should not involve very substantial evidence or extensive documentation
 - VI. Respondent’s non-bifurcated preliminary objections will require investigation of Claimant’s damages claim in any event
 - VII. Conclusion

I. Law on bifurcation

4. The test for whether bifurcation should be ordered is set out in Rule 42(4) of the ICSID Arbitration Rules:

“(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

- (a) bifurcation would materially reduce the time and cost of the proceeding;
- (b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and
- (c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.”

5. This provision expressly catering for bifurcation was first introduced in the current 2022 Arbitration Rules. In the antecedent 2006 Arbitration Rules there was no such express provision.¹

6. The material engendered in the transition from the 2006 Rules to the 2022 Rules provides some useful pointers as to how the power to bifurcate should be exercised:

- (1) As uniformly held by ICSID case law, there is **no** presumption in favour of bifurcation.²
- (2) Bifurcation should not be ordered automatically because the facts of each case are relevant to determining whether bifurcation is appropriate.³
- (3) The Tribunal retains discretion as to whether to bifurcate depending on the circumstances of each case, after hearing the parties’ views.⁴

¹ Before the ICSID Arbitration Rules 2022 came into effect Tribunals dealt with requests for bifurcation pursuant to the following residual power to decide procedural matters accorded to them by Article 44 of the ICSID Convention: “...If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”

²Working Paper #1 published in August 2018 (“WP1”), p. 188, §393 [R-1].

³WP1, p. 188, §392 [R-1].

⁴WP1, p. 188, §395 [R-1].

- (4) Rule 42(4)(a)-(c) reflects the most widely adopted circumstances but, as stated in the chapeau, they are non-exhaustive.⁵
- (5) One Member State proposed that the word “would” should be replaced by “could” in Rule 42(4)(a) (on the basis that the standard should be that bifurcation is capable of materially reducing time and costs and disposing of the dispute). But this proposal was explicitly dismissed. “[U]nless the questions to be addressed in the separate phase of the proceeding succeed, bifurcated proceedings are, on average, longer and costlier than non-bifurcated proceedings. As a result, it is appropriate for the Tribunal to consider whether bifurcation **would** reduce time and cost.”⁶ (emphasis added).
7. As Rule 42(4)(a)-(c) is meant to reflect the most important criteria previously applied by Tribunals in deciding whether to bifurcate, the ICSID case law which precedes this Rule remains instructive.⁷ However, the carefully chosen wording of the 2022 provisions, in particular the word “would” in Rule 42(4)(a) and (b), needs to be taken into account.
8. Specifically regarding bifurcation of liability and damages, the same is not common and is even rare:
- “bifurcation of the merits phase of an ICSID case into determination of liability and a determination of damages is not common”⁸
 - bifurcation of liability and damages “may not be the norm in ICSID arbitral proceedings”⁹

⁵Working Paper #3 published in August 2019, p. 321, §110 [R-2].

⁶Working Paper #4 published in February 2020, p. 313, §93 [R-3].

⁷ It should be noted that the cases referred to hereunder were decided under the pre-2022 Arbitration Rules.

⁸ **Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi University S.A. v The Argentine Republic (“Suez v Argentina”)** ICSID Case No. ARB/03/19 Decision on Liability (30 July 2010) §273 [RL-1].

⁹ **Coropi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko v. Republic of Serbia (“Coropi v Serbia”)** ICSID Case No. ARB/22/14 Procedural Order No. 4 (Bifurcation of Liability and Quantum Phases) §18 [RL-2].

- also, “requests to bifurcate merits claims are relatively rare”¹⁰
9. This is because the application of the considerations set out in Rule 42(4) normally indicates that bifurcation of liability and damages is inappropriate.
 10. Under Rule 42(4)(c), the Tribunal must consider whether the questions to be addressed in separate phases are so intertwined as to make bifurcation impractical. The case law shows that this factor is of overriding importance.
 11. In **Gavrilović v Croatia**¹¹, the Tribunal held that:

“It must follow, in the Tribunal’s view, that the jurisdictional and admissibility stage, on the one hand, and the merits stage, on the other, will be linked, if not inextricably, at least closely. In this regard, the Tribunal notes that it was accepted by the tribunal in *Mesa Power Group, LLC v. Government of Canada*¹² that the existence of “**closely linked**” **facts** may, **of itself**, be sufficient to justify a refusal of an application to bifurcate.”¹³ (emphasis added)
 12. When there are overlapping facts or issues between the phases of the dispute sought to be bifurcated, bifurcation is inappropriate. In particular, it would be “causative of unnecessary delay...where the proceeding would be divided into two phases for very little procedural, or other, advantage.”¹⁴

¹⁰ **RWE AG and RWE Eemshaven Holding II BV v Kingdom of Netherlands (“RWE v Netherlands”)** ICSID Case No. ARB/21/4 Procedural Order No. 2 Decision on Bifurcation (22 February 2022) §55 [RL-3]; see also **Waguih Elie George Siag and Clorinda Vecchi v Egypt** ICSID Case No. ARB/05/15 Award (1 June 2009) §116 (citing §17 of Procedural Order #3) [RL-4].

¹¹ **Gavrilović and Gavrilović d.o.o. v. Republic of Croatia (“Gavrilović v Croatia”)** ICSID Case No. ARB/12/39 Procedural Order (21 January 2015) [RL-5].

¹² **Mesa Power Group, LLC v. Government of Canada** PCA Case No. 2012-17 Procedural Order No. 2 (18 January 2013) §16 [RL-6].

¹³ **Gavrilović v Croatia** §76 [RL-5]. See also §50.

¹⁴ *Ibid.*, §§83, 92.

13. In the recent decision **Coropi Holdings v Serbia**¹⁵, the Tribunal specifically noted that “there are also cases in which quantum evidence will be an essential component of a party’s case at the liability phase”, and gave the following example as “clearcut”:

“**The clearest example** of this will be in circumstances in which a claimant contends the breach of a non-expropriation provision of an investment 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.**”¹⁶ (emphasis added.)

14. This is particularly in point with regard to the Respondent’s submissions, set out in Section III below, with respect to the Claimant’s case on breach of the non-expropriation provision in Article 6 of the instant BIT.
15. In considering whether bifurcation **would** materially reduce the time and cost of the proceeding under Rule 42(4)(a), where the calculation of damages is not *prima facie* demonstrated to be sufficiently complex (as here, see Section V below), bifurcation of liability and quantum is not only uncondusive to saving time and costs but is likely to incur additional time and costs. The Tribunal in **Red Eagle v Colombia** recently so concluded¹⁷:

“The damages calculation put forward by Claimant does not appear *prima facie* to be complex since it claims full reparation of sunk costs based on its audited financial statements. The bifurcation requested by Colombia would only be justified if it can be assumed or *prima facie* determined from the outset that the damages determination will be a complex matter. The Claimant’s claim based on sunk costs backed by audited financial

¹⁵ See footnote 9 above. It should be noted that although the decision on bifurcation was rendered in August 2023, the 2022 amendments were not under the Tribunal’s consideration. This *might* be due to the fact the arbitration commenced in May 2022, which predates the 2022 amendments.

¹⁶ Ibid, §§20, 21.

¹⁷ **Red Eagle Exploration Limited v Republic of Colombia** (“Red Eagle v Colombia”) ICSID Case No. ARB/18/12 Decision on Bifurcation (3 August 2020) [RL-7].

statements suggests otherwise. Therefore, at this stage, the Respondent's request for bifurcating the merits phase into liability and quantum is not justified and is premature. This conclusion does not prevent the Respondent from demonstrating at a later stage the complexity of the calculation of damages to sustain a bifurcation request of the merits.”¹⁸

16. The Tribunal in **Churchill Mining v Indonesia** came to the same conclusion:¹⁹

“While it understands the Respondent's concerns, the Tribunal does not believe they are justified and is disinclined to bifurcate liability and quantum for the following reasons. First, **if bifurcation of liability and quantum were accepted and liability established at the end of the liability phase, there would be a need for a further phase dealing with quantum, with the result that the totality of the two merits phases would be significantly longer and more expensive than non-bifurcated merits proceedings.** By contrast, if liability is not established in non-bifurcated proceedings, any additional costs which the Respondent may have incurred as a result of the absence of bifurcation may be taken into account when the Tribunal makes its decision on costs. **In addition, the quantum part, even if complex, appears to require significantly fewer resources than the part on liability** (among other elements, this can be shown by reference to the number of hearing days requested by the Respondent).” (emphasis added.)

17. It is to be noted that in all of the cases dealing with the bifurcation of liability and quantum referred to above **bifurcation has been requested by the**

¹⁸ Ibid §68.

¹⁹ **Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia** (“Churchill Mining v Indonesia”) ICSID Case No. ARB/12/14 and 12/40 Procedural Order No.8 §14 (22 April 2014) [RL-8].

respondent state; in none has bifurcation been requested by the claimant investor.²⁰

18. In light of the Tribunals' holdings in **Red Eagle v Colombia** and **Churchill Mining v Indonesia** above, it is understandable that it is rare to find an investor with a meritorious claim adopting the procedural posture of contending, pursuant to Rule 42(4)(b), that having the issue of liability heard first would have the effect of disposing of all or a substantial portion of the dispute, given that the investigation into the issue of damages to the full extent claimed would inevitably follow (assuming the investor has confidence in its damages claim).
19. Indeed, in view of the "would" wording in Article 42(4)(a) and (b), the Claimant here is essentially, and paradoxically, contending that it would not succeed on liability and thus a further inquiry into quantum would be disposed of and would not be required. The Claimant's stance is particularly difficult to understand in view of the clear intertwining of liability and quantum issues in this matter, as elaborated below.
20. In connection with the above, it is important to note that "a respondent State is entitled to the opportunity to frame its jurisdictional objections as it wishes, absent overriding considerations of efficiency or fairness."²¹ A respondent State must likewise be entitled to frame its defence to a claimant's liability claim as it wishes. Hence, if a respondent State's defence will necessarily raise issues of damages (as to which, see below), this will point against making an order to bifurcate.

²⁰ It may be noted that where a request for bifurcation of an objection to jurisdiction is made, it is also normally the respondent State which makes such request. See WP1, §380 [R-1] and **RWE v Netherlands** §45 [RL-3].

²¹ **RWE v Netherlands** (footnote 10 above) §§50-51 [RL-3]: Netherlands' main argument against bifurcation was that it deserved to argue the jurisdictional objection as it saw fit. It wished to "address the outcome of the German Proceedings – whatever the outcome – when asserting its intra-EU objection, which it plans to do with its full defense in the Counter-Memorial". The Tribunal held that this position was reasonable "without taking any view on the various questions surrounding the German Proceedings, including whether those proceedings have any bearing on the intra-EU objection."

21. As a final point, it is the Claimant who bears the burden of persuading the Tribunal that, on balance, bifurcation will facilitate the relevant objective(s).²² The Respondent says that, applying the above criteria, in particular Rule 42(4)(c), for the reason set out below it is plain that the Claimant has not discharged the burden and that the bifurcation sought is wholly inappropriate.

II. Summary of Respondent's case on bifurcation

22. The Respondent contends that in this case issues of liability and damages are singularly “intertwined”, rendering bifurcation “impractical” (Arbitration Rule 42(4)(c)).
23. The breaches alleged by the Claimant of each of the 4 obligations under the BIT upon which the Claimant relies involve the Respondent's failure to pay the Claimant amounts allegedly due and owing to the Claimant by Alutrint under the EPC Contracts. But the Respondent fundamentally challenges the Claimant's entitlement to the sums claimed, on the basis that they have been grossly exaggerated and/or are not supported by necessary documentation and/or are plainly unsustainable.
24. Hence, in determining whether the Respondent breached the obligations under the BIT by not paying the Claimant the sums it was demanding, the Tribunal will have to consider whether the Claimant was contractually entitled to the sums it was claiming. So issues of damages for breach of the EPC Contracts are intrinsic to the resolution of the Claimant's pleaded case as to the Respondent's alleged liability under the BIT.
25. The Respondent also sets out below how the determination of whether it was in breach of the 4 obligations under the BIT will necessarily, in the case of each such obligation, requires investigation of the Claimant's damages claim.

²² **Orazul International España Holdings S.L. v Argentine Republic** ICSID Case No. ARB/19/25 Decision on Bifurcation (7 January 2021) §30 [RL-9].

26. The above matters are set out in **Section III**.
27. As appears in **Section IV**, the Claimant's damages claim is obviously very weak. This is for the reasons set out above, namely that various parts of the claim are grossly exaggerated and/or are not supported by any or any proper documentation and/or are obviously unsustainable in law. The Respondent contends that it should not be the function of bifurcation to allow a deficient damages claim to be dealt with separately, nor would bifurcation of such a claim satisfy the requirements of Arbitration Rule 42(4)(a) or (b).
28. In **Section V** the Respondent sets out why resolution of the Claimant's damages claim should not involve complex or very extensive documentation or evidence. (Although, whatever the complexity of the process, the damages issues cannot be divorced from the liability issues anyway – see above).
29. The Respondent contends that its non-bifurcated preliminary objections will require investigation of the Claimant's damages claim in any event. Hence, for this reason alone, there is no point in having damages dealt with separately. This is addressed in **Section VI**.

III. Liability issues are “intertwined” with damages issues

(1) Claimant's BIT claims each allege failure to pay sums due under the EPC Contracts

30. The Claimant's case is that the Respondent's breach of its obligations under the BIT was constituted by, inter alia, the Respondent's failure to pay the Claimant

outstanding amounts allegedly due and owing to the Claimant by Alutrint under the EPC Contracts. This is the central plank of the Claimant's case.²³

31. This allegation permeates, and is central to, each of the 4 alleged breaches of the BIT which the Claimant relies upon in the Request for Arbitration:

(1) Unlawful expropriation under Article 6(1) of the BIT

In §89 the Claimant contends that the Respondent's failure to pay outstanding amounts owing to CMEC under the EPC Contracts constitutes an **indirect expropriation**.

In §90 the Claimant also relies on **direct expropriation**, and refers to the Respondent inviting the Claimant to go home without any payment of the outstanding amounts due upon the Project's termination.

(2) Failure to accord fair and equitable treatment (FET) under Article 3(2) of the BIT

§93 cites 5 instances of the Respondent's failure to accord FET to the Claimant's investment, 4 of which are as follows:

- (i) In §93(i), the Claimant relies on a **legitimate expectation** that the Respondent would pay the amounts due under the EPC Contracts.
- (ii) In §93(ii), the Claimant relies on a further **legitimate expectation** allegedly violated by, inter alia, the Respondent inviting the Claimant to go home without any payment of the outstanding amounts due upon the Project's termination.
- (iii) In §93(iii), the Claimant says the Respondent has not been **transparent** in its dealings with the Claimant because, inter alia,

²³ The only other "planks" relied on by the Claimant for founding its contention that the Respondent breached its obligations under the BIT are:

(1) The Respondent's termination of the project as a whole: see Request for Arbitration, §§90, 93(ii) and (v), 96 and 98; and

(2) The Respondent's withdrawing the EMA appeal: see Request for Arbitration, §93(ii) and (iii).

But even these allegations cannot be seen as self-standing and separate from the related complaint of non-payment of sums said to be owed under the EPC Contracts as a result of the project coming to an end.

it has failed to pay the amounts due under the EPC Contracts without informing CMEC of any legitimate, circumstantial or legal reason for such non-payment.

- (iv) In §93(v), the Claimant says the Respondent violated the principles of **good faith** and **pacta sunt servanda** by, inter alia, refusing to make payments of any outstanding amounts due to the Claimant upon termination of the Project.

(3) Breach of non-impairment obligation under Article 3(3) of the BIT

In §96(i), the Claimant contends that the Respondent “impaired” the Claimant’s investment by, inter alia, failing to make payment of any outstanding amounts due to the Claimant upon termination pursuant to the EPC Contracts.

In §96(ii), the Claimant contends that the impairment was unreasonable as the Respondent failed to make or authorise the requisite payment without any reason for doing so.

(4) Breach of the umbrella clause, Article 13(2) of the BIT

The Claimant contends that the Respondent violated the umbrella clause in the BIT by failing to make payment to the Claimant pursuant to the EPC Contracts.

- 32. So the distinctive feature of the Claimant’s case that the Respondent breached its obligations to the Claimant under the BIT is that it relies almost entirely on the non-payment of monies which the Claimant says it was owed under the EPC Contracts. This is so for each of the 4 ways in which the Claimant puts its case for breach of the BIT.
- 33. But the Respondent fundamentally challenges the Claimant’s entitlement to the sums claimed.

34. The Respondent's case includes that it was reasonable for the Respondent/Alutrint not to have paid the sums the Claimant demanded since these sums were grossly inflated and/or, for the most part, they were not supported by necessary documentation. These matters are developed below.
35. Thus in order to determine whether the Respondent breached the obligations under the BIT in refusing to pay the sums the Claimant was demanding, the Tribunal will have to consider whether, as a matter of contract law, the Claimant was entitled to recover the damages it was claiming.
36. **In other words the issue of damages for breach of the EPC Contracts is an intrinsic part of the issue of liability raised in the Claimant's claim under the BIT. Hence, liability issues and damages issues are "intertwined".**
37. It is to be noted that the damages claimed by the Claimant in its claim under the BIT appear to be the same as (wholly overlap with) the damages which the Claimant was seeking against Alutrint under the EPC Contracts.
38. Thus §70 of the Request of Arbitration says: "The current value of the payments the State owes CMEC, including interest, exceeds **US\$310 million**" (emphasis added). This is just a little more (no doubt because of interest) than the sum the Claimant sought from Alutrint some 7 months previously in the Claimant's 15 August 2022 letter (referred to in §49(ix) of the Request for Arbitration: [C-44]), being some **US\$304 million**.
39. So the Claimant's present damages claim against the Respondent overlaps with the Claimant's earlier damages claim against Alutrint.
40. So, not only is establishing the Claimant's entitlement to the contractual claim part and parcel of its liability claim under the BIT, but also the quantum of the

BIT claim seems to be identical to the quantum of the contractual claim.²⁴ Hence there seems to be no further damages issue under the BIT claim which is capable of being severed from the liability issue under the BIT claim.

(2) Challenges by Respondent/Alutrint to payment of sums sought by Claimant

41. The fundamental challenges by the Respondent to the Claimant's damages claim (which reflect the prior position of Alutrint) are based on the following.
42. The Claimant's damages claims have been grossly inflated, do not represent losses actually suffered by the Claimant, lack documentary support and/or are plainly unsustainable.
43. The Claimant has made successive claims in letters to Alutrint, as set out in §§47 and 49 of the Request for Arbitration. The primary focus in §49 is on the Claimant's claim in its 17 May 2013 letter to Alutrint [C-35], which is said to constitute the Claimant's "finalised consolidated outstanding claims" (totalling US\$169,597,715.10). Subsequent claims by letter are said to involve the Claimant in "updating its claims amount from time to time to reflect interest and other accrued costs and losses".
44. For convenience, **Schedule I**, attached hereto, sets out the Claimant's successive claims made in letters to Alutrint. Schedule I comprises all the Claimant's claims made by letter which are referred to in paragraphs 47 and 49 of the Request for Arbitration and, in addition, the Claimant's claims by letters dated 14 February 2011, [R-4] 21 September 2011 [R-5], 4 September 2012 [R-6] and 31 July 2019 [R-7].
45. The central feature of the Claimant's damages claim is in respect of the production of engineering drawings for the smelter. The claims for these

²⁴ Even if, in a way yet to be disclosed by the Claimant, its damages claim under the BIT does not wholly overlap with its damages claim under the Contracts, the two must largely overlap – so severing the BIT claim for damages cannot save much time and costs.

drawings are the largest individual elements in the Claimant's overall claim. The Claimant's claim in respect of these drawings has unaccountably ballooned as the Claimant has made its successive claims.

46. The engineering drawings fall into 2 classes: (1) preliminary design drawings, which the Claimant says were completed: there are said to be 808 such drawings; and (2) construction drawings, which had not been completed when the project was terminated.
47. The work on (1) and (2) was done up to, but not later than, June 2009²⁵ ie the work on the drawings terminated long before the Claimant made any of the monetary claims referred to in §§47 and 49 of the Request for Arbitration.
48. In the 17 May 2013 claim **[C-35]** the Claimant claimed US\$33,120,000 for (1), and US\$33,534,000 for (2),²⁶ being a total of **US\$66,654,000**.
49. But only 6 months previously, in its 28 November 2012 claim **[C-32]**, referred to in §47 of the Request for Arbitration, the Claimant claimed US\$23,248,000 for (1), and US\$20,823,840 for (2),²⁷ being a total of **US\$44,071,840**.
50. And only 2 months before that, in its 4 September 2012 claim **[R-3]**, the Claimant claimed US\$13,248,000 for (1) and US\$11,823,840 for (2), being a total of **US\$25,071,840**.²⁸ This 4 September 2012 claim is not referred to in the Request for Arbitration.

²⁵ See the Claimant's 21 March 2014 claim **[C-36]**, which is the claim referred to in §49(i) of the Request for Arbitration. Item 1.1 of that claim includes the claim for the cost of the engineering drawings and says "Claim on EPC Contract to June 2009" (underlining added). All the later claims listed in §49(ii) to (ix) use the same language: see Schedule I.

²⁶ See Item 1.1 of the claim and the attached breakdown ("details attached") on pp 1/3 and 2/3 of **C-35**.

²⁷ See Item 1.1 of the claim and the attached breakdown ("details attached") on pp 1/3 and 2/3 of **C-32**. Note that in §47 of the Request for Arbitration, this claim is said to be "a preliminary statement of claim; but the letter itself says it is "our comprehensive statement of claim" (underlinings added).

²⁸ Item 1.1 of the Claimant's letter of 4 September 2012 **[R-6]** is for US\$39,279,896.30. The reference in the "Remarks" column is to the Claimant's 21 September 2011 claim **[R-5]**, which is not referred to in the Request for Arbitration. The 21 September 2011 letter identified the total claim in the sum of US\$39,279,896.30 (ie the same as in the 4 September 2012 letter), and the attached breakdown on pp 1/3 and 2/3 shows that the claim was US\$13,248,000 for (1), and US\$11,823,840 for (2).

51. **Hence, over a period of some 8 months (from 4/9/12 to 17/5/13) the Claimant's claim for the engineering drawings went from some US\$25 million, to some US\$44 million, and ended up at some US\$66 million. And these ballooning claims were all in respect of the self-same drawings.** This is shown by (1) the identical language used in each claim letter to explain what the claim is for, and (2) the simple fact that by the time each of the above claims was made, the Claimant had long since ceased its design work (by June 2009) as the project had long since come to an end.
52. It should also be noted that the Claimant's 28 November 2012 claim [C-32] for (1) was exactly US\$10 million more than its 4 September 2012 claim [R-3] for (1). And the Claimant's 28 November 2012 claim for (2) was exactly US\$9 million more than its 4 September 2012 claim for (2). So the Claimant has seen fit to make these arbitrary, rounded and massive increases in its claim for the engineering drawings in the course of the 2-month period which separated these claims.
53. There can be no explanation for the dizzying inflation of the amounts claimed by the Claimant for the engineering drawings. The Claimant has simply plucked bigger and bigger figures out of the air.
54. The said claim of a total of US\$66,654,000 for the engineering drawings in the 17 May 2013 claim has been carried forward and is comprised within Item 1.1 of each of the successive claims referred to in §49(i) to (ix) of the Request for Arbitration. The Claimant has never provided a breakdown of the US\$66,654,000. Nor it seems could it do so, given the way that the claim for that sum has simply been arbitrarily and massively increased.
55. Nor has the Claimant provided any documents to support its claim for US\$66,654,000. This is no doubt for the same reason that the Claimant has never provided a breakdown of this figure.

56. Furthermore, no or scant documentation has been provided by the Claimant to support its other major claims and some of such claims are plainly unsustainable.
57. The latest presentation of the Claimant's claim is in its 15 August 2022 letter [C-44], which is referred to in paragraph 49(ix) of the Request for Arbitration.
58. In the Claimant's 15 August 2022 letter the total claim is for US\$304,870,269.
59. The claim for the engineering drawings (for US\$66,654,000), referred to above, is included within Item 1.1 (which totals US\$98,484,000). As stated above, no documents have been provided by the Claimant to support this claim.
60. The other major items in the 15 August 2022 claim are as follows.
61. Item 1.3 is a claim for alleged **loss of profit** of **US\$20,700,000**, which represents 5% of the 2008 Contract price.
62. No evidence has ever been provided to Alutrint or GORTT to substantiate the claim that the Claimant has actually suffered this (or any) loss of profit. The 5% figure has never been explained.
63. Furthermore, on the Claimant's own case, any loss of profit suffered by the Claimant is irrecoverable. This is for the following reasons.
64. The Claimant's case is that it terminated the 2008 Contract by giving an official Notice of Termination dated 10 March 2013 [C-33] pursuant to Clause 16.2(e), on the basis of a "prolonged suspension": see paragraph 48 of the Request for Arbitration.
65. But, if there was a termination of the 2008 Contract by the Claimant under Clause 16.2, the Claimant's entitlement to recover loss of profit is excluded.

66. The 2008 Contract comprises Particular Conditions of Contract (“PCC”) and General Conditions of Contract (“GCC”), the former supplementing the latter. Whenever there is a conflict, the provisions in the PCC prevail over those in the GCC: see the 2008 Contract Agreement, **C-15** (on the fourth page).
67. Clause 16.4 of the GCC **does** provide that after a notice of termination under Clause 16.2 the Respondent should pay the Claimant’s loss of profit, by stating that the Respondent shall promptly (inter alia):
- “(c) pay to [the Claimant] the amount of any loss of profit or other loss or damage sustained by [the Claimant] as a result of this termination.”
68. But Clause 16.4 of the PCC provides that Clause 16.4(c) of the GCC be replaced with the following, which specifically **omits** the reference to the Respondent paying the Claimant any loss of profit:
- “Pay to [the Claimant] the amount of any loss or damage sustained by [the Claimant] as a result of this termination.”
69. So, as the PCC prevail over the GCC, the Claimant’s entitlement to recover its loss of profit when it has terminated under Clause 16.4 is specifically omitted.
70. This exclusion of the Claimant’s entitlement to recover loss of profit is affirmed by:
- (1) Clause 17.6 of the GCC which provides:
- “Neither party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract other than under Sub-Clause 16.4 [Payment on Termination] and Sub-Clause 17.1 [Indemnities] (underlining added).

(2) Clause 1.1.4.2, of the GCC which provides that ““Cost”...does not include profit”: this means that the Claimant cannot recover loss of profit as coming within “Cost” under Clause 19.6(c).

71. So, on its own case as to when and how the 2008 Contract was terminated, the Claimant’s claim for loss of profit is unsustainable.

72. Item 1.4 is a massive “**Interest cost**”: **US\$111,953,819** plus **US\$49,924,695**. Most of this claim is calculated by reference to claims which are either patently grossly exaggerated and unsupported by any evidence (being the claims for US\$66,654,000 for the engineering drawings, referred to above) or are obviously unsustainable (being the claim for US\$20,700,000 for loss of profit, referred to above).

73. Item 1.5 is a claim for “**Overhead cost**” of **US\$10,000,000** plus **US\$3,000,000**. The overhead cost is said to be calculated on the basis of US\$100,000 per month. This must represent a claim for overhead costs for a 130-month period (ie from September 2011 to July 2022), and continuing. The US\$100,000 per month claimed seems to be simply an arbitrary, rounded figure. No basis for this claim has been provided to Alutrint or the Respondent, nor has any documentary evidence been supplied. Nor has the Claimant explained how this claim can be continuing, when the Project came to an end some 12 years previously.

74. The only other major item is Item 2.1, “**Downtime cost**”, being **US\$12,838,427** plus **US\$2,366,042**. Even if such a claim is recoverable in law, most of this claim is for interest, since it stems from a claim for US\$3,988,539 referred to in the Claimant’s 4 September 2012 letter claim, **R-3**, to which interest has thereafter been added.

(3) How the Claimant’s disputed damages claim is intertwined with the Respondent’s alleged liability for breach of each of the obligations under the BIT

75. Hereunder the Respondent states how the Claimant's disputed damages claim is wholly intertwined with the Respondent's alleged liability for breach of each of the four obligations under the BIT relied on by the Claimant.

(i) Unlawful expropriation: Article 6(1) of the BIT
(Part E.1, §§87-91 of the Request for Arbitration)

76. Article 6 of the BIT provides that:

“(1) [The Respondent] shall [not] expropriate, nationalize or take other similar measures ...against the investments of investors of the [PRC] in its territory, except: (a) for the public purpose; (b) under domestic law; (c) without discrimination; (d) against compensation.

(2) The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the market value of the expropriated investments immediately before the expropriation is taken or before the impending expropriation becomes public knowledge, whichever is the earlier. The value shall be determined in accordance with generally recognized principles of valuation. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall be made without delay, be effectively realizable and be freely transferable.” (underlining added)

77. The Claimant seeks “a DECLARATION that the State has violated its obligation under Article 6 of the BIT by unlawfully expropriating the Claimant’s investment and an ORDER that the State pay damages or compensation accordingly (in an amount to be quantified at a later stage in the proceedings)” (underlining added) (§117(i), Request for Arbitration).

78. As stated above, the amounts due under the EPC Contracts are the subject matter (or at least an essential ingredient) of the alleged unlawful expropriation.

79. **First**, a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable: see **SGS v Philippines**,²⁹ which was a case in which the alleged expropriation was also of a sum payable under a contract. **So where**

²⁹ **SGS Société Générale de Surveillance v. Republic of the Philippines** (“**SGS v Philippines**”), ICSID Case No ARB/02/6 Decision of the Tribunal on Objections to Jurisdiction §161 [RL-10].

the claimant's case is that the thing expropriated is a sum owed, there can be no finding of expropriation unless and until the amount of the sum owed has been determined. As stated above, here there is plainly an unresolved dispute as to the amount payable, and the Respondent will make good its case at the merits stage³⁰.

80. So no finding of expropriation can be made in such circumstances without resolution of the issue of the quantum of the debt.
81. **Secondly**, as stated above, **Coropi v Serbia** refers to the circumstance in which there is a dispute between the parties as to the proper compensation for an alleged breach of a non-expropriation provision as being the “clearest” and “clearcut” example of a case in which bifurcation of liability and damages is inappropriate.
82. **Thirdly**, assuming the Tribunal were to find that there was expropriation, as is made plain by §§91 and 117(1) of the Request for Arbitration, the Tribunal will have to determine whether the alleged expropriation was “unlawful”, including whether it was “against compensation”.
83. In **Tidewater v Venezuela**,³¹ the Tribunal stated at §141 that “[a]n expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation.” And the Tribunal further stated at §§145-146:
- “145. ...This is not a case where the State took assets without any offer of compensation. The record does not demonstrate a refusal on the part of the State to pay compensation. Rather, it discloses that the Parties were unable to agree on the basis or the process by which such compensation would be calculated and paid. This is therefore a task that they have submitted to this Tribunal.

³⁰ *ibid* §§41-43.

³¹ **Tidewater v Venezuela**, ICSID Case No ARB/10/5, Award (13 March 2015) §§129-146 [RL-11].

146. For present purposes, it suffices to conclude that the present expropriation was lawful, since it wants only compensation...”

84. In other words, the requirement for compensation is considered fulfilled, rendering expropriation lawful, where the State has recognised the obligation to compensate the investor or a procedure exists which the investor may effectively and promptly invoke to ensure compensation. This remains the case even though no compensation has been paid for many years.³²
85. At the merits stage, in addition to denying that there was expropriation, whether as alleged or at all, the Respondent will make the following contention.
86. The 2008 EPC Contract [C-15] provides a dispute resolution procedure, which involves the appointment of a Dispute Adjudication Board (“**DAB**”) and notice of dissatisfaction with the DAB’s decision being given within 28 days (under Clause 20.2 to 20.4), attempts to settle the dispute amicably (under Clause 20.5), followed by the commencement of international arbitration on or after 56 days after the notice of dissatisfaction was given (under Clause 20.5 to 20.6).
87. As stated in §§53-68 of the Request for Arbitration, the Claimants gave notice to Alutrint (the party to the EPC Contract) that it would proceed to arbitration (pursuant to the said contractual mechanism), duly gave formal notice of its intention to refer all its claims to a DAB and then and thereafter discussions took place between the Claimant and Alutrint/the Respondent regarding the quantum of the contractual debt. Alutrint, by its lawyers, acquiesced in the matter proceeding by way of the Claimant’s claims being referred to a DAB.³³ The Request for Arbitration does not state why the Claimant did not proceed with the said contractual mechanism after allegedly putting its claim on hold in the midst of the 2015 Trinidad and Tobago general election (§57).

³² *ibid* §135

³³ See the letter dated 14 July 2015 from Hogan Lovells (for Alutrint) to Pinsent Masons (for the Claimant): **C-49**.

88. Hence the Respondent³⁴ did not refuse to settle the true amount of the contractual debt but rather there was a genuine dispute as to the Claimant's purported quantification of the contractual debt. Thus, as stated in **Tidewater v Venezuela**, the alleged expropriation (being the act of non-payment) was lawful.
89. So, when considering the Claimant's claim for a declaration for unlawful expropriation at the liability stage, the Tribunal will necessarily have to determine whether there was a bona fide dispute as to the amount of the contractual debt and/or the amount of compensation under Article 6(2).
90. Hence bifurcation of liability and damages is singularly inappropriate, as the Tribunal will have to investigate damages anyway when determining whether the Respondent is liable for unlawful expropriation.
91. It is important to note that the damages and compensation all along sought by the Claimant (to which the Request for Arbitration exclusively alludes) have been only the amount of the contractual debt. The Claimant has not referred to any alternative or other compensation.
92. Thus, in the present case, the amount of the contractual debt is the same as both the amount of compensation under Article 6(2) and the amount of damages payable in the event that the alleged unlawful expropriation is made out. Consequently, it is **impossible** (let alone "impractical") to bifurcate the issues of liability and damages.

(ii) Failure to accord fair and equitable treatment (FET): Article 3(2) of the BIT
(Part E.2: §§92-94 of the Request for Arbitration)

93. Article 3(2) of the BIT provides that:

³⁴ Obviously, it was Alutrint, not the Respondent, which had to be the contractual debt pursuant to the EPC Contracts.

“Investments of the investors of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.”

94. FET ensures that there is at least a minimum level of protection derived from fairness and equity for the investor concerned.³⁵
95. “[C]ases suggest that the minimum standard of [FET] is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”³⁶ (underlining added)
96. Arbitrariness lies at the heart of the protection envisaged by non-contingent standards, which includes FET.³⁷
97. In the above context the ICSID case law indicates that it is not appropriate for a conclusion to be reached on the merits of an investor’s FET claim based on the State’s non-payment under a contract while there is an unresolved dispute as to the amount payable.
98. Thus in **SGS v Philippines** (supra), which was such a case, the Tribunal said, at §162:

“...an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under [the FET provision in

³⁵ **Garanti Koza LLP v Turkmenistan**, ICSID Case No ARB/11/20, Award (19 December 2016), §380. [RL-12]

³⁶ **Waste Management, Inc v United Mexican States II**, ICSID Case No ARB (AF)/00/3, Award (30 April 2004), §98 [RL-13].

³⁷ McLachan, *International Investment Arbitration (2nd Edition): Substantive Principles*, §7.211 [RL-14].

the BIT]...**But there being an unresolved dispute as to the amount payable, for the Tribunal to decide on the claim in isolation from a decision by the chosen forum under the...Agreement is inappropriate and premature.**” (emphasis added)

99. And in **BIVAC v Paraguay**³⁸ the Tribunal agreed, saying that in that case, unlike in **SGS v Philippines** case, “it appears at this preliminary stage of the proceedings that **there is no apparent unresolved dispute as to the amount payable**” and “**Accordingly, we conclude that it would not be premature to come to a decision on the merits of the claim under [the FET provision] of the BIT**, at least in so far as the claim relates to acts attributable to Paraguay in relation to the failure to make payments owing under the Contract” (§125). (emphasis added)

100. This makes sense.

101. In respect of non-payment cases, the practice of tribunals has been examined and described by the Tribunal in **BIVAC v Paraguay**,³⁹ as follows:

“*first* they address the nature of conduct; *second*, assuming the conduct to be such as to give rise to the possibility of a breach of the obligation to provide [FET], they address whether it meets the requirement not to be arbitrary or discriminatory or otherwise unfair or inequitable (underlining added)

102. So where, as here, there is a serious dispute regarding the amount the Claimant claims (since the Claimant has unreasonably inflated the figures for its expended costs and its losses, without supporting evidence) the Respondent’s non-payment of the inflated amounts sought cannot be said to be arbitrary or otherwise unfair and inequitable.

³⁸ **Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay**, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction [RL-15].

³⁹ Further Decision on Objections to Jurisdiction, §268 [RL-16].

103. Similarly, it cannot be suggested that there could be any legitimate expectation that the Respondent/Alutrint would pay whatever amount the Claimant demanded.

104. Hence, as stated in **SGS v Philippines** and **BIVAC v Paraguay**, it is necessary to determine the amount the Respondent is liable for under the EPC Contracts in order to determine whether it has breached any FET obligations.

(iii) Breach of the non-impairment obligation: Article 3(3) of the BIT
(Part E.3: §§95, 96 of the Request for Arbitration)

105. Article 3(3) of the BIT provides that:

“Without prejudice to its laws and regulations, neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory by the investors of the other Contracting Party.”

106. The standard of “reasonableness” has no different meaning in this context than in the context of the FET standard with which it is associated. The standard of “reasonableness” therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship to some rational policy. A violation of the non-impairment clause does not differ substantially from a violation of the FET standard, but the former identifies the more specific effects of a violation, namely with regard to the management, maintenance, use, enjoyment or disposal of the investment by the investor.⁴⁰

107. Here, the particulars of the alleged breach of the non-impairment obligations overlap with those of the alleged breach of FET.

⁴⁰ **Saluka Investments v Czech Republic** UNCITRAL Partial Award (17 March 2006) §§460, 461 [RL-17].

108. Most tribunals endorse the view that “unreasonable” bears the same meaning as “arbitrary” in the sense of something done capriciously without reason,⁴¹ or they accept that any difference is merely a matter of semantics.⁴²
109. Thus, the arguments in respect of FET obligations apply *mutatis mutandis* to the alleged impairment breaches. Hence, a decision as to whether the Respondent has breached the non-impairment obligation will require an antecedent determination of the amount the Respondent is liable for under the EPC Contracts.

(iv) Breach of the umbrella clause: Article 13(2) of the BIT
(Part E.4, §§97, 98 of the Request for Arbitration)

110. Article 13(2) of the BIT provides that:

“Each Contracting Party shall observe any commitments it may have entered into with the investors of the other Contracting Party as regards their investments.”

111. The umbrella clause brings commitments made by the State to the investor as regards the investment within the protective umbrella of the treaty so that the State’s breach of contract under the proper law of the contract becomes the State’s violation of the umbrella clause under international law.
112. The Respondent will submit that this alleged breach is a non-starter, as the word “it” in Article 13(2) refers to the State and not to entities separate and distinct from the State. Since the Respondent did not enter into any contract (commitments) with the Claimant, Article 13(2) is not applicable.⁴³

⁴¹ **National Grid PLC v Argentina** UNCITRAL Award (3 November 2008) §197 [RL-18].

⁴² **LSG Building Solutions v Romania** ICSID Case No. ARB 15/19 Decision on Jurisdiction, Liability and Principles of Reparation (11 July 2022) §1055 [RL-19].

⁴³ See for example **Gravrilovic v Croatia** Award (26 July 2018), in respect of a similarly worded umbrella clause, at §1159 [RL-20].

113. Be that as it may, it is also plain that this (untenable) alleged breach should not be bifurcated, given that the damages payable for the breach are simply the contractual debt.
114. As stated above, the crystallisation of the amount of the contractual debt is critical to establishing the other alleged breaches of the BIT. Thus, it would be wholly unwarranted and impractical for the Tribunal to bifurcate liability and damages in respect of the alleged breach of the umbrella clause in isolation from the liability and damages in respect of the other alleged breaches of the BIT. The damages for the breach of the umbrella clause are wholly intertwined with the liability and damages for the other alleged breaches of the BIT, all of which concern the amount of the contractual debt.

IV. Bifurcation should not be allowed to mask a weak damages claim

115. The Claimant's damages claim is obviously very weak. Bifurcation should not be ordered where its effect would be to mask a weak claim.
116. The Respondent in this context again refers to the claim as itemised in CMEC's 15 August 2022 letter [C-44].
117. As stated above, the largest individual element of the Claimant's claim – the claim for the preliminary design drawings and the construction drawings for US\$66,654,000 – is plainly grossly exaggerated and no documents have been provided to support this claim.
118. Also as stated above:
- (1) the claim for loss of profit (US\$20,700,000) is plainly unsustainable, and in any event no evidence has been provided to support the claim for this (or any) loss of profit;
 - (2) most of the claim for "interest cost" (US\$111,953,819 plus US\$42,924,695) is calculated by reference to claims which are obviously

grossly exaggerated and unsupported by any evidence (being the claims for the engineering drawings) or are obviously unsustainable (being the claim for loss of profit);

- (3) no basis has been provided for the claim for “overhead cost” (US\$10,000,000 plus US\$3,000,000), nor is the claim supported by any documents; further, no explanation has been provided as to how the claim can be continuing, when the Project came to an end some 12 years previously;
- (4) as to the only other major claim, being the claim for “downtime cost” (US\$12,838,427 plus US\$2,366,042), even if such a claim is recoverable in law, it overwhelmingly comprises interest.

119. So each element of the Claimant’s damages claim is seriously problematic – that being so, it is respectfully suggested that it should not be the function of bifurcation to allow such a deficient damages claim to be hived off. Apart from anything else, a separate hearing of such a damages claim:

- (1) would not “materially reduce the time and cost of the proceeding” (see Arbitration Rule 42(4)(a)), since the problematic damages claim would be left to be dealt with, but in a separate hearing;
- (2) would not “dispose of all or a substantial portion of the dispute” (see Arbitration Rule 42(4)(b)), since, again, the problematic damages claim would not have been resolved but would constitute an active source of disagreement between the parties.

V. Resolution of damages issues should not involve very substantial evidence or extensive documentation

120. For the reasons set out above in Section III, the issue of liability is inextricable from that of damages. Accordingly, even if the process of determining damages was to be very complicated and time-consuming, it must be undertaken.

Nonetheless, the Respondent submits that the process should not be overly complex.

121. As stated in Section IV immediately above, the Claimant has provided no documentation to support any of:
- the sums claimed for the preliminary design drawings or the construction drawings
 - loss of profit (which, as presented, is simply calculated as 5% of the 2008 Contract price)
 - “interest cost” (which, as presented, is again a simple calculation based on a claimed 7% per annum)
 - “overhead cost” (the US\$100,000 per month seems to be an arbitrary, rounded figure, which has remained the same for a 130-month period: see paragraph 48, above).
122. So the above claims, even where they are not simply mathematical calculations (as is the case in respect of loss of profit and “interest cost”), should not be document-heavy (unless the Claimant relies on documentation that it has not proffered in the past).
123. As to the only other major claim, being “downtime cost”, as stated above this stems from a claim for US\$3,988,539 referred to in the Claimant’s 4 September 2012 letter **[R-3]**, to which a claim for some US\$11 million interest (at 7% per annum) has been added. So, while the US\$3,988,539 will require investigation, any challenge to the interest claim should not involve detailed investigation.
124. Hence it does not appear, at this stage, that determination of the Claimant’s damages claim will require examination of extensive documentation nor, it appears, substantial witness evidence or other complexities.

125. In **Suez v Argentina**⁴⁴ and **Coropi v Serbia**⁴⁵ the Tribunals decided that it was helpful to try the liability issues before damages so that the issues may be crystallised for the purposes of giving consistent and well-defined instructions to an independent quantum expert. But here:

- (1) as stated above, the Claimant's case, as framed in the Request for Arbitration, shows that the damages sought are indeed the amount of the contractual debt. Since the latter is an essential component of both the Respondent's defence and the Claimant's case on expropriation, bifurcation of the issues would save no costs at all;
- (2) these decisions do not concern the intertwining of the issues of liability and quantum, which is of overriding importance, as stated above.⁴⁶

126. The above therefore all points to dealing with the Claimant's damages claim at the same time as the issues on liability.

VI. Respondent's non-bifurcated preliminary objections will require investigation of Claimant's damages claim in any event

127. The Respondent's preliminary objections include the contention that the Claimant's claims are barred on the ground of abuse of process: see paragraph 28.1.2 of draft Procedural Order No 1. In accordance with Arbitration Rule 45, the Respondent has not requested bifurcation of this (or any) preliminary objection.

128. In the context of its abuse of process contention, the Respondent relies upon, inter alia, the matters set out in paragraph 28.1.2(c) of draft Procedural Order No 1:

⁴⁴ §§272-275 [RL-1].

⁴⁵ §§19, 21-23, 25 [RL-2].

⁴⁶ It is also relevant to note that these decisions were made before the 2022 Arbitration Rules came into effect and therefore did not take account of the carefully-chosen wording of the new Rules.

“(c) the Claimant’s transplant of its successive quantified contractual claims submitted to Alutrint Limited into its present claims under the BIT against the Respondent, being claims which are grossly exaggerated, plainly unsupported as presented and for which there is no reasonable basis.”

129. The Respondent will not set out here its detailed case on the meaning and content of the notion of abuse of process in the context of investor-State disputes, but will limit itself to the following:

- (1) Abuse of process has been defined as “the malicious, frivolous or wrongful use of procedural rights contrary to their intended purpose”.⁴⁷ “The doctrine of abuse of rights prohibits the exercise of a right for purposes other than those for which the right was established”.⁴⁸
- (2) Abuse of process is premised on good faith. It involves asking the question whether the claimant has exercised its right of recourse to arbitration in good faith.⁴⁹ “Abuse as a general principle of international law concerns the intent or purpose of the subject in exercising the right...Requiring culpability or absence of reasonable basis for making out abuse are subjective and objective measures of good faith, in order to judge the subject’s exercise of a right.”⁵⁰
- (3) The categories of abuse are not closed.⁵¹
- (4) “Abuse of process can also lie if the claim is fraudulent or the claimant brings a knowingly frivolous action”.⁵² As an example, where a claimant has invented a transaction in order to gain access to international

⁴⁷ Menalco J Solis, ‘Good-Faith Rule against Abusing Process by Multiplying Action’, in Meg Kinnear and Campbell McLachlan (eds), *ICSID Review – Foreign Investment Law Journal* OUP 2021, Volume 36 Issue 1) pp.70-98, at pp.72, 82, 91 [RL-21].

⁴⁸ **Orascom TMT Investments v Algeria** ICSID Case No ARB/12/35, Final Award [2017], §540 [RL-22].

⁴⁹ Solis, pp.70-72 [RL-21].

⁵⁰ Solis, pp.86, 97 [RL-21]; see also John David Branson, ‘The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration’, in Maxi Scheurer (ed), *Journal of International Arbitration*, Kluwer Law International 2021, Volume 38 Issue 2, pp.187-214, at pp.187-188 [RL-23].

⁵¹ **Orascom v Algeria**, §541 [RL-22].

⁵² Solis, p.85 [RL-21]. See also **Gavrilovic v Croatia**, ICSID Case No ARB/12/39 [2012] Award, §412 [RL-20].

jurisdiction and was guilty of various sorts of procedural misconduct (including causing excessive delays), the ICSID tribunal characterised the claim as fraudulent and held that there had been an abuse of process.⁵³ It has also been said that “[T]he paradigm form of abuse of process is the action which is known to be unarguable or nearly so. A plaintiff bringing such a claim is warping the process *ab initio*. But he might compound his abuse by later fabricating or suppressing evidence, or by engaging in other procedural maneuvers designed to conceal the emptiness of his claim.”⁵⁴

(5) The Claimant’s conduct should be viewed as a whole in order to determine whether there has been an abuse of process.⁵⁵

130. In view of the Respondent’s reliance on the said matters set out in paragraph 28.1.2(c) of draft Procedural Order No 1 in support of its abuse of process contention, the detail of the Claimant’s damages claim will necessarily be canvassed at the hearing on liability.

131. That being so, for this reason alone, it is not appropriate that the issues of liability and damages be bifurcated.

VII. Conclusion

132. In consequence of the above, the Respondent contends that the Claimant’s request that liability and damages be bifurcated should be declined.

133. The Respondent will not summarise the various matters raised above which, it is submitted, plainly point against bifurcation but will instead limit itself to making the following short points.

134. **First**, in light of the Respondent’s substantive defences on questions of liability referred to above, the Respondent contends that given the intertwining of liability

⁵³ **Cementownia ‘Nowa Huta’ SA v Turkey** ICSID Case No ARB(AF)/06/2 [2009] Award, §§157-9 [RL-24].

⁵⁴ **Solis**, footnote 138 on p.85 [RL-21].

⁵⁵ **Solis**, pp.70-71 [RL-21].

and quantum issues, it is impossible (or “impractical”: Arbitration Rule 42(4)(c)) to try the liability and damages phases separately.

135. **Secondly**, fairness demands that the Respondent be allowed to present its defence fully and freely in the way it wishes. It would be against procedural fairness for the Respondent to be shut out from mounting its defence on the question of liability in the manner it wishes (**RWE v Netherlands** §§50-51). Here, the Respondent’s defence will necessarily raise the issue of damages, being the true amount of the contractual debt.
136. **Thirdly**, pursuant to Arbitration Rule 42(4)(a), it is plainly not the case that the bifurcation sought **would** materially reduce the time and cost of the proceeding.
137. It is clear from the above that the amount of the contractual debt at the very least obviously constitutes a **closely linked fact** between the phases of liability and quantum for all of the alleged breaches of the Treaty. This of itself is sufficient for the Tribunal to decline the Claimant’s request for bifurcation (see **Gavrilović v Croatia** §76).
138. **Fourthly**, regarding Rule 42(4)(a) and (b), as stated above, bifurcation puts the Claimant in the counterintuitive position of showing that it would not succeed on the question of liability, so that the dispute would be disposed of without advancing to the consideration of damages. By contrast with the present position, the bifurcation of liability and damages is normally sought by the respondent State, not the investor. In any event, this is a distinctively inappropriate case for there to be bifurcation, for all the reasons stated above.

Dated the 10th day of April 2024.

Mark Strachan KC, SC
Jeffrey Chau
Rowan Pennington-Benton