

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

**RESPONDENT'S COUNTER-MEMORIAL ON THE MERITS
AND MEMORIAL ON PRELIMINARY OBJECTIONS**

Mark Strachan KC, SC

Jeffrey Chau

Rowan Pennington-Benton

Charles Russell Speechlys LLP

Counsel for the Respondent

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RESPONDENT’S COUNTER-MEMORIAL ON THE MERITS

A. Summary

1. This claim, now presented as a claim against the Republic of Trinidad and Tobago (“T&T” or “GORTT”) for breach of its international obligations under the Treaty,¹ is misconceived.
2. The claim started out life as a claim by CMEC² against its contractual counterparty, Alutrint.³ The claim, when it was in that form, alleged that Alutrint was liable to CMEC for losses it had suffered as a result of the termination of the 2005 Contract⁴ and the 2008 Contract⁵.
3. This claim was made in 15 letters sent successively by CMEC to Alutrint. The claim was for ever-increasing and grossly-exaggerated amounts⁶. These contractual claims, which were first made in 2011, peaked in a letter dated 15 August 2022, in which the sum claimed was US\$304 million.⁷
4. In early 2015, during the period when CMEC’s claim was being presented as a contractual claim against Alutrint, CMEC initiated the contractual dispute resolution procedure under the 2008 Contract, by sending Alutrint formal notice of its intention to refer its claim to a Dispute Adjudication Board (“DAB”). Alutrint agreed to CMEC’s claim being referred to a DAB and made some proposals as to how the DAB process should be conducted.
5. Later in 2015, CMEC, unilaterally and unaccountably, abandoned the contractually-agreed DAB process which it had initiated and to which Alutrint

¹ 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, **CL-0001** (“the Treaty”).

² The Claimant, China Machinery Engineering Corporation (“CMEC”).

³ Alutrint Limited (“Alutrint”), whose formation had history are referred to below.

⁴ The EPC Contract between Alutrint and CMEC dated 20 December 2005 (“the 2005 Contract”) [**C-0011**].

⁵ The EPC Contract between Alutrint and CMEC dated 30 October 2008 (“the 2008 Contract”) [**C-0015**].

⁶ The topic of CMEC’s exaggerated claims is dealt with in Section G below, and also in Appendix II hereto.

⁷ **C-0044**.

had assented and reverted instead to making yet more claims, in increasing amounts, in letters sent to Alutrint.⁸

6. Then, after some years of discussions with T&T government officials aimed at achieving settlement of its claims against Alutrint, CMEC suddenly changed tack and instigated instead a claim against T&T alleging breach of its international treaty obligations (this claim).
7. The change of tack came out of the blue. CMEC had not intimated that it would be making any claim against T&T until Clifford Chance, on behalf of CMEC, served on T&T Notification of a Claim and Request for Consultations and Negotiations, dated 26 August 2022, pursuant to Article 10(2) of the Treaty (“CC’s Notification of a Claim”).⁹
8. This was just 11 days after CMEC’s said claim made against Alutrint on 15 August 2022, more than 11 years after CMEC had made its first claim against Alutrint in 2011, and some 12 years after the events which are now said to constitute T&T breaches of its obligations under the Treaty. Prior to receipt of CC’s Notification of a Claim, T&T had no idea that it was the subject of any claim by CMEC, whether under the Treaty or otherwise.
9. Furthermore, in the course of the period since CMEC’s Treaty claim against T&T was first intimated by CC’s Notification of a Claim, the character of CMEC’s claim has fundamentally changed.
10. In CC’s Notification of a Claim, CMEC’s claim mirrored the contractual claim it had been making against Alutrint. Hence CMEC there said that the value of its outstanding claims “exceeds US\$300 million” (CC’s Notification of a Claim, Annex, §47).

⁸ CMEC’s activation of the dispute resolution procedure under the 2008 Contract is referred to in Section I, 4.2 below and the relevant correspondence is set out in Appendix IV hereto.

⁹ C-0491.

11. CMEC's Treaty claim continued to mirror its previous contractual claim against Alutrint in its Request for Arbitration dated 27 March 2023 (§70 said CMEC's claim "exceeds US\$310 million") and also at the Bifurcation Hearing before the Tribunal on 24 April 2024 (§4 of CMEC's Written Submissions said CMEC's claim was "over US\$300 million").
12. Then, with the service of the Memorial¹⁰, CMEC changed tack. The amount CMEC now claims against T&T is US\$156 million.¹¹ So the claim has been slashed to about half of what CMEC had been consistently claiming against T&T throughout the previous two years. No explanation is given in the Memorial as to why the claim CMEC was previously making against T&T was in excess of US\$300 million, nor why the claim CMEC is now making has been so substantially reduced.¹²
13. CMEC's confusion as to the true target of its claim permeates the Memorial.
14. The Memorial, §1, says that since 2012 "the State has repeatedly made false assurances that it will compensate the Claimant...for the termination of the Project and related contractual rights". But T&T has given no such assurances; as appears from the above, T&T was not even aware that CMEC was seeking any compensation from it until it received CC's Notification of a Claim of 26 August 2022.
15. The Memorial, §1, also refers to the "State's decade-long avoidance of its obligations". But, again, this makes no sense, since prior to sending CC's Notification of a Claim CMEC had not asserted that T&T had any obligations.
16. CMEC's zigzagging between a contractual claim against Alutrint and a Treaty claim against T&T is further exemplified in §38 of the Memorial, which says:

¹⁰ Claimant's Memorial on Jurisdiction and Merits, 11 November 2024 ("the Memorial").

¹¹ See §§686, 713 and 730 of the Memorial.

¹² This is just one of the many ways in which CMEC's case in the Memorial differs from its case in its Request for Arbitration. **Appendix I** hereto collates those differences.

“Unfortunately, now after more than a decade, Alutrint has still not paid any compensation to CMEC for the cancellation of the Project and/or the termination of related contractual rights.”

But, as referred to above, CMEC commenced and then abandoned its contractual claim against Alutrint. CMEC cannot expect Alutrint to pay it compensation now it has switched its claim to a claim against T&T.

17. Most importantly, the belated re-packaging of CMEC’s contractual claim against Alutrint as a Treaty claim against T&T does not work.
18. This is and always has been a contractual claim against Alutrint. CMEC’s attempt to shoehorn it into a Treaty claim has not succeeded.
19. None of T&T’s alleged breaches of its Treaty obligations can be substantiated.
20. CMEC gives prominence to its claim for expropriation. But its case on expropriation is a muddle. It is not even clear what property CMEC says has been expropriated. Each time CMEC has presented its expropriation claim (first in CC’s Notification of a Claim, then in the Request for Arbitration, now in the Memorial) the identity of CMEC’s property which is said to have been expropriated has changed. Insofar as CMEC now says that what has been expropriated are its contractual rights under the EPC Contracts, the same does not work in law and in any event CMEC has not been permanently deprived of such rights. These and T&T’s multiple further responses to CMEC’s expropriation claim are set out below.
21. CMEC’s other major contention is that T&T has breached the fair and equitable treatment standard. None of the contentions that T&T treated CMEC unfairly or inequitably is sustainable. CMEC’s main points are that T&T gave CMEC assurances to the effect that the Project would continue to completion and that amounts due to CMEC under the EPC Contracts would be settled.

22. But it is plain that T&T gave CMEC no assurances as to the further course of the EPC Contracts and no assurances that T&T would settle amounts due under the EPC Contracts. As to the latter, as stated above, CMEC had throughout sought payment only from Alutrint and not from T&T. T&T did not even know a claim was being made against it until it received CC's Notification of a Claim many years later. Furthermore, it is impossible to contend that it was unfair or inequitable for T&T not to pay the excessive amount of over US\$300 million which CMEC was seeking, when it has now seen fit to slash its claim to half that sum.
23. As is often the case, CMEC's claim that T&T breached the Non-Impairment standard cannot succeed essentially for the same reasons its case that T&T breached the fair and equitable treatment standard cannot succeed. CMEC's claim that T&T breached the umbrella clause is plainly unsustainable – CMEC does not even address the elephant in the room viz the well-known "it" problem.
24. The above matters are all developed in Sections D to N below.
25. Thereafter, the Memorial on Preliminary Objections comprises Sections O and P.
26. In Section O, T&T respectfully contends that the Tribunal has no jurisdiction over CMEC's claim since the essential basis of the claim is breach of the EPC Contracts between CMEC and Alutrint; hence the claim falls outside the jurisdiction of ICSID and the Tribunal.
27. In Section P, T&T contends that CMEC's claims are barred on the grounds of (1) extinctive prescription, (2) acquiescence and estoppel and (3) abuse of process and bad faith.
28. It is submitted that the preliminary objections in Section O and Section P are each fatal to CMEC's claim.

B. The change of administration in T&T in April 2025

29. The material in §10 of the Memorial has been overtaken by events.
30. As a result of the general election held in T&T on 28 April 2025 there was a change from the previous People’s National Movement (“PNM”) administration to the present Until National Congress (“UNC”) administration.
31. The new Prime Minister is The Honourable Kamla Persad-Bissessar, the UNC’s political leader.¹³
32. The new Attorney-General is The Honourable John Jeremie SC.¹⁴

C. Material submitted with this Counter-Memorial on the Merits and Memorial on Preliminary Objections

33. This Counter-Memorial on the Merits and Memorial on Preliminary Objections is submitted by T&T pursuant to Annex B of Procedural Order No 1 dated 22 May 2024 (as updated), includes the 4 Appendices referred to in the Table of Contents and is supported by:
- a. The witness statement of Leroy Mayers, dated 29 May 2025; and
 - b. Expert reports from:
 - i. Tim Tapper, an independent quantum expert, a Chartered Quantity Surveyor and a director of Turner & Townsend Contract Services Ltd

¹³ This is Kamla Persad-Bissessar’s second term of office as Prime Minister, her first term having been from 24 May 2010 to 7 September 2015.

¹⁴ John Jeremie previously served as Attorney-General in two PNM administrations, between 2003 and 2007 and again from 2009 to 2010.

- ii. Chris Hillier, an independent engineering expert, a Chartered Engineer and a director of Turner & Townsend Contract Services Ltd.

34. Along with the above, T&T submits:

- a. Factual Exhibits **R-0008** to **R-0011**; and
- b. Legal Authorities **RL-0025** to **RL-0117**.

D. Factual background and development of the dispute

D1. Introduction

35. In Section D (General Factual Background) and Section E (Facts and Circumstances of the Dispute) of the Memorial, which together occupy some 150 pages and 450 paragraphs, CMEC deals in granular detail with numerous factual matters, much of which appears not to be relevant to any issue in the case. The effect of the volume of detail is more to obfuscate than to illuminate.
36. T&T, instead, will address the factual background and chart the development of the dispute in the context of topics under the following 11 headings, each of which bears directly on matters now in issue between the parties. For the avoidance of doubt, no admission is made as to matters raised in the Memorial which T&T does not specifically address.

D2. Introduction of aluminium smelting in T&T

37. The notion of establishing an aluminium industry in T&T dates back to as early as the 1960s.¹⁵ However, the origins of what duly became the Project were in the early 2000s, when Dr Alfredo Riviere, on behalf of the Sural Group of Companies, wrote to T&T's Minister of Energy and Energy Industries with a

¹⁵ See L. Barclay, The Anatomy of a failed industrial policy: development of an aluminium industry in Trinidad and Tobago, August 2012 **C-0334**, p.10.

proposal for a fully integrated aluminium production and organisation complex.¹⁶

38. From those early origins events led to the later execution of the 2005 Contract and the 2008 Contract between CMEC and Alutrint.
39. The Project involved the construction of the first aluminium smelter in T&T and also in the wider Caribbean region. The 2005 EPC Contract represented the first time that Chinese aluminium smelting technology was being promoted in the Western world.¹⁷

D2.1 Public concerns, particularly regarding health and environmental issues

40. It is well known that aluminium smelters by their very nature raise health and environmental issues.¹⁸
41. One of the major problems with aluminium smelting is that in the course of the electrolysis process hydrogen fluoride (“HF”) is generated which, as a gas, is dangerous to health and therefore has to be prevented from entering the environment around the plant in concentrations that would be dangerous.¹⁹
42. Another major problem is that, as a result of the electrolysis process, the pot linings give off noxious gases which may affect the environment and employees. Furthermore, spent pot linings (“SPLs”) constitute hazardous waste because of their fluoride and cyanide content and the possibility of emitting noxious gases, which can cause cancer, brittle bone disease and other similar diseases. Consequently, safe disposal of SPLs is an important feature of the aluminium smelting process. In the case of the Project, the main proposal was that there be

¹⁶ See Leroy Mayers’ witness statement in the *Sural v GORTT* arbitration, dated 20 January 2014 [C-0369], §12.

¹⁷ T&T’s Ministry of Energy and Energy Affairs’ Note for Cabinet, dated 16 July 2010 [C-0248], §2.

¹⁸ See Leroy Mayers’ witness statement in the *Sural v GORTT* arbitration [C-0369], §18.

¹⁹ See T&T Hansard, 25 August 2006 [C-0097] at pp.33 to 34, per Winston Dookeran.

off-island disposal at a licensed hazardous waste facility in the US, with all its associated transportation problems.²⁰

43. In view of the health and environmental issues, the proposal for the construction of an aluminium smelting plant tends to be controversial.
44. The proposal to introduce aluminium smelting in T&T was no exception. It engendered fierce debate, with many voices against it.
45. On 6 December 2006²¹ the National Symposium on the Aluminium Industry was held in Trinidad, attended by the Minister of Energy and Energy Industries (Dr Lenny Saith) and many experts and others. The focus of the Symposium was the Project and another aluminium smelter project which Alcoa had then proposed.²² The transcript of the discussion at the National Symposium demonstrates the sharply divided views as to the desirability of introducing the aluminium smelting plant into T&T.
46. The Chairman of the Symposium (Mr Rampersad Motilal) said:

“This plant is expected to occupy some 450 acres and includes a 200-acre buffer zone. There have been several concerns raised about these smelters by members of the national community with a particular focus on environmental issues and on the extent of the economic benefits that could be realized by the country. These concerns have sparked public interest in this debate. However, a recent survey published in one of the daily newspapers revealed that close to 50% of respondents did not feel they had been sufficiently informed to offer a reasoned opinion about the development of an aluminium industry in Trinidad and Tobago. It is

²⁰ See T&T Hansard, 25 August 2006 [C-0097] at p.42, per Winston Dookeran; the High Court Judgment of 16 June 2009 [C-0018], Reasoning and Decision, §§13 and 14 (p.175) and 105 to 110 (pp.195-196); Leroy Mayers’ witness statement in the Sural v GORTT arbitration [C-0369], §18.

²¹ This was, therefore, after the 2005 Contract had been entered into (on 20 December 2005) but long before the 2008 Contract was executed (on 30 October 2008).

²² See the transcript of the Symposium at C-0112 p.1. The Alcoa project was suspended in 2007 and has not been revived: see L. Barclay [C-0334] pp.11-12.

necessary, therefore, that as much information as possible is made available to the general public and to promote discussion based on facts and informed opinion.

As mentioned previously, the objective of this symposium is to provide information pertaining to the potential development of an aluminium industry in Trinidad and Tobago. We have therefore come together today to engage in discussion and to get as much factual information as we can on the industry.²³

47. The Chairman went on to say:

“Some of the questions to which we all seek answers are as follows: Will the introduction of the aluminium industry significantly further the country’s development relative to other available options? What model of such industry is appropriate for our small twin-island State? What are the downsides associated with any chosen model and how can we ensure that these are minimized if not eliminate entirely? What can we do to strengthen the capability and performance of the various agencies and institutions whose task it is to safeguard the interest of the public so that any new development is done in accordance with prescribed standards?

These are not simple questions to answer. In the past year²⁴ there has been much public debate on some of these issues. Various persons and groups have expressed a range of views. It is of course important that views are formulated from the best information available on which reasoned discussion can take place and some consensus arrived at.”²⁵ (emphasis and underlining added)

²³ See C-0112, p.2.

²⁴ So the public debate on the desirability of introducing aluminium smelting into T&T was taking place before the 2005 Contract was entered into on 20 December 2005.

²⁵ See C-0112, p.2.

48. Most of those concerned about the smelter plant emphasised the health and environmental risks.

49. Thus Dr S. Smith said:

“...I, unfortunately, unlike my colleague, cannot keep too much of an open mind on this because I am here to deal with the health aspects of aluminium smelting. Health from the perspective not only of the workforce intended for the aluminium smelter but the health of the population or the health of the people in the environment of the smelter.

...

Many of us do not realize that our health and our enjoyment of life today have to do with what has happened in the environment. So, environmental health is of vital importance to everyone for the maintenance and protection of health and mental well-being. So, I would say that economic development is important, but economic growth cannot be the be-all and end-all.”²⁶

50. Professor John Spence,²⁷ who was invited to speak on the subject of “To Smelt or not to Smelt”²⁸, said the following at the end of his address:

“My conclusion is that it has been suggested by a government official that this symposium is for us to persuade the government why the smelters should not be constructed. I view it differently. There has been enough objection voiced to the smelters and sufficient evidence from polls to indicate that the majority of citizens of this country are not in favour of the smelters. Therefore, it is at this symposium for the government to persuade the people of this country that they would benefit from having

²⁶ See C-0112, pp.14-15.

²⁷ Professor Spence was referred to as “one of the nation’s leading agricultural and environmental advocates” [C-0112] p.41.

²⁸ See C-0112, p.41.

aluminium smelters and that the adverse effects are outweighed by the benefits...²⁹ (underlining added)

51. Apart from the National Symposium, the extent to which the Project encountered serious opposition is captured by the following:

“The protest actions of the ‘anti-smelter’ campaign, as it was popularly called, included protests outside the site of the Alutrint smelter, sit-ins, a 40-day fast, unscheduled visits to offices of the local organisations responsible for establishing Alutrint, press conferences held in the capital city, letters sent to the acting CEO of Alutrint and government officials, advertisements and letters placed in the local newspapers and other media, and the hosting of a public symposium on the economics of the smelter.”³⁰

52. Alutrint itself recognised at an early stage that the main risks affecting the Project were its non-approval from a financing or environmental perspective.³¹

53. The introduction of a new aluminium smelting industry in T&T also carried with it a number of other risks.

54. Some of such risks were referred to in CMEC’s Feasibility Study for the Alutrint Aluminium Complex dated April 2006:³²

- (1) Under “Uncertainty Analysis” it said when either construction investment or operating costs increase by 10% or a sale price reduction of 10% occurs “the result is not a so good economic benefit and weak risk resistance ability”.³³

²⁹ See **C-0112**, p.54.

³⁰ See L. Barclay **[C-0334]**, p.12 f/n 8. Prominent environment groups which oppose the Project included Fisherman and Friends of the Sea, Citizens for Conservation Trinidad and Tobago and Caribbean Natural Resources Institute: see Leroy Mayors’ witness statement 29 May 2025, §41

³¹ See Leroy Mayers’ witness statement in the Sural v GORTT arbitration, **[C-0369]**, §53, and the Final Award in the Sural v GORTT arbitration **[C-0014]**, §78, p.18.

³² CMEC’s Feasibility Study, April 2006, is **C-0085**. It was prepared for the purpose of making a case to the Exim Bank of China for financing the Project **[C-0085]** p.10.

³³ **C-0085**, §16.4.2, p.335.

- (2) Under “Risk Analysis”, it said: “Though Alutrint is an enterprise operating in a rapidly developing country with the advantage of natural gas, there are still many risks in product market, production technology, management, material, construction and policy changing”.³⁴
- (3) Under “Policy Risk”, it specifically noted that “Trinidad government restrictions on smelting project and the National Environment Standards, will all have a significant impact on the project efficiency”.³⁵
- (4) It also noted that, additionally, there are “social and political risks”.³⁶

55. In the context of the above body of opinion which was against the introduction of aluminium smelting in T&T, on 29 June 2007, 3 public interest groups sought leave from the High Court of T&T to apply for judicial review of the decision of the Environmental Management Agency (“EMA”) to grant a Certificate of Environmental Clearance (“CEC”) in respect of the Project. Leave was duly granted on 13 September 2007. These matters are developed in Section D7 below.

D2.2 The stances of the major political parties on the introduction of aluminium smelting in T&T

56. The two major parties in T&T are the People’s National Movement (PNM) and the United National Congress (UNC) which, between them, have supplied every Prime Minister since 1991.³⁷

³⁴ C-0085, §16.5, p.336.

³⁵ C-0085, §16.5(5), p.336.

³⁶ C-0085, §16.5, p.337.

³⁷ The PNM was in government from 2001 to 2010 (during which period the 2 EPC Contracts were executed) and from 2015 to April 2025. The UNC was in government from 1995 to 2001, from 2010 to 2015 and was re-elected in April 2025.

57. The debate in the House of Representatives held on 25 August 2006 [C-97] demonstrates the respective views of the UNC and the PNM at that time on introducing aluminium smelting into T&T.
58. The UNC members (Winston Dookeran and Kamla Persad-Bissessar) emphasised the various health and environmental concerns associated with aluminium smelting and, in consequence, their opposition to the Project.³⁸
59. On behalf of the PNM, Dr Keith Rowley spoke in favour of aluminium smelting in T&T, focusing on its economic advantages and saying that health and environmental concerns were addressed by the engineering technology and adherence to regulatory standards.³⁹ He also said of the UNC that they had “not got a good word to say” about aluminium smelting in T&T once they had left office (in 2001).⁴⁰
60. So, for several years before the EPC Contracts were entered into, the UNC’s aversion to establishing an aluminium smelting industry on health, environmental and other grounds was well-known to the public in T&T and to any potential investors.
61. Relying on a statement by a pro-smelter commentator,⁴¹ the Memorial, §638(a)⁴², says that historically there has been bi-partisan support for aluminium and the diversification of T&T’s natural gas-led industrialisation and that, given this background, “a much more stable government approach to the Project was expected irrespective of the political party in power”.

³⁸ See C-0097 pp. 10-24, 43, 47-57.

³⁹ See C-0097 pp.24-47.

⁴⁰ See C-0097 p.37. The UNC’s stance opposing aluminium smelting in T&T had therefore been adopted well prior to the execution of the 2005 Contract.

⁴¹ A. Wilson’s article in the T&T Guardian newspaper, 22 July 2009. “Are T&T’s environmentalists anti-people”, C-0198.

⁴² This is the first of the “pre-termination assurances and representations” CMEC relies on to support its claim that T&T breached its fair and equitable treatment obligation by not upholding CMEC’s legitimate expectations. The Memorial, §50, makes the same point as §638(a) and also refers to A. Wilson’s said article.

62. In light of the material set out above, the statement that historically there has been bi-partisan support for aluminium in T&T is incorrect, or at least misleading. As stated, for several years prior to the execution of the 2005 Contract, the UNC's stance on the establishment of an aluminium smelting industry in T&T, in light of the attendant health and environmental concerns, was well-known.
63. For the same reason, the alleged expectation that aluminium smelting in T&T would be supported irrespective of whether the PNM or the UNC was in office has no proper basis.⁴³

D2.3 Express reservations under the Treaty

64. The Treaty was signed on 22 July 2002.⁴⁴

65. The Preamble to the Treaty reads:

“The Government of the Republic of Trinidad and Tobago and the Government of the People's Republic of China, hereinafter referred to as the Contracting Parties;

Desiring to intensify economic cooperation between both States on the basis of equality and mutual benefits;

Recognizing that the reciprocal encouragement, promotion and protection of investments will be conducive to stimulating business initiatives of investors and the economic development of both States;

Intending to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party;

Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application;

⁴³ The UNC's stance on the smelter issue before the election held on 24 May 2010 (which was won by the People's Partnership a coalition of 5 political parties led by the UNC) was well-known. See the article in the T&T Guardian newspaper on 23 July 2010 [C-0250] and Alutrint's 28 May 2010 email to CMEC [C-0026].

⁴⁴ The Treaty is CL-0001.

Respecting the sovereignty and laws of the Contracting Party within whose jurisdiction the investment falls;...” (underlining added)

66. Thus, in the Treaty, the objectives (upon which CMEC has placed reliance⁴⁵) are subject to the important caveats underlined above. The Treaty expressly states that the objectives are to be achieved without relaxing T&T’s ability to take health and environmental measures and that the investor has to respect the sovereignty and laws of T&T.
67. It is notable that these caveats are not formulaic. They are absent from many treaties and their incorporation evidences the intention of T&T and the PRC that investment protection be balanced with the host State’s protection of health, safety and the environment within their jurisdictions.⁴⁶

D3. The parties to the Project and other entities involved

D3.1 CMEC

68. CMEC is a Chinese state-owned company, which is primarily engaged in international engineering contracting projects. From 2012 to 2021 CMEC was listed on the Hong Kong Stock Exchange.
69. CMEC was “interested in building a large showcase project that can demonstrate Chinese engineering, construction and technology capabilities to potential customers in the Western hemisphere”.⁴⁷
70. CMEC subcontracts “substantially all” of its construction works.⁴⁸

⁴⁵ See the Memorial, §§464 and 465. CMEC accepts that the Treaty’s object and purpose may be ascertained from its Preamble: Memorial, §464.

⁴⁶ “Preambles in Treaty Interpretation”, Max H. Hulme, University of Pennsylvania Law Review, Vol 164, 1281 at pp.1322-1323 [RL-0096]. See also Section J, 2 below.

⁴⁷ See Alutrint’s Feasibility Study for the Alutrint Complex, March 2006 [C-0081] p.4.

⁴⁸ See the IPO Prospectus of CMEC, dated 11 December 2012 [C-0342] p.7: “We adopt an asset-light operating model as we subcontract substantially all of the construction works...”

71. In this case CMEC subcontracted the production of the engineering design drawings for the Project to the Northeastern University Engineering & Research Institution Co Ltd (“NEUI”). NEUI is a Chinese company which provides engineering consultancy, engineering design and similar services.⁴⁹
72. A matter of substantial dispute in this case, as regards the issue of damages, is the quantum of CMEC’s claim in respect of the engineering design drawings which were prepared by NEUI.
73. When CMEC was pursuing its contractual claim against Alutrint, its claim increased by stages up to as much as US\$66,654,000 for the preliminary design and construction drawings and a further US\$9,530,000 for upstream and downstream design drawings, making a total claim for all the drawings of US\$76,184,000. CMEC’s present claim for all the drawings is US\$37 million. The present claim is still excessive.⁵⁰ The various sums CMEC has sought in the past and is now seeking in respect of the drawings are considered in detail in Sections G and N, below, in Chris Hillier’s expert report and in Appendix II hereto.

D3.2 Alutrint

74. Alutrint (then named Trinalco Ltd⁵¹) was incorporated in April 2005 to manage and represent the ownership of the Project.
75. Alutrint has throughout been owned as to 60% by T&T and as to 40% by Sural,⁵² as the Memorial acknowledges.⁵³

⁴⁹ See the NEUI company profile [C-0540], p.1 and also the reference to NEUI having carried out work for T&T at p.27.

⁵⁰ See Section N below.

⁵¹ Trinalco Ltd changed its name to Alutrint Ltd on 1 June 2005 [C-0009].

⁵² The relevant entity is Sural Barbados Ltd, incorporated in Barbados and a member of the Sural Group of companies.

⁵³ See the Memorial, §§33.2 and 36.5.

76. Hence it is incorrect to say that Alutrint is “owned and controlled by the State”: Memorial, §29.
77. Alutrint is characterised as a State Enterprise in some official publications and as a State Agency in others. However, this label is applied to entities whether they are wholly-owned, majority-owned (as in the case of Alutrint) or minority-owned by T&T.⁵⁴
78. Importantly, State Enterprises, such as Alutrint, operate in the same way as any other company in the private sector.
79. Hence, the IMF Country Report says the following of Trinidad and Tobago⁵⁵:
- “2. **PBs [public bodies] are comprised of two types: state-owned enterprises (SOEs) and statutory bodies (SBs).** SOEs are established under the Companies Act (Chapter 81:01) with the express objective of supporting the Government’s policy for the sector, while SBs are formed by statutes that are approved by the Parliament. SOEs operate, and have the same powers as any other private sector company. The SOE sector is comprised of 60 companies (Annex I): 48 wholly owned; 7 majority owned companies; and 5 minority owned companies.”;
- ...
- “The ***Board of Directors***, which is the highest governing body inside the legal structure of an SOE, directs the management of the business and affairs of the SOE”. (original emphasis, underlining added)
80. That Alutrint, being a majority-owned SOE, operates in the same way as companies in the private sector is affirmed by the contents of the Unanimous

⁵⁴ See, for example, C-0496 p.2 and C-0575, p.5.

⁵⁵ C-0444: International Monetary Fund, IMF Country Report No 17/533 – Trinidad and Tobago, Selected Issues, 4 October 2017 pp.3 and 5.

Shareholders' Agreement ("USA") made between T&T and Sural on 3 July 2007.⁵⁶

81. Clause 25.1 of the USA provided:

"GORTT hereby acknowledges that transactions contemplated in this Agreement are commercial in nature rather than governmental..."⁵⁷

82. Other provisions of the USA further affirm that Alutrint was run as a commercial entity and was not exercising governmental authority. See Section H, 2.3, below.

83. As for those responsible for conducting the affairs of Alutrint, the USA provided that:

- (1) the Chairman and Deputy Chairman of the Board were to be appointed by T&T;⁵⁸
- (2) The Managing Director was to be appointed by Sural;⁵⁹
- (3) the Board should comprise 11 directors, of whom T&T could nominate 7 and Sural could nominate 4.⁶⁰

84. As for the funding of Alutrint's activities, the arrangements made in the course of 2005 were as follows:

- (1) By a Letter of Agreement dated 18 May 2005 it was agreed that any fees that needed to be paid to third parties in respect of the Project would be shared on a 60% (NEC) and 40% (Sural) basis.⁶¹
- (2) The Project was to be partly funded by T&T and Sural (via Alutrint) with the remainder of the funding to be provided by an international financial

⁵⁶ The USA is at C-0010.

⁵⁷ C-0010, p.18.

⁵⁸ See Clause 9.1 of the USA, C-0010, p.9.

⁵⁹ See Clause 9.1.1(ii) of the USA, C-0010, p.9.

⁶⁰ See Clause 9.2.1 of the USA, C-0010, p.9.

⁶¹ See the Final Award in the Sural v GORTT arbitration [C-0014] §70c, p.16; Leroy Mayer's witness statement, C-0369, §43, p.10.

institution. CMEC approached a state-owned Chinese bank (Exim Bank) for this purpose.⁶²

- (3) By July 2005 the estimated cost of the Project was US\$570 million. 70% of the funding was to be provided by Exim Bank. The remaining 30% was to be provided by Alutrint's shareholders, with Sural and T&T contributing to the 30% in proportion to their shareholdings in Alutrint (being 60% T&T and 40% Sural).⁶³

85. The USA duly supplanted the Letter of Agreement of 18 May 2005 and set out how the Project was to be funded in its Clause 5.⁶⁴

D3.3 Sural

86. The Sural Group of companies⁶⁵ is owned and controlled by Dr Alfredo Riviere, with headquarters in Venezuela, and with worldwide interests in aluminium downstream facilities, involving the manufacture of aluminium alloy, rods cables and wires and aluminium alloy automobile wheels. Since 1984 Renda Butler has served as Dr Riviere's second in command at the Sural Group.⁶⁶
87. Sural was interested in using its technology and know-how in aluminium downstream facilities to invest in an integrated aluminium project in T&T that included aluminium primary production to supply these downstream facilities.⁶⁷
88. Sural Barbados Ltd, a member of the Sural Group of companies, was formed to represent the Sural Group's interest in Alutrint and hence in the Project.

⁶² See the Final Award, *supra*, §71, p.16.

⁶³ See the Final Award, *supra*, §72, p.17.

⁶⁴ See the USA [C-0010], Clause 5, pp.7-8.

⁶⁵ C-0541 provides some history of the Sural Group and the scope of its aluminium-based business.

⁶⁶ See the Final Award in the *Sural v GORTT* arbitration, C-0014, §47, p.11.

⁶⁷ Alutrint's Feasibility Study for the Alutrint Aluminium Complex, March 2006 [C-0081] p.4.

89. The Memorial appears to downplay the role played by Sural as T&T's partner in the Project.⁶⁸ However, the fact that Alutrint was very much a joint venture, with Sural playing a very important role, has been emphasised by T&T. Thus the Note to Cabinet of 16 July 2010⁶⁹ said at §7:

“GORTT recognized that it was critical for the success of the project to have a joint venture partner in this project, one that would provide operating experience and access to markets.” (underlining added)

90. Thus, in summary, Alutrint was operated on normal commercial lines, in the same manner as any other company in the private sector, with each of its shareholders (T&T and Sural) playing a significant part, both financial and otherwise, in its operations.

D3.4 T&T

91. T&T is a parliamentary democracy, with the executive being the Cabinet headed by the elected Prime Minister.⁷⁰
92. The Cabinet has the general direction and control of the T&T government.⁷¹
93. Hence decisions made by the T&T government qua 60% shareholder in Alutrint were necessarily made by the Cabinet. An example is the Cabinet's decision to approve the USA.⁷² Other examples of the Cabinet making decisions with respect to the Project are set out in the Memorial, §27. The fact that it was the Cabinet that made decisions with respect to the Project therefore does not mean that it did so in the exercise of T&T's sovereign powers.

⁶⁸ The Memorial, §56, says: “As Sural brought to the table only its experience in aluminium fabrication and a related sales network, it was necessary for the State to provide the following...”

⁶⁹ This Note for Cabinet [C-0248] was prepared by the Ministry of Energy and Energy Affairs in order for the Cabinet to review and consider the state of the Project for the purpose of charting the best way forward.

⁷⁰ See the Final Award in the Sural v GORTT arbitration [C-0014] §50, p.11.

⁷¹ See the Office of the Prime Minister, Republic of Trinidad and Tobago [C-0513], p.1.

⁷² See the Final Award in the Sural v GORTT arbitration [C-0014] §56, p.13. See also §§91-93.

94. The Memorial, §28, identifies the four administrations in T&T between 1995 and April 2025. On 28 April 2025 the UNC won the general election and Kamla Persad-Bissessar became Prime Minister.⁷³

D4. The 2005 EPC Contract and the 2008 EPC Contract⁷⁴

D4.1 The 2005 Contract

95. The 2005 Contract between Alutrint as Employer and CMEC as Contractor was made on 20 December 2005.⁷⁵
96. The Project then comprised an aluminium complex at a total price of US\$465 million, of which US\$275 million was allocated to the upstream facility (being the smelter with a nominal annual production output of 125,000 mt of molten aluminium) and US\$190 million was allocated to the downstream facilities (being for the fabrication of bars, wires, rods and cables).
97. Some of the provisions of the 2005 Contract which may impact this case are the following.

D4.1.1 The CEC

98. It was a condition for the contract coming into full force and effect that Alutrint had obtained a CEC.
99. The Contract Agreement, p.2, provided:

⁷³ This is Kamla Persad-Bissessar's second term of office as Prime Minister, her first term having been from 24 May 2010 to 7 September 2015.

⁷⁴ "EPC" signifies that CMEC were to provide engineering, procurement and production services on a lump sum, turnkey basis.

⁷⁵ The 2005 Contract is **C-0011**.

“The provisions of Sub-Clause 14.2(1) of the Conditions of Contract shall come into full force and effect upon the satisfaction of the provisions therein. The balance of the Contract shall come into full force and effect on the date when all of the following conditions are satisfied:

...

(e) the Employer has obtained all approvals which it is obligated to obtain in Trinidad and Tobago for the implementation of the Works including the Certificate of Environmental Clearance...”

100. Conditions of Contract, Clause 1.13(a) requires Alutrint to obtain approval from environmental authorities.

101. So the continuation of the Project was dependent upon the grant of a valid CEC.

D4.1.2 Extension of “Time for Completion”

102. In the Memorial, §§117 and 118, CMEC says it was entitled to an extension of the Time for Completion and appears to rely on various provisions of Clause 8.4 for so saying.

103. The short point is that CMEC never sought such an extension and never activated the procedure under Clause 20.1 for obtaining such an extension.

104. In those circumstances the question of CMEC’s entitlement to an extension of the Time for Completion does not arise for consideration.

D4.1.3 Variations

105. Similarly, while §119 of the Memorial suggests that CMEC was entitled to a price adjustment for accommodating variations instructed by Alutrint, CMEC never activated the variation procedure under Clause 13.3.

106. So the question of CMEC's entitlement to a price adjustment in respect of any variations does not arise for consideration.

D4.1.4 Alutrint's entitlement to termination

107. Importantly, Alutrint was entitled to terminate the 2005 Contract whenever it wished to do so.

108. Thus Clause 15.5 provides:

“[Alutrint] shall be entitled to terminate the Contract, at any time for [its] convenience, by giving notice of such termination to [CMEC].”

109. Termination by Alutrint under Clause 15.5 did not entitle CMEC to recover any loss of profits.⁷⁶

110. It is noticeable that nowhere in its detailed consideration of contractual and other matters in the Memorial does CMEC make any mention of this provision.

D4.1.5 Dispute resolution procedure

111. Clauses 20.5 and 20.6 of the 2005 Contract set out the contractual dispute resolution procedure, comprising an attempt at amicable settlement followed by final settlement by international arbitration under ICC Rules in Switzerland or other agreed place.

112. CMEC did not see fit to activate this procedure.

D4.2 The 2008 Contract

⁷⁶ A termination under Clause 15.5 entitled CMEC to the payments set out in Clause 19.6, none of which was for loss of profits. Furthermore, Clause 17.6 re-affirms that loss of profits is not a recoverable head of claim.

113. The 2008 Contract between Alutrint and CMEC was made on 30 October 2008.⁷⁷
114. The Project was re-configured to comprise only a smelter, having an annual production of 125,000 mt of molten aluminium at a revised price of US\$414 million. The downstream facilities were excluded, as were the port facilities.
115. The 2008 Contract comprised General Conditions of Contract (“GCC”) and Particular Conditions of Contract (“PCC”). Where the GCC and the PCC were in conflict, the provisions of the latter prevailed over the provisions of the former.⁷⁸
116. Relevant provisions of the 2008 Contract are as follows.

D4.2.1 The price

117. While recognising that the Contract Price was a lump sum US\$414 million under Clause 14.1, CMEC goes on to say: “Further, CMEC is explicitly entitled to 5% reasonable profit and 5% overhead **in addition to** the contract price, which together represent a 10% markup on costs” (Memorial, §126, relying on Sub-Clause 1.2 of the PCC, original emphasis).
118. So, by this interpretative process, a US\$414 million lump sum contract is converted into a contract whose price is US\$414 million + 10%. In the course of the more-than-a-decade-long dispute between CMEC and Alutrint, CMEC never suggested that it was entitled to this 10% mark up. This contention has been first advanced in the Memorial.
119. CMEC’s interpretation of Sub-Clause 1.2 of the PCC is obviously incorrect:

⁷⁷ The 2008 Contract is C-0015.

⁷⁸ See C-0015, fourth page.

- (1) Sub-Clause 1.2 of the PCC (which replaced Sub-Clause 1.2 of the GCC) simply says:

“In the Contract, provisions including the expression “reasonable profit” shall be (5%) and “overhead” shall be (5%) of the Cost. Reasonable profit and overhead are in addition to the contract price.”

- (2) This means that wherever there are provisions in the 2008 Contract which include those expressions, those expressions are to have the assigned meaning in those particular provisions. An example is Sub-Clause 2.1, which refers to the Contractor being entitled to payment of the cost it has incurred as a result of the Employer’s failure to give the Contractor access to the site, “plus overhead and reasonable profit”.
- (3) Sub-Clause 1.2 plainly does not mean that the whole of the lump sum amount of the 2008 Contract is automatically increased by 5% and 5%.

120. Clifford Chance has instructed CMEC’s damages expert, Michael Tonkin, to assess CMEC’s claim for loss of profits on the basis of the said interpretation of the effect of Sub-Clause 1.2 of the PCC of the 2008 Contract. Hence this topic is re-visited in Section N, 4.3.2, below.

D4.2.2 The CEC

121. As in the case of the 2005 Contract, the 2008 Contract required that there be a valid CEC.

122. It is to be noted:

- (1) that Clause 6 of the Contract Agreement in the 2008 Contract is not in the same terms as the Contract Agreement p.2 sub-paragraph (e) of the 2005 Contract;⁷⁹

⁷⁹ Clause 6 of the Contract Agreement of the 2008 Contract does not refer to Alutrint obtaining the CEC.

- (2) GCC, Clause 1.13(a) of the 2008 Contract refers to Alutrint obtaining the permissions described in the Employer's Requirements **[C-160]**, which refer to 6 permissions, (a) to (f), of which the CEC is (a);
- (3) PCC, Clause 5.4, provides that CMEC had to meet with the approvals "(eg CEC)" of T&T's Government Agencies and Statutory Bodies;
- (4) at the time the 2008 Contract was executed (30 October 2008) the CEC had already been obtained (on 2 April 2007).

D4.2.3 Alutrint's entitlement to termination

- 123. Clause 15.5 of the 2008 Contract entitled Alutrint to terminate the Contract at any time for its convenience, just as in the case of the 2005 Contract.
- 124. Again, termination by Alutrint of the 2008 Contract under Clause 15.5 did not entitle CMEC to recover any loss of profit (for the same reasons that loss of profits are not recoverable in the event of a termination under Clause 15.5 of the 2005 Contract).
- 125. Again, the Memorial is silent as to Clause 15.5 of the 2008 Contract.

D4.2.4 Termination by CMEC

- 126. Clause 16.2 entitled CMEC to terminate the Contract on any of the 6 grounds, (a) to (f), there set out.
- 127. CMEC purports to have effected a termination by delivering a Notice of Termination dated 1 March 2013 "on the basis of the Project having suffered a prolonged suspension" (Memorial, §370).

128. Termination on the grounds of “a prolonged suspension” is one of the grounds set out in Clause 16.2, being Clause 16.2(e). Yet the Memorial is silent as to the existence of this provision or the manner of its operation.⁸⁰

D4.2.5 Dispute resolution procedure

129. Clause 20.2 to 20.8 set out the dispute resolution procedure under the 2008 Contract, which commences with adjudication by a DAB, followed by an attempt to settle the dispute amicably, escalating to international arbitration, under ICC Rules, seated in London.
130. CMEC activated the dispute resolution process by giving formal Notice of Intention to refer all its claims in relation to the Project to a DAB, pursuant to Clause 20.2 of the 2008 Contract. But, unaccountably, CMEC later simply abandoned the process. See Section I, 4.2, below and Appendix IV hereto.
131. The Memorial refers to the fact that CMEC activated the dispute resolution process⁸¹ but is silent as to why the process was not pursued after the September 2015 general election.

D4.3 The relationship between the 2005 Contract and the 2008 Contract

132. The provisions of the 2008 Contract indicate that it was not intended that, upon its execution, it would immediately supersede the 2005 Contract. The intention was that the 2008 Contract and the 2005 Contract should, at least for a period, exist in parallel.
133. The above appears from Clause 8 of the Contract Agreement of the 2008 Contract:

⁸⁰ This matter is further considered in Section D, 8, below.

⁸¹ Memorial, §§399, 408-411.

“8. The coming into force of this Agreement [ie the 2008 Contract] shall render ineffective the [2005 Contract].”

134. This raises the question of when the 2008 Contract “came into force”.
135. Clause 6 of the Contract Agreement of the 2008 Contract (as amended⁸²), together with Clause 7, set out various conditions, all of which had to be satisfied for the 2008 Contract to come into full force and effect.
136. Not all of the Clause 6 and Clause 7 conditions were satisfied, with the result that the requirement for the 2005 Contract being rendered ineffective was not met.
137. So, while the 2005 Contract had not been rendered ineffective, it is plainly the case that it was not fully operational.
138. It would make no sense to say that the 2005 Contract was fully operational for several years after the 2008 Contract was made and was being implemented, when the 2 Contracts had different subject-matters, different contract prices and different provisions. Furthermore, Alutrint and CMEC were obviously working on the basis that the 2008 Contract had substantially superseded the 2005 Contract.⁸³
139. Hence, T&T does not accept that “Both EPC Contracts were operational prior to them being terminated” (Memorial, §151).

⁸² Clause 6 was amended by the First Amendment to the 2008 Contract made on 17 December 2009 [C-0016].

⁸³ There are a number of indications that this is so, among which are:

- (1) CMEC’s Notice of Termination dated 1 March 2013 [C-0343], on which CMEC now relies (Memorial, §370), explicitly referred only to the 2008 Contract. Presumably CMEC was of the view that the 2005 Contract did not need to terminate as it was no longer effective.
- (2) When CMEC (by Pinsent Mason) in its letter dated 13 March 2015 [C-0048] gave Alutrint its Notice of Intention to refer its claims to a DAB, it referred only to the 2008 Contract.
- (3) Leroy Mayers’ witness statement in the Sural v GORTT arbitration, refers to the 2008 Contract having “superseded” the 2005 Contract: C-0369, §39.
- (4) Finalisation of the 10 Annexes to the Conditions of Contract of the 2005 Contract was “superseded” by events which led to the execution of the 2008 Contract: Memorial, §92.

D5. The EMA and the CEC

140. The EMA is the regulatory agency created by the Environmental Management Act. The EMA is independent of the T&T Government.⁸⁴
141. The EMA's functions include taking all appropriate action for the prevention and control of pollution and conservation of the environment. An important part of the EMA's powers is the issue of CECs to new development projects that may impact the environment. Generally, an Environmental Impact Assessment ("EIA"), which involves collecting data as to the environmental impact of the proposed project in both the wet and dry seasons, is required of the developer. The relevant EIA was submitted by NEC for this Project in January 2006.⁸⁵
142. The CEC in question, CEC 1033/2005, was granted on 2 April 2007.⁸⁶
143. The CEC was granted conditionally, being subject to the implementation of various measures to ensure environmental safety, which included the following:
- (i) Buffer Zone Management and Monitoring Plan.
 - (ii) Sediment and Storm Water Management Plan.
 - (iii) Particulate and Monitoring Plan.
 - (iv) Road Traffic Management Plan.
 - (v) Noise Monitoring.
 - (vi) Archaeological Finds.
 - (vii) Environmental Management System.
 - (viii) Medical Monitoring Plan.

⁸⁴ See Leroy Mayers' witness statement of 29 May 2025, §7.2

⁸⁵ See Leroy Mayers' witness statement in the Sural v GORTT arbitration, dated 20 January 2014 [C-0369], §20. The EIA is C-0077.

⁸⁶ The CEC is C-0017. The CEC was granted for "The Establishment of an Aluminium Smelter Complex with a target capacity of 125,000 metric tonnes per annum": C-0017, p.1.

- (ix) Source Emission Testing Plan.
- (x) Ambient Air Quality Monitoring Plan.
- (xi) Soil Monitoring Plan.
- (xii) Ground Monitoring Plan.
- (xiii) Electro-Magnetic Radiation Monitoring Plan.
- (xiv) Waste-Water Treatment System.
- (xv) Spent Pot Lining (SPL) Management Plan.
- (xvi) Pesticides and Toxic Chemicals.
- (xvii) Decommissioning/Abandonment Plan.
- (xviii) Emergency Prevention and Response Plan.
- (xix) Community Awareness and Emergency Response (COER).⁸⁷

144. The environmental control was iterative, with the EMA continuing to exercise control even after the CEC was granted.⁸⁸
145. Thus, the CEC could be revoked if any of such conditions was not fulfilled.
146. The CEC provided, in General Condition (i)(e), that any requests for modifications to the “layout and scale of the development as stated in the application for CEC 1033/2005” must be submitted to, and approved by, the EMA prior to the start of any related works.

⁸⁷ See the 2009 High Court Judgment [C-0018], “The Facts”, §68, p.32.

⁸⁸ See the 2009 High Court Judgment [C-0018], “Reasoning and Decision”, §110, p.196.

147. Notwithstanding that the NEC made an early application for the CEC on 22 April 2005⁸⁹ and that the EIA was completed by January 2006⁹⁰, the CEC was only issued on 2 April 2007.⁹¹
148. As CMEC puts it in the Memorial:
- (1) “[t]his was one year later than the originally estimated approval date, and two years after the initial CEC application”⁹²;
 - (2) “as the events progressed, the EMA exercised *"meticulous care"* in deciding whether to greenlight the construction of the Project which led to *"nearly two (2) years of the [CEC] application, evaluation and clarification process"* that resulted in *"extensive redesign and schedule delays"*”⁹³ and raised various further requests and requirements.⁹⁴
 - (3) “the significant delay in the issuance of CEC 1033/2005...had profound ripple effects on the overall schedule and budget of the Project”⁹⁵.
149. The above evidences the following: (1) the complexity of the environmental issues involved, (2) the independence of the EMA from T&T, and (3) the uncertainties concerning the Project, both in respect of the EMA’s future approval of the Project and the escalating costs. The above also shows that CMEC was well aware of all these things.

⁸⁹ Memorial, §155

⁹⁰ Memorial, §156

⁹¹ For the avoidance of doubt, Alutrint gave CMEC no “assurance” that the CEC would be granted in October 2006 (cf §114.3 of the Memorial). Alutrint said only that it felt confident that the CEC would be received at that time: **C-0096**, §2.

⁹² Memorial, §162.

⁹³ Memorial, §159.

⁹⁴ Memorial, §160 and Annex 7.

⁹⁵ Memorial, §165.

D6. Sural's disengagement from the Project and the search for a replacement partner

150. From as early as 2006 it had become clear to Alutrint that the main risks associated with the Project were its non-approval from a financing or environmental perspective.⁹⁶ At a later stage Sural became seriously concerned by the legal challenges that could delay the Project for years, with resulting cost escalations and overruns and with the Project burdened by the unbudgeted costs of Alutrint staff. Sural had diminishing confidence that the legal proceedings would be resolved quickly. Sural believed that the Project therefore needed to be restructured.⁹⁷
151. The said risks to the Project perceived by Sural, which echoed CMEC's awareness of the problems which had been developing with the Project referred to in Section D, 5, above, caused Sural to seek disengagement from the Project in December 2007.
152. In or about April 2008 Sural made enquiries of the Votorantim Group (a large industrial conglomerate in Latin America operating in various sectors) with a view to it becoming Sural's partner in a restructured Project. Votorantim was interested in a smelter which was twice the size of the 125,000 mtpy plant. Duly, Sural and Votorantim submitted a proposal to T&T that they should together buy 60% of the shares in Alutrint (T&T having the remaining 40% of the shares).⁹⁸
153. The said proposal was not pursued after Votorantim reviewed the project in October 2008, and took into account various economic considerations, including capex costs, increased powers costs and the global financial crisis.⁹⁹

⁹⁶ See Leroy Mayers' witness statement in the Sural v GORTT arbitration [C-0369], §53 and the Final Award in the Sural v GORTT arbitration [C-0014] §78, p.18.

⁹⁷ See the Final Award in the Sural v GORTT arbitration [C-0014] §99, p.23.

⁹⁸ Final Award in the Sural v GORTT arbitration [C-0014] §§106-113, pp.25-27.

⁹⁹ Ibid, §263.

154. Thereafter, Sural and Votorantim had further discussions about their respective involvements in a restructured project.¹⁰⁰
155. Later, Votorantim entered into further discussions with T&T with a view to it alone participating in the Project with T&T. On 4 December 2009 T&T and Votorantim made an agreement for Votorantim's participation in Alutrint by providing for it to make initial contributions totalling US\$30 million for a 10% interest in a 250,000 mtpy smelter and downstream facilities, with an option to acquire an increased shareholding on the basis of an increased equity contribution ("the Votorantim Agreement").¹⁰¹
156. One of the conditions of the Votorantim Agreement was that Sural should no longer be a shareholder in Alutrint and should have no further involvement or participation in Alutrint or the Project.¹⁰²
157. The Votorantim Agreement also provided that it would terminate automatically on 30 September 2010 if at that date the parties had not executed and delivered all definitive documentation.¹⁰³
158. Thus at the time when T&T were considering the future of the Project in September 2010:
- the Votorantim Agreement, if implemented, involved a commitment to expand the plant from one to two pot lines (ie from 125,000 to 250,000 mt per year), which could itself create further environmental problems;
 - there was no agreement as to how Sural was to be removed from the Project, which was a pre-condition for the Votorantim Agreement coming into effect.

¹⁰⁰ Ibid, §§118, 122.

¹⁰¹ Ibid, §128. The Votorantim Agreement is **C-0218**.

¹⁰² See Clause 2(a)(iii) of the Votorantim Agreement: **C-0218**, p.8; Final Award in the Sural v GORTT arbitration: **C-0014**, §129, p.31.

¹⁰³ See Clause 11(b) of the Votorantim Agreement: **C-0218**, p.16.

- it was critical for the success of the Project for T&T to have a joint venture partner, being one which would provide operating experience and access to markets.¹⁰⁴
159. The Votorantim Agreement further provided, by Clause 3(h), that it was necessary that a CEC be obtained “approving the construction of a 250,000 tons per year smelter”.
160. The Votorantim Agreement duly terminated automatically on 30 September 2010, as the parties to it had not executed and delivered all definitive documentation by that date.
161. Notwithstanding the above events involving Sural:
- (1) the 2 Sural-nominated directors of Alutrint remained directors of Alutrint throughout the period from 18 May 2005 to 28 June 2012;¹⁰⁵
 - (2) from 1 June 2010 to 28 September 2011, the 2 Sural-nominated directors were the only directors of Alutrint;¹⁰⁶
 - (3) up until 28 June 2012, the Sural-nominated directors continued to attend and participate in various Alutrint Board meetings.¹⁰⁷
162. Furthermore, Sural throughout remained (and still remains) a 40% shareholder in Alutrint.

¹⁰⁴ Note for Cabinet, 16 July 2010: **C-0248**, §7, p.3.

¹⁰⁵ Memorial, Annex 3, pp.3-13.

¹⁰⁶ Memorial, Annex 3, p.10.

¹⁰⁷ For the 13 March 2012 Board meeting, see **C-0315**; for the 5 June 2012 Board meeting, see Colleen Murray’s witness statement in the Sural v GORTT arbitration, **C-0368**, §§88 and 89, p.17; as for the Directors Working Session for local directors on 18 June 2009, a full Board meeting was not convened to discuss the 2009 High Court Judgment since the matter was urgent and could not await the convening of a Board meeting (Colleen Murray’s witness statement, **C-0368**, §53, p.11).

D7. The 2009 High Court Judgment and the EMA's appeal

163. On 16 June 2009 Dean-Armorer J delivered a Judgment¹⁰⁸ whereby an order of certiorari was issued quashing the decision of the EMA to issue CEC 1033/2005 and remitting the matter for further consideration by the EMA.¹⁰⁹
164. The High Court Judgment referred to various matters relating to the inadequacy of the steps the EMA had taken to address important environmental and health concerns.
165. Hence the High Court said:
- “There could be no doubt that there was considerable scientific evidence before this Court of threats of both serious and irreversible damage to both the environment and human health.”¹¹⁰
166. The High Court further found that:
- (1) there was no finalised method of over-land transportation of the SPLs¹¹¹; and
 - (2) there was also “no evidence, transparent or otherwise to prove the hard look on the part of the EMA of the cumulative [environmental] impact of the three parts of the project”.¹¹²

¹⁰⁸ The High Court Judgment is **C-0018**.

¹⁰⁹ See the High Court Judgment, **C-0018**, §125, p.200.

¹¹⁰ Ibid, Reasoning and Decision, §10, p.174.

¹¹¹ Ibid, §14. As to SPLs, the High Court also said at §109:

“...it appears to me that having regard to the hazardous nature of the SPL and its potential to cause harm to human health. It was outrageous of the decision-maker to leave such issues unresolved before the CEC was granted. A reasonable decision-maker would have insisted that the information sought by conditions would have been settled before the Certificate was granted.”

¹¹² Ibid, §118, p.199. The 3 parts of the Project were: the aluminium complex, the power plant and the port facility: *ibid*, §124. As to the “cumulative impact” point, the High Court also said, at §120:

“It seems that in respect of a factor as important as cumulative impact which could have far reaching effects on health and safety the Authority could have on one last occasion exercised the meticulous care of which it had taken through the preceding two years.”

167. The High Court Judgment is plainly the product of an independent judiciary, and CMEC has never questioned the independence of the Courts in T&T.¹¹³
168. In July 2009 the EMA lodged an appeal against the High Court Judgment which quashed the decision of the EMA to issue the CEC. The Court of Appeal heard the appeal over a period of several days between September and November 2009, whereafter it reserved judgment.¹¹⁴
169. The Attorney-General, Anand Ramlogan SC, said of the strength of the EMA's appeal: "the prospects of the Court of Appeal reinstating the CEC were not promising".¹¹⁵
170. The Memorial, §306, has sought to emphasise some indications from the Court of Appeal which appeared to point to the appeal having a successful outcome. However the indications from the Court of Appeal were decidedly mixed. For example, the Chief Justice said that "he was "troubled" that Alutrint spoke about hydrocarbons but did not deal with nitrous oxide, a by-product of smelter production and a potent greenhouse gas."¹¹⁶ The Chief Justice also asked whether counsel for the EMA "was submitting that the EMA was properly exercising its statutory duty by putting out on "openly-defective EIA" and whether such a document would assist the public".¹¹⁷ The Chief Justice also questioned the EMA's counsel's submissions concerning the public's access to information regarding health impacts.¹¹⁸
171. The short point is that it was not possible to divine the outcome of the appeal; but, as stated, the Attorney-General's view was that the prospects of the appeal were "not promising".

¹¹³ As to which, see Leroy Mayers' witness statement in that arbitration, **C-0369**, §19(a), p.5.

¹¹⁴ See Colleen Murray's witness statement in the Sural v GORTT arbitration, **C-0368**, §56, p.12.

¹¹⁵ See the Final Award in the Sural v GORTT arbitration [**C-0014**], §137.

¹¹⁶ **C-0214**, p.6.

¹¹⁷ **C-0214**, p.10.

¹¹⁸ **C-0214**, p.12.

D8. Termination of the Project and the EPC Contracts

172. The decision to discontinue the Project was taken in the face of insurmountable environmental obstacles and structural and financial repercussions following the withdrawal of T&T's equity partner, Sural.

173. Following a review of the Project, referred to below, at the Cabinet meeting that took place on 8 September 2010 it was agreed to discontinue the Project with immediate effect on the basis that:

“(a) There was in fact no project because of lack of CEC approval and the prospects of the Court of Appeal reinstating the CEC were not promising and indeed in November 2010 the EMA withdrew its appeal;

(b) There were concerns about the issue of HF standards and whether the revised project (250,000 metric tonnes per year) would be able to comply with the required HF standards;

(c) There were concerns about the economic viability of the project”¹¹⁹.

174. In his Budget Speech to Parliament on the same day (8 September 2010) the Minister of Finance (Winston Dookeran) also referred to the health and environmental concerns engendered by the Project, Alutrint's financial position and whether the Project represented the best way to use T&T's natural gas.

175. Thus he said:

“[T]here has been great uncertainty about both the Alutrint and the Rapid Rail projects. There has been much public criticism of these projects rising from legitimate concerns. In addition to the health and environmental risk, there is also serious concern as to Alutrint's viability

¹¹⁹ See Attorney-General, Anand Ramlogan's witness statement, §50, referred to in the Final Award in the Sural v GORTT arbitration [C-0014] §137.

and the optimal use of our gas. This project shall cease and an alternative strategy will be put into place for the south-west peninsula.”¹²⁰

176. Before the said decision was taken, the then Energy Minister, Carolyn Seepersad-Bachan, commissioned a report containing a review and status of the Project. Accordingly, the Ministry of Energy and Energy Affairs produced a Note for Cabinet dated 16 July 2010.¹²¹ The Note for Cabinet, whose authors were Leroy Mayers and Frank Look Kin¹²², set out the pros and cons of continuing the Project.
177. The Note for Cabinet identified various concerns, which duly formed the basis of the Cabinet’s decision to discontinue the Project, such as (1) the uncertainty concerning the outcome of the appeal against the 2009 High Court Judgment,¹²³ (2) the opportunity cost of the natural gas foregone to Alutrinc to generate electricity for the smelter,¹²⁴ and (3) the problems attendant upon excluding Sural from the Project, which was a pre-condition of the participation of Votorantim, whose involvement was necessary for the Project.¹²⁵
178. The Note for Cabinet also referred to environmental considerations¹²⁶ and, specifically, noted that “with two potlines [which were necessary for increasing the annual output from 125,000 mt to 250,000 mt] the company will be unable to meet the HF standard of one (1) microgram. This will jeopardize the project and the proposed joint venture with Votorantim”.¹²⁷

¹²⁰ C-0252, p.13.

¹²¹ C-0248.

¹²² See Leroy Mayers’ witness statement of 29 May 2025, §118.

¹²³ See the Note for Cabinet, 16 July 2010 [C-0248], §15 (“The Court of Appeal Hearing was heard in Oct/Nov 2010 and the Court decision is pending for over 7 months”) and §36 (“...any further development would depend on the decision of the Court of Appeal”).

¹²⁴ Ibid, §§10, 39(g) and 42.

¹²⁵ Ibid, §§7 and 8.

¹²⁶ Ibid, §42.

¹²⁷ Ibid, §21. The Note for Cabinet did not consider the impact of the two pot lines in detail “because specific information about the impact of a 250,000 mtpy smelter was not available at the time”: Leroy Mayers’ witness statement of 29 May 2025, §120.

179. The Note for Cabinet concluded as follows:

“42. In conclusion, a decision for the continuation of the project should be based on factors such as the project economics, opportunity costs of alternative natural gas utilization, generation of employment opportunities and industrial activities and environmental considerations.”¹²⁸

180. The EMA duly decided to seek leave to discontinue its appeal.¹²⁹ The application was made in May 2011 and an order to that effect was made by the Court of Appeal in July 2011.¹³⁰

181. It is relevant to observe that even if the appeal had not been discontinued but instead had continued and been successful, the Project would have still been beset with a number of uncertainties. For example:

- (1) Given that the size of the smelter would have to be doubled, it is uncertain whether the EMA would have granted the requisite new CEC;
- (2) The above matter would have provided further opportunities for renewed challenges by the public interest groups;
- (3) All the above would have further delayed the Project and increased the Project costs.

182. In consequence of the decision to discontinue the Project, Alutrint proceeded to terminate the EPC Contracts.

183. By its letter to CMEC dated 19 January 2012,¹³¹ Alutrint gave notice to CMEC to cease all works and activities pertaining to the Project. This was what was

¹²⁸ Ibid, §42.

¹²⁹ The Court of Appeal’s decision had been pending since November 2009 which, presumably, was indicative of the complexity of the issues involved.

¹³⁰ See Leroy Mayers’ witness statement of 29 May 2025, §124

¹³¹ **C-0030.**

required of CMEC after service by Alutrint of notice to terminate under Clause 15.5 of the EPC Contracts: see Clause 16.3(a).

184. By its letter to CMEC dated 23 January 2012,¹³² Alutrint gave notice to CMEC formally to demobilise completely and remove all its assets from the Project site. This was also what was required of CMEC after service by Alutrint of notice to terminate under Clause 15.5: see Clause 16.3(c).
185. The effect of Alutrint's said letters of 19 and 23 January 2012 was to terminate the EPC Contracts under Clause 15.5, a provision which entitled Alutrint to terminate at any time for its convenience.
186. CMEC duly acknowledged that Alutrint had effected termination of the EPC Contracts by its said letters.
187. Thus, CMEC's letter to Alutrint dated 16 February 2012¹³³ referred to Alutrint's 19 and 23 January 2012 letters, saying:

“...We will proceed as instructed on the basis that you are terminating our Contract for your convenience

...

We are also presently preparing and will submit to you in due course an account of the outstanding payments due to us for the works, the costs of demobilising from the Project Site and other costs arising from your termination of our Contract and the Project.” (underlining added)

188. And CMEC's letter to Alutrint dated 4 September 2012¹³⁴ was to similar effect:

“As for the Alutrint Smelter Project was terminated by Alutrint with letters dated January 19th, 2012 and January 23rd, 2012 about the cease of the construction activities and Notice of demobilize from the Aluminium

¹³² C-0031.

¹³³ R-0009.

¹³⁴ R-0006.

Smelter Site at Union Industrial Estate, Vessigny Village, La Brea, we, China Machinery Engineering Corporation (formally China National Machinery & Equipment Import & Export Corporation), has accepted and confirmed the letters mentioned above and wish to recover its expenditure and costs for the Works completed to date (the “Claim”).” (underlining added)

189. CMEC’s letter to Alutrint dated 28 November 2012¹³⁵ was also to the same effect:

“...We note that Alutrint, through its correspondence...dated January 19th, 2012 has formally terminated the EPC Contract for construction of the Smelter.” (underlining added)

190. The Memorial makes no mention of CMEC’s said contemporaneous acceptance that it was Alutrint which had effected the termination of the EPC Contracts¹³⁶, nor of the multiple occasions thereafter when CMEC acknowledged the same thing.¹³⁷

191. Instead, CMEC’s case, as set out in the Memorial, appears to be that it was CMEC which terminated the EPC Contracts by delivering to Alutrint by hand a pre-prepared Notice of Termination dated 1 March 2013¹³⁸, termination being on the basis that the Project had suffered a prolonged suspension: Memorial, §370.

192. CMEC’s said 1 March 2013 letter says that “this Notice is served pursuant to Clause 16(2)(e) and is therefore of immediate effect”.

¹³⁵ C-0032.

¹³⁶ It is notable that in CMEC’s detailed treatment in the Memorial at §359 et seq of matters occurring, and correspondence passing between the parties, after Alutrint sent its 19 January 2012 and 23 January 2012 letters, there is a spectacular omission of any mention of CMEC’s 16 February 2012 letter [R-0009] or of its 4 September 2012 letter [R-0006]. And CMEC’s reference to its 28 November 2012 letter [C-0032] (see Memorial, §366) omits any mention of CMEC’s acknowledgment that Alutrint had “formally terminated the EPC Contract”.

¹³⁷ See CMEC’s letter to the Ambassador of the PRC in T&T, dated 30 December 2014 [C-0391], p.2; CMEC’s letter to the Prime Minister, Dr Keith Rowley, dated 24 September 2015 [C-0403], p.1; CMEC’s letter to the Prime Minister, Dr Keith Rowley, dated 3 November 2015 [C-0046], p.3.

¹³⁸ C-0343.

193. Apart from the fact that by March 2013 CMEC had long since accepted by its various letters sent to Alutrint, referred to above, that it was Alutrint which had terminated the EPC Contracts, CMEC's present case as to how it effected termination has its problems.
194. **First**, prior to service of the Memorial, CMEC had throughout maintained that it effected termination by service of its Notice of Termination dated 10 March 2013¹³⁹ (not 1 March 2013). This was CMEC's case in CC's Notification of a Claim of 26 August 2022¹⁴⁰, Annex §31 and in its Request for Arbitration of 27 March 2023, §48.
195. **Secondly**, it is plain that CMEC's 1 March 2013 letter was incapable of terminating the EPC Contracts pursuant to Clause 16.2(e) on the grounds of a prolonged suspension.
196. The first point is that there had not been a "prolonged suspension", as contractually defined, at the time CMEC sent its 1 March 2013 letter.
197. Clause 16.2(e) applies when "A prolonged suspension affects the whole of the works as described in Sub-Clause 8.11". Sub-Clause 8.11 refers to what CMEC may do when there has been a prolonged suspension under Sub-Clause 8.8. Sub-Clause 8.8 provides that Alutrint may at any time instruct CMEC to suspend progress of part or all of the works.
198. So Clause 16.2(e) is predicated upon Alutrint having instructed CMEC to suspend the works and such suspension having become prolonged.
199. But, as at 1 March 2013, CMEC had already explicitly accepted that Alutrint's notices sent to CMEC to cease all work, demobilise completely and remove all

¹³⁹ C-0033.

¹⁴⁰ C-0491.

its assets from the Project site had terminated (not merely suspended) the Project and CMEC had sent a fully quantified claim to Alutrint on that basis.¹⁴¹

200. As the Contracts had already been terminated, as acknowledged by CMEC, no question of CMEC terminating for prolonged suspension could arise.
201. The second point is that even if it was open to CMEC to terminate for prolonged suspension, CMEC did not comply with the procedure prescribed by Sub-Clause 8.11, which is the trigger for the operation of the termination provision in Clause 16.2(e).
202. Sub-Clause 8.11 breaks down into the following:
 - If the suspension under Sub-Clause 8.8 has continued for more than 84 days, CMEC may request Alutrint's permission to proceed;
 - If Alutrint does not give permission within 28 days after being requested to do so, and the suspension affects the whole of the works, CMEC may give notice of termination under Clause 16.2.
203. But, CMEC had not requested Alutrint's permission to proceed, with the consequence that it cannot be said that Alutrint did not give its permission to proceed within 28 days of being asked to do so.
204. As a result of the above, CMEC's 1 March 2013 letter did not effect termination pursuant to Clause 16.2(e).
205. **Thirdly**, CMEC's 1 March 2013 letter expressly referred to termination only of the 2008 Contract.¹⁴² So even on its own case, CMEC never terminated the 2005 Contract.

¹⁴¹ CMEC's letter to Alutrint dated 4 September 2012 [R-0006], having acknowledged that Alutrint had terminated the EPC Contracts, went on to quantify its claim in the sum of US\$67,581,256.60.

¹⁴² CMEC's 1 March 2013 letter [C-0343] says: "Pursuant to the Contract dated the 28th day of October 2008...CMEC wishes to serve a Notice of Termination of the Contract on Alutrint".

206. For all the reasons set out above, it was Alutrint which terminated the EPC Contracts, not CMEC.

D9. CMEC's grossly exaggerated claims

207. Both prior to and subsequent to the termination of the Project and the EPC Contracts, CMEC sent numerous letters to Alutrint containing regularly updated claims for the losses and expenses it had allegedly suffered.

208. CMEC's said letters were sent to Alutrint between February 2011 and August 2022

209. In all such letters the losses and expenses CMEC claimed to have suffered were grossly exaggerated, did not represent losses and expenses actually suffered by CMEC, lacked documentary support and were plainly unsustainable.

210. T&T addresses this topic of CMEC's grossly exaggerated claims in Section G below, and sets out each of CMEC's said successive claims in Appendix II hereto.

D10. CMEC's activation of the dispute resolution procedure under the 2008 Contract.

211. As stated above¹⁴³, the dispute resolution procedure under the 2008 Contract is set out in Clause 20.2 to 20.8 and commences with adjudication by a DAB.

212. CMEC activated the procedure by giving formal Notice of Intention to refer all its claims in relation to the Project to a DAB in January 2015. However, in about August 2015 CMEC simply abandoned the procedure. This matter is referred to fully in Section I, 4.2 below and in Appendix IV hereto.

¹⁴³ See Section D, 4.2.5, above.

D11. CMEC’s discussions and negotiations with T&T government officials, acting on behalf of Alutrint

213. In and after 2013 CMEC had various discussions with T&T government officials with a view to achieving a settlement of its claim against Alutrint.¹⁴⁴
214. The important feature of these discussions, so far as CMEC’s present claim against T&T is concerned, is that their purpose was to seek a settlement of the claims CMEC was making against Alutrint. CMEC was therefore engaged in the discussions qua 60% shareholder in Alutrint and not qua the T&T government. This was plain since, at the time when the discussions were ongoing, CMEC had not made any claim against the T&T government, only against Alutrint.
215. In addition to the fact that over the whole period when the discussions took place CMEC had made no claim against the T&T government, the fact that the purpose of the discussions was to seek settlement of CMEC’s claim against Alutrint, is confirmed by the following:
- (1) Throughout the period when the discussions were taking place, CMEC was regularly sending letters making its updated claims to Alutrint: see Appendix II hereto, where each of the claims by letter is set out;
 - (2) When there was discussion between CMEC and T&T government officials about a “good faith payment” being made to CMEC, the payment was to be made by Alutrint, not by the T&T government.¹⁴⁵ Thus the 3 November 2015 letter from CMEC to the Prime Minister, Dr Keith Rowley¹⁴⁶ said:

“[i]n view of the change of the economic situation of Trinidad and Tobago, the former Government of Trinidad and Tobago wished

¹⁴⁴ Memorial, §§393 to 445 gives CMEC’s account of those discussions.

¹⁴⁵ See §§402 to 405 of the Memorial for CMEC’s account of this matter.

¹⁴⁶ C-0046.

to get grace period for the indemnity from CMEC. To show the good faith, the former Government of Trinidad and Tobago would like to pay fifteen million USD from the account balance of Alutrint Limited to CMEC beforehand.” (underlining added)

- (3) When CMEC sent its 5 January 2015 letter to the T&T Minister of Energy and Energy Affairs about settlement of its claims [C-392], CMEC’s threat in the event that a settlement was not reached was the activation of the contractual dispute resolution process against Alutrint.
- (4) CMEC proceeded to activate the dispute resolution procedure under the 2008 Contract in 2015 against Alutrint.

216. It should also be borne in mind that the background against which the said settlement discussions between CMEC and T&T government officials were taking place was that CMEC was making claims for increasingly exaggerated amounts in its letters to Alutrint¹⁴⁷, which was hardly conducive to a consensual settlement of its dispute with Alutrint.

D12. CMEC’s sudden change of tack: CMEC’s claim against T&T under the Treaty

- 217. Throughout the 11 year period between 14 February 2011¹⁴⁸ and 15 August 2022¹⁴⁹ CMEC made successive claims in the 15 letters it sent to Alutrint.¹⁵⁰
- 218. By letter dated 29 June 2021 sent to T&T, CMEC threatened “to commence legal action” if it had not received “your satisfactory response” by the end of July 2021.¹⁵¹

¹⁴⁷ See Section G below and Appendix II hereto.

¹⁴⁸ CMEC’s letter to Alutrint dated 14 February 2011 [R-0004].

¹⁴⁹ CMEC’s letter to Alutrint dated 15 August 2022 [C-0044].

¹⁵⁰ See Appendix II hereto.

¹⁵¹ CMEC’s letter dated 29 June 2021 was sent to T&T’s Minister of Finance, Colm Imbert: C-0486.

219. Still it appeared that CMEC was pursuing its contractual claim against Alutrint since, one year later, CMEC sent Alutrint the claim in its 15 August 2022 letter, referred to above.
220. Then 10 days later, on 25 August 2022, CMEC sent T&T a letter saying they had engaged Clifford Chance “to commence the dispute resolution procedure” and enclosing a Power of Attorney which appointed Clifford Chance to act on behalf of CMEC “in connection with the dispute with the Government of the Republic of Trinidad and Tobago”, including but not limited to “international arbitration proceedings pursuant to the [Treaty]”.¹⁵² At that point T&T was not aware that there was any dispute between it and CMEC.
221. On the following day, 26 August 2022, Clifford Chance, on behalf of CMEC, sent T&T the Notification of a Claim, pursuant to Article 10(2) of the Treaty.¹⁵³
222. CMEC’s said 25 August 2022 letter and Clifford Chance’s said 26 August 2022 Notification of a Claim, came out of the blue. Prior to then, CMEC had never intimated any claim at all against T&T, whether pursuant to the Treaty or otherwise, all its previous claims having been contractual claims against Alutrint pursuant to the EPC Contracts.
223. In CC’s Notification of a Claim, §5, CMEC said:
- “5. CMEC’s dispute under the Treaty concerns the State’s failure to pay amounts due for works CMEC has carried out under the two EPC Contracts (as supplemented and amended), and costs and losses it has incurred, or otherwise is entitled to, prior to, upon, and/or following the termination of the Project”. (underlining added)

¹⁵² C-0490.

¹⁵³ C-0491.

224. The problem with this is that, self-evidently, it was not T&T's obligation to pay CMEC for works it had carried out under the EPC Contracts, nor had CMEC ever previously suggested that T&T had such obligation.

225. Similarly, CC's Notification of a Claim, §6, said:

“6. Since 2013, CMEC has sought payments of the amounts due from Alutrint and the State.” (underlining added)

226. This is incorrect. In the many years that had passed since the termination of the Project, CMEC had sought payment only from Alutrint, not from T&T.

E. The significance of the provisions of the EPC Contracts when the expropriated investments are CMEC's “contractual rights”

E1. CMEC's case as to the irrelevance of the provisions of the EPC Contracts

227. CMEC has misapprehended the significance of the provisions of the EPC Contracts to its claim that T&T has expropriated its rights under those Contracts.

228. CMEC asserts in §453 of the Memorial:

“In relation to the law to be applied in this case, a trite yet fundamental point must be reiterated for the avoidance of any doubt: CMEC's claims in this ICSID arbitration are based on Trinidad and Tobago's violation of its obligations under the BIT and international law exclusively, *not* for breaches of the EPC Contracts. It follows that beyond establishing the existence of contractual rights held by CMEC by way of BIT-covered investments in Trinidad and Tobago at the time they were expropriated by the State, the provisions of these contracts – including their ICC dispute resolution provisions – are entirely irrelevant to this case.” (underlining added)

229. CMEC then goes on to boldly assert in §454 of the Memorial that “States often attempt to blur the lines between contractual claims and BIT claims in a bid to escape liability in treaty arbitrations – a strategy that [T&T] has already foreshadowed in its written and oral submissions to date”, and in §456 that “CMEC’s claims founded on international law also extend to damages: monetary reparation requested in this arbitration is not for Alutrint’s breaches of the EPC Contracts, but for damages under international law in respect of [T&T’s] expropriation and other mistreatment of CMEC’s investments (including various EPC Contract rights) in violation of the BIT”. (underlining added)

230. These various assertions seriously misapprehend the true relationship between CMEC’s Treaty claim and CMEC’s rights under the EPC Contracts.

E2. The provisions of the EPC Contracts are relevant to CMEC’s Treaty claim, in relation to both liability and quantum

231. CMEC grossly understates the significance of the provisions of the EPC Contracts to its present Treaty claim. Since what CMEC says has been expropriated are its contractual rights, it is the provisions of the EPC Contracts which identify and define the scope of those rights and also which affect what constitutes proper reparation for the loss of those rights. Such provisions are therefore critical to CMEC’s Treaty claim, both as to liability and quantum.

232. This is borne out by the international law jurisprudence.

233. Thus, in **Bayindir v Pakistan**,¹⁵⁴ in which the assets allegedly expropriated were the Bayindir’s rights under its contract with the NHA relating to the M-1 Project, the tribunal said:

“Bayindir’s contractual rights are defined by the terms of the Contract.
To establish an expropriation of its rights as a result of NHA’s exercise

¹⁵⁴ **Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v Islamic Republic of Pakistan** ICSID Case No ARB/03/29, Award, [CL-0064] 27 August 2009.

of its own contractual rights, Bayindir must start by proving that its contractual rights were not limited by NHA's contractual rights or that NHA took an action that, although allegedly based on the Contract's terms, was in fact clearly in breach of such terms. Absent such proof, there can be no deprivation of the economic substance of Bayindir's rights, as the scope of such rights is limited by NHA's own rights under the Contract" (§460). (underlining added)

234. In **Venezuela Holdings v Venezuela** (Decision on Annulment)¹⁵⁵, the *ad hoc* Committee considered Venezuela's challenge to what it said was the tribunal's flawed approach to the assessment of compensation for the expropriation of the investor's Cerro Negro Project, based on the fact that the tribunal had failed to have regard to the limitation of liability ("the Price Cap") in the relevant contract (§§137-140).
235. The investor's contention was that "the Price Cap was not applicable to the case in hand, as their claims were treaty claims under the BIT not contractual claims". (§142)
236. The *ad hoc* Committee rejected the investor's contention and annulled the tribunal's decision on quantum for expropriation on the basis that it failed to give consideration to "what effect the Price Cap (as a limitation on the investor's rights) might have had on 'market value' of the investment or on the intentions and calculations of the hypothetical willing buyer." (§184)
237. It is pertinent to note that in the annulment proceedings, Venezuela contended (§168):
- "first, that an investment is, of its very nature, an item of property, that the ascertainment of what that property consists of is a necessary and

¹⁵⁵ **Venezuela Holdings, B.V., et al v Venezuela** ICSID Case No. ARB 07/27 Decision on Annulment, 9 March 2017 [RL-0025].

inescapable precondition to any assessment of its value, and specifically of its ‘market value’ under Article 6(c) of the BIT, so that this is an essential prior step which the reasoning of the Tribunal missed out entirely; **second**, that property is not a quantity that is, or can be, created by international law, and that the only role of international law is to recognize property created and defined by national law, and then to draw from that whatever consequences may flow on the international plane, so that the Tribunal failed altogether to bring the proper analysis to bear on the scope of the expropriation in question, or on the law applicable to its consequences by way of compensation.” (emphasis and underlining added.)

238. The *ad hoc* Committee ruled that Venezuela was correct in principle in each of the two contentions set out above (§170). In so doing, it therefore rejected what CMEC is presently asserting, namely, that since its claims are based on a breach of the Treaty, it is governed exclusively by international law, and thus the contractual provisions are “entirely irrelevant” “beyond establishing the existence of contractual rights held by CMEC by way of BIT-covered investments”.
239. The rationale is that it is national law that creates and defines the property right alleged to constitute an investment under the relevant BIT. As Venezuela succinctly put it, “the relevant enquiry is not “whether a particular asset ‘qualifies as an investment under the Treaty’ but rather what that asset consists of.” What the asset consists of (or the scope of the rights attached to it) is determined by national law, not international law. International law can only provide protection for rights recognised by domestic law but not create new property rights or expand existing property rights.” (§44). (underlining added)
240. It is the false dichotomy between the precepts of international law and the contents of the parties’ contractual rights which led the tribunal into error in

Venezuela Holdings v Venezuela. CMEC’s submission, referred to above, now urges the Tribunal to repeat this error in these proceedings.

241. The above is confirmed by the very passage from the tribunal’s award in **Karkey v Pakistan**, which is cited in §454 of the Memorial and which emphasises that “[i]t is therefore, important to identify the rights duly held by the Claimant under the Contract at the moment when the expropriation occurred”.¹⁵⁶

242. It is the logical impossibility of not referring to and relying on the contractual provisions when it is CMEC’s claim that it has had its contractual rights expropriated that causes Michael Tonkin, CMEC’s quantum expert, to say the following in §4.1.2 of his Report regarding the impact of the contractual provisions on his quantum assessment:

“In my opinion, as a quantum expert, it is fundamental when assessing the quantum of claims to understand the legal basis upon which claims for additional payment are being made, including whether the claim is made by reference to a contractual clause, a breach of contract or some other legal provision. This is to understand the basis from which my quantum opinions will flow and to allow me to assist the Tribunal”.
(underlining added)

243. It is because of the logical necessity of referring to the contractual provisions in the EPC Contracts as and when they impact CMEC’s claim, that CMEC blows hot and cold throughout the Memorial by, on the one hand, relying on contractual provisions when they suit its purpose while, on the other hand, ignoring them and relying on mere assertions when they do not.

244. If the contractual provisions are, essentially, entirely irrelevant to CMEC’s Treaty claim, it is not immediately obvious why some 70 paragraphs (§§84 to

¹⁵⁶ **Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan** ICSID Case No. ARB 13/1 Award, 22 August 2017 [CL-0022] §678. And see also §996.

153) and some 25 pages (pp.30 to 55) of the Memorial are devoted to the provisions of the 2 EPC Contracts and various arguments advanced by CMEC in relation to those provisions.

245. Nor is it clear why CMEC is presently using one of its contractual claims against Alutrint, viz its 28 November 2012 claim **[C-32]**, as its referential claim, as to which see Section G, 4, below.

246. Many other examples of CMEC thus blowing hot and cold appear in T&T's submissions set out below in this Counter-Memorial.

E3. CMEC previously sought damages calculated on the basis of its contractual claim

247. The damages claim in §686 of the Memorial is as follows:

“These valuations place the Claimant's damages to be approximately **USD156,022,913** as currently assessed.”

248. The damages claim, as thus presently advanced, is to be contrasted with the damages claim CMEC was consistently advancing prior to service of the Memorial, when the claim was identical to its contractual claim against Alutrint. Hence, as stated above:

- (1) In CC's Notification of a Claim dated 26 August 2022 **[C-0491]** it was said that CMEC's claims “exceed US\$300 million” (Annex, §47). This reflected the amount CMEC had claimed in its last claim against Alutrint, which was in its letter of 15 August 2022 **[C-0044]**, when CMEC had sought US\$304,870,469.
- (2) In the Request for Arbitration, dated 27 March 2023, CMEC said its claim “exceeds US\$310 million” (§70).
- (3) At the Bifurcation Hearing on 24 April 2024, CMEC said in §4 of its submissions: “In relation to the compensation sought, CMEC estimates

that the losses it has sustained as a result of these breaches amounts to over US\$300 million”, and referred to §70 of the Request for Arbitration in support.

249. The substantial discrepancy between CMEC’s claim as presently advanced and the claim it has consistently been advancing heretofore, reflects the fact that, as appears from the matters referred to above, CMEC is now at pains to distance itself from its previous claims based on contractual damages.
250. In the circumstances, it is unfair for CMEC to accuse T&T of being involved in an attempt “to blur the lines between contractual claims and BIT claims” (Memorial, §454) when, prior to service of the Memorial, CMEC consistently considered it appropriate to do the same thing itself.
251. When T&T makes references to the contractual provisions, as it does below, it does so in accordance with recognised principles.

F. Evidentiary weight of statements by politicians and government officials

252. In Section G of the Memorial (§§469-471), which addresses the evidentiary weight of statements by politicians and government officials, prominence is given to a dictum from **Nicaragua v USA**¹⁵⁷ [CL-0032] (“**the Nicaragua dictum**”) which CMEC says gives “guidance” when “determining the weight to be accorded the statements by high-ranking officials and politicians of Trinidad and Tobago”.
253. CMEC does not make clear what guidance is provided by the Nicaragua dictum. However, in the Executive Summary (Memorial, §3) CMEC asserts that “an important note in the context of these proceedings is that **international law attributes particular probative value to such statements** [by high-ranking

¹⁵⁷ **Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United State of America)**, Merits Judgment, 27 June 1986, ICJ Reports 1986 [CL-0032] p.14, §64.

government officials]” (emphasis added). The statement in question is (now former) Prime Minister Rowley’s speech criticising the previous administration [C-1].

254. Thus, CMEC is asserting that “statements by politicians and government officials” or “high ranking officials” (see the heading of Section G of the Memorial) somehow have intrinsically high probative value.

255. As submitted below, CMEC’s assertion is based on a misreading of the dictum in **Nicaragua v USA**, the lone decision relied on in Section G. On the contrary, such statements are generally considered to have no or low probative value.

F1. The legal framework for evidentiary matters

256. The starting point is determining what law governs matters of evidence.

257. Evidentiary matters are governed by the arbitral rules the parties selected and the law at the seat of the arbitration (*lex arbitri*). However, where the arbitration is conducted under the auspices of ICSID, being a delocalised forum, international law governs procedural matters and the seat of the arbitration has no legal importance.¹⁵⁸

258. Thus it falls to the Tribunal itself to evaluate the evidence, using its very broad discretion. This is affirmed by:

- (1) Rule 36(1) of the ICSID Arbitration Rules, which provides that “the Tribunal shall determine the admissibility and probative value of the evidence adduced.”

¹⁵⁸ Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (OUP, 2018) [RL-0097] §§7.15 to 7.16.

- (2) Article 9(1) of the IBA Rules, which provide guidance in this arbitration,¹⁵⁹ also provides that the Tribunal “shall determine the admissibility, relevance, materiality and weight of evidence.”
- (3) The holding of the ICJ in **Honduras v Nicaragua**¹⁶⁰ that “(t)he appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not open to question.”¹⁶¹

259. Thus, the legal framework plainly provides no reason why statements by politicians or high ranking government officials should intrinsically have some high probative value or any other special evidential status.

F2. CMEC’s misapprehension as to the import of the Nicaragua dictum

260. The Nicaragua dictum is specifically concerned with a narrow sub-set of statements, namely statements made by representatives of the State which “acknowledge facts or conduct unfavourable to the State” and thus “may be construed as a form of admission”.

261. This is made plain by reading §64 of the judgment (which CMEC cites), together with §65 (which CMEC does not cite):

“64. The material before the Court also includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political

¹⁵⁹ Procedural Order No.1, §15.1.

¹⁶⁰ **Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)**, Judgment, 18 November 1960, ICJ Reports 1960 [RL-0026]. The ICJ found that the essential error relied on by Nicaragua to annul an award was “no more than evaluation of documents and of other evidence submitted...”.

¹⁶¹ Ibid, pp.215–216.

figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge **facts or conduct** unfavourable to the State represented by the person who made them. **They may then be construed as a form of admission.**

65. However, it is natural also that the Court should treat such statements with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the [ICJ] Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between the Parties. The Court must take account of the manner in which the statements were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also take note whether the text of the official statement in question appeared in the language used by the author or on the basis of a translation (cf. I.C.J. Reports 1980, p. 10, para. 13). It may also be relevant whether or not such a statement was brought to the Court's knowledge by official communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably had sometimes to interpret the statements, to ascertain precisely to what degree **they constituted acknowledgments of a fact.**¹⁶² (emphasis and underlining added.)

262. Thus, it is clear that the subject-matter in respect of which probative value is being considered to be accorded is **official statements** which constitute **a form of admission** by the State, rather than all statements made by high-ranking political figures.

¹⁶² *Nicaragua v. USA*, supra, [CL-0032], §§64 and 65.

263. This narrow scope of the Nicaragua dictum (concerning statements which have the character of admissions only) is also evident in the ICJ's application of it in that case.
264. There, Nicaragua invited the ICJ to treat the United States' invocation of collective self-defence as a "major admission of direct and substantial United States involvement in the military and paramilitary operations directed against Nicaragua". The ICJ observed that the normal purpose of an invocation of self-defence is to justify conduct which would otherwise be wrongful and that if advanced as a justification in itself, not coupled with a denial of the conduct alleged, it may well imply both an admission of that conduct and of the wrongfulness of that conduct.
265. However, the ICJ did not consider the statement as probative of Nicaragua's claim that the United States had fully admitted its responsibility for the activities complained of as the statement did not list or describe the measures which the United States claimed to have taken in self-defence. The ICJ therefore declined to consider the United States' invocation of self-defence as a general admission of military intervention because "the recourse to the right of self-defence...does not make possible a firm and complete definition of admitted facts."¹⁶³
266. In **Sevilla v Spain**, in applying the approach in **Nicaragua v USA** that statements contrary to the interests or contentions of the party to the dispute to which the witness owes allegiance have superior credibility, the tribunal determined that evidence of the investor's own witness, which contained adverse statements as regards when the investor first planned to make its investment, had probative value in favour of the State's version of the facts.¹⁶⁴ This makes it quite clear that the Nicaragua dictum is directed to, and cited in relation to, the principles

¹⁶³ CL-0032, §74.

¹⁶⁴ **Sevilla Beheer B.V. and others v The Kingdom of Spain** ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022 [RL-0027] §§806 to 813, in particular §811 and fn 1070.

concerning admissions of facts, not any statements by politicians and high ranking officials.

267. It is relevant to note here that (former) Prime Minister Rowley's speech criticising the previous administration does not include any form of admission whatsoever.¹⁶⁵ Indeed, a political speech by a senior member of a current administration criticising the previous administration could hardly be considered to be probative of the state of mind or conduct of the latter, as it involves inherently polemical discourse. It would be absurd to consider President Donald Trump's statement at a rally regarding former President Joe Biden's administration, or vice versa, to have some elevated probative value.

F3. Political statements generally have no or low probative value

268. Far from political statements having some intrinsic high probative value, international law generally accords such statements no or low probative value.
269. In **Bosnia v Serbia**,¹⁶⁶ the ICJ declined Bosnia's request for the treatment of the declaration of Serbia's Council of Ministers (which included a statement condemning and demanding accountability for war crimes committed in Srebrenica) as "a form of admission and having decisive probative force" in relation to proving the occurrence of (and Serbia's acceptance of responsibility for) genocide. The ICJ said that the declaration was merely political and not intended as an admission:

"378. ... However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a **political nature**: it was clearly **not intended as an admission**, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this

¹⁶⁵ C-0001.

¹⁶⁶ **Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)** Judgment, 26 February 2007, ICJ Reports 2007 [RL-0028].

Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.”¹⁶⁷ (emphasis and underlining added.)

270. Thus, contrary to CMEC’s assertion that high probative value is to be accorded to statements made by State officials or politicians in a political context, it is plain that the ICJ’s approach is in fact that a statement which is made in a political context, short of being a clear form of admission, would have **no or low** probative value. This is no more than common sense: it is unlikely that statements made by politicians on the hustings or in the adversarial political arena are worthy of being accorded any particular weight.
271. Consistent with this is the well-established body of case law to the effect that political statements are normally incapable of giving rise to legitimate expectations, since they will invariably not satisfy the requirement that they be clear and explicit promises or commitments nor that it be reasonable for the investor to rely upon them.¹⁶⁸ This topic is further addressed in Section J, 4.8, below.
272. Thus, it is submitted that the statements by government officials and politicians set out at great length in Annex 4 to the Memorial have no or low probative value. In any event, CMEC has not made plain in what way and in respect of what specific issues such statements are probative.
273. It may be that many of the political and/or official statements referred to in Annex 4 are relied on by CMEC to impute a particular motive (political or

¹⁶⁷ Ibid, p.199, para.378. See also p.130, §213, citing *Nicaragua v USA* §§59-73.

¹⁶⁸ **Continental Casualty Co v Argentine Republic** ICSID Case No. ARB/03/9, Award, 5 September 2008 [**RL-0029**] §261; **El Paso Energy International Company v Argentine Republic** ICSID Case No. ARB/03/15, Award, 31 October 2011 [**CL-0123**] §378.

discriminatory) or allege a malign intent (bad faith) regarding T&T's decision to terminate the Project.

274. If that is so, such statements cannot be relied on to discharge the high evidentiary burden which CMEC has to discharge with regard to such matters.
275. The **Corfu Channel Case** is instructive in demonstrating the approach of international courts to the treatment of circumstantial evidence when one party (the United Kingdom) was seeking to establish “knowledge” or “connivance” on the part of the other party (Albania). The ICJ there considered that recourse to inferences of fact and circumstantial evidence may be permitted in such circumstances, but only to the extent that they are based on “a series of facts linked together and leading logically to a single conclusion” and “provided that they leave *no room* for reasonable doubt.”¹⁶⁹
276. And in **Bayindir v Pakistan** the tribunal affirmed this approach to circumstantial evidence and proof of bad faith in an investor-State context. As in the present case, Bayindir there similarly attempted to establish, by inferences of fact and circumstantial evidence, that its expulsion by Pakistan was a “political decision”. The tribunal, referring to the restrictive terms of the decision in the **Corfu Channel Case**, said that “the standard for proving for bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence.”¹⁷⁰
277. From the decisions in **Bayindir v Pakistan** and the **Corfu Channel Case**, for CMEC to impute a political motive or bad faith to a particular act of T&T on the basis of circumstantial evidence, it must establish a series of facts which lead

¹⁶⁹ **Corfu Channel Case (UK v. Albania)**, Merits, Judgment of 9 April 1949, ICJ Reports 1949 [RL-0030] p. 18.

¹⁷⁰ **Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan (I)**, ICSID Case No. ARB/03/29, Award, 27 August 2009 [CL-0064] §§141-143.

logically to the single conclusion of such political motive or bad faith without leaving any room for reasonable doubt.

F4. Limited probative value to be given to statements made by politicians and/or government officials reported in newspaper articles

278. The ICJ in **Nicaragua v USA** stressed, in §65 (cited above), that the manner in which the statement is made public is an important factor affecting the evidentiary weight to be ascribed to the statement.

279. Earlier in the judgment, the ICJ said that newspaper articles, on their own, were not evidence capable of proving facts. It held that:

“62. ... the Court has been careful to treat [press articles] with great caution; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence.”¹⁷¹

280. This matter arose too in the context of the investment arbitration in **BIVAC v Paraguay**. As here, the investor in that case sought to rely on various newspaper reports containing numerous statements by Paraguay’s ministers as to their alleged intention not to pay the investor, in support of its claim that Paraguay had used their sovereign authority to deny the investor reliefs under a contract. The Tribunal stated:

“234. ...The Tribunal is wary about placing too much reliance on newspaper reports, which may provide an incomplete or partial account of what has been said, even assuming that the quotations are accurately recorded and reproduced. The Tribunal has no objection to treating such

¹⁷¹ **Nicaragua v. USA**), supra, [C-0032] §62.

reports, which are in the public domain, as admissible but of limited, if any, probative weight.¹⁷² (underlining added)

281. It is submitted that the above observations are equally apposite when considering newspaper reports of court proceedings.¹⁷³

G. CMEC's grossly exaggerated claims made against Alutrint

282. Between 14 February 2011 and 15 August 2022 CMEC made 15 claims by letter to Alutrint for loss and expense it had allegedly suffered in connection with, or as a result of, the termination of the EPC Contracts.

283. These claims were grossly inflated, did not represent losses and expenses actually suffered by CMEC, lacked documentary support and were plainly unsustainable.

284. **Appendix II** hereto sets out CMEC's said successive claims made by letter to Alutrint.¹⁷⁴

G1. CMEC's claims for the costs of preliminary design and construction drawings

285. The central feature of CMEC's claims was in respect of the production of engineering drawings for the smelter. The claims for these drawings was the largest individual element in CMEC's overall claim. The claims in respect of these drawings unaccountably ballooned as CMEC sent its successive letters.

286. The engineering drawings fall into 2 classes: (1) preliminary design drawings, which the Claimant says were completed: there were said to be 808 such

¹⁷² **Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v The Republic of Paraguay** ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012 [RL-0016] §234.

¹⁷³ See Section M, 2.2 (Causation), below.

¹⁷⁴ CMEC's said claims by letter are referred to in §§386 and 387 of the Memorial and in the footnotes thereto.

drawings; and (2) construction drawings, which had not been completed when the Project was terminated.

287. The work on (1) and (2) was done up to, but not later than, 2010¹⁷⁵ ie the work on the drawings terminated long before CMEC made any of the monetary claims referred to in its 15 letters.
288. In its 4 September 2012 claim **[R-0006]**, CMEC claimed US\$13,248,000 for (1) and US\$11,823,840 for (2), being a total of **US\$25,071,840**.¹⁷⁶
289. In its letter sent 2 months later, on 28 November 2012 **[C-0032]**, CMEC claimed US\$23,248,000 for (1) and US\$20,823,840 for (2),¹⁷⁷ being a total of **US\$44,071,840**.
290. And in its letter sent 6 months thereafter, on 17 May 2013 **[C-0035]**, CMEC claimed US\$33,120,000 for (1) and US\$33,534,000 for (2),¹⁷⁸ being a total of **US\$66,654,000**.
291. **Hence over a period of some 8 months (from 4 September 2012 to 17 May 2013) CMEC'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, CMEC had long since ceased its design work (by 2010) as the Project had long since come to an end.

¹⁷⁵ In CMEC's 21 March 2014 claim **[C-0036]**, Item 1.1 of that claim includes the claim for the cost of the engineering drawings and says "Claim on EPC Contracts to June 2009" (underlining added). All the later claims used the same language. If work on (1) and (2) was done later than June 2009, it did not extend beyond 2010.

¹⁷⁶ Item 1.1 of CMEC's 4 September 2012 letter **[R-0006]** is for US\$39,279,896.30. The reference in the "Remarks" column is to CMEC's 21 September 2011 claim **[R-0005]**. 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).

¹⁷⁷ See Item 1.1 of the claim and the attached breakdown ("details attached") on pp.1/3 and 2/3 of **C-0032**.

¹⁷⁸ See Item 1.1 of the claim and the attached breakdown ("details attached") on pp.1/3 and 2/3 of **C-0035**.

292. It should also be noted that CMEC's 28 November 2012 claim **[C-0032]** for (1) was exactly US\$10 million more than its 4 September 2012 claim **[R-0006]** for (1). And CMEC's 28 November 2012 claim for (2) was exactly US\$9 million more than its 4 September 2012 claim for (2). So CMEC saw 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.
293. There can be no explanation for the dizzying inflation of the amounts claimed by CMEC for the engineering drawings. CMEC simply plucked bigger and bigger figures out of the air.
294. The said claim of a total of US\$66,654,000 for the engineering drawings in the 17 May 2013 claim was carried forward and was comprised within Item 1.1 of each of the successive claims CMEC made thereafter. CMEC never provided a breakdown of the US\$66,654,000. Nor could it do so, given the way that the claim for that sum had simply been arbitrarily and massively increased.
295. CMEC provided no documents to support its claim for the US\$66,654,000. This is no doubt for the same reason that it never provided a breakdown of this figure.

G2. None of CMEC's claims in respect of the engineering design drawings represented the costs it had incurred in respect of the drawings

296. CMEC's claims against Alutrint in respect of the engineering design drawings should have, but did not, represent the costs CMEC had incurred in respect of the drawings.
297. CMEC's case is that it terminated the EPC Contracts under Clause 16.2(e) (Memorial, §370). This would have entitled CMEC to recover from Alutrint the various costs it had incurred in respect of the Project.¹⁷⁹

¹⁷⁹ See Clauses 16.2(e), 16.4 and 19.6 of the EPC Contracts.

298. Furthermore, CMEC presented its successive claims to Alutrint as representing the monies it had actually expended on the Project, including monies it had actually expended on the engineering design drawings.¹⁸⁰
299. But none of CMEC's claims made against Alutrint represented the costs CMEC had actually incurred in respect of the engineering design drawings.
300. As stated above, CMEC did not do the drawings themselves: the design work was carried out by a Chinese entity, NEUI. NEUI is a substantial organisation (with a total of 200 professional and technical personnel) which has been in existence for several decades and provides engineering consultancy, engineering design and similar services.¹⁸¹
301. It has now become apparent that neither NEUI nor CMEC kept timesheets.¹⁸² This is most unusual as a matter of engineering and commercial practice, particularly in light of the size of both NEUI and CMEC¹⁸³ and also the size and importance of the Project itself.
302. Further, CMEC has not relied, and is not relying, on its obligations under any sub-contract with NEUI with regard to its claim in respect of the engineering drawings.
303. Qingchen Yang (who appears to have been the President of NEUI since 2023, but before then for many years was its Chief Designer) says in his witness statement, at §9, that NEUI provided design services and technology for the

¹⁸⁰ See eg CMEC's 21 September 2011 letter to Alutrint [R-0005], with its multiple references to "cost breakdown", "expenditures" and "expenses", and specifically its claim for "Designing expenses for preliminary design and detailed design" and "Designing expenses for upstream and downstream".

¹⁸¹ See the NEUI company profile [C-0540], p.1 and also the reference to NEUI having carried out work for T&T at p.27.

¹⁸² §5.3.2 of Damian Connelly's expert Report says: "**I understand that CMEC and its main design subcontractor NEUI did not keep timesheets.**"

¹⁸³ See Chris Hillier's expert Report §2.5.2.

Project “under a subcontracting arrangement with CMEC, the EPC Contractor of the Project”, but does not provide any sub-contract.

304. From the Memorial, §23 f/n 23, however, it is clear that there was a subcontract between CMEC and NEUI, being the Design Contract dated 19 January 2006 [C-0079].¹⁸⁴

305. By the Design Contract NEUI agreed to carry out all the engineering design work necessary for the Project¹⁸⁵ for a lump sum of RMB62,800,000.¹⁸⁶

306. Thus Clause 5.1 of the Design Contract provides:

“After negotiation, the total Contract Price hereunder is RMB62,800,000, including the price for the foreign part of US\$1,000,000. This total Contract Price is a fixed price, including all domestic and foreign costs involved in completing the preliminary design, construction drawing design, as-built drawing design, design review, and cooperation with on-site construction until project acceptance...as well as reasonable profits. Unless otherwise agreed in writing, [NEUI] shall not, for any reason, require [CMEC] to pay any fees beyond the total Contract Price.”

307. Clause 5.3.2 of the Design Contract sets out a schedule of payments CMEC was required to make to NEUI for the design work as the work went along. It can only be assumed that CMEC made the stage payments to NEUI in accordance with the schedule.

308. The Design Contract is governed by Chinese law: see §§1.1.1 and 1.3.

309. So, under the Design Contract, the total amount CMEC was then contractually bound to pay NEUI for all the engineering design work on the Project was

¹⁸⁴ NEUI also provided CMEC with an Engineering Proposal for Alutrint, dated 15 May 2005 [C-0065].

¹⁸⁵ See Design Contract [C-0079], Clause 3.1, p.9 and Attachment 1, p.19.

¹⁸⁶ See Design Contract [C-0079], Clause 5.1, p.15.

RMB62,800,000, which at the date of the Design Contract was equivalent to some US\$7.85 million.¹⁸⁷

310. CMEC and NEUI entered into Design Contract Supplement No 1 on 8 May 2007 [C-0127] which dealt with the design of the cast house, in-plant raw material storage and transport system. The price for this design work was RMB8 million, equivalent to some US\$1 million.
311. So the total amount CMEC was contractually bound to pay NEUI for all the engineering design work on the Project was US\$8.85 million.
312. Nevertheless, CMEC continued to present its increasingly exaggerated claims to Alutrint, allegedly for the costs it had incurred in respect of the preliminary design drawings and construction drawings, terminating in its claim for some **US\$66 million**. This was in spite of the fact that its maximum liability to NEUI in respect of all¹⁸⁸ the engineering drawings was of only **US\$8.85 million**.¹⁸⁹
313. But, in any event, CMEC did not seek to rely on the Design Contract when making its claims against Alutrint in relation to the engineering drawings.
314. So CMEC, not having sought to rely on any contractual or other obligation to pay NEUI for the engineering drawings, appears to have itself incurred no cost (and no liability) in respect of the drawings.
315. One further point arises in respect of CMEC's claims for these engineering drawings.

¹⁸⁷ The USD/RMB currency exchange rate of 1:8 has been used.

¹⁸⁸ CMEC's maximum liability to NEUI for some US\$8.85 million would have included also design costs of upstream and downstream, referred to in Section G, 3, below.

¹⁸⁹ It is to be noted that whereas CMEC's liability to NEUI was some US\$8.85 million in respect of all engineering drawings for the Project, CMEC's claim against Alutrint was some US\$66 million for only some of the engineering drawings, being those completed before the Project was terminated.

316. The further point is to compare CMEC's maximum liability to NEUI in respect of all the design drawings, being US\$8.85 million, with what CMEC is now claiming for the design drawings in these proceedings. CMEC's present claim for the drawings is US\$37 million (see MT's Appendix 1.3 Items 1.1 to 1.4). So the present claim vastly outstrips any liability CMEC may have to NEUI.

G3. CMEC's other exaggerated claims

317. CMEC did not limit its exaggeration to its claims for design costs for the preliminary design and construction drawings.
318. There was also obvious exaggeration of the following claims.
319. Design cost of upstream and downstream. This claim increased, unaccountably, by US\$8,490,000 in the 6-month period between the 28 November 2012 claim [C-0032] and the 17 May 2013 claim [C-0035]. This (very substantial) increase is unaccountable since the design work for upstream and downstream was all completed (by NEUI) many years earlier.
320. Management cost for CMEC. This claim increased, unaccountably, by exactly US\$2 million in the 2-month period between 4 September 2012 [R-0006] and 28 November 2012 [C-0032]. This increase is unaccountable since (1) there was no increase in the claim for this item in the one-year period between 21 September 2011 [R-0005] and 4 September 2012 [R-0006], and (2) the increase occurred over a very short period (2 months) and was for exactly US\$2 million.
321. Goods delivered by CMEC. This claim increased, unaccountably, by US\$8,260,000 in the 6-month period between 28 November 2012 [C-0032] and 17 May 2013 [C-0035]. The increase is unaccountable since the claim was for goods which had been delivered many years previously, so there should have been no increase in this claim at all in the identified 6-month period.

322. Site management cost. This claim increased, unaccountably, by exactly US\$4 million in the 2 month period between 4 September 2012 **[R-0006]** and 28 November 2012 **[C-0032]**. The increase is unaccountable since (1) it is very difficult to see how there could have been such a substantial increase in this claim over the said 2-month period, and (2) it is impossible to see how the increase could have been exactly US\$4 million.
323. Just as in the case of the costs for the preliminary design and construction drawings, CMEC provided no documents to support its claim for design costs of upstream and downstream, or for management costs or for site management costs.
324. The increased claims in respect of the said four items were carried forward and were comprised within Item 1.1 of each of the successive claims which CMEC made thereafter.
325. Overhead costs. CMEC consistently claimed US\$100,000 per month for overhead costs. By the date of CMEC's last letter claim to Alutrint, of 15 August 2022 **[C-0044]**, the claim was for US\$13 million (US\$100,000 per month for 130 months), and continuing. The US\$100,000 per month claimed was simply an arbitrary, rounded figure. No basis for this claim was provided to Alutrint. Nor was any documentary evidence supplied. Nor did CMEC explain how this claim could be continuing, when the Project had come to an end some 12 years previously.
326. CMEC's exaggerated claims, referred to above, are set out in the Table at the end of this section.
327. Loss of profits. During the period between 4 September 2012 **[R-0006]** and 15 August 2022 **[C-0044]** CMEC's claim consistently included a claim for loss of

profit, in the amount of US\$20,700,000,¹⁹⁰ being 5% of the contract price for the 2008 Contract (US\$414 million).

328. No evidence was provided by CMEC to substantiate its claim that it had suffered this (or any) loss of profit. Nor was the 5% figure ever explained.
329. More importantly, on CMEC's own case, any loss of profit that it suffered was irrecoverable.
330. CMEC's present case is that it terminated the 2008 Contract by delivering to Alutrint a Notice of Termination dated 1 March 2013, pursuant to Clause 16(2)(e) on the basis of a "prolonged suspension" **[C-0343]** (Memorial, §370).
331. But if there was a termination of the 2008 Contract by the CMEC under Clause 16(2)(e), CMEC's entitlement to recover loss of profits is excluded.
332. This is the result of Clause 16.4¹⁹¹ of the PCC having supplemented Clause 16.4 of the GCC, the former omitting reference to Alutrint having to pay CMEC for any loss of profit.
333. Nevertheless, in spite of the fact that it was plain that CMEC was not entitled to recover any loss of profit, it persistently sought to do so in letter after letter.
334. It is to be noted that this claim for loss of profit of 5% of the 2008 Contract price has now been abandoned.
335. Instead, Clifford Chance has instructed Michael Tonkin that CMEC had an explicit right to 5% reasonable profit and 5% overhead in addition to the 2008 Contract lump sum price of US\$414 million, together representing a 10% mark

¹⁹⁰ The first time CMEC made this claim, in its 4 September 2012 letter **[R-0006]**, the sum claimed was US\$22,050,000. In all subsequent claims the claim was for US\$20,700,000.

¹⁹¹ A termination by CMEC under Clause 16(2)(e) of the 2008 Contract gives an entitlement to payments from Alutrint as set out in Clause 16.4.

up (Memorial, §721). This is based on Clifford Chance’s interpretation of Clause 1.2 of the PCC of the 2008 Contract.

336. Interest. In CMEC’s letter claims, a claim for interest was made in ever-greater sums. In its last letter claim, of 15 August 2022 [C-0044], the claim for “interest cost” was US\$111,953,889 and US\$49,924,695, being a total claim for interest in excess of US\$150 million. This claim for interest was, of course, based on the various itemised claims, almost all of which were grossly exaggerated or plainly unsustainable, as set out above.

G4. CMEC’s change of referential claim

337. Michael Tonkin was instructed by Clifford Chance to undertake his quantum assessment by reference to CMEC’s 28 November 2012 letter to Alutrint [C-0032] and then make adjustments to that assessment. See the Memorial, §715, Section 5 of MT’s report, Appendix MT-1.2 and the Final Account set out in Appendix MT-1.3.
338. This is surprising since, prior to the Memorial, CMEC had consistently presented its 17 May 2013 claim [C-0035] as its final consolidated claim, with subsequent claims said only to involve updating to reflect interest and other accrued costs and losses: see CC’s Notification of a Claim of 26 August 2022 [C-0491], Annex §32 and the Request for Arbitration, dated 27 March 2023 §§49 and 51.
339. It may be that the focus for CMEC’s referential claim has shifted from the 17 May 2013 claim back to the previous 28 November 2012 claim because the former represented the apogee of CMEC’s exaggerated claims, as was apparent at the Bifurcation Hearing.
340. But now that the focus has been put on CMEC’s 28 November 2012 claim [C-0032] as its referential claim, it is necessary to see whether this claim is solid, reliable and appropriate for use as a “base” claim.

341. It is plain that it is not.
342. A comparison between the 28 November 2012 claim **[C-0032]** and its predecessor claim, being the 4 September 2012 claim **[R-0006]** made only 2 months before, shows (as referred to above) that **C-0032** itself contained claims which were grossly inflated by comparison with claims in **R-0006**, or were otherwise for sums which were plainly irrecoverable. A collation of these matters is as follows.
343. First, the claim for the engineering drawings was for some US\$25 million in **R-0006** but increased to some US\$44 million in **C-0032**. The claim for the preliminary design drawings was US\$13,248,000 in **R-0006**, but increased by exactly US\$10 million to US\$23,248,000 in **C-0032**; the claim for the construction drawings was US\$11,823,840 in **R-0006**, but increased by exactly US\$9 million to US\$20,823,840 in **C-0032**.
344. Further, the claim in respect of the engineering drawings in **C-0032** (some US\$44 million) was explicitly for the “expenses” and “costs” CMEC had incurred in respect of the same,¹⁹² but CMEC had in fact incurred no such expenses or costs at all (as to which, see Section G, 2, above).
345. Secondly, the claim for management costs was US\$12,800,000 in **R-0006** but increased by exactly US\$2 million to US\$14,800,000 in **C-0032**.
346. Thirdly, the claim for site management costs was US\$4,530,000 in **R-0006** but increased by exactly US\$4 million to US\$8,530,000 in **C-0032**.

¹⁹² **C-32** said:

“The expenses detailed cover the costs for:

...

Preliminary design and detailed design of smelter” (underlining added)

347. Fourthly, the claim for overhead costs was US\$1,100,000 in **R-0006**, and increased to US\$1,300,000 in **C-0032**. This claim for overheads, calculated on the basis of exactly US\$100,000 per month, is obviously unreliable.

348. Fifthly, **C-0032** includes a claim for “reasonable profits” in the sum of US\$20,700,000. But it is plain that CMEC’s entitlement to loss of profits is contractually excluded.

G5. Table setting out CMEC’s exaggerated claims

349. The Table below sets out CMEC’s exaggerated claims referred to in Sections G, 1, G, 2 and G, 3, above.

CMEC’s claim by letter	21/9/11 [R-0005]	4/9/12¹⁹³ [R-0006]	28/11/12 [C-0032]	17/5/13 [C-0035]	Remarks
Items Claimed					
1. Design Cost:					
(1) preliminary design	\$13,248,000	\$13,248,000	\$23,248,000 (increase of <u>exactly \$10 million</u> in 2 months)	\$33,120,000 (increase of <u>\$9,872,000</u> in 6 months)	1. In the 8-month period between 4/9/12 and 17/5/13 the claim for these drawings increased from 25 million to \$44 million to \$66 million.
(2) construction drawings	\$11,823,840	\$11,823,840	\$20,823,840 (increase of <u>exactly \$9 million</u> in 2 months)	\$33,534,000 (increase of <u>\$12,710,160</u> in 6 months)	2. Some of the increases
Total:	\$25,071,840	\$25,071,840	\$44,071,840	\$66,654,000	

¹⁹³ The sums claimed in the 4/9/12 letter **[R-0006]** are the same as the sums claimed in the 21/9/11 letter **[R-0005]**, since the relevant total sum claimed in **R-0006** (US\$39,279,896.30) is the same as that claimed in **R-0005**, and, in the Remarks column in **R-0006**, reference is expressly made to the 21/9/11 letter (CMECTD-AL-B-DJHI 109-206).

					are in <u>exact</u> figures: (1) the claim re the preliminary design drawings in the 28/11/12 claim is <u>exactly \$10 million</u> more than in the pervious claims. (2) the claim re the construction drawings in the 28/11/12 claim is <u>exactly \$9 million</u> more than in the previous claims.
2. Design Cost of upstream and downstream	\$1,040,000	\$1,040,000	\$1,040,000	\$9,530,000 (increase of \$8,490,000 in 6 months)	1. This claim increased by \$8,490,000 in the 6-month period between 28/11/12 and 17/5/13. 2. This claim relates to design work

					which would have been completed many years before. In each of R-0005, C-0032 and C-0035, it is said in relation to this claim: “Port preliminary design and cast house proposal have been completed in May 2007 and Technical Contract... was signed by both parties in August 2007”. So there should have been no increase in this claim between 28/11/12 and 17/5/13.
3. Management Cost for CMEC	\$12,800,000	\$12,800,000	\$14,800,000 (increase of <u>exactly \$2 million</u> in 2 months)	\$14,800,000	1. In the 2-month period between 4/9/12 and 28/11/12 this claim

					increased by <u>exactly \$2 million</u> . 2. Note that there was <i>no</i> increase in the 1-year period between 21/9/11 and 4/9/12.
4. Goods delivered by CMEC	\$7,120,000	\$7,120,000	\$7,120,000	\$15,380,000 (increase of \$8,260,000 in 6 months)	It is difficult to see how this claim for goods delivered (a long time previously) could have increased by \$8,260,000 in the period between 28/11/12 and 17/5/13.
5. Site Management Cost	\$4,530,000	\$4,530,000	\$8,530,000 (increase of <u>exactly \$4 million</u> in 2 months)	\$8,530,000	1. It is very difficult to see how there could have been such a substantial increase in this claim over the 2-month period between 4/9/12 and 28/11/12.

					2. It is impossible to see how the increase could have been <i>exactly</i> \$4 million over this period.
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G6. CMEC has not sought to justify its exaggerated claims

350. T&T squarely raised the matter of CMEC’s exaggerated claims, at length and in detail, in its written submissions for the Bifurcation Hearing¹⁹⁴ held on 24 April 2024.

351. Nevertheless, CMEC’s Memorial makes no mention of its exaggerated claims, still less does it seek to justify or explain them. And this, in spite of the fact that CMEC has now adopted its 28 November 2012 claim [C-0032] as its referential claim,¹⁹⁵ and this claim is itself riddled with exaggerations, as set out in Section G, 4, above.

G7. The CMEC personnel who were involved in making CMEC’s exaggerated claims

352. A question arises as to who, on behalf of CMEC, a substantial Chinese state-owned international construction and engineering company, was involved in presenting these grossly exaggerated claims to Alutrint.

¹⁹⁴ T&T’s written submissions for the Bifurcation Hearing (dated 10 April 2024) raised CMEC’s exaggerated claims in §§41 to 74, and in Schedule I thereto.

¹⁹⁵ See Memorial, §715 and Mr Tonkin’s Final Account, Appendix MT-1.3 to Mr Tonkin’s Report.

353. CMEC's claims were progressively exaggerated up to and including its 17 May 2013 claim **[C-0035]**, as appears from the Table at Section G, 5, above.
354. Thereafter the same exaggerated claims as appeared in the 17 May 2013 claim were carried forward into CMEC's subsequent claims, the sums subsequently claimed being updated primarily to reflect interest and other accrued costs and losses.¹⁹⁶
355. Of the 15 claims set out in Appendix II hereto, the first 13¹⁹⁷ were accompanied by letters signed by a Mr Duo Jinhai ("Mr Duo").
356. Mr Duo was initially Standing Deputy Project Manager of CMEC but later became CMEC's Senior Project Manager.¹⁹⁸
357. According to CMEC's witness Qingchi Wang, Mr Duo formally retired in 2014, but "[i]n order to pursue settlement of the outstanding payments after Trinidad and Tobago's termination of the Project, as an exceptional arrangement, Mr Duo continued to work on matters related to the Project for another five years as Senior Project Manager until mid-2019".¹⁹⁹
358. Mr Duo was thoroughly conversant with the sums which were said to be owed to CMEC in the first 13 claims. This is because the accompanying letters themselves show that he was fully aware of the enclosed details of the claims CMEC was making and also because he was kept on after 2014 specifically "in order to pursue settlement of the outstanding payments".
359. Mr Duo is not, at present, among the witnesses CMEC is proposing to call to give evidence.

¹⁹⁶ See Request for Arbitration, §49.

¹⁹⁷ See the letters numbered 1 to 13 in Appendix II, dated between 14/2/11 **[R-0004]** and 31/7/19 **[R-0007]**.

¹⁹⁸ See Qingchi Wang's witness statement, §10.

¹⁹⁹ See Qingchi Wang's witness statement, §12.

360. The last 2 of the 15 claims²⁰⁰ were accompanied by letters signed by Qingchi Wang²⁰¹ (“Mr Wang”) who, as stated, is being called as a witness by CMEC.
361. As set out in his witness statement, Mr Wang participated in the Project by supporting Mr Duo as from 2007 (§§9 and 10) and continued to assist Mr Duo until the end of Mr Duo’s five-year extended term in 2019 (§12). Thereafter “Mr Duo handed over his responsibilities to me in 2019 and **I became the lead of the Project team in charge of all outstanding matters**” (§13) (emphasis added).
362. So Mr Wang too must be thoroughly conversant with the sums which CMEC was claiming it was owed in all 15 letters, since:
- (1) Mr Wang assisted Mr Duo throughout the period (from 2011 to 2019) when the first 13 claims were sent to Alutrint;
 - (2) Since 2019 Mr Wang has been in charge of “all outstanding matters” on behalf of CMEC regarding the Project, and the primary outstanding matter must be CMEC’s claim for recovery of its alleged losses;
 - (3) Mr Wang himself sent Alutrint the last 2 claims (in 2020 and 2022), each of which contained the grossly exaggerated amounts referred to above; and
 - (4) Mr Wang’s witness statement addresses, in detail, the various heads of claim of which CMEC has sought recovery over the years and is still seeking recovery.
363. CMEC is also calling a Ms Dandan Pei (“Ms Pei”) to give evidence.
364. Ms Pei joined CMEC in 2000 and since then has been working as an accountant in CMEC’s finance department, focusing on matters relating to project costs and expenses. She is now overseeing accounting matters in the engineering

²⁰⁰ The 2 claims are CMEC’s 17/1/20 claim [C-0043] and 15/8/22 claim [C-0044].

²⁰¹ Mr Wang was Deputy General Manager of CMEC’s No 1 Complete Plant Division as from 2016 and retired from CMEC in September 2024: see §§7 and 9 of his witness statement.

department under CMEC's No 1 Complete Plant Division. She has been informed of expenses borne by CMEC associated with managing the Project from 2005 to September 2014. See §§7 and 8 of Ms Pei's witness statement.

365. In view of Ms Pei's employment as an accountant and her focus on CMEC's claims in respect of the Project, she too should have considerable familiarity with the details of the claims made over the whole of the period when CMEC was making the 15 claims.

H. Attribution

H1. CMEC's case on Attribution

366. CMEC asserts in §524 of the Memorial that "Alutrint is State Enterprise or Agency that was founded by Trinidad and Tobago for the purpose of and charged with developing the Smelter Project. There should be no doubt that Alutrint's acts and omissions are attributable to Trinidad and Tobago".
367. In support of its case that Alutrint's conduct is attributable to T&T, CMEC relies on Article 5 and Article 8 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts.
368. As set out below, neither Article 5 nor Article 8 supports CMEC's case that Alutrint's conduct can be attributed to T&T.
369. As also appears below, the fact that Alutrint is categorised as a State Enterprise or a State Agency is not relevant to the application of Article 5 or Article 8, nor is the fact that Alutrint was set up for the purpose of developing the smelter Project.

H2. Article 5 of the ILC Articles

H2.1. The law

370. Article 5 of the ILC Articles states:

“The conduct of a person or entity which is not an organ of the State under Article 4 but which is **empowered by the law of that State to exercise elements of the governmental authority** shall be considered an act of the State under international law, **provided the person or entity is acting in that capacity in the particular instance.**” (emphasis added)

371. Article 5 presupposes that the entity in question is not a State organ.²⁰² For attribution to the State to apply under Article 5, it must be established (1) that the entity is “empowered by the law” with the function “to exercise elements of the governmental authority” and (2) that its conduct in question was carried out “in that capacity [i.e. of exercising that governmental authority as empowered by law] in the particular instance”.

372. Thus attribution under Article 5 “is based on a sequential reasoning that comprises, first, a preliminary structural analysis and, secondly the application of a functional test, provided that the State instrumentality in question is formally empowered by law to exercise elements of the government authority. Indeed, this normative operation consists in the two steps of *identification* of the parastatal entity as being such (*structural* test) and *attribution* of the specific act or omission based on the exercise of governmental authority (*functional* test)”.²⁰³ (original italics)

373. Thus, attributing an act of a person to a State under Article 5 involves a 2-step test:

²⁰² Article 4 deals with when the conduct of a State organ is considered an act of the State under international law.

²⁰³ Carlo De Stefano, Special Issue on 20th Anniversary of ARSIWA Attribution of Conduct to a State ICSID Review Vol. 37, No.1-2 (2022) pp.20-50 [RL-0098] at p.39.

- (1) Step 1 - **a structural test**: whether the entity is empowered by the law of the State to exercise elements of governmental authority;
- (2) Step 2 - **a functional test**: whether the conduct in question was carried out in that capacity (i.e. of exercising that governmental authority as empowered by law) in the particular instance.

374. The above should be undisputed, as the 2-step test is accurately stated in §531 of the Memorial, which cites **EDF v Romania**²⁰⁴ [CL-0060].

375. However, misleadingly, §532 of the Memorial goes on to refer to only part of the relevant material in **EDF v Romania**²⁰⁵ and omits the following:

“191. ...Therefore, in order for an act to be attributed to the State under ILC Article 5, two cumulative conditions must be fulfilled:

- first, the act must be performed by an entity empowered by the internal law of the State to exercise elements of governmental authority;
- second, the act in question must be performed by the entity in the exercise of the delegated governmental authority.

...

193. ...Therefore, in order for an act of a legally independent entity to be attributed to the State, it must be shown that **the act in question** was an authorised exercise of specified elements of governmental authority. As stated by ILC Commentary to Article 5, “It is accordingly a narrow category”.²⁰⁶” (emphasis and underlining added)

²⁰⁴ **EDF (Services) Limited v Republic of Romania** ICSID Case No. ARB/05/13, Award, 8 October 2009 [CL-0060] §§191-192.

²⁰⁵ In §532 of the Memorial CMEC cites only part of §193 of the award in **EDF v Romania**.

²⁰⁶ See Commentary (7) on Article 5 [CL-0099] p.43

Step 1 – The structural test

376. To satisfy the structural test, a formal empowerment by the internal law of the State to exercise governmental functions is required.
377. In **Bosh v Ukraine**, the tribunal considered that the National University of Kiev’s provision of higher education services and the management of State-owned property in accordance with **various Ukrainian decrees and laws** “constitute forms of governmental authority that the University is empowered by the law of Ukraine to exercise”.²⁰⁷
378. Similarly, in **Jan de Nul v Egypt**, the tribunal concluded that “[t]here is no doubt that the Suez Canal Authority was and still is empowered to exercise elements of governmental authority”, as it was in particular **empowered by legislation** to “issue decrees related to the navigation in the canal” and to “impose and collect charges for the navigation and progress through the canal”, which are regulatory and fiscal powers.²⁰⁸
379. Whereas, if the relevant legislation does not confer any functions of a public character that are of a regulatory nature or are otherwise within the remit of the State’s public prerogatives and powers, no attribution will be found.
380. In **Staur Eiendom v Latvia**, the investor argued that the SJSC Airport, a Latvian State-owned enterprise, was endowed by legislation (i.e. the SOE Law, as supplemented by the Aviation Law) with the governmental authority to “ensure sanitary, quarantine, customs and border (passport) and other control of aircraft crews and passengers”. It also argued more generally that the SJSC Airport “has implicitly been endowed with governmental authority” as it was “a “strategic

²⁰⁷ **Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine** ICSID Case No. ARB/08/11 Award, 25 October 2012 [RL-0031] §173.

²⁰⁸ **Jan de Nul NV and Dredging International NV v Arab Republic of Egypt** ICSID Case No. ARB/04/13 Award 6 November 2008 [RL-0032] §166.

State asset”, the management of which “could not possibly take place without the exercise of governmental authority””.²⁰⁹

381. But the tribunal rejected the investor’s arguments:

“...the Tribunal is not persuaded that there has been any delegation of governmental authority to SJSC Airport under Latvian law. The Tribunal agrees with the Respondent that the SOE Law does not delegate any governmental authority to SJSC Airport, but merely provides for its establishment and governance. Nor do the provisions of the Aviation Law upon which the Claimants rely, or any other enactment or instrument, delegate the performance of any specific governmental tasks to SJSC Airport. Although the Claimants have contended that SJSC Airport’s powers have been bestowed upon it in order to advance “classically sovereign purposes,” they have failed to demonstrate that SJSC Airport itself enjoys or is entitled to exercise any sovereign powers at all, such as acts of a regulatory nature or otherwise involving the use of the State’s public prerogatives or *imperium*, i.e., acts of “*puissance publique*.” In this regard, the Tribunal agrees with the Respondent that it does not follow simply from the Airport’s classification as an “object of national interest” that SJSC Airport has been empowered to exercise elements of governmental authority, in the absence of any showing that specific elements of governmental authority have, in fact, been conferred upon SJSC Airport.”²¹⁰ (underlining added)

Step 2 – The functional test

382. The actual exercise *in fact* of the governmental authority which has been accorded to the entity is the further and necessary requirement for the entity’s acts in question to be attributed to the State so as to engage the State’s

²⁰⁹ **Staur Eiendom AS, EBO invest AS and Rox Holding AS v Republic of Latvia** ICSID Case No. ARB/16/38, Award, 28 February 2020 [RL-0033] §340.

²¹⁰ Ibid, §342.

international responsibility. Thus, the State's internal law having empowered the entity to exercise governmental authority, the entity's conduct in question must have involved the exercise of that governmental authority.

383. As made clear by Commentary (5) on Article 5 of the ILC Articles, “[t]he justification for attributing to the State under international law the conduct of “parastatal” entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for the purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and **not other private or commercial activity in which the entity may engage**...”.²¹¹ (emphasis and underlining added)
384. “[A]scertaining the public dimension of the corporate objective of a State enterprise does not conclusively solve the issue of attribution, since it just stands as an element falling under the structural analysis in article 5..., which further requires the application of the functional test for attributability proper. As observed by the *Jan de Nul v Egypt* Tribunal, ‘the fact that the subject matter of the Contract related to the core functions of the SCA, i.e., the maintenance and improvement of the Suez Canal, is irrelevant. [...] **What matters is not the “service public” element, but the use of “prérogatives de puissance publique” or governmental authority.**’ Accordingly, the public purpose or nation-wide strategic role of the concerned State entity (for instance, ‘to contribute to the development of national economy’...) is not as such determinative of the result of attribution of its acts and omissions to its establishing State, which entails a normative operation that cannot neglect the actual exercise of sovereign authority in connection with the specific act at issue. The structural test ‘in itself clearly does not resolve the issue of attribution’. A tribunal should subsequently resort to the functional test of the actual exercise of elements of governmental

²¹¹ Commentary (5) on Article 5 [CL-0099] p.43.

authority pursuant to Article 5...”.²¹² (original italics, underlining and emphasis added)

385. So the mere fact that the act in question contains a “public service element” is insufficient to amount to an exercise of the governmental authority conferred by the law. This has been made clear in the following arbitral awards.
386. That the conduct in question was not an exercise of governmental authority was decisive of the tribunal’s rejection of attribution under Article 5 in **Hamester v Ghana**. Despite the tribunal’s earlier finding that Cocobod (a state-owned entity) was “indeed trusted with governmental functions” under the relevant legislation of Ghana, the tribunal said that “this in itself clearly does not resolve the issue of attribution” as it is “well established that for an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity.”²¹³ (underlining added)
387. The tribunal said that it did not suffice for the purposes of attribution under Article 5 that the act of the entity empowered to exercise governmental authority was performed “in the general fulfilment of some general interest, mission or purpose”.²¹⁴ The tribunal went on to analyse Cocobod’s conduct in negotiating and finalising the 2001 Price Agreement with the investor and found that Cocobod had not done so in the exercise of *puissance publique*. The tribunal concluded that the acts of Cocobod were properly characterised as acts “*de jure gestionis*” (commercial or private as opposed to public and governmental acts) and thus were not attributable to Ghana.²¹⁵

²¹² Carlo De Stefano, *Special Issue on 20th Anniversary of ARSIWA Attribution of Conduct to a State* ICSID Review Vol. 37, No.1-2 (2022) pp.20-50 [RL-0098] p.41.

²¹³ **Gustav F W Hamester GmbH & Co KG v Republic of Ghana** ICSID Case No. ARB 07/24, Award, 18 June 2010 [RL-0034] §§190, 193.

²¹⁴ Ibid, §202.

²¹⁵ Ibid, §246-250.

388. The tribunal in **Jan de Nul v Egypt** similarly emphasised that “What matters is not the “*service public*” element, but the use of “*prérogatives de puissance publique*” or “governmental authority.” The tribunal considered that the conduct of the Suez Canal Authority (an Egyptian State entity) in refusing to grant an extension of time to the investors at the time of the tender did not show “that governmental authority was used, irrespective of the reasons for such refusal”. The tribunal said “Any private contract partner could have acted in a similar manner”.²¹⁶
389. In **Bosh v Ukraine** (which involved the termination of a contract), the tribunal concluded that the National University of Kiev’s conduct was not attributable to Ukraine under Article 5 as “the University’s decision to enter into and subsequently terminate the 2003 Contract with B&P did not relate to the exercise of governmental authority, but by reference to the nature and purpose of the 2003 Contract...was a private or commercial activity which was aimed to secure commercial benefits for both parties.”²¹⁷
390. The tribunal’s decision in **Amto v Ukraine** specifically held that defaults on debt by state-owned entities are commercial acts which are not attributable to States under Article 5. There, the claimant attempted to attribute Energoatom’s non-payment of contractual debts to Ukraine in order to establish responsibility for a breach of Article 10(1) of the Energy Charter Treaty. The tribunal held that the “payment or non-payment by a state entity of contractual debts owed to a service provider involves no exercise of sovereign authority or *puissance publique*, and cannot be attributed to the Ukraine.” The tribunal particularly emphasised that it had not been shown that the decisions not to pay were made on the instructions of, or under the direction or control of Ukraine.²¹⁸

²¹⁶ **Jan de Nul v Egypt** supra [RL-0032] §170.

²¹⁷ **Bosh v Ukraine** supra [RL-0031] §177.

²¹⁸ **Limited Liability Company Amto v Ukraine** SCC Case No. 080/2005 Final Award, 26 March 2008 [RL-0035] §§107-108.

H2.2. CMEC’s erroneous summary of the law and its erroneous application of the law to the present case

391. CMEC’s purported summary of the law is incorrect and confusing. It misstates the test under Article 5 in the following respects.
392. First, CMEC correctly identifies the 2-step test in the Memorial, §531, but conflates the 2 steps in §530.
393. In §530 CMEC says: “The conduct of Alutrint is attributable to Trinidad and Tobago as Alutrint is an entity *"exercising elements of governmental authority"*. Article 5 sets out a functional test, namely, whether the entity is *"empowered, if only exceptionally and to a limited extent, to exercise specific functions which are akin to those normally exercised by the organs of the State"*.”
394. §530 thereby conflates the structural test and the functional test. Showing that an entity is “empowered to exercise specific functions” concerns the “structural test”, not the functional test.
395. So, the whole of the content of §530 in fact addresses the structural test alone, and none of it addresses the functional test.
396. Second, as a consequence of the conflation, CMEC fails to apply the functional test at all. Thus (1) there is no identification of any specific conduct on the part of Alutrint and (2) consequently, it is not shown that such conduct was an exercise of governmental authority.
397. Thirdly, assuming that CMEC intended to recite the structural test (and not the functional test) in §530, the recitation is in any event incorrect:
- (1) In the first place, the critical words in Article 5 are omitted, namely that the entity has to be “empowered by the law of the State to exercise elements of the government authority” (underlining added). Nowhere in

the Memorial is this point addressed. So CMEC has not identified the “law of the State” which empowered Alutrint to exercise governmental authority.

- (2) In the second place, by reason of the above omission, the assertion that “[t]he conduct of Alutrint is attributable to Trinidad and Tobago as Alutrint is an entity “exercising elements of governmental authority”” makes no sense. In §533 of the Memorial, CMEC puts forward some “[e]xamples of “*governmental authority*” confirmed by investment tribunals” (original italics) and then refers to random conduct constituting the exercise of governmental authority identified in those decisions. But nowhere does the Memorial address the question of **how Alutrint was empowered by the law of T&T to exercise what specific governmental functions.**

398. Given CMEC’s said inadequate treatment of the law, it is unsurprising that it wrongly concludes that Alutrint’s conduct is attributable to T&T under Article 5.

H2.3 Alutrint’s conduct cannot be attributed to T&T under Article 5

399. CMEC omits the following critically important matters from the “circumstances of [Alutrint’s] creation”, referred to in §534 of the Memorial.
400. The USA²¹⁹ governed the manner in which Alutrint’s affairs in relation to the Project were to be conducted, in addition to containing provisions relating to the relationship between T&T and Sural and various other matters.

²¹⁹ The USA is C-0010.

401. Critically, the USA makes it quite clear that Alutrint was not carrying out its business in the exercise of any governmental authority but rather was conducting its affairs in the capacity of a commercial or private entity.
402. Thus Clause 25.1 of the USA states that “The Government of Trinidad and Tobago hereby acknowledges that the transactions contemplated in this agreement are commercial in nature rather than governmental...”. (underlining added)
403. Clause 25.1 thus makes it explicit that none of Alutrint’s conduct constituted the exercise of governmental authority.
404. Further provisions of the USA confirm that Alutrint was not exercising governmental authority.
405. Clause 10.2 of the USA lists a number of activities that Alutrint may not undertake without the consent of all its shareholders, ie T&T and Sural. Such activities could not have had any governmental character since Sural is a private entity.
406. Similarly, Clause 12 of the USA imposes a “best endeavours” obligation on both T&T and Sural in their capacities as shareholders to ensure inter alia that Alutrint conducts its business properly, efficiently, and in accordance with the business plan; transacts its business on arms’ length terms; receives not less than a fair commercial price for any goods or services supplied to it; does not enter into any agreement or arrangement restricting its competitive freedom to provide and take goods and services etc.
407. The above shows clearly that Alutrint has always been intended to be run as a commercial entity.

408. Alutrint's conduct is generally equivalent to that in **Bosh v Ukraine** (decision to enter into and terminate a contract) and **Amto v Ukraine** (non-payment), being commercial conduct in which any contract partner could have engaged, particularly when viewed in the context of the provisions of the USA.
409. Putting CMEC's case at its highest, the "circumstances of [Alutrint's] creation" at best show that Alutrint is "an object of national interest" (**Staur Eiendom v Latvia** above) or is an entity with a "public service element" (**Jan de Nul v Egypt** above). Those circumstances do not demonstrate that Alutrint has been empowered by any T&T legislation to exercise any governmental authority at all.
410. As a result, it is plain that CMEC fails to establish attribution under Article 5.

H3. Article 8 of the ILC Articles

H3.1 The law

411. Article 8 reads as follows:

"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

412. Tribunals regularly adopt an "effective control" test (which it appears CMEC accepts: §537 of the Memorial).
413. "International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution

of which is at stake; this is known as the “effective control” test.”²²⁰ (underlining added)

414. A consistent theme throughout arbitral jurisprudence and CMEC’s authorities in the specific context of the present case involving a (partially) State-owned entity, is that the mere general corporate ownership and control by a State in a State-owned entity does not suffice for attribution under Article 8.
415. Commentary (6) on Article 8 is of particular importance as its focus is on “the conduct of companies or enterprises which are State-owned and controlled”. It reads as follows,

“Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled....In discussing this issue, it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie, their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the de facto seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular

²²⁰ Jan de Nul v Egypt supra [RL-0032] §173.

result, the conduct in question has been attributed to the State.” (emphasis and underlining added)²²¹

416. Thus, international law recognises the separate personality of corporate entities, even when they are State-owned and therefore subject to the control of the State. The fact of the State’s ownership is not sufficient to satisfy the requirement of “control” under Article 8 so as to render the conduct of such entities attributable to the State. The position is different when the State-owned corporate entity is exercising elements of governmental authority within the meaning of Article 5.

H3.2 CMEC’s fundamental error in its summary and application of the law

417. CMEC’s summary of the test under Article 8 has the fundamental error that it fails to address the issue of whether Alutrint’s conduct was in the exercise of elements of governmental authority.
418. CMEC fails to recite Commentary (6) to Article 8, which is central to the present case as Alutrint is a State-majority-owned entity.
419. As a result, CMEC’s summary omits the aspect of the effective control test which is critical for present purposes, namely, “[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie, their conduct in carrying out their activities is not attributable to the State **unless they are exercising elements of governmental authority within the meaning of article 5.**” (emphasis added)
420. CMEC thus offers **no** analysis of why and how Alutrint was exercising elements of governmental authority within the meaning of Article 5.

²²¹ See Commentary (6) on Article 8 [CL-0099] p.48.

421. **As stated above, CMEC has failed to establish attribution through Article 5. Thus, for this reason, it likewise fails to establish attribution through Article 8.**
422. The authorities referred to in §§538, 539 and 540 of the Memorial are not on point. The critical question is whether the relevant entities were exercising elements of governmental authority in those particular instances.
423. A further result of CMEC’s omission is that most of the matters set out in §§541 to 543 of the Memorial are irrelevant with regard to Article 8, as ownership and general control via the ownership structure is insufficient for the purposes of attribution under Article 8.²²²
424. As stated in Section D, 3.2, above, entities characterised as “State-owned Enterprises” include all government-owned companies, whether wholly-owned, majority-owned, or minority-owned, and as such operate and have the same powers as any private sector company. Alutrint is an SOE, a “majority-owned company”, and therefore also operates and has the same powers as any other private sector company. This reinforces the separateness of Alutrint’s corporate personality, and further accentuates the need, for the purpose of attribution under Article 8, to show that Alutrint’s acts have been in the exercise of governmental authority.
425. In view of CMEC’s critical omission, it naturally has applied the wrong test and come to the wrong conclusion.

²²² In **White Industries Australia Limited v The Republic of India** UNCITRAL Final Award, 30 November 2011 [RL-0036] the tribunal said at §8.1.6: “To the extent that White relies on the organisational structure of Coal India, the manner of appointment of its directors, and the frequency of consultation on issues such as pricing, these matters are largely irrelevant with regard to Article 8.”

H3.3 CMEC's further error in its summary and application of the law

426. For completeness, T&T identifies CMEC's further error in its summary of the test under Article 8.
427. It is incorrect to suggest that "the instruction or direction by the State can be general instead of specific or overly formal" (Memorial, §537).
428. The excerpt from Professor Crawford's text relied on by CMEC was written in the context of discussing the **Bosnian Genocide** case, in which the ICJ ruled that for a State to incur Article 8 responsibility, its instructions must have been given "in respect of each operation in which the alleged violations occur, not generally in respect of the overall actions taken by the person or group of persons having committed the violations. This, however, gives rise to the question of how the term 'operation(s)' is to be defined". The passage CMEC cites addresses this question, which is "to be resolved by asking whether the unlawful or unauthorised conduct was really incidental to the mission or clearly went beyond it"²²³.
429. Thus, the citation from Professor Crawford's text discussed is in the specific situation in which the State has instructed an entity to perform an act but leaves ambiguity as to how the task should be completed. In such a case, if the entity's unlawful or unauthorised acts are "incidental to the task in question" or "conceivably within its expressed ambit", then they may be attributable under Article 8. Much will depend on the "particular circumstances of the case in question". The citation does not support the proposition that the instruction or direction itself can be "general instead of specific or overly formal".

²²³ See Commentary (8) on Article 8 [CL-0099] p.48.

H3.4 Conclusion

430. Hence, CMEC has also failed to establish attribution under Article 8.

I. Expropriation

I1. Introduction

431. CMEC contends that T&T has acted in breach of the expropriation provisions in Article 6 of the Treaty. CMEC's case is set out in §§546 to 616 of the Memorial.

432. It is submitted that it is plain that T&T did not breach the expropriation provisions. T&T will rely on each of the multiple reasons set out below.

433. In this introductory section, some general comments are made on the confusion which permeates CMEC's expropriation claim, as exemplified by the way in which the claim has changed each time it has been presented.

434. As tribunals have regularly said, it is of critical importance in expropriation cases for the investor to identify with precision what asset has been expropriated: "The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated."²²⁴

435. It is equally important to identify whether direct or indirect expropriation is relied upon, since the two are conceptually distinct²²⁵ and mutually exclusive – the same measure cannot qualify as both at the same time.²²⁶

²²⁴ **Bayindir v Pakistan** ICSID Case No ARB/03/29, Award, 27 August 2009 [CL-0064], §442. See also **Generation Ukraine v Ukraine**, ICSID Case No ARB/00/9, Award, 16 September 2003 [CL-0098], §6.2:

"Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when the allegedly expropriatory acts occurred."

²²⁵ Direct expropriation is a formal, official act which involves the taking of the investors' legal ownership of property; indirect expropriation is a governmental act, short of a direct taking, which results in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of the investor, the investor's legal title to the investment being left unaffected.

²²⁶ Reinisch [RL-0099] §§152-3; **Enron Corporation v Argentine Republic** ICSID Case No ARB/01/3, Award, 22 May 2007 [RL-0037] §250.

436. Here, CMEC’s case on what has been expropriated and the type of expropriation relied upon keeps changing.
437. In CC’s Notification of a Claim of 26 August 2022 [C-0491], it was said (in §§5 and 11) that it was T&T’s failure to pay amounts due for works which CMEC had carried out under the two EPC Contracts which violated the expropriation provision (and other provisions) of the Treaty.
438. In CMEC’s Request for Arbitration, its case was that there had been indirect expropriation of “outstanding amounts owing to CMEC under the EPC Contracts” (§89) (“the contractual debt”) and direct expropriation of “all performance by [CMEC] that was stipulated under the EPC Contracts” (§90) (“all performance etc”).
439. Now, in the Memorial, CMEC has abandoned both the claim for indirect expropriation of the contractual debt and the claim for direct expropriation of all performance etc.
440. Instead, CMEC now makes the following two expropriation claims, both based on indirect expropriation, being:
- (1) a claim for indirect expropriation of:
 - CMEC’s rights under the EPC Contracts (§589); and
 - “the use, enjoyment and/or value of all other covered investments” (§590), which include the things set out in §590(a) to (m); and
 - (2) a claim for indirect expropriation, in the form of creeping expropriation, of CMEC’s “covered investments” (§610), through the measures set out in §§611(a) to (i) and 612.
441. The said general references to indirect expropriation of CMEC’s “covered investments” hardly identify with precision what assets CMEC is now saying T&T has expropriated. And it is difficult to conceive how a case can be made

out that what was expropriated was CMEC's "use, enjoyment and/or value" of, for example, "Training" (§590(f)), "Testing" (§590(g)), "Management Costs" (§590(h)) etc.

442. Separately, the treatment of CMEC's expropriation case in the Memorial proceeds upon the premise that T&T is liable for expropriation under Article 6 unless it can satisfy the excepting circumstances set out under Article 6(1), (a) to (d)²²⁷: §582 says there was "unlawful expropriation because the lawful expropriation requirements under Article 6 of the BIT have not been satisfied".
443. But the premise is incorrect.
444. The excepting circumstances under Article 6(1) only come into play where it has been shown that expropriation has taken place. So the starting point is to see whether there has been an expropriation in the first place. If there has been no expropriation, then the excepting circumstances do not fall for consideration. It is only when it has been shown that there has been an expropriation that consideration needs to be given to whether the same is lawful, which will be the case if the excepting circumstances have been satisfied.²²⁸
445. Hence, the Memorial avoids addressing the numerous matters which show that there has been no expropriation in the first place. Further, even if it were to be found that expropriation has taken place, the excepting circumstances set out on Article 6(1) have in any event been satisfied.

²²⁷ See §§582 to 589 of the Memorial, and also §§547(c), 556 and 613.

²²⁸ See **Fireman's Fund [RL-0039]**, §174, in which it is said that to start an enquiry into whether expropriation has occurred by examining whether the excepting circumstances have been fulfilled "would indeed be putting the cart before the horse ("poner la carreta delante de los caballos")."

See also **Feldman v Mexico [CL-0068]**, §98: "If there is no expropriatory action, factors a-d are of limited relevance, except to the extent that they have helped to differentiate between government acts that are expropriation and those that are not..."

446. The numerous problems with CMEC's expropriation claim arise from the simple fact that CMEC is trying to shoehorn its contractual claim against Alutrint into a Treaty claim against T&T, and the Treaty claim does not fit.
447. T&T therefore says that the expropriation claim is plainly unsupportable, for the reasons summarised in the Section immediately below.

I2. Summary of reasons for which there was no breach of the expropriation provisions

448. T&T's case, developed in the Sections below, is that there was no expropriation for each of the following reasons:
- (1) There could be no expropriation of CMEC's contractual rights, since the same did not constitute property rights. Expropriation can only occur when that investor is deprived of a property right, (or asset); the rights allegedly expropriated here do not consider property rights but, rather, are pure contractual rights. See Section I, 3, below.
 - (2) CMEC has not been permanently deprived of its contractual rights under the EPC Contracts. For expropriation to be found, the investor must have been permanently deprived of its investment, here CMEC's contractual rights. It is plain that CMEC has not been permanently deprived of its right to claim for work done and costs incurred under the EPC Contracts, even having availed itself of the dispute resolution procedure in the 2008 Contract. See Section I, 4, below.
 - (3) None of the expropriatory measures relied on by CMEC – relating to the termination of the Project and non-payment of CMEC's claims – constituted the exercise by T&T of its sovereign powers. See Section I, 5, below.
 - (4) The alleged expropriation of CMEC's contractual rights was not "compulsory". CMEC, as a contracting party, consented to the

termination of the EPC Contracts, which was effected in accordance with their terms. See Section I, 6, below.

- (5) There was no expropriation since T&T's termination of the Project constituted legitimate regulatory action carried out by reason of environmental and health concerns ie the "police powers exception" applies. See Section I, 7, below.
- (6) T&T's non-payment of CMEC's claims does not constitute a "measure" within the meaning of "other similar measures" in Article 6(1) of the Treaty, since it was not conduct on the part of T&T which was driven by a purpose or design to deprive CMEC of its investment. See Section I, 8, below.

449. Each of the points made above, if successful, is sufficient on its own to dispose of CMEC's expropriation claim.

450. Further, even if all the above points fail, and it were to be held that expropriation has taken place, nevertheless each of the excepting circumstances set out in Article 6(1) has been satisfied and due process and the FET and Non-Impairment standards have been complied with, with the result that (the assumed) expropriation was lawful in any event. See Section I, 9, below.

I3. There could be no expropriation of CMEC's contractual rights, since the same did not constitute property rights

451. CMEC says "a longstanding principle of international law is that it protects the expropriation of contractual rights" (§597).

452. This is a misapprehension. The proposition is too wide and ignores the critical feature of an expropriation claim.

453. The loss of a right conferred by a contract *may* give rise to a claim for expropriation, but only if the right conferred by the contract constitutes a

property right (an asset). Examples would be where a contract is the source of intangible property, such as debts and other choses in action. The defining characteristic of a property right (or asset) is that it has a monetary value and is therefore capable of being freely alienated, assigned or otherwise transferred to another.²²⁹

454. The rights allegedly expropriated here are CMEC's pure contractual rights under the 2 EPC Contracts.²³⁰ These contractual rights do not confer on CMEC any property right (or asset).
455. Hence CMEC's claim based on expropriation cannot succeed for this reason alone.

I3.1 The law: expropriation must be of a property right (or asset)

456. Recently the tribunal in **Emmis v Hungary**²³¹ undertook a comprehensive analysis of rights which were, and were not, capable of being expropriated. That analysis is directly relevant here and justifies being cited at length. Underlining has been added to particularly important and useful passages:

"159. In view of the fact that the only cause of action within the Tribunal's jurisdiction is that of expropriation, Claimants must have held a property right of which they have been deprived. This follows from the ordinary meaning of the term. The *Oxford English Dictionary* defines 'expropriate' as '(of the state or an authority) take (property) from its owner for public use or benefit'/'dispossess (someone) of property'. Its

²²⁹ **Emmis v Hungary** ICSID Case No ARB/12/2, Award, 16 April 2014, §§165, 166 and 169 [RL-0087]; **Accession Mezzanine v Hungary**, ICSID Case No ARB/12/3, Award (17 April 2015), §§147, 154 [RL-0038]

²³⁰ See §§589, 596, 604, 609, 686 of the Memorial.

²³¹ This case involved a claim for expropriation arising from the State's non-renewal of the Claimants' broadcasting licence on the expiration of its term. The questions were what rights, if any, the Claimants had in respect of such renewal, whether the same constituted an investment for the purposes of the jurisdiction of ICSID under Article 25 of the Convention and whether the same constituted an investment capable of giving rise to a claim for expropriation (§45). The tribunal held that the only property right the Claimants had capable of protection from expropriation was its broadcasting right, which was a right which had expired with the expiration of its term (§§194 and 255).

origin is from the medieval Latin *expropriat* – ‘taken from the owner’, from the verb *expropriare*, from *ex-* ‘out, from’ + *proprium* ‘property’, neuter singular of *proprius* ‘own’.

160. The Tribunal in *Waste Management II* made the same point when it held that the object of expropriation is the property of the claimant:

An indirect expropriation is still a taking of property.²³² By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant. (underlining added)

.....

165. But it is important to emphasise that the protection from expropriation in relation to rights conferred under contract still requires identification of a property interest or asset held by the claimant. As the Iran-US Claims Tribunal put it in *Amoco*:

Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value. [...] It is because *Amoco*'s interests under the *Khemco* Agreement have such an economic value that the nullification of those interests by the Single Article Act can be considered as a nationalization.

166. The need to identify a property right or asset with commercial value not only equates with the basic concept of expropriation. It also aligns with the critically important distinction between rights protected by international law and contractual rights under municipal law. In its full

²³² That the requirement that the investor must have held a property right is applicable both to cases of direct expropriation and to cases of indirect expropriation is further affirmed by the fact that **Emmis v Hungary** was itself an indirect expropriation case (see §122). See also **Accession Mezzanine v Hungary** §§149 and 178 [RL-0038]

analysis of the issue in *Waste Management II*, the Tribunal distinguished between cases in which the claim of expropriation of contractual rights was ancillary to a claim of expropriation of other property and ‘the much smaller group of cases where the only right affected is incorporeal’. As to the latter, it said:

[...] these come closest to the present claim of contractual non-performance. [...] In such cases, simply to assert that “property rights are created under and by virtue of a contract” is not sufficient. The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. [...]

The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation.

167. Moreover, such an interpretation also accords with the separate and distinct function of the protection against expropriation as compared to the other protections included within the framework of the wider investment treaty. Thus:

- (a) Both Treaties provide for the ‘fair and equitable treatment’ of investments. This protection is designed to ensure that investments receive due process from the host State’s administrative authorities and courts. That provision would not serve a useful and distinct function if procedural rights were treated as assets of the investor protected by the expropriation clause;
- (b) The Netherlands BIT specifically provides that ‘[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.’

Such a requirement to observe undertakings generally would be unnecessary if all undertakings, whether contractual, unilateral or under the general municipal law, were treated as assets subject to protection under the expropriation clause;

- (c) The Switzerland BIT specifically protects from impairment ‘by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments’. A similar provision afforded the claimant a good cause of action in *Lemire v Ukraine* in relation to the award of radio broadcasting licences. But the Tribunal in that case emphasised the importance to its decision of the fact that the claim was brought for breach of the fair and equitable treatment standard, and not for expropriation.

168. It also follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress. This has been recognised by many tribunals, for example:

- (a) In *Marvin Roy Feldman Karpa v United Mexican States*, the Tribunal rejected an expropriation claim because ‘the Claimant never really possessed a “right” [under Mexican law] to obtain tax rebates upon exportation of cigarettes.’
- (b) In *Generation Ukraine v Ukraine*, the Tribunal noted that since ‘expropriation concerns interference with in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when the alleged expropriation occurred.’ The Tribunal went on to hold that in respect of a claimed right to use land, there ‘cannot be an expropriation of something to which the Claimant never had a legitimate claim.’

- (c) In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, the Tribunal noted that the ‘first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated.’
- (d) In *Merrill & Ring v Canada*, the Tribunal rejected a claim that Canada had expropriated the claimant’s interest in realizing fair market value for its logs on the international market because this was “only a potential interest that may or may not materialize” and was not therefore covered by the treaty protection from expropriation.
- (e) In *Crompton (Chemtura) Corporation v Canada*, the Tribunal held that, when analysing an expropriation claim, the first step was to determine ‘whether there was an investment capable of being expropriated.’
- (f) In *Apotex v United States of America*, the Tribunal rejected claimant’s argument that it had made an investment in the United States by applying for regulatory approval for a drug that it claimed it would have been granted but for Respondent’s alleged breaches. The Tribunal held “the critical enquiry must be as to the nature of the alleged ‘property’ as at the date of the alleged breach - not at some future point.”
- (g) In *Swisslion DOO Skopje v Macedonia*, the Tribunal found that the ‘Claimant has not proven the juridical fact on which the second limb of its expropriation claim is based, i.e., that it had a clear right to recover the purchase price [of a share purchase and sale agreement that had been terminated] in that proceeding such that the court’s failure to so order constituted an expropriation.’”

457. The tribunal then went on, in §169, to summarise the points it had made at length in the earlier paragraphs:

“169. Pausing at this point in the analysis, the Tribunal summarises the legal position under international law in the following way: the loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. The claimant must own the asset at the date of the alleged breach. It is the asset itself - the property interest or chose in action - and not its contractual source that is the subject of the expropriation claim. Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.”

458. Thus, only a property interest or asset is the subject-matter of protection from expropriation.

459. In **Tidewater v Venezuela**²³³ the tribunal, referring to **Emmis v Hungary** said:

“116. Expropriation under international law undoubtedly contemplates property rights existing under national law that have been taken by the State. As the Iran-US Claims Tribunal put it in *Amoco*:

Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value.

117. In **Emmis v Hungary**, the reason there could be no claim for expropriation was because the only property right that the claimants in that case had acquired upon making their investment in Hungary was a fixed-term broadcasting licence that had expired prior to the State measure alleged to constitute the expropriation. For that reason, the

²³³ The Award in this case was made on 13 March 2015 [RL-0011].

claimants in that case, in their contemporaneous regulatory filings, attached no value to their investment after the expiry of the licence.”
(underlining added)

460. And in the later award in the case of **Accession Mezzanine v Hungary**,²³⁴ the tribunal agreed with the tribunal in **Emmis v Hungary** on what rights are capable of being expropriated. Again, the approach and analysis of the tribunal in **Accession Mezzanine v Hungary** justify a lengthy citation from the Award. And, again, passages which deserve emphasis have been underlined:

“146. The Tribunal has concluded that the Claimants did not have a property right, contractual right or any other vested legal right in Hungarian law in relation to the exploitation of a national radio frequency in Hungary on the critical date of the alleged expropriation. The question of what precisely can be the object of an expropriation has thus been rendered moot by the Tribunal’s findings in respect of the Claimants’ first and second arguments as set out above. The Parties have, however, made detailed submissions on the question of what rights are capable of being expropriated and it is appropriate for the Tribunal to present a summary of its views. As will be clear, the Tribunal is in substantial agreement with the Emmis tribunal on this question.

147. The Respondent submits that only property rights are capable of being the object of an expropriation. Although the Tribunal need not decide this question in light of its previous findings, it is important to recognise that there is a profound difference between property rights and purely personal rights in the context of adjudging a claim for expropriation. The defining characteristic of a property right is that it is capable of alienation or assignment. One investor’s property right might

²³⁴ In **Accession Mezzanine v Hungary** the Claimants held stock in Danubius Radio, a Hungarian company and a former licensee of one of the two nationwide radio broadcasting frequencies in Hungary. The Claimants alleged unlawful expropriation or nationalization of their investments in and in relation to Danubius Radio and its operating activities by the State. An account of the circumstances out of which the claim arose is set out in §§27-55 of the Award. [RL-0038]

just as well be the property of another investor or of the state. It is precisely because property rights can be alienated or assigned that makes them susceptible to being appropriated or expropriated. What cannot, on the other hand, be appropriated or expropriated are personal rights because the right is not separable in law from the person who has it. A personal right cannot enter circulation in a market like a property right can. By way of example, taxi licenses in some countries are capable of alienation and hence are a property right. But it is unlikely that a licence to practise medicine is alienable in any country because it cannot be separated from the person to whom it is granted. It is not, therefore, a property right.

148. This is not, of course, to suggest that personal rights cannot be interfered with by the state in a manner that violates international law. A licence to practise medicine can be annulled by a state regulatory body on an arbitrary basis. That might give rise to complaints of a lack of due process or breach of a legitimate expectation. But it makes no sense to talk about the annulment as an “expropriation”. The state has not taken the licence and used it for its own purposes or given it to someone else because that is impossible: it is not capable of alienation or assignment.

149. There are compelling reasons of justice that demand that only property rights in this sense be considered as the potential objects of an expropriation. It is widely accepted that a state can be liable for an indirect or *de facto* expropriation regardless of whether the state intended to expropriate the rights in question or whether it even had actual knowledge of the existence of the investor’s rights to property. This is defensible because everyone, including the state and its organs and officials, has constructive notice of property rights. Property rights are good against the whole world. For this reason, in many national legal systems, liability for the usurpation of control over someone else’s property does not require actual notice of the rights to that property and liability for damage to

someone else's property is also imposed without the requirement of actual notice.

150. This is not defensible, however, in relation to rights that are not property rights, such as pure contractual rights.

151. A contractual right is a right to the performance of someone. The characteristics of that someone, the dutyholder, are of fundamental importance to the rightholder. Is the dutyholder good for the money? Does the dutyholder have the necessary expertise or qualifications or resources or reputation or experience to give the performance that the rightholder has bargained for? In contrast, the holder of a property right has no means of ascertaining the identity of the potential dutyholders and their personal attributes *ex ante*. For this reason, the obligations of third parties in respect of property rights are simple and straightforward: property rights always generate duties of abstention.

152. In national legal systems, liability for interferences with contractual rights can only be imposed on the basis of actual notice; whereas in relation to property rights there is no requirement for actual notice. In the contractual context, a party to a contract has actual notice of its counterparty's rights under the contract and of course can be liable for breaching its corresponding obligations. In the limited circumstances in which a third party can be liable for interferences with contractual rights, there must also be actual notice of such rights in the form of a specific intent to cause prejudice to them; this is domain of the *intentional* tort for procuring a breach of contract that exists in many national legal systems.

153. It is not possible to expropriate a pure contractual right because it is not a thing that has an independent existence from the personalized contractual relationship in which it is embedded. This is why scholars of the US constitution have maintained that pure contractual rights cannot be "taken" under the Fifth Amendment:

Contract rights are not property rights for takings purposes insofar as they reflect nothing more than a bilateral agreement; as contractual rights break free from the initial contracting parties and enter into general circulation as investments or money, they become property.

154. Pure contractual rights cannot be expropriated or taken because they are incapable of being alienated to a third party. For that reason they cannot be equated with property rights. Contracts can, however, be the source of intangible property such as debts and other choses-in-action. There is no doubt that debts and other choses-in-action are capable of being expropriated. But the object of the expropriation in such a case is the debt or chose in-action and not the contract itself.

155. The *Emmis* tribunal made the same point in the following terms:

[T]he loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed [...]. It is the asset itself – the property interest or chose in action – and not its contractual source that is the subject of the expropriation claim.

156. Most of the older cases now cited for the proposition that contract rights in general are capable of being expropriated actually concerned debts and other choses-in-action and therefore intangible property.

157. The distinction between a contract as a source of bilateral personal obligations and the contract as a source of property rights is critical because international law distinguishes between a state's mere non-performance of its contractual obligations to a foreign party, which cannot constitute an expropriation, and a state's taking of intangible property, which can.

158. To conclude: had the Tribunal found that the Claimants had vested rights under Hungarian law to the exploitation of radio frequencies at the critical date of the alleged expropriation, the claim for expropriation would only have been cognisable in respect of rights that had the characteristics of property rights under Hungarian law.”

461. As appears above, §156 of **Accession Mezzanine v Hungary** refers to the older cases which are sometimes cited to support the broad proposition that contractual rights in general (“pure” contractual rights: see §§153, 154) can be expropriated.
462. The Memorial, in §§596-600, refers to some of these older cases to support CMEC’s contention that “a longstanding principle of international law is that it protects the expropriation of contractual rights” (§597).
463. However, as stated in §156 of **Accession Mezzanine v Hungary**, these older cases often concerned debts and other choses in action, and therefore intangible property. In these cases, a general statement to the effect that both contractual rights and property rights can be expropriated is often made in the context of a contract which has in fact generated property rights, whether tangible or intangible.
464. And none of the older cases, including the cases CMEC now relies upon, provides a principled basis (nor any persuasive support) for the broad proposition that pure contractual rights can be expropriated.
465. Each of the (7) cases which CMEC relies upon is considered in detail in **Appendix III** hereto.

I3.2 Rights allegedly expropriated here do not constitute property rights

466. CMEC alleges indirect expropriation of its contractual rights: Memorial §§589, 596, 604, 609, 686.

467. However CMEC's rights under the 2 EPC Contracts do not constitute property rights or assets.
468. The following matters make it plain that what was conferred on CMEC under both the 2005 and 2008 Contracts cannot constitute property rights (assets).
469. First, far from CMEC being accorded any property right, the EPC Contracts did not give CMEC the "right" to any performance at all.
470. Clause 4.1 of the GCC ("The Contractor's General Obligations", underlining added) defines CMEC's performance as a series of obligations ("shall"), being primarily to "design, execute and complete the Works in accordance with the Contract" and says "The Works shall include any work which is necessary to satisfy the Employer's requirements or is implied by the Contract".
471. Clause 14.1 ("The Contract Price") defines the Contract Price as "the net price payable to the Contractor for its obligations under the Contract" (underlining added).
472. Further, Request for Arbitration, §23, acknowledged that "CMEC carried out the works under the 2005 Contract pursuant to instructions or permissions by, or agreement with, Alutrint".
473. Hence CMEC had only an obligation to Alutrint to carry out the works in accordance with Alutrint's instructions, as opposed to any right, claim or entitlement to do so.
474. Secondly, it is necessary to consider what CMEC did have, if it was not a property right or asset.
475. At best CMEC may say that it had an "expectation" that it could render full performance of the EPC Contracts or an "opportunity" to render such performance.

476. But it makes no sense to talk of expropriation of an expectation or an opportunity. Tribunal awards do not talk of expropriation of expectations or opportunities. And furthermore, the language of “expectation” and “opportunity” is inapt anyway, in light of Clause 15.5 which entitled Alutrint to terminate the EPC Contracts “at any time for Alutrint’s convenience”.
477. Thirdly, CMEC says part of what has been expropriated is the profit it would have made from future performance of the EPC Contracts (Memorial, §§701, 702). It says that it has an “explicit” contractual right to 5% reasonable profit and 5% overheads which, CMEC contends, are to be added to the Contract Price, pursuant to Clause 1.2 of the Particular Conditions of Contract under the 2008 Contract (Memorial, §§126, 720-722).
478. But there is no question of CMEC having an intangible property right in respect of the profit to be derived from future performance at the point in time when the allege expropriation occurred.²³⁵ This is because, at that point, the stage had not been reached when CMEC had “earned” such profit. The Contract Price was payable under the EPC Contracts only upon completion of the works:
- (1) Under Clause 14.1 of each of the Contracts, the Contract Price is described as the price payable to CMEC “for its obligations under the Contract” (underlining added). And Clause 14.1(a) of the 2008 Contract also says that “payment for the works shall be made on the basis of the lump sum Contract Price”.
 - (2) The obligations referred to are set out in Clause 4.1 of each of the Contracts, which requires that “[CMEC] shall design, execute and complete the Works in accordance with the Contract” (underlining added).

²³⁵ It is trite that, in the case of an expropriation claim, the tribunal is concerned with identifying the property right held by the Claimant at the particular point when the alleged expropriation occurred. See: **Generation Ukraine v Ukraine**, ICSID Case No ARB/00/9, Award, 16 September 2003 [CL-0098], §6.2:

“Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when the allegedly expropriatory acts occurred.” See also §22.1:

“There cannot be an expropriation of something to which the Claimant never had a legitimate claim.”

- (3) So CMEC's interest in, and entitlement to, the Contract Price only vests upon completion of the contractual works. Prior to such completion CMEC has no legitimate claim to or interest in the Contract Price.
- (4) As completion to the works had not occurred at the time when the Project was terminated, CMEC could not have had any intangible property in respect of the Contract Price.

Conclusion

479. As the EPC Contracts did not confer upon CMEC any property right, or asset, CMEC's expropriation claim cannot succeed.

I4. CMEC has not been permanently deprived of its contractual rights under the EPC Contracts

480. It is axiomatic that for expropriation to be found (whether direct or indirect) the investor must have been permanently deprived of its investment.

481. The tribunal in **Fireman's Fund v Mexico**²³⁶ provided a comprehensive guide to the key characteristics of expropriation²³⁷, having considered a number of arbitral awards which interpreted the same provision, as well as customary international law in general.²³⁸ Relevant here are the following two characteristics:

“(c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (ie it approaches total impairment).

²³⁶ **Fireman's Fund Insurance Company v The United Mexican States** ICSID Case No ARB(AF)/02/01, Award [RL-0039], 17 July 2006.

²³⁷ While **Fireman's Fund** concerns Article 1110(1) of the NAFTA (a multilateral investment treaty) the provision on expropriation is in substantially similar terms to that in the GORTT-PRC BIT.

²³⁸ The **Fireman's Fund** characteristics have been frequently cited in the authoritative texts. For example, see Dolzer “Expropriation” pp.160-1 [CL-0073] and Reinisch “Expropriation” §§146-8 [RL-0099]

(d) The taking must be permanent, and not ephemeral or temporary.”²³⁹

482. Here, it is plain that T&T’s alleged expropriatory acts did not permanently deprive CMEC of its contractual rights under the EPC Contracts.²⁴⁰

I4.1 The law

483. The requirement that the expropriatory acts permanently deprived the investor of the thing taken is not satisfied if the investor had available to it remedies enabling it to recover that thing.

484. In **SGS v Philippines**²⁴¹ the claimant, SGS (a Swiss company), made a claim against the Philippines pursuant to a Switzerland-Philippines BIT. SGS’s claim arose out of the Philippines’ failure to pay SGS for comprehensive import supervision services which SGS had provided to the Philippines under an agreement (the CISS Agreement) between SGS and the Philippines made in the 1990s. SGS’ case was that such non-payment under the CISS Agreement constituted a breach of, inter alia, the expropriation provision in the BIT. The CISS Agreement contained an exclusive jurisdiction clause whereby all disputes under it were to be filed at the Regional Trial Courts of Makati or Manila.

485. There was a dispute between the parties as to the amount payable under the CISS Agreement.²⁴²

486. As to SGS’s claim that the Philippines’ non-payment constituted expropriation of the debt, the tribunal said, at §161:

²³⁹ The above relevant characteristic of expropriation are also referred to in the cases referred to in §§559 to 565 of the Memorial.

²⁴⁰ The submissions and subsequent submissions are advanced irrespective of T&T’s further submissions:

(1) of **non-attribution** of Alutrint’s conduct to T&T
(2) that the alleged **expropriatory measures did not constitute the exercise of sovereign powers**
(3) on **causation**.

²⁴¹ ICSID ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [RL-0010]

²⁴² See **SGS v Philippines**, §§41-43, 155, 161-3.

“In the Tribunal’s view, on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.”

487. In consequence the tribunal dismissed the claim for lack of jurisdiction insofar as it was based on expropriation: §177(b).
488. In **BIVAC v Paraguay**²⁴³ the claimant, BIVAC (a Dutch company), made a claim against Paraguay pursuant to a BIT between the Netherlands and Paraguay. BIVAC’s claim arose out of Paraguay’s failure to pay BIVAC for the provision of its technical services for pre-shipment and inspection of imports into Paraguay, which were performed pursuant to a contract made in 1996. The contract provided that disputes be submitted to the tribunals of the City of Asunción, Paraguay. BIVAC chose not to go to those tribunals. BIVAC’s case was that Paraguay’s non-payment constituted a breach of its obligations, contained in the BIT, in relation to expropriation, fair and equitable treatment and the umbrella clause.
489. BIVAC sought to distinguish **SGS v Philippines** on the basis that in that case there was a dispute as to the amount payable under the contract, whereas (BIVAC

²⁴³ ICSID ARB/07/09, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 [RL-0015]

contended) there was no dispute as to the amount payable by Paraguay to BIVAC.²⁴⁴

490. Again, the tribunal held that it had no jurisdiction in relation to the expropriation claim: see §§106-117 and 162(a).

491. The tribunal followed the approach in §161 of **SGS v Philippines**, saying, at §110:

“We have been presented with no arguments asserting that the legal principle applied by the tribunal [in *SGS v Philippines*] was wrong as a matter of law, and there is nothing with which we disagree in respect of the legal principle identified and applied by the tribunal. Where a debt arising under a contract continues to exist, and where the contractually agreed forum for the resolution of disputes relating to that debt remains available, it appears self-evident that a contracting party’s rights in relation to that debt cannot be said to have been expropriated, whether directly or indirectly. In the present case there is no allegation that the debt under the contract does not continue to exist, or that the contractual forum provided for by the Contract is not available: BIVAC has freely chosen not to go to the courts of Asunción to recover the sums which it says are due to it under the Contract.”²⁴⁵

²⁴⁴ See §§110, 111.

²⁴⁵ It is to be noted that the tribunal in **BIVAC v Paraguay** made it plain that this “no permanent deprivation” point was separate and distinct from any challenge to the expropriation claim on the basis that Paraguay’s conduct did not involve any sovereign act: “We reach this conclusion even assuming that it could be shown that Paraguay acted in exercise of a *puissance publique*” (§117).

In some of the cases in which expropriation is alleged as a result of a State’s non-payment of a contractual debt the “no permanent deprivation” point is considered alongside the issue of whether the State’s non-payment constituted a sovereign act. **Waste Management v Mexico II [RL-0013]**, is an example of such a case.

I4.2 The dispute resolution procedures and CMEC's activation of the same in this case

492. Each of the EPC Contracts contains a dispute resolution procedure which it has been open to CMEC to use.

2005 Contract [C-0011]

493. Clause 20 deals with Claims, Disputes and Arbitration in respect of disputes arising under the 2005 Contract.
494. Clause 20.5 contains provisions relating to Amicable Settlement of such disputes. Clause 20.6 provides that, unless amicably settled, such a dispute shall be finally settled by international arbitration under ICC Rules and sets out details of how the arbitration is to be conducted.
495. So CMEC has had available to it the vindication of its alleged contractual rights under said procedures in the 2005 Contract. CMEC has seen fit not to avail itself of those procedures.

2008 Contract [C-0015]

496. Clause 20 deals with Claims, Disputes and Arbitration in respect of disputes arising under the 2008 Contract.
497. The dispute resolution procedure prescribed by Clause 20 involves the appointment of a DAB, notice of dissatisfaction with the DAB's decision being given within 28 days (under Clause 20.2 to 20.4) and attempts to settle the dispute amicably (under Clause 20.5), followed by the commencement of international arbitration (under ICC Rules unless the parties otherwise agree) on or after 56 days after the notice of dissatisfaction was given (under Clause 20.5 to 20.6). Clause 20.7 and 20.8 set out further provisions as to the DAB's Decision and the DAB's Appointment.

498. CMEC did activate the above dispute resolution process in January 2015. But CMEC abandoned the process in or about August 2015. **Appendix IV** hereto sets out each of the letters passing between the parties and their solicitors – Pinsent Masons (“PM”) for CMEC, and Hogan Lovells (“HL”) for Alutrint – relating to CMEC’s activation of the dispute resolution process.²⁴⁶
499. PM did not respond to HL’s letter of 14 July 2015 [C-0049], which was the last letter passing between the solicitors. HL’s 14 July 2015 letter therefore marked the end of the PM/HL correspondence and the abandonment by CMEC of the activation of the dispute resolution process under the 2008 Contract.
500. CMEC has never said why PM did not respond to HL’s 14 July 2015 letter, nor why it simply abandoned the DAB process.
501. §411 of the Memorial says:
- “At that time, as the next general election had been scheduled to be held imminently on 7 September 2015 CMEC decided to put further negotiations on hold until after the election to assess the way forward.”
- Qingchi Wang’s witness statement, §67, says the same thing.
502. No explanation is given as to why CMEC did not proceed with the DAB process after the general election on 7 September 2015.
503. It is notable that the Request for Arbitration gave a different account of the circumstances in which CMEC did not proceed with the DAB process under the 2008 Contract.
504. §57 of the Request for Arbitration said:
- “Discussions between CMEC and the State in the midst of the 2015 Trinidad and Tobago general election led to CMEC agreeing to put its

²⁴⁶ These matters are referred to, briefly, in §§399 and 408-411 of the Memorial.

claim on hold. It did so in reliance on the State's assurance that (i) a substantial good faith payment would initially be made to CMEC before the general election and (ii) shortly after the election, CMEC's claims would be settled in full. Yet, once again, the State failed to carry out its promises."²⁴⁷

505. The Request for Arbitration does not state who, on behalf of T&T, nor who, on behalf of CMEC, "agreed" to CMEC putting its claim on hold. Nor does the Request for Arbitration explain why, when T&T did not carry out its alleged promises, CMEC did not resume the DAB process. In any event, CMEC no longer relies on the reason stated in §57 of the Request for Arbitration as to why CMEC "put its claim on hold".
506. So the present position is that CMEC abandoned the DAB process it had commenced under the 2008 Contract for reasons which remain unexplained. It may be that CMEC decided not to proceed with the DAB process in the hope or expectation that it would secure another major construction contract from T&T.²⁴⁸
507. Hence, CMEC has had available to it contractual resolution processes enabling it to obtain full redress in respect of its contractual rights which it now says T&T has expropriated. CMEC initially pursued, and then voluntarily abandoned, one of those processes. It is plain therefore that T&T did not permanently deprive CMEC of its alleged rights, for example to claim for works done and costs incurred under the EPC Contracts.

²⁴⁷ A similar, but not identical account is given in CC's Notification of a Claim of 26 August 2022 [**C-0491**], in §38 of the Annex thereto, where however there is a reference to CMEC's "understanding" rather than T&T's "assurance":

"On 13 March 2015, CMEC referred its claims to a DAB pursuant to clause 20.2 of the 2008 EPC Contract. Discussions between CMEC and the State led to CMEC agreeing to put these claims against Alutrint on hold in the midst of the 2015 Trinidad and Tobago general election on the understanding that the State would settle the claims after the election."

²⁴⁸ See the numerous attempts made by CMEC to secure such a contract from T&T, referred to in Section I, 9.2.2, below.

508. Hence, again for this reason alone, CMEC's claim for indirect expropriation of its contractual rights cannot succeed.

I5. The expropriatory measures relied on by CMEC did not constitute an exercise of sovereign power

509. To establish expropriation, the investor has to show that the State's impugned conduct constituted an exercise of its sovereign powers.

510. Here, the measures relied upon by CMEC to establish its case of indirect expropriation are:

- (1) Measures relating to the termination of the Project: see Memorial, §§580 and 611(a)(b) and (d) to (f);
- (2) Non-payment of CMEC's claims: see Memorial, §§611(c)(g) and (i) and 612.

511. None of such measures constituted the exercise by T&T of its sovereign powers.

I5.1 General law on the requirement that the State has exercised its sovereign powers²⁴⁹

512. "It is uncontested that expropriation requires an act of the State in its official capacity. Typically expropriations occur through legislative acts and through measures taken by the State's administration, often in combination...**The need for an act of an official nature is particularly evident in the treatment of claims based on contract**"²⁵⁰ (emphasis added)

513. The overarching test applicable here is that set out in **Impregilo v Pakistan**,²⁵¹ which involved facts not dissimilar to the present ie where the party to the

²⁴⁹ The Memorial, at §§601-604, refers to equivalent legal principles.

²⁵⁰ Dolzer et al, "Expropriation", Principles of International Investment Law [CL-0073] p.151.

²⁵¹ **Impregilo SpA v Islamic Republic of Pakistan**, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005 [CL-0110].

investment contract with the investor is a separate corporate entity independent of the host State.²⁵² The tribunal said, in §266, that whether the State had breached provisions of the BIT in that case (which would include a breach of the non-expropriation provision) would depend on:

- (a) whether the claimant is able to establish “attribution” to the host State in so far as the acts of other entities are concerned; and
- (b) whether the claimant is able to meet the threshold for treaty claims ie activity beyond that of an ordinary contracting party (*puissance publique*).

This is regularly referred to as “**the Impregilo test**”.

514. It is the second limb of the Impregilo test which is under consideration here.

515. As to the second limb, the tribunal said, at §260:

“In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a

²⁵² In **Impregilo v Pakistan** the investor entered into contracts with the Pakistan’s Water and Power Development Authority (WAPDA) to construct hydroelectric power facilities in Pakistan (§8). The investor alleged that WAPDA was part of the Government of Pakistan (§§28, 100). Pakistan challenged this (§§66, 194). The investor alleged that WAPDA breached the contracts (by delaying performance of the works, denying requests for time extensions etc) and also that Pakistan breached various of its treaty obligations, including the non-expropriation obligation (by destroying the value of the investor’s investment). The investor alleged that the tribunal had jurisdiction over its claim for breach of the contracts (§82) in addition to its claims for breaches of the treaty. The tribunal held that the legal personality of WAPDA was distinct from that of the State of Pakistan and that the contracts were concluded with WAPDA. In consequence the tribunal declined to exercise jurisdiction over Impregilo’s contractual claims (§§216, 262).

However, as to Impregilo’s breach of treaty claims, the tribunal held that, on the assumption *pro tem* that Impregilo could (in due course) establish the facts upon which it relied, such breaches could be made out if (a) and (b) referred to in §266 were shown to be satisfied (§§266, 274, 291(b)).

consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.”

516. Tribunals in many other cases have underlined the importance of the distinction between things which any ordinary contracting party can do and things which only a State can do in the exercise of its sovereign authority.²⁵³
517. The two limbs of the Impregilo test are independent of one another – both must be established in a case like the present case where the contract in issue is between the investor and an entity which has a separate personality from the State.²⁵⁴
518. Further, the fact that the State was not itself the contracting party does not preclude a finding that it acted like any ordinary contracting party and therefore was not in breach of its treaty obligations.
519. Hence the following are examples of decisions which, in the context of expropriation claims, draw the distinction between the State acting in its sovereign capacity and the State acting in its ordinary contractual capacity, albeit that the State is not the contracting party.
520. In **Impregilo v Pakistan** itself, the investor’s contracts were with WAPDA, which had a separate legal personality from the State of Pakistan. Nevertheless the tribunal held that whether Pakistan was liable for breach of the treaty would

²⁵³ In **RFCC v Morocco** the tribunal differentiated between a mere exercise of a contractual right and an action by the host State “in public capacity” (*puissance publique*), and placed emphasis on whether or not a law or governmental decree had been passed or a judgment executed: ICSID Case No ARB/00/6, Award, 22 December 2003) [**RL-0040**], §§65-69, 85-89.

In **Siemens v Argentina** the tribunal, when discussing expropriation, held, at §248, that a state party to a contract would breach the applicable treaty only if its behaviour went beyond that which an ordinary contracting party could adopt. The tribunal said at §253:

“...for the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its “superior governmental power”. It is not a matter of being disappointed in the performance of the State in the exercise of a contract but rather of interference in the contract execution through governmental action.”

ICSID Case No ARB/02/8, Award, 6 February 2007 [**CL-0100**].

²⁵⁴ Hence, “a finding of attribution does not necessarily entail that the acts under review qualify as sovereign acts”: **Bayindir v Pakistan**, ICSID Case No ARB/03/29, Award, 27 August 2009, [**CL-0064**], §129.

depend on whether Impregilo could satisfy the second limb of the Impregilo test viz whether Pakistan, albeit not a contracting party, had been engaged in activity which was beyond that of an ordinary contracting party.

521. And in **Joy Mining Machinery v Egypt**²⁵⁵ (cited in §261 of **Impregilo v Pakistan** in relation to the second limb of the Impregilo test) the tribunal said at §72:

“a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract.”

This distinction was drawn in circumstances in which the contract was between the investor (Joy Mining Machinery) and an entity, IMC, which was other than the State itself.²⁵⁶

I5.2 (1): Measures relating to termination of the Project

522. The measures CMEC relies on to establish its case of indirect expropriation, insofar as they relate to the termination of the Project, are set out in §§580 and 611(a)(b) and (d)-(f) of the Memorial.

523. Those measures did not constitute the exercise by T&T of its sovereign powers.

I5.2.1 The law

524. The principles applied by tribunals to claims by investors that their contracts have been terminated by States in the exercise of their sovereign powers are set out in the decisions referred to below.

²⁵⁵ ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004 [RL-0041]

²⁵⁶ **Joy Mining Machinery v Egypt** [RL-0041], in §74, refers to **Wena Hotels v Egypt** (ICSID Case No ARB/98/4, Decision on Application for Annulment of the Award, 5 February 2002,) as exemplifying the distinction between the commercial aspects of an investment dispute and matters which are essentially of a governmental nature. See **Wena Hotels** [CL-0090], §§15, 16 and 28-36 for its treatment of this distinction.

525. The decisions are illuminating as to, inter alia, what acts may, and may not, constitute the exercise of sovereign powers in the context of contract terminations; the relevance of the termination being within or without the contractual framework; and the relevance of the fact that the termination was for, or included, a public policy purpose.

Decision showing the distinction between the State (1) exercising its sovereign power, and (2) acting in its commercial capacity as an ordinary contracting party, in respect of various State actions relating to the termination of the investor's contract.

526. In **Biwater Gauff v Tanzania**²⁵⁷, the subsidiary of the investor (Biwater Gauff), City Water, entered into a Lease Contract with DAWASA (Dar es Salaam Water and Sewerage Authority, a Tanzanian public corporation established under the DAWASA Act 1981, and owned and controlled by Tanzania), pursuant to which City Water was to provide water and sewerage services for a 10-year period to the residents of Dar es Salaam.

527. In due course “serious difficulties were experienced by both City Water and DAWASA in their respective performances of the Lease Contract. Overall, however, although City Water made improvements in the water system, in difficult operating conditions, its performance failed to achieve the level that was anticipated at the time of conclusion of the Lease Contract” (§147).

528. (1) The Minister of Water and Livestock Development duly terminated the Lease Contract.
- (2) Tanzania, in a written press release issued by the Minister, made a public announcement that the Lease Contract was terminated; this was followed by a similar declaration on television.

²⁵⁷ ICSID Case No ARB/05/22, Award, 24 July 2008, [CL-0046].

- (3) There was a political rally at which the Minister confirmed that the Cabinet had approved the termination of the Lease Contract.
 - (4) Then the Tanzanian government:
 - unilaterally withdrew a VAT exemption on purchases that City Water had hitherto been granted.
 - occupied City Water’s facilities and installed new management ie representatives of DAWASCO, a newly formed government entity.
 - deported City Water’s management staff.
529. The investor alleged breaches of the duty not to expropriate its investment and of various other of Tanzania’s treaty duties.
530. The tribunal said, in §458, “the critical distinction is between situations in which the State acts merely as a contractual partner and cases in which it acts “*iure imperii*”, exercising elements of its governmental authority” and referred to the second limb of **Impregilo v Pakistan** (at §§260-261) and **Joy Mining Machinery v Egypt** (at §§72 and 82) in that context.
531. Importantly, as to the potential for Tanzania, in its capacity as shareholder of DAWASA, to intervene in the affairs of DAWASA, the tribunal said (at §460):
- “Here, there was always the possibility (of which BGT knew or should have known) that the Republic, in its capacity as a shareholder of DAWASA, would intervene in the same manner as a private shareholder might have done in the decisions to be taken during the life of a contract. Indeed, the relationship between the Republic and DAWASA (a State owned entity exercising key functions) was such that intervention by the Republic was more likely than that of a private shareholder. The type of intervention that may have been expected, however, has to be distinguished from other situations in which the acts of the Republic might properly be characterised as the use of its prerogatives of *puissance publique* to perform acts which exceed the normal course of conduct of a

State shareholder of a State-owned company. These are important criteria against which each of the acts that are now complained of must be measured.” (underling added)

532. Applying the said distinction, the tribunal went on to determine whether each of the matters (1) to (4) above was either a sovereign act or an act in the normal course of conduct of a State shareholder of a State-owned company.

533. The tribunal held that (1) (the termination of the Lease Contract) was an act in the normal conduct of a contractual counterparty. As to this the tribunal said at §492:

“The decision to terminate the Lease Contract was in fact taken by DAWASA, albeit shortly thereafter approved by the Tanzanian Cabinet. It had long been foreshadowed, and was the culmination of a series of alleged contractual failures on City Water’s part. It was not “procured” by the Republic in the way [the investor] contends. Rather, this was the ordinary behaviour of a contractual counterparty, and the fact that the Republic itself was involved can be no surprise, given its ownership of DAWASA, and its expected involvement in the Project.”

534. The tribunal held that the more egregious and inflammatory matters, (2), (3) and (4), were to be characterised as sovereign acts (§§497-503, 511, 519).

535. As to (2), the tribunal said that the press release and the declaration on television “was an exercise of executive authority, which effectively and publicly inflamed the dispute, thereby undermining City Water in the general public’s eye, and disabling it from progressing the contractual process in an ordinance fashion” (§498).

536. As to (3), the tribunal said that the political rally “was an unreasonable disruption of the contractual mechanism existing between City Water and DAWASA,

damaging to City Water and [the investor's] interests, and motivated by political considerations" (§500).

537. As to (4), the tribunal said that:

- the withdrawal of the VAT exemption was “without any justification...unreasonable and unjustified...[and] adversely impacted upon City Water’s rights, and its ability to continue to perform (§502);
- the occupation of City Water’s facilities and usurpation of management control were “unreasonable and arbitrary, unjustified by any public purpose (there being no emergency at the time) and the most obvious display of *puissance publique*” (§503);
- the deportation of City Water’s management staff “was an integral element in the negation of [the investor’s] contractual and property right...[and] was clearly the exercise of *puissance publique*, in violation of [the investor’s] rights under the Treaty, without any satisfactory justification” (§511).

538. In light of the above, and having held that “it must consider [Tanzania’s] conduct both in terms of the effect of individual, isolated acts complained of, as well as in terms of the cumulative effect of a series of individual and connected acts, insofar as such cumulative effect might be to deprive the investor in whole or in material part of the use or economic benefit of its assets” (§455), the tribunal concluded “that [the investor’s] investment, as embodied in the Lease Contract, was the subject of an expropriation by [Tanzania]” (§485, and also §519).

Decision showing that termination of the investor’s contract within the contractual framework will not constitute the exercise of sovereign powers

539. In **Bayindir v Pakistan**²⁵⁸ the tribunal held that as the governmental acts and directions which terminated the investor’s contract were carried out within the

²⁵⁸ ICSID Case No ARB/03/29, Award, 27 August 2009, [CL-0064].

contractual framework the same could not be considered to be the exercise of *puissance publique*.

540. The investor was a Turkish company which engaged in the construction of motorways and other large infrastructure projects in Turkey and elsewhere. The investor contracted with the National Highway Authority (NHA) for the construction of a six-lane motorway (the M-1 Project). The NHA was a public corporation controlled by the Pakistan Government.
541. The NHA duly terminated the contract on the basis of the investor's failure to proceed with the works. Thereafter the civil engineering section of the Pakistan army secured the site and the investor's personnel were evacuated.
542. The tribunal said that it "will take contract matters into account in its determination of whether [Pakistan] has breached the Treaty whenever relevant, while noting that a breach of contract is neither a necessary nor a sufficient condition for a breach of treaty" (§139, underlining added).
543. When addressing the investor's contention that "a breach of the Contract as a result of government directions would suffice for a finding of expropriation", the tribunal disagreed, saying that even where the contract breach deprives an investor of the substance of its investment and the breach stems from a government direction "it would not necessarily follow that the contractual breach is the result of a sovereign act, as a direction of the State may be given in the framework of the contract" (§445, underlining added).
544. The tribunal held that "the fact that Bayindir was expelled is obviously not enough. As rightly pointed out by the Respondent, if the expulsion was lawful under the Contract, then there would be no taking of or interference with Bayindir's rights. Moreover, even if the expulsion was conducted in breach of the Contract, that would not as such be enough for a finding of expropriation under the Treaty" (§458).

545. The tribunal further held that “there is a reasonable interpretation of the Contract according to which the mechanisms leading to Bayindir’s expulsion as well as those regarding measures subsequent to the expulsion were used in conformity with the Contract” (§458).
546. The tribunal went on to say: “To establish an expropriation of its rights as a result of NHA’s exercise of its own contractual rights, Bayindir must start by proving that its contractual rights were not limited by NHA’s contractual rights or that NHA took an action that, although allegedly based on the Contract’s terms, was in fact clearly in breach of such terms. Absent such proof, there can be no deprivation of the economic substance of Bayindir’s rights, as the scope of such rights is limited by NHA’s own rights under the Contract” (§460).
547. When concluding that Pakistan had not expropriated the investor’s contractual rights, the tribunal said “even if the expulsion violated the Contract and deprived Bayindir of the economic substance of its contract rights, a finding of expropriation would only be founded if the acts at issue were sovereign acts. The evidence does not point in this direction. To the contrary, it shows that Pakistan can reasonably justify the expulsion by Bayindir’s poor performance...with the consequence that the expulsion must be seen in the framework of the contractual relationship, not as an exercise of sovereign power. This conclusion is not contradicted by the close involvement of the Pakistani government in the M-1 Project...governmental involvement is not necessarily equivalent to the exercise of sovereign power when it is grounded on legitimate contractual considerations” (§461, underlining added).
548. So the tribunal’s conclusion that there would be no finding of expropriation since Pakistan had not exercised its sovereign powers, was based primarily on the fact that Pakistan could reasonably justify the investor’s expulsion within the framework of the contractual relationship. To be noted in particular are the tribunal’s views (1) that if the investor’s expulsion had been lawful under the contract there could be no expropriation, and (2) that even if the expropriation

had been in breach of contract, that of itself would not have been sufficient for a finding of expropriation (§458).

Decisions in which the State's termination of the investor's contract was for a dual purpose ie for the investor's breach of contract and for government public policy purposes

549. Some tribunals have considered the situation in which termination of the investor's contract has had a dual purpose, one purpose being a termination consequent upon the investor's breach of contract, and the other purpose being a change of government policy in respect of the subject-matter of the contract.

550. In **Malicorp v Egypt**²⁵⁹, Malicorp signed a contract with Egypt (represented by the Egyptian Civil Aviation Authority) for the construction, management, operation and transfer of the Ras Sudr International Airport, under which Malicorp was allocated a site for the Airport's construction and management.

551. Egypt duly terminated the Contract.

552. The parties differed with respect to the reasons for termination (§33):

- (1) According to the investor, the Contract was terminated for reasons connected to national security. That being so, the investor claimed that Egypt breached, inter alia²⁶⁰, its non-expropriation obligation;
- (2) According to Egypt, the Contract was terminated for reasons contained in the Contract itself (Malicorp had produced false documents, had not fulfilled its obligation to set up an Egyptian company, had failed to provide the necessary guarantees etc).

²⁵⁹ ICSID Case No ARB/08/18, Award, 7 February 2011, [RL-0043].

²⁶⁰ The tribunal said (§124) that in order to rely on breach of the FET obligation the investor must show that it had been the victim of measures other than expropriation. As the investor's sole complaint concerned the termination of the Contract (ie expropriation), the FET allegation was rejected.

553. Malicorp contended that the grounds for termination put forward by Egypt were “mere pretexts and that the real reason lies in a change in government policy concerning the development of the airports network” (§129).
554. The tribunal addressed Egypt’s possible exercise of its sovereign powers and its possible dual purpose when saying that:
- (1) If Egypt “had the right to discharge itself from the Contract pursuing the private law rules governing it...it is unnecessary to examine whether [Egypt] also took a measure under its public powers (“*measures de puissance pubilque*”), not as a party to the Contract but as a State...” (§129); and
 - (2) “It is possible that the Government did later modify its policy...” but “A contracting party cannot be prohibited from discharging itself from a contract where it has legitimate reasons for doing so, even if, indirectly, the measure suits its convenience and enables it to go back on choices made earlier. Put another way, the first question to ask is whether the reasons given by the Respondent in its letter of termination justify the termination” (§129).
555. The tribunal held that the reasons put forward by Egypt for terminating the Contract were “sufficiently well founded” (§137), “sufficiently plausible for [the Tribunal] to reject the complaint that they were merely a pretext designed to conceal a purely expropriatory measure” (§142) and “appear serious and adequate” (§143).
556. Hence the tribunal rejected the investor’s expropriation claim (§143).
557. So the essence of the tribunal’s decision was that there will be no expropriation if the State has a “sufficient” basis for terminating the contract and it is nothing to the point that, at the same time, the termination “suits its [governmental] convenience and enables it to go back on choices made earlier.”

558. In **Vigotop v Hungary**²⁶¹ the tribunal put a gloss on the principle deriving from **Bayindir v Pakistan** and **Malicorp v Egypt** viz that if the State has a proper (or reasonable or sufficient) contractual basis for terminating the investor's contract, that would be sufficient of itself to acquit the State of responsibility for expropriation, even if such termination also satisfies the State's other purpose of a change of policy.
559. Vigotop's investment comprised its rights in King's City Project (which was intended to be a luxury resort), including a Concession Contract made with Hungary.
560. At the time when the Project was entered into and the Concession Contract was made (2009) the governing political party in Hungary was MSZP. In 2011, when the Fidesz Party (Victor Orbán, being the Prime Minister) had come into power, Hungary terminated the Concession Contract, relying on Vigotop's breaches of various of its terms, as set out in §193.
561. At the end of the Award, the tribunal summarised the central problem in this way²⁶²:
- “The heart of the issue is this. The Project straddled a national election campaign and two government administrations. The first supported the Project, while the second did not. This undoubtedly put the Claimant's investment in an unfortunate situation.”**²⁶³
(emphasis added)
562. Vigotop contended that Hungary's termination of the Concession Contract amounted to an expropriation of Vigotop's interest: §204 et seq. Hungary contended that it had lawfully exercised its contractual right of termination of

²⁶¹ ICSID Case No ARB/11/22, Award, 1 October 2014, [RL-0044].

²⁶² This mirrors what happened in the present case, after the UNC had taken over from the PNM in May 2010.

²⁶³ See §634(ix) of the Award.

the Concession Contract and had acted as an ordinary contracting party in doing so: §221 et seq.

563. Vigotop's case was that "the purported contractual termination grounds were only a pretext and, in fact, Respondent terminated the Concession Contract for public policy reasons, thus acting in its sovereign capacity, despite the formal appearance of the Termination Letter" (§315).

564. The tribunal referred to **Impregilo v Pakistan**, **Bayindir v Pakistan** and **Malicorp v Egypt**: §§317-327.

565. In §§328-330 the tribunal dealt with the consequences of different findings as to whether Hungary:

- (1) did/did not have a political reason for terminating the Concession Contract;
- (2) did/did not have a proper contractual basis for terminating the Concession Contract;
- (3) did have contractual grounds for termination, in addition to public policy reasons.

566. As to (3) above, the tribunal said at §330:

"In the event of such a parallel cause (public policy reasons and contractual grounds), the Tribunal would thus have to examine, as a third and final step, whether the contractual termination was legitimate, *i.e.*, consistent with the good faith principle. To be specific, the Tribunal would have to determine whether the termination constituted an abuse of the contractual right in order to avoid liability to compensate, that is, whether it involved a "*fictitious*" or "*malicious*" exercise of the right to terminate."

And in the same vein the tribunal said at §331:

“If the Tribunal were ultimately to conclude that it was indeed legitimate for Respondent to invoke its contractual grounds for terminating the Concession Contract, this would exclude a finding of an expropriation, despite the parallel existence of public policy reasons. The issues for determining an expropriation in the context of a contract termination are (i) whether the contract is terminated by the contractual procedure rather than a legislative act or executive decree, and (ii) whether there exists a legitimate contractual basis for termination, *i.e.*, (a) the contract or the governing law provides the ground for termination, (b) the evidence substantiates a factual basis for invoking the contractual ground, and (c) the State acts in good faith, not abusing its right by a fictitious or malicious exercise of it.”

567. The tribunal duly held:

- (1) that Hungary did have public policy reasons for terminating the Concession Contract and therefore acted in its sovereign capacity when doing so (§§441-2);
- (2) that Hungary also had a proper contractual ground for terminating the Concession Contract (§543);
- (3) that when Hungary exercised its contractual grounds to terminate the Concession Contract it did so legitimately, ie in good faith, and its termination was not an abuse intended to avoid the liability to compensate and amounting to a “fictitious” or “malicious” exercise of its contractual rights (§§544, 545, 628-630). In §630 the Tribunal said:

“As discussed above, in a situation in which Respondent had both a public policy reason and a contractual reason for terminating the Concession Contract, Claimant’s expropriation claim could only be successful if it proved that Respondent exercised its contractual termination right contrary to good faith or abused such right in order to avoid its liability to compensate under the Treaty. On the

balance of the evidence, the Tribunal is of the view that Claimant has failed to discharge its burden of proof that there was such conduct on the part of Respondent.”

568. The tribunal summarised its analysis at §634, finally holding that Vigotop’s investment was not expropriated by Hungary’s termination of the Concession Contract.

569. So the gloss put by **Vigotop v Pakistan** on the principles deriving from **Bayindir v Pakistan** and **Malicorp v Egypt** is that if the State has both a public policy reason and a contractual reason for terminating the investor’s contract the same is sufficient to acquit the State of responsibility for expropriation, unless the investor proves that the State exercised its contractual right to terminate contrary to good faith and abusively (amounting to a “fictitious” or “malicious” exercise of such right) in order to avoid the liability to compensate.²⁶⁴

I5.2.2 How the legal principles referred to above apply to the present case

570. Applying the principles and approach of the tribunals referred to above, T&T’s involvement in bringing the Project to an end cannot properly be characterised as a sovereign act. T&T refers to, and relies on, the following matters.

(1) T&T’s stated reasons for terminating the Project

571. The circumstances in which T&T decided to discontinue the Project and its reasons for doing so are set out in Section D, 8, above. The major points are the following.

²⁶⁴ See McLachlan et al, International Investment Arbitration: Substantive Principles, “8. Expropriation” [CL-0067] §§8.132-8.138 for a treatment of some of the cases referred to above.

572. The Attorney-General, Anand Ramlogan SC said that at the Cabinet meeting which took place on 8 September 2010 it was agreed to discontinue the Project on the basis that:

- “(a) There was in fact no project because of lack of CEC approval and the prospects of the CA reinstating the CEC were not promising and indeed in November 2010 the EMA withdrew its appeal.
- (b) There were concerns about the issue of HF standards and whether the revised project (250,000 metric tonnes per year) would be able to comply with the required HF standards;
- (c) There were concerns about the economic viability of the project”.

See the Final Award in the Sural v GORTT arbitration [C-0014], §137.

573. On the same day, 8 September 2010, the Minister of Finance in his Budget Speech referred to the public criticism of the Project “rising from legitimate concerns” and also said: “In addition to the health and environmental risk, there is also serious concern as to Alutrint’s viability and the optional use of our gas”: [C-0252].

574. The T&T government’s decision to discontinue the Project was made in light of the Ministry of Energy and Energy Affairs’ Note for Cabinet of 16 July 2010 [C-0248]. Whatever statements were made in the public, political sphere, the Note for Cabinet makes it crystal clear that the decision was made in the light of a thorough and sober consideration of all relevant matters.

(2) The decision of the EMA to grant the CEC had been quashed

575. As at September 2010, the position regarding CEC approval was as follows:

- (1) The 2009 High Court Judgment had quashed EMA’s decision to grant the CEC [C-0018].

- (2) Both the 2005 Contract **[C-0011]** and the 2008 Contract **[C-0015]** required that the CEC be granted. See Sections D, 4.1.1 and 4.2.2, above.

576. In light of the above, the A-G's statement that, as at September 2010, "[t]here was in fact no project", was correct.

(3) T&T's position as majority shareholder in Alutrint

577. T&T has been throughout a 60% shareholder in Alutrint. It was therefore in a position, as majority shareholder, to cause any proper, contractual steps to be taken on behalf of Alutrint.

578. T&T acted as such when causing Alutrint to terminate the EPC Contracts.

579. In Alutrint's 28 May 2010 email to CMEC **[C-0026]** reference was made to a briefing paper being prepared by Alutrint for presentation to the new Minister of Energy and Energy Affairs "to assist in an early determination of the future of the company" and seeking "specific instructions to the Acting CEO to reduce expenditures and seek approval for monthly expenditure until the future of the company is decided by the Government as the majority shareholder of the project.

Until there is a determination by the Government of Trinidad and Tobago as the major shareholder of the [sic] Alutrint, the company has to reduce its expenditure." (underlining added)

580. Similarly, in the context of the termination of a contract made between the investor and a company in which the State has a controlling interest, the tribunal in **Biwater Guaff v Tanzania [CL-0046]** said at §460:

"Here, there was always the possibility (of which BGT knew or should have known) that the Republic, in its capacity as a shareholder of DAWASA, would intervene in the same manner as a private shareholder might have done in the decisions to be taken during the life of a contract.

Indeed, the relationship between the Republic and DAWASA (a State owned entity exercising key functions) was such that intervention by the Republic was more likely than that of a private shareholder.”

(4) Termination of the EPC Contracts was within the contractual framework

581. By Alutrint’s 19 and 23 January 2012 letters to CMEC, the EPC Contracts were terminated pursuant to Clause 15.5. CMEC accepted that Alutrint had so terminated the Contracts in its 16 February 2012, 4 September 2012 and 28 November 2012 letters and on multiple occasions thereafter. See Section D, 8, above where this is set out in detail.

582. The EPC Contracts having been terminated within the contractual framework, the same did not constitute the exercise by T&T or its sovereign powers: see **Bayindir v Pakistan [CL-0064]**, above.²⁶⁵

(5) T&T’s acts did not publicly inflame the dispute with CMEC, disable CMEC from progressing the contractual process in an orderly fashion or disrupt the contractual mechanism between CMEC and Alutrint etc

583. Applying the approach in **Biwater Gauff v Tanzania [CL-0046]**, T&T did nothing to inflame publicly any dispute with CMEC, nor to undermine CMEC in the general public’s eyes, nor to disable CMEC from progressing the contractual process in an orderly fashion, nor to disrupt the contractual mechanism between CMEC and Alutrint. T&T committed no acts having any

²⁶⁵ Even if it could be said that T&T, as majority shareholder in Alutrint, had a dual purpose – one purpose being to terminate using a contractual mechanism which was properly available to it, and the other purpose being to implement T&T government policy to discontinue the Project – the same does not constitute the exercise by T&T of its sovereign powers: see **Malicorp v Egypt [RL-0043]**, above. Furthermore, **Vigotop v Hungary [RL-0044]** indicates that the termination should not be seen as the exercise by T&T of its sovereign power, such as to lead to a finding of expropriation, unless CMEC could prove that T&T exercised its contractual right to terminate contrary to good faith and abusively (amounting to a “fictitious” or “malicious” exercise of such right) in order to avoid the liability to compensate. There is nothing to indicate here that T&T so acted.

of the pernicious effects referred to in §§498 to 511 of **Biwater Gauff**, which the tribunal there characterised as sovereign acts.

584. For the above reasons, T&T's involvement in bringing the Project to an end was not in the exercise of its sovereign powers.

I5.3 (2): Non-payment of CMEC's claims

585. The measures CMEC relies on to support its case of indirect expropriation, insofar as they relate to non-payment of CMEC's claims, are set out in §§611(c), (g) and (i) and 612 of the Memorial.

586. These measures – all of which comprise non-payment of CMEC's successive claims for payment, culminating in CMEC's claim by letter of 17 May 2013 to Alutrint **[C-0035]** – do not constitute the exercise by T&T of its sovereign powers for each of 3 separate reasons.

(i) State's refusal to pay sums due under a contract, even if persistent and unjustified, does not constitute a sovereign act

587. A State's refusal to pay sums due under a contract, even if persistent and unjustified, does not have the character of a sovereign act, since such non-payment may be committed by any ordinary (private) contracting party.

588. In **Waste Management v Mexico II**²⁶⁶ the tribunal considered, in and after §163, whether “the persistent refusal or inability of the [State] to pay sums due under the Concession Agreement involved an expropriation, or at least measures tantamount to an expropriation of the sums due”. The investor alleged that the (state organ's) failure to pay, persisted in over many months, was a virtual

²⁶⁶ ICSID Case No ARB(AF)/00/3, Award, 30 April 2004 **[RL-0013]**

expropriation of its contractual rights amounting to a breach of Article 1110” (being the non-expropriation provision in NAFTA).

589. The tribunal, in §165, held that “it is undeniable...that the [state organ] was in breach of the Agreement for much of its duration, especially as concerns its failure to pay the monthly fee due. Thus the present case does raise the question whether a persistent and serious breach of a contract by a State organ can constitute expropriation of the right in question, or at least conduct tantamount to expropriation of that right, for the purposes of Article 1110”.

590. Having reviewed the authorities, the tribunal said the following about what is required for non-payment by the State to constitute expropriation for the purposes of international law:

- “The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalisation and expropriation are inherently governmental acts, as is envisaged by the use of the term “measures” in Article 1110(1)” (§174);
- “...the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to a definitive denial of the right (ie the effective taking of the chose in action) and the protection of Article 1110 be called into play” (§174);
- “The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the

Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA. Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent” (§175).

591. Also in the context of non-payment of an outstanding debt, the distinction between the State acting as an ordinary contracting party and the State acting in the exercise of its sovereign powers was considered in detail in **BIVAC v Paraguay**.²⁶⁷

592. As the analysis in that case is thoroughgoing and on point, it is worth citing relevant paragraphs, §§239-246, at length (the most important passages are underlined):

“239. The Tribunal turns therefore next to the issue of how to characterize Paraguay’s conduct. Is the persistent refusal to pay an outstanding debt under the Contract a sovereign act, as the Claimant argues, or merely an act that an ordinary contracting party could have engaged in, as Paraguay argues?

²⁶⁷ (1) The relevant passages are in the Further Decision on Objections to Jurisdiction (9 October 2012) [**IRL-0016**]. The passages cited appear in the context of the Tribunal’s treatment of BIVAC’s FET claim but, as the section heading shows (“4.3.3.2 The characterization of the conduct: non-performance of Contract or exercise of sovereign authority”), the tribunal’s treatment of how Paraguay’s conduct in not paying the debt is to be characterised is equally relevant in the context of expropriation.

Note that BIVAC’s expropriation claim had already been dismissed for lack of jurisdiction in the Decision of the Tribunal on Objection to Jurisdiction, 29 May 2009: see §52-55, above.

(2) Note that **BIVAC v Paraguay**, unlike the present case, was a straightforward case of Paraguay refusing, without justification, to pay BIVAC what it was owed:

“237. ...it appears an inescapable conclusion on the basis of the record of evidence before the Tribunal that Paraguay has an outstanding debt to the Claimant under the Contract, and that it has, since 2005 at least, failed without proper justification to make payment on that debt. Putting it another way, the Tribunal concludes that the evidence demonstrates that the heart of the dispute that is before it concerns “a persistent failure to make payment on an outstanding debt...”

After the publication of the Report of March 2005 there was no need for any further assessment, as the validity of the debt had, in effect, been recognised by the relevant Paraguayan authorities, and a payment was recognised as being owed. From March 2005, there has been a straightforward refusal to pay, without any apparent justification.”

Hence, the approach in **BIVAC v Paraguay** applies a fortiori to the present case, as in the present case T&T had every reason not accept that it was liable to pay CMEC the exaggerated amounts which CMEC was claiming.

.....

241. It is also apparent that Paraguay has not availed itself of the kinds of powers that are normally available to a sovereign if it wishes to interfere with the rights of an ordinary party. No legislation or regulatory acts have been adopted, no police powers used, no judgment of any court has been ignored...It is therefore not immediately apparent that any of the conduct complained of by the Claimant might not equally have been adopted by a contracting party which was not a sovereign: the initial refusal to pay, the commissioning of one internal report after another, the contradictory decisions of different departments, the involvement of the chief executive, and so on...There has been no reliance by Paraguay on the powers of a public authority that might not – by analogous means – also be available to a private person or corporation. Attempts to mislead, distort, conceal or otherwise confuse a contractual partner are strategies open to and used by both public and private persons.

242. It is equally not apparent to the Tribunal that the mere passage of time can have the effect of transforming an act (or acts) that any private person could perform into a sovereign act. The Tribunal does not see how time alone, coupled with the repetition of the conduct, could as such transform the act of a sovereign contracting party into an exercise of sovereign authority. “We will not pay” means “we will not pay”, whether it is said in Year 1 or in Year 8. The fact that eight years may have passed does not as such change the characterisation of the conduct. An act that breaches a contract remains that – and that alone – whether it has been done once in a single year or twenty times over eight years.

.....

246. The Parties are divided on a great number of issues, but they appear to agree that for Paraguay to be liable for a violation of Article 3(1) it must be shown that it acted in a manner that is qualitatively different from an ordinary contracting party. In fact, by its very nature an act that

breaches a contract is likely to contradict an initial representation of one of the parties to the contract, and the act may occur for undisclosed reasons or without transparency or pursuant to bad faith of the party in breach. This is the daily lot and misfortune of commercial life, giving rise to a great number of commercial proceedings in law. States are not exempt from this type of conduct. It can be part of the unfair or unreasonable treatment that may be meted out to a private partner in a contractual relationship. Such behaviour under a contract, however, cannot as such give rise to a violation of an obligation established by Treaty governed by international law. All the characterisations that have been invoked to characterize unfair and unreasonable treatment in international law and which the Claimant has argued and which the Respondent denies having occurred – arbitrariness, lack of transparency, negligence, inconsistency, bad faith, the frustration of legitimate expectations, the introduction of unreasonable measures – occur in exercise of sovereign authority over and above acts that constitute mere breach of contract. Something more than mere breach of contract is needed. This might occur, for example, if the State agreed to the jurisdiction of its national courts for the resolution of a contractual dispute and then acted to limit effective access to such courts.”

593. Thus, in the context of a State’s non-payment of a contractual debt, the non-payment cannot amount to the exercise of sovereign power. Something more is necessary. The “something more” that is required beyond the wrongful refusal to pay under the contract (see **BIVAC v Paraguay**, §246) is the State’s wrongful interference with the investor’s rights under the contract by the use of its public powers, for example, by legislation, regulatory powers, executive decision/resolutions, the exercise of police powers, limiting access to the courts, ignoring court judgments etc.

594. Having reviewed the relevant authorities, the tribunal said the following at §269:

“269. In the present case the real issue the Tribunal is faced with is the determination of whether a refusal to pay an outstanding contractual debt can by its nature constitute a sovereign act, in the sense of being conduct that an ordinary contracting party cannot engage in. The Tribunal notes that the Claimant has not been able to identify a single case in which a tribunal has ruled that the non-payment of an outstanding debt by a State (or statal body) could be characterised as an exercise of sovereign authority. This is true too even if the non-payment is said to be persistent and unjustified under the contract.”

595. And in its conclusion the tribunal said at §276:

“Having concluded that this dispute is premised on Paraguay’s failure to make a payment of a debt owing under the Contract it entered into with the Claimant, the Tribunal further concludes that Paraguay’s failure to pay that outstanding debt, including in particular in the period after March 2005, cannot properly be characterized as an exercise of sovereign authority. It is, in the Tribunal’s view, conduct that an ordinary private party to a contract might also engage in. The fact that the failure is persistent cannot change the character of the conduct. Nor can the fact that the failure appears to be wholly unjustified transform the nature of the conduct into the exercise of sovereign authority. Taking the Claimant’s case at its highest, the bottom line is that Paraguay has refused to pay sums owing to the Claimant under the Contract. That failure, which turns on the facts established in the record, cannot as a matter of law amount to an exercise of sovereign authority.”

(ii) No demand for payment was made of T&T, qua T&T, so non-payment by T&T cannot constitute a sovereign act

596. This matter is dealt with in Section D, 11, above. A summary is as follows.

597. CMEC made numerous claims for payment by letters sent to Alutrint between 14 February 2011 **[R-0004]** and 15 August 2022 **[C-0044]**: see Appendix II, hereto.
598. Settlement discussions between CMEC and T&T government officials in and after 2014 concerned CMEC's proposals that payment be made by Alutrint.
599. Hence when, in or about September 2014, a US\$15 million payment to CMEC was discussed, the same was to come from the account of Alutrint.
600. Hence also, when CMEC sent its 5 January 2015 letter to the T&T Minister of Energy and Energy affairs about settlement of its claims **[C-0392]**, CMEC's threat in the event that a settlement was not reached was the activation of the contractual dispute resolution process against Alutrint. And, in due course, CMEC proceeded to activate that process against Alutrint: see Appendix IV hereto.
601. It was not until CMEC's 25 August 2022 letter to T&T's Minister of Finance **[C-0490]** that it became apparent, from the attached Power of Attorney, that CMEC was proposing to commence arbitration proceedings, pursuant to the Treaty, against T&T.
602. A day later, 26 August 2022, CMEC instigated the claim procedure under the Treaty, by CC's Notification of a Claim, sent to T&T pursuant to Article 10(2) of the Treaty **[C-0491]**.
603. CC's Notification of a Claim was the first intimation by CMEC that it was making a claim that T&T had failed to pay amounts it said it was due to it in respect of the EPC Contracts.
604. CMEC never having therefore demanded payment from T&T, it cannot be the case that T&T's non-payment constituted a sovereign act.

(iii) Non-payment of CMEC's exaggerated claims
cannot constitute a sovereign act

605. CMEC's said numerous claims for payment, all directed to Alutrint, between 14 February 2011 [R-0004] and 15 August 2022 [C-0044], demanded sums which were increasingly grossly exaggerated. See Section G, above, and also Appendix II hereto for full details of the exaggeration of CMEC's claims.
606. Non-payment of CMEC's grossly exaggerated claims cannot be characterised as the exercise of sovereign power. Non-payment of such claims is a quintessentially commercial act.

I6. The alleged indirect expropriation of CMEC's contractual rights by termination of the Project was not "compulsory"

607. The alleged indirect expropriation of CMEC's contractual rights by termination of the Project was not "compulsory". That being so, there could have been no expropriation of CMEC's said rights.

I6.1 The law

608. The essence of an expropriation is that it is achieved without the investor's consent and against the express will of the investor. For conduct to be expropriatory it must be compulsory, and the fact that an investor has consented to the taking will therefore preclude a finding of expropriation.²⁶⁸

²⁶⁸ The authoritative texts are to this effect. See eg:

- (1) McLachlan et al, International Investment Arbitration, Substantive Principles, 8. Expropriation [CL-0067] p.382, §8.74: "...the investor must be the subject of a compulsory measure"
- (2) Reinisch [RL-0099] p.149, §698: "It is inherent in the nature of an expropriatory measure that it is achieved without and often against the will of the expropriated owners." See also §701.

609. In **Amoco v Iran**²⁶⁹ the tribunal said, at 220, “Expropriation...can be defined as a compulsory transfer of property rights...”.

610. And in **Tradex v Albania**²⁷⁰ the tribunal, at §177, indicated that expropriation required involuntary, compulsory action:

“As expropriation by definition is a “compulsory” transfer of property rights...an agreement reached in consent with the foreign investor and signed by it...can hardly be seen as an act of expropriation in itself.”

I6.2 Here, the alleged expropriation was not compulsory

611. Here, the alleged expropriation was not compulsory, but rather was consented to by CMEC.

612. By Alutrint’s 19 and 23 January 2012 letter, the EPC Contracts were terminated pursuant to Clause 15.5.

613. In subsequent correspondence, CMEC acknowledged and accepted that Alutrint had so terminated the EPC Contract: see CMEC’s letters to Alutrint of 16 February 2012, 4 September 2012 and 28 November 2012, all of which antedated CMEC’s purported termination of the Contract(s) on 1 March 2013.

614. CMEC, as a contracting party to the EPC Contracts, consented to such conduct of the parties as was carried out in accordance with the terms of the EPC Contracts. Alutrint’s said termination was carried out in accordance with the terms of the Contracts, as was acknowledged and accepted by CMEC’s said subsequent correspondence. That being so, it is not possible for CMEC now to

²⁶⁹ **Amoco International Finance Corporation v The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited**, IUSCT Case No. 56, Partial Award No.310-56-3, 14 July 1987 [CL-0069] §108.

²⁷⁰ ICSID Case No ARB/94/2, Award, 29 April 1999 [RL-0045].

contend that the alleged expropriation of CMEC's contractual rights in consequence of the termination was "compulsory" ie not consented to by CMEC.

615. Just as in **Tradex v Albania**, in which the tribunal rejected Tradex's claim on the basis that none of the reasons put forward by it for its assent to the dissolution of the joint venture was the result of an expropriatory act by Albania,²⁷¹ so here any contention that all performance of the EPC Contracts was compulsorily expropriated should be similarly rejected.

616. Further, given that (1) CMEC accepted that Alutrint terminated the EPC Contracts pursuant to the agreed contractual framework (as stated above), (2) CMEC has never previously alleged, whether before or after the alleged "expropriatory acts", that their property was "expropriated" and (3) as a corollary of (1) and (2) above, CMEC never alleged that there was any act of expropriation, and consistently resorted to contractual remedies, it cannot be said that CMEC was "forced" to terminate the EPC Contracts, or that T&T "[took] advantage of its own wrong" (Memorial, §§605 and 607).

I7. No expropriation since T&T's termination of the Project constituted legitimate regulatory action ie the "police powers exception" applies

617. The mere finding of an exercise of sovereign power (*puissance publique*) is not sufficient to establish expropriation. The State must also have abused that power.

618. Hence there is a distinction between compensable expropriation on the one hand (where the State has abused its public power) and non-compensable regulation on the other hand (where the State has simply exercised and acted within its public power).

²⁷¹ See **Tradex v Albania [RL-0045]** §§180-183.

17.1 The law

619. Reinisch [RL-0099] at §389 summarises the position in law as follows:

“The concept of indirect expropriation encompasses regulatory action which amounts to expropriation, so called regulatory expropriation. At the same time, it is generally accepted that legitimate regulatory action in the public interest does not constitute indirect expropriation and thus does not give rise to claims of compensation”. (underlining added)

620. The legitimate regulatory action/“police powers exception” is referred to in **Fireman’s Fund [RL-0039]** at 176(j):

“(j) To distinguish between a compensable expropriation and a non-compensation regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.”

621. **Saluka v Czech Republic**²⁷² is instructive in this context.

622. That case involved the loss of the investor’s investment as a consequence of the Czech Republic’s forced administration of a bank.

623. As a result of the move towards privatisation, the investor, a subsidiary of Nomura, became a substantial shareholder in a bank, IPB, which had previously been owned by the Czech Republic (§§1, 70-73). In due course IPB encountered

²⁷² UNCITRAL Partial Award, 17 March 2006, [RL-0017].

serious financial problems: there were runs on the bank, its liquidity seriously deteriorated and its solvency was threatened (§133).

624. The Czech Republic, by the Czech National Bank (CNB), decided to put IPB into forced administration, coupled with a quick sale to a strategic investor, being another bank, CSOC (§137). Duly, IPB was transferred to CSOB (§143) and CSOB became the new owner of the investor's shares (§163).

625. The investor's case was that the Czech Republic was in breach of the non-deprivation provision in Article 5 of the Treaty ("Neither Contracting Party shall take any measures depriving, directly or indirectly investors of the other Contracting Party of their investments unless the following conditions are complied with..."), as a result of the investor being deprived of the value of its shares in IPB by the Czech Republic's intervention culminating in the forced administration of IPB (§246).

626. The tribunal said the following:

"254. The Tribunal acknowledges that Article 5 of the Treaty in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.²⁷³...

255. It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.

.....

²⁷³ Note that this legitimate regulatory action/"police powers exception", while being a limit on what State conduct can be characterised as expropriation, is not (conventionally) referred to anywhere in the treaty as such a limit.

258. [The above] exceptions do not, in any way, weaken the principle that certain takings or deprivations are non-compensable. They merely remind the legislator or, indeed, the adjudicator, that the so-called “police power exception” is not absolute.

.....

262. In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today. There is ample case law in support of this proposition.”

627. In its Analysis and Findings the tribunal said:

“267. There can be no doubt, and the Tribunal so finds, that Saluka has been deprived of its investment in IPB as a result of the imposition of the forced administration of the bank by the CNB on 16 June 2000.”

and

“271. As will be seen, the CNB’s decision is fully motivated. Having reviewed the totality of the evidence which the CNB invoked in support of its decision, the Tribunal is of the view that the CNB was justified, under Czech law, in imposing the forced administration of IPB and appointing an administrator to exercise the forced administration.”

628. Thus, in its Conclusion, the tribunal said:

“276. In summary, the Tribunal finds, based on the totality of the evidence which has been presented to it, that in imposing the forced administration of IPB on 16 June 2000 the Czech Republic adopted a measure which was valid and permissible as within its regulatory powers, notwithstanding that the measure had the effect of eviscerating Saluka’s investment in IPB.”

629. The tribunal therefore held that the Czech Republic had not acted in breach of Article 5 of the Treaty (§511b).²⁷⁴
630. So: “As a result, the forced administration of a bank in which the Dutch investor had invested was not considered a breach of the prohibition against expropriation contained in the applicable BIT” (Reinisch [RL-0099] §476).²⁷⁵
631. Environmental and health concerns are among the various matters which may be the subject of legitimate regulatory action attracting the “police powers exception”.²⁷⁶ Thus:
- (1) In **Feldman v Mexico [CL-68]** at §103 the Tribunal said: “At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax régimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like”²⁷⁷, underlining added; and
 - (2) In **Philip Morris v Uruguay**,²⁷⁸ the investor’s complaint concerned Uruguay’s restrictive cigarette packaging rules. The tribunal said that “Protecting public health has since long been recognised as an essential manifestation of the State’s police power...” (§291, underlining added, and see also §§298-9) and that Uruguay’s measures had been adopted in fulfilment of its national and international obligations for the protection of public health (§302). Endorsing the **Saluka v Czech Republic** line of cases (§§292-305), the Tribunal said at §305:

²⁷⁴ It is to be noted from this case that the legitimate regulatory action/“police powers exception” applies not only when the State has introduced regulations which are of wide-ranging effect, but also where the State has imposed a specific regulatory measure which may affect only one entity/individual. In **Saluka v Czech Republic** it was only the investor which was affected by the regulatory measure of IPB being put into forced administration.

²⁷⁵ See also Reinisch [RL-0099] §§402-411 and 470-510 for further cases implementing the legitimate regulatory action/“police powers exception” and discussion of the topic.

²⁷⁶ Reinisch [RL-0099], §§412-469, refers to the various areas of public interest which legitimate regulatory action/the “police powers exception” usually address.

²⁷⁷ See Reinisch [RL-0099] §409. See also Reinisch §§454-463 which refers to further cases which address environmental regulatory action and discusses related issues.

²⁷⁸ ICSID Case No, ARB/10/7, Award, 8 July 2016 [RL-0046].

“As indicated by earlier investment treaty decisions, in order for a State’s action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate. In the Tribunal’s view, the SPR and the 80/80 Regulation satisfy these conditions.”

The tribunal therefore rejected the investor’s expropriation claim. See also Reinisch [RL-0099] §§464-469 for a consideration of this case.

632. So the legitimate regulatory action/“police powers exception” places the State’s regulations concerning matters of public interest or general welfare outside the scope of the State’s obligation to refrain from unlawful expropriation and to compensate for lawful expropriation.
633. As the criteria of public interest and general welfare closely resemble the “for the public purpose” feature in Article 6(1)(a) of the Treaty, which (along with the other 3 features of Article 6(1)) renders an expropriation lawful, a line has to be drawn between (1) government action taken in the public interest which, being legitimate regulatory action, is not compensable and (2) government action which, if it is for the public purpose, is considered lawful so long as compensation is paid.
634. To maintain the distinction between (1) legitimate regulatory action, which causes government acts not to be expropriatory, and therefore not compensable, and (2) government acts which if carried out for the public purpose are compensable, some tribunals have stated that for regulatory action to fall under (1) it has to satisfy the proportionality test.

635. Thus in **Azurix v Argentina**²⁷⁹ the tribunal said the following (important passages underlined):

“310. For the Tribunal, the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim...

311. ...The parties have referred in their exchanges to findings of the tribunal in *Tecmed*. That tribunal sought guidance in the case law of the European Court of Human Rights, in particular, in the case of *James and Others*. The Court held that “a measure depriving a person of his property [must] pursue, on the facts as well as in principle, a legitimate aim ‘in the public interest’”, and bear “a reasonable relationship of proportionality between the means employed and the aim sought to be realized”. This proportionality will not be found if the person concerned bears “an individual and excessive burden”. The Court considered that such “a measure must be both appropriate for achieving its aim and not disproportionate thereto.”

312. The Tribunal finds that these additional elements provide useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation.”

636. And the tribunal in **LG&E v Argentina**²⁸⁰ suggested a similar balancing test (underlining added):

“189. In order to establish whether State measures constitute expropriation under Article IV(1) of the Bilateral Treaty, the Tribunal must balance two competing interests: the degree of the measure’s interference with the right of ownership and the power of the State to adopt its policies.

²⁷⁹ ICSID Case No ARB/01/12, Award, 14 July 2006 [CL-0120].

²⁸⁰ ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006 [CL-0142].

.....

195. With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed. The proportionality to be used when making use of this right was recognized in *Tecmed*, which observed that “whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact, has a key role upon deciding the proportionality.””

637. So the test to be applied to regulatory acts in order for them not to be characterised as expropriatory is that they be (1) necessary to achieve a genuine public interest or general welfare purpose, and also (2) proportionate in terms of their degree of interference with the investor's property.

I7.2 T&T's termination of the Project was not expropriatory since it constituted legitimate regulatory action ie fell within the “police powers exception”

638. T&T's termination of the Project was not expropriatory since it constituted legitimate regulatory action carried out by reason of environmental and health concerns. See the material set out in Section D, 4.1.1, 4.2.2, 5, 7 and 8, above.
639. Specifically, the Treaty recognises that the reciprocal protection of investors' investments was to be achieved without compromising T&T's proper environmental and health concerns. The Preamble to the Treaty says: “Agreeing

that these objectives can be achieved without relaxing health, safety and environmental measures of general application”.²⁸¹

640. Also, the necessity for having and complying with the CEC was made explicit in both of the EPC Contracts. See Section D, 4.1.1 and 4.2.2, above.

641. So it should be noted that by the time the 2008 Contract was entered into (30 October 2008) the following things had happened:

- (1) On 2 April 2007 EMA had granted the CEC **[C-0017]**;
- (2) On 29 June 2007 three public interest groups had applied to the High Court of T&T for leave to apply for judicial review of EMA’s decision to grant the CEC **[C-0018, §§1, 6, 10]**;
- (3) On 13 September 2007 the High Court had given the public interest groups leave to apply for judicial review **[C-0018, §§7, 8]**; and
- (4) The hearing of the public interest groups’ application for judicial review had begun in the High Court, on 6 October 2008, and was continuing **[C-0020, p.106]**.

642. So the parties, and in particular CMEC, knew when entering into the 2008 Contract that the validity of the grant of the CEC was under heavy challenge and that the environmental and health effects of the smelter project were under intense legal scrutiny in the High Court.²⁸²

²⁸¹ Note that some BITs address the protection of the environment and health in their preambles or elsewhere: see Reinisch **[RL-0099]** §456.

²⁸² As to investors having to expect to encounter government regulatory activity which affects their business, the tribunal in **Feldman v Mexico [CL-0068]** said at §112:

“Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.”

And see also McLachlan’s treatment of this topic at §§8.128-8.130 **[CL-0067]**.

643. It should therefore have come as no surprise to CMEC when the High Court, in its 16 June 2009 Judgment [C-0018], issued an order of certiorari quashing the decision of EMA to issue the CEC.
644. Thereafter, the Project was terminated in substantial part because of the environmental and health concerns that the smelter plant raised. See Section D, 8, above, and in particular the reasons for which the Cabinet agreed to terminate the Project on 8 September 2010, as set out in §50 of the Attorney-General, Anand Ramlogan SC's witness statement in Sural v GORTT arbitration²⁸³ and what the Minister of Transport said in his Budget Speech on the same day [C-0252].
645. In the circumstances the termination of the Project for the above reasons was for a genuine public welfare purpose and was proportionate.
646. Hence T&T's termination of the Project was not expropriatory.

I8. T&T's non-payment of CMEC's claims does not constitute a "measure" within the meaning of "other similar measures" in Article 6(1) of the Treaty

647. The term "other similar measures" in Article 6(1) of the Treaty is generally considered to comprehend the various forms of indirect expropriation. CMEC relies on T&T's non-payment of CMEC's claims for payment as one of the "measures" (along with termination of the Project) relied on to support its indirect expropriation claim based on creeping expropriation: see §§611(c)(g) and (i) and 612 of the Memorial.
648. However T&T's non-payment (ie its omission to pay) CMEC's claims does not constitute as such a "measure".

²⁸³ See the Final Award in the Sural v GORTT arbitration [C-0014] §137.

I8.1 The law

649. In **Olguin v Paraguay**²⁸⁴ the investor's investment was in a company engaged in the manufacture and distribution of food products in Paraguay. The investor deposited funds with a Paraguayan finance company for that purpose. The investment was lost as a result of a crisis suffered by the finance company (bankruptcy) and the Paraguayan financial system in general. The parties agreed that the crisis was the consequence of irregular conduct on the part of the finance company's managers that could have been directed, brought to a halt, and if necessary, sanctioned, thereby fostering confidence in both the integrity of Paraguay's financial system and investor credits in securities issued by the finance company (§69). The tribunal said that "there were considerable omissions on the part of Paraguay's public bodies, which had the duty to preserve the integrity of that country's financial system, in regard, not only, but especially, to foreign investment" (§70).
650. The investor contended that his investment (the deposited funds) had been expropriated.
651. The tribunal held that it was not possible to equate the loss of funds suffered by the investor with an expropriation, saying that expropriation occurs when "a person is deprived of property through an action to take ownership of that property by the State, which legally contracts an obligation to pay its price" (§65(d)).
652. The tribunal said that the BIT did not envisage there would be an expropriation where a contracting State committed gross omissions in regard to their legal and constitutional duties or obligations, thereby causing third parties to suffer losses (§73).

²⁸⁴ ICSID Case No ARB/98/5, Award, 26 July 2001, 6 ICSID Rep 164, 18 ICSID Rev FILJ (2003), IIC 97 (2001, Oreamuno Blance P, Rezek & Alvarado) [unofficial translation from Spanish in ICSID Rev-FILJ] [RL-0047]

653. The Tribunal concluded, in §84:

“84. For an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property. Expropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place.” (underlining added).

654. So for indirect expropriation to occur, the State must have engaged in a “teleologically driven action” (ie State conduct which is driven by a purpose or design). Omissions which cannot be so described will not suffice.

655. In **Suez v Argentina**²⁸⁵ the investor’s investment was as a shareholder in AASA, which had a concession to operate the water and sewage system of Buenos Aires. The Argentinian authorities took various legislative, regulatory and administrative actions prior to, during and following Argentina’s financial crisis which reduced the profitability of the investor’s investment.

656. The Tribunal considered whether the loss to the investment resulted from “measures” taken by Argentina, such as would constitute expropriation of the investment. In that context the Tribunal examined each of the “measures” taken by Argentina of which the investor made complaint (§§129, 131 et seq).

657. In relation to one matter of which the investor complained – Argentina’s failure to revise the tariff that AASA was to receive from payments by consumers for water and sewage services – the Tribunal, at §141, considered whether the same constituted a failure to take action (ie a simple omission) or something more, qualifying as a “measure”:

²⁸⁵ ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010 [RL-0001]

“In making a literal interpretation of the BITs, one encounters an initial question with respect to the Claimants’ assertion. All three treaties require the existence of a governmental “measure” in order to found a claim for expropriation. Can a *failure* to take action, such as to revise a tariff, constitute a “measure”? In *Olguin v Paraguay*, the tribunal expressed the opinion that “[e]xpropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place.” A “measure”, which is not defined in any of the three BITs, is usually interpreted to mean an action taken to achieve a particular purpose. In this case, although Argentina refused to revise the tariff that action of refusal was not an omission but the result of a carefully considered decision formally communicated to AASA and that decision constitutes a measure within the meaning of all three treaties. The decision not to revise the tariff in response to AASA’s requests was certainly teleologically driven.”²⁸⁶ (underlining added).

658. So the tribunal said that a “measure” is “an action taken to achieve a particular purpose” and that a refusal to act as a result of a carefully considered decision by the State amounted to a “measure”. The key test is whether the State’s refusal to act was driven by a purpose or design to deprive the investor of its investment.

I8.2 T&T’s non-payment of (ie its omission to pay) CMEC’s claims does not constitute a “measure”

659. In this case T&T’s non-payment of CMEC’s claims was not a “measure” since it was not a teleologically driven refusal to act, T&T having no purpose or design

²⁸⁶ The tribunal nevertheless decided that Argentina’s refusal to revise the tariff to be applied by AASA did not constitute indirect expropriation, since there was no substantial deprivation of the investment (§145). And having examined the various measures taken by Argentina from the onset of the crisis until the determination of the concession, the tribunal concluded that none of them, either individually or collectively, violated the BIT provisions governing direct and indirect expropriation (§157).

to avoid any proper liability nor to deprive CMEC of any proper right to payment of its claims.

660. First, CMEC made no claim for payment against T&T; all its claims by letters sent between 14 February 2011 [R-0004] and 15 August 2022 [C-0044] were sent to Alutrint. The first intimation by CMEC that it was making a claim that T&T had failed to pay amounts allegedly due in respect of the EPC Contracts was in CC's Notification of a Claim of 26 August 2022 [C-0491]. See Sections D, 11, and I, 5.3.2, above. Non-payment by T&T cannot have been a "measure" taken by T&T as T&T had never been asked to make payment.
661. Secondly, and related to the first point above, T&T's participation in the settlement discussions in and after 2014 was qua majority shareholder in Alutrint and on the basis that any payment would be made by Alutrint. T&T thereby assumed no obligation that it would make any payment to CMEC.²⁸⁷ See Section D, 11, above.
662. Thirdly, CMEC's said numerous claims for payment, all directed to Alutrint, between 14 February 2011 [R-0004] and 15 August 2022 [C-0044], demanded sums which were increasingly grossly exaggerated. See Section G, above, and Appendix II hereto for full details of the exaggeration of CMEC's claims. Furthermore, CMEC failed to provide requisite proof to support those claims. Hence, non-payment of CMEC's exaggerated and unsupported claims was the result of there being a bona fide dispute as to CMEC's entitlement; it was not the result of a teleologically driven determination to avoid any liability to pay.
663. Hence, T&T's non-payment (omission to pay) did not constitute a "measure" within the meaning of Article 6(1) of the Treaty.

²⁸⁷ The mere participation of representatives of the State in settlement negotiations between the investor and the State-owned entity regarding the latter's non-payment under a contract does not without more transform the State into a contracting party which has breached that contract. For an example of this, see **Waste Management v Mexico II** [RL-0013] at §§106-107.

I9. Any expropriation of CMEC's contractual rights was lawful, since each of the exceptions in Article 6(1) was satisfied

664. Article 6(1) of the Treaty sets out 4 excepting circumstances which, if satisfied, make an expropriation lawful.
665. The circumstances are that the expropriation be “(a) for the public purpose”, “(b) under domestic law”, “(c) without discrimination” and “(d) against compensation”.
666. These circumstances only come into play when it has been shown that expropriation has taken place: see Section I, 1 (Introduction), above.
667. T&T contends that for the reasons set out above, CMEC's case that its investment was expropriated cannot succeed. If, however, T&T is wrong about that, it contends that the expropriation was lawful as the excepting circumstances were satisfied, as set out below.
668. CMEC says, in §§583-585 and 613 of the Memorial, that the contended for expropriation was unlawful since circumstances (a), (c) and (d) were not satisfied.
669. CMEC also says, in §§586, 587, 613 and 614, that the due process, fair and equal treatment and non-impairment requirements are imported into Article 6(1) of the Treaty, by virtue of the MFN provision in Article 4(3) of the Treaty, read together with Article III(1) and (2) and Article II(3) of the T&T-US treaty. CMEC says that those requirements, too, were not satisfied.
670. Each of the matters in which CMEC relies is addressed below.

I9.1 “(a) for the public purpose”

I9.1.1 The law

671. The host State is given a wide discretion to determine what is in its own public interest. Reinisch [RL-0099], §939, says: “...investment tribunals have been generally reluctant to question the determination of a public purpose by an expropriatory state”. See also the summaries of the various authorities to the same effect, set out in Reinisch, §§940 to 958.
672. ICSID tribunals have shared the reluctance of other international courts and tribunals to question the public interest assessment of a host State. In **Goetz v Burundi**²⁸⁸ the tribunal said, at §126: “In the absence of an error of fact or law, of an abuse of power or of a clear misunderstanding of the issue, it is not the Tribunal’s role to substitute its own judgment for the discretion of the Government of Burundi of what are ‘imperatives of public need...or of national interest.’”

I9.1.2 T&T’s public purpose in this case

673. The public purpose of the termination of the Project was T&T’s environmental and health concerns, which concerns were made public by T&T and were a matter of general public knowledge. See Section I, 7.2 above.
674. In light of the above, contrary to §583(a) of the Memorial, there were clearly-stated reasons given for the termination of the Project and an obvious nexus between the termination of the Project and the declared public purpose.
675. It is a misapprehension simply to characterise the decision to terminate the Project as “inherently political” (§583(b)) and thereby to condemn it as not being

²⁸⁸ ICSID Case No ARB/95/3, Decision on Liability, 2 September 1998 incorporated within the Award (in French), 10 February 1999 (incorporating parties’ settlement agreement) [RL-0048].

for the public purpose. The fact is that the basis of the UNC's anti-aluminium smelter stance was its concerns for the environment and health referred to above. The fact that such a stance was part of its political programme is neither here nor there. A public purpose and a political stance are not mutually exclusive.

676. The assertion in §583(c) that the Project was beneficial to the public and to T&T in general is tendentious, and in any event non-justiciable. The fact is that there were pro-aluminium smelter and anti-aluminium smelter factions in T&T in and before September 2010.
677. As for the anti-aluminium smelter faction, there was a very significant campaign of protest by civil society organisations,²⁸⁹ epitomised by the 3 public interest groups which had obtained an order quashing the EMA's decision to grant the CEC to the NEC, the order being under appeal by the EMA in September 2010.
678. As for the assertion in §583(c) that there was a news report that some residents of La Brea (where the project was located) staged protests to demand a reconsideration of the decision to stop the smelter, the reported number of protestors was few²⁹⁰ and at the same time there were equivalent but opposite news reports that La Brea residents were satisfied with the scrapping of the smelter.²⁹¹
679. The above demonstrates why CMEC's assertion that the Project was beneficial to the public and to T&T in general is non-justiciable and also why tribunals are reluctant to question a State's determination that its acts have a public purpose.

²⁸⁹ See Section D, 2.1, above.

²⁹⁰ The T&T Guardian newspaper report of 16 September 2010 [C-0255], to which the Memorial refers, says: "About 50 La Brea residents lined Abercromby Street in Port-of-Spain, mere metres away from the Red House, to protest the Government's decision to abandon the building of the smelter plant". (underlining added)

²⁹¹ In the House of Representatives on 1 October 2010 [C-0254, p.4] the Minister of Energy and Energy Affairs (Carolyn Seepersad-Bachan) referred to an article in the Newsday newspapers, which had the headline "La Brea residents satisfied with scrapping of smelter", and which stated:

"The majority of residents of Square Deal Village, La Brea, and areas adjacent to the site for the now-scrapped aluminium smelter plant, have expressed satisfaction that the smelter has been halted, and an alternative use would be found for the industrial site."

I9.2 “(c) without discrimination”

I9.2.1 The law

680. Discrimination entails a differential treatment applied to people who are in similar situations. It relates to the foreign investor being treated differently from another investor whether foreign or national in a similar situation. As such, a comparator or a basis for comparison must be identified in the first place.²⁹²
681. Nevertheless, a mere showing of differential treatment is not sufficient to establish unlawful discrimination. For discriminatory treatment, comparators must be materially similar; and there must then be no reasonable justification for differential treatment.²⁹³
682. What matters is a measure’s practical effect.²⁹⁴ In **Siemens v Argentina** the tribunal said “that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.”²⁹⁵

I9.2.2 T&T’s termination of the Project was not discriminatory

683. CMEC’s contention in §§584 and 613(a)(ii) of the Memorial that T&T’s termination of the Project was discriminatory because CMEC was a Chinese contractor is hopeless.
684. It is notable that in the Request for Arbitration, while it was said that T&T’s termination of the Project did not satisfy the public purpose and compensation

²⁹² See Reinisch pp.835-837; **Ulysseas v Ecuador**, Final Award, 12 June 2012 [RL-0094].

²⁹³ **Electrabel SA v The Republic of Hungary** ICSID Case No. ARB/07/19, Award, 25 November 2015 [CL-0138] §175.

²⁹⁴ **S.D. Myers Inc v Canada** UNCITRAL Partial Award, 13 November 2000 [CL-0094] §§252-254.

²⁹⁵ **Siemens AG v The Argentine Republic** ICSID Case No. ARB/02/8 Award, 6 February 2007 [CL-0100], §321.

requirements of Article 6(1), there was no mention of any non-compliance with the non-discrimination requirement: see §91 of the Request for Arbitration.

685. Having trawled through the documents CMEC has now come up with the new assertion that there was discriminatory conduct on the part of T&T, when clearly there was none.

686. CMEC has alighted upon an article in Newsday newspaper of 15 March 2010 in which Carolyn Seepersad-Bachan is reported as saying that she was not confident that CMEC, the Chinese contractors, would build the smelter plant in accordance with standards **[C-0226]**.

687. CMEC's allegation that the T&T government was guilty of discriminatory conduct is as regrettable as it is hopeless:

- (1) At the time when Carolyn Seepersad-Bachan made her reported statements (15 March 2010) she was not a T&T government official nor even a member of the T&T House of Representatives. She did not become such until 24 May 2010 when the UNC-led People's Partnership defeated the PNM in the T&T general election (Memorial, §311). So her reported statement cannot possibly be attributed to T&T.
- (2) In context, **[C-0266]** Carolyn Seepersad-Bachan was primarily saying that the Norwegian experts, apparently brought in "to so-call clear the air", were not those involved in the construction of the smelter plant.
- (3) Most importantly, CMEC has provided no support for the contention that nationality was a factor in T&T's decision-making process in September 2010. It is plain that it was not. The Note for Cabinet of 16 July 2010 **[C-0248]** shows that CMEC's nationality had nothing whatsoever to do with T&T's decision to terminate the Project. Indeed the Note, which was prepared by the Ministry of Energy and Energy Affairs and submitted by Carolyn Seepersad-Bachan when she was the Minister in charge of that

Ministry (§43 of the Note), referred to the fact that the Project would be using CMEC's Chinese technology in favourable terms.²⁹⁶

- (4) CMEC continued to explore opportunities to engage in future major construction contracts with the T&T government for several years after the termination of the Project.²⁹⁷ The fact that these opportunities did not materialise had nothing to do with CMEC's nationality.

I9.3 “(d) against compensation”

I9.3.1 The law

688. Article 6(1) provides that for expropriation to be lawful it must be “against compensation”. The manner of assessment of the compensation is dealt with in Article 6(2) which provides, essentially, that the compensation be equivalent to the market value of the expropriated investments and be made without delay.

689. The cases show that an expropriation is considered to be lawful if all the exempting circumstances are satisfied, save only an assessment of the amount of compensation properly due.²⁹⁸

690. Hence in **Tidewater v Venezuela**²⁹⁹ the tribunal, having reviewed the relevant cases in §§135 et seq, said at §140:

²⁹⁶ §22 of the Note for Cabinet says:

“22. The aluminium industry offers the following benefits:

...

(e) Transfer of Technology – the Chinese technology is one of the most advanced in the aluminium industry. T&T will benefit from using the most efficient and cleanest technologies in aluminium smelting.”

²⁹⁷ See: emails between L. Zhang (CMEC) and I. Anthony from 11-12 September 2014 [C-0384]; CMEC's 3 November 2015 letter to Dr Keith Rowley [C-0046], p.5; CMEC's 9 November 2016 letter to Minister of Finance [C-0420], p.3; CMEC's 9 February 2017 letter to Ministry of Finance [C-0432], p.2; CMEC's 5 June 2017 letter to Ministry of the Attorney General and Legal Affairs [C-0440]; CMEC's Virtual Meeting Agenda, Item B2(2), attached to its 6 August 2021 letter to the Minister of Finance [C-0058]. See also Leroy Mayers' witness statement of 29 May 2025, §144.

²⁹⁸ It is notable that, if the thing allegedly expropriated is a debt payable under a contract, there will be no finding of expropriation in the first place where there is a refusal to pay the debt because of an unresolved dispute as to the amount payable: **SGS Société Generale de Surveillance v Republic of the Philippines**, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction [RL-0010], §161.

²⁹⁹ ICSID Case No ARB/10/5, Award, 13 March 2015 [RL-0011].

“...an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation”,
and, at §141:

“An 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.”

691. Similarly, in **Goetz v Burundi**,³⁰⁰ §130, the tribunal held that, all other conditions for a lawful taking having been met, the failure to pay prompt and adequate compensation did not suffice to “taint this measure as illegal under international law” (“entacher d’illicéité internationale la mesure litigieuse”).

692. In **Tidewater v Venezuela** the tribunal concluded as follows:

“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 which they have submitted to this Tribunal.

146. For present purposes, it suffices to conclude that the present expropriation was lawful, since it wants only compensation, a matter vouchsafed by the Parties to this Tribunal to determine according to the standards presented in the BIT.”

I9.3.2 The facts

693. This is not a case in which T&T has ever set its face against paying compensation for something which it has expropriated.

³⁰⁰ Affaire CIRDI ARB/95/3, Sentence, 10 February 1999 [RL-0048].

694. The short point is that the first time T&T ever became aware that CMEC was alleging that it had expropriated anything or was bound to pay CMEC anything was when CMEC activated the dispute resolution process under the Treaty, by sending T&T CC's Notification of a Claim of 26 August 2022 **[C-0491]**.
695. Prior to 26 August 2022 no question of T&T having expropriated anything, or having to pay CMEC anything, had been raised by CMEC, its only line of fire having been against Alutrint, on the basis that Alutrint had a contractual liability to make payment to CMEC under the EPC Contracts. See Sections D, 11, and I, 5.3(2)(ii), above.
696. Further, when CMEC's claim was a contractual claim against Alutrint, there was plainly a substantial dispute as to the proper amount payable in view of the increasingly exaggerated claims which CMEC had seen fit serially to advance. See Section G, above, and Appendix II hereto.
697. Yet further, even since CMEC has activated the dispute resolution process under the Treaty, there has been no consistency in the amount of CMEC's claim:
- (1) In CC's Notification of a Claim of 26 August 2022 **[C-0491]**, it was said that CMEC's claims "exceed US\$300 million" (Annex, §§5 and 47). This reflected the amount CMEC had claimed in its last contractual claim against Alutrint, when CMEC had sought US\$304 million.
 - (2) In the Request for Arbitration of 27 March 2023, CMEC said its claim "exceeds US\$310 million" (§70).
 - (3) At the Bifurcation Hearing held by the Tribunal on 24 April 2024, CMEC confirmed that its claim against T&T was "over US\$300 million": see §4 of CMEC's Submissions for that hearing, dated 10 April 2024.
 - (4) Yet, in the Memorial, dated 11 November 2024, the amount CMEC now claims against T&T is US\$156 million (§§686, 713, 730). So the claim has been slashed to about half of what CMEC had been consistently

claiming throughout the previous two years. No explanation is given in the Memorial as to why the claim CMEC was previously making was in excess of US\$300 million, nor why the claim has now been so substantially reduced.

- (5) Furthermore, as appears below and from T&T’s quantum experts’ reports, even CMEC’s present claim for US\$156 million is still exaggerated, and to a very substantial extent.

698. For the above reasons CMEC cannot complain that T&T has failed to pay compensation without delay. The proper quantum of CMEC’s claim is quite unclear and the subject of a substantial dispute. Hence CMEC cannot contend that any expropriation by T&T (which is denied) was unlawful by virtue of non-compliance with the compensation requirement set out in Article 6(1)(d).

I9.4. Due process and advance notice

699. CMEC submits that it is entitled to “due process prior to an expropriation of its covered investments by virtue of the MFN clause in Article 4(3) of the BIT, read with Article III(1) and (2) of the US BIT” (Memorial, §586³⁰¹). It is further said that the case law and commentary “show beyond doubt that reasonable advance notice is part of due process” (Memorial, §586(a)), and T&T was in breach of the due process requirement as CMEC “was not given notice that its investment would be expropriated and not afforded an opportunity to consult or submit its views or objections as to a contemplated expropriation in a fair, open and meaningful process” (Memorial, §586(b)).

³⁰¹ See also Memorial, §§549 and 550.

I9.4.1 The law

700. CMEC relies on **ADC v Hungary [CL-0075]**³⁰² and **Kardassopoulos v Georgia [CL-0079]**.³⁰³ to assert that “advance notice” is required to be given “prior to expropriation”.

701. This is incorrect.

702. In **ADC v Hungary [CL-0075]** the tribunal emphasised that the focus is on “due process of law”. There must, in other words, exist an accessible *legal* process for challenging state expropriations either before or after the expropriation. This is plain from the decision itself (§435):

“The Tribunal agrees with the Claimants that ‘*due process of law*’, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that “*the actions are taken under due process of law*” rings hollow. And that is exactly what the Tribunal finds in the present case.” (original italics, underlining added.)

³⁰² **ADC Affiliate Limited & Anor v The Republic of Hungary** ICSID Case No. ARB/03/16, Award, 2 October 2006 [CL-0075] (cited in footnote 1028 of the Memorial).

³⁰³ **Ioannis Kardassopoulos v The Republic of Georgia** ICSID Case No. ARB/05/18, Award, 3 March 2010 [CL-0079] (cited in footnote 1028 of the Memorial).

703. In **Kardassopoulos v Georgia** [CL-0079], the tribunal, applying **ADC v Hungary**, also expressly recognised the possibility of the exercise of due process after the expropriation measures had been taken. What matters is the opportunity, before a court or tribunal, to challenge the alleged acts of expropriation. As the tribunal explained, in §396, the State has “to ensure that there was a procedure or mechanism in place, either before the taking or thereafter, which allowed Mr. Kardassopoulos, within a reasonable period of time, to have his claims heard”. The claimant in that case was not (according to the tribunal’s findings) given “a reasonable chance within a reasonable time to have his claims heard following the expropriation of his investment” (§404).
704. Accordingly, contrary to CMEC’s assertion, the true position is that a party facing expropriation of its property must have available to it procedural mechanisms “either before the taking or thereafter” which allow it “within a reasonable period of time, to have its claims heard”. Using the said language of the tribunal in **Kardassopoulos v Georgia**, that is “a reasonable chance within a reasonable time to have his claims heard following the expropriation of his investment”. This is also consistent with “a reasonable chance within a reasonable time [for the investor] to claim its legitimate rights and have its claims heard”, per the tribunal in **ADC v Hungary**.
705. In **Generation Ukraine v Ukraine**,³⁰⁴ the tribunal emphasised that the investor’s abandonment of his investment without “any effort at overturning the administrative fault” may lead to rejection of a claim of indirect expropriation:
- “In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* – not necessarily exhaustive –

³⁰⁴ **Generation Ukraine, Inc. v Ukraine** ICSID Case No. ARB/00/9, Award, 16 September 2003 [CL-0098].

effort by the investor to obtain correction.”³⁰⁵ (Original italics, underlining added.)

706. As regards due process, the real question to be addressed is whether, taken as a whole and given the particular facts, the available procedural mechanisms in the host State provided adequate redress.³⁰⁶
707. **Unglaube v Costa Rica**³⁰⁷ concerned development lands and properties owned by the claimants around the picturesque, environmentally important and biodiverse area of Playa Grande, Cabo Vela, Costa Rica. Moved by environmental and related concerns (specifically nesting areas for the highly endangered leatherback turtle), the State designated parts of the surrounding area a national park. Amongst other things, there was a dispute as to whether, on a true construction of the legislation, part of one of the claimant’s lands fell within the park, specifically a 75 “meter” strip of land intended for development (the “75-meter strip”). The State treated the 75-meter strip as falling within the park.
708. The tribunal ruled that, by way of a series of measures taken from 1991 onwards, the State had effectively expropriated the 75-meter strip. The practical and economic use of the land had been lost by increasing restrictions placed on it by the authorities, including debarring development.³⁰⁸ However, the claimants had not stood by idly. Several challenges were launched in the host State courts seeking to challenge the State’s actions, both with respect to the 75-meter strip and other parts of their lands. The claimants complained, generally, that the State had failed to provide an adequate remedy in respect of the State’s actions relying on delay in the host State courts and a failure to implement decisions effectively.
709. Citing the decision in **ADC v Hungary**, the tribunal reminded itself that a claimant must demonstrate that the laws of the host State “taken as a whole, did

³⁰⁵ Ibid, §20.30.

³⁰⁶ See also Section J, 6.2, below (Due process in the context of FET).

³⁰⁷ **Marion Unglaube v Republic of Costa Rica** ICSID Case No. ARB/09/20, Award, 16 May 2012 [RL-0095].

³⁰⁸ Ibid, §§202-223.

not afford them an adequate opportunity, within a reasonable time, to vindicate their legitimate rights”³⁰⁹. While there had been some rulings which were adverse to the claimants in the host State courts, they had also enjoyed “several important victories along the way”³¹⁰. The tribunal rejected the complaint of a denial of justice in the host State³¹¹.

“Mrs. Unglaube succeeded, inter alia, in her legal actions to thwart both the 2003 and 2004 efforts to expropriate the 75-Meter Strip. She has not been successful in persuading Costa Rican courts or agency officials regarding the alleged unlawfulness of suspending development activity between 2005 and late 2009. But these facts do not establish that, in these specific instances, (1) she, in fact, had a legitimate legal claim or (2) that the failure of the judicial system to find in her favor, amounts to “a decision so egregiously wrong that no honest or competent court could possibly have given it.

[...]

The Tribunal finds therefore that Claimants have not corroborated their claims of a violation of the fair and equitable treatment standard – either on grounds of (1) lack of an effective remedy or (2) denial of justice.”

710. Thus, to show that there was unlawful expropriation in violation of due process, a claimant must establish both the existence of “legitimate rights” (principally, in the expropriation context, establishing investment property that has been taken), *and* that the procedural mechanisms available in the host State were inadequate or (if they were sought to be utilised) proved futile.³¹²

³⁰⁹ Ibid, §272.

³¹⁰ Ibid, §274.

³¹¹ Ibid, §§277-279.

³¹² There was no suggestion, in **Unglaube v Costa Rica** that State liability turned simply on the question of whether the claimants had been given advance notice prior to any acts of expropriation.

I9.4.2 The facts

711. It is to be noted that from the time of the alleged expropriation in January 2012 until a decade afterwards when T&T received CC’s Notification of a Claim in August 2022, CMEC never suggested, let alone protested, that T&T had carried out an expropriation of its investment. Instead, during the same period, CMEC went on to assert its contractual rights under the 2008 Contract, to claim payment from Alutrint in consequence of contractual termination and to activate the contractual dispute resolution process for this purpose.
712. Acting as CMEC did in consistently pursuing contractual remedies against Alutrint, including discussions with T&T as Alutrint’s majority shareholder, T&T was led to believe (and did believe) that CMEC was solely ventilating its contractual rights under the 2008 Contract and that the only threatened claim was a contractual claim against Alutrint, as opposed to any Treaty claim against T&T.
713. Thus, in these circumstances where nobody (including CMEC) contemplated that the “Expropriation Orders” amounted to any expropriation of CMEC’s property or “contractual rights”, it is unrealistic for CMEC now to suggest that any “reasonable advance notice” of the expropriation could or should have been given (Memorial, §586(a)) or that CMEC could or should have been afforded “an opportunity to consult or to submit its views or objections as to a contemplated expropriation in a fair, open and meaningful process” (Memorial, §586(b)). This is perhaps the strongest possible fact pattern where “the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction.”: see **Generation Ukraine v Ukraine**, above.
714. In these premises, it is impossible for CMEC to maintain that it was deprived of notice of the (alleged) expropriation so as to disable CMEC from challenging it.

715. Had CMEC believed that T&T had expropriated its property, it had every opportunity to challenge that deprivation in the host State through various legal procedures and avenues for redress which exist under Trinidad law.
716. CMEC's rights to property are protected under the laws and procedures of Trinidad and Tobago, as they are in most other sophisticated common law jurisdictions. Section 4 of the Constitution of Trinidad and Tobago provides express protection of the right to "enjoyment of property and the right not to be deprived thereof except by due process of law" together with the right to "the protection of the law". Had T&T taken CMEC's property (which, of course, is denied), CMEC could have brought, for example, a claim for judicial review against such a taking by public authorities. The 2009 High Court Judgment itself is testament to the existence and availability of this legal procedure and remedy under Trinidad law.
717. Furthermore, as CMEC's Memorial now relies on its "contractual rights" being the subject of expropriation, CMEC had access to the contractual dispute resolution process under the EPC Contracts (as noted in Section I3.2 above) or to private avenues for redress provided by Trinidad's common law system.
718. That CMEC failed to avail itself of any of these mechanisms is not indicative of any lacuna in the availability of due legal process in the host State but, rather, of the lack of any genuine belief on the part of the CMEC that the State deprived it of its property.
719. The reality is that adequate means were available by which CMEC could have challenged the alleged acts of expropriation (had it truly believed its rights to have been infringed). Because CMEC chose not to avail itself of these means (or did so but chose to abandon them), it is now not possible for it credibly to submit that T&T deprived it of property in breach of the due process requirement.

I9.5 FET and Non-Impairment

720. Additionally, also by virtue of the MFN clause, CMEC avers that the alleged expropriation did not accord with the FET and Non-Impairment standards (Memorial, §§587, 614). These matters are addressed by T&T below in Section J and Section K³¹³.

J. Fair and Equitable Treatment (“FET”)

J1. The FET standard

721. Article 3(2) of the Treaty reads as follows,

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

722. There is a general consensus that “[t]he rule of law is properly to be understood as the principle underlying and animating the concept of fair and equitable treatment”.³¹⁴ Thus, only State conduct which offends reasonableness or non-arbitrariness, legal certainty, predictability, consistency, non-discrimination, transparency, and due process is a violation of this standard.³¹⁵

723. The decision by the **Glencore v Colombia**³¹⁶ Tribunal is instructive:

“1308. Absent any further guidance from the Treaty itself, it is generally accepted that the obligation to afford [FET] contained in a treaty is a requirement that host States abide by a certain standard of conduct vis-à-vis protected investors. The fair and equitable standard is a legal concept

³¹³ Note that (1) in §614, CMEC referred only to Section J, 2, the Section on FET, not Section J, 3, the Section on Non-Impairment; (2) CMEC has to show that the expropriation failed to accord the FET and Non-Impairment standards. Thus, its allegations in Section J, 2 (and Section J, 3) are wider in scope.

³¹⁴ McLachlan et al, *International Investment Arbitration: Substantive Principles* 2nd Ed (OUP 2017) 7. Treatment of Investors [CL-0067] §7.16.

³¹⁵ Zivković, *Fair and Equitable Treatment and the Rule of Law* (Elgar International Investment Laws, 2023), Chapter 1, p.2. [RL-0114]

³¹⁶ **Glencore v Colombia** ICSID Case No. ARB/16/6 Award, 27 August 2019 [RL-0049] §§1308-1311.

which, though typically not further defined, has a content that can be established by the rules of the interpretation of the VCLT [Vienna Convention on the Law of Treaties of 1969], aided by the jurisprudence of international tribunals. A host State breaches such minimum standard and incurs international responsibility if its actions (or in certain circumstances omissions) violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor.

1309. The obligation to provide FET binds the State, and accordingly can be breached by the conduct of any branch of government...

- By the executive or administrative branch or its separate agencies, by means of administrative acts that directly target the investor or the investment
- By the State's judicial system, as a whole, when it commits a denial of justice; or
- By legislation or regulation of general application which modifies the applicable legal framework to the detriment of the investor or the investment

1310. The threshold of propriety required by FET must be determined by the tribunal in light of all the relevant circumstances of the case. To this end, the tribunal must carefully analyse and take into consideration all the relevant facts, among them the following factors:

- whether the host State has engaged in harassment, coercion, abuse of power, or other bad-faith conduct against the investor;
- whether the host State made specific representations to the investor before the investment was made and then acted contrary to such representations;
- whether the State has respected the principles of due process, consistency, and transparency when adopting the measures at issue;

- whether the State has failed to offer a stable and predictable legal framework, in breach of the investor's legitimate expectations.

1311. In evaluating the State's conduct, the Tribunal must balance the investor's right to be protected from improper state conduct against other legally relevant interests and countervailing factors. First among these factors is the principle that legislation and regulation are dynamic, and that (absent a treaty obligation to the contrary) States enjoy a sovereign right to amend their laws and regulations and to adopt new ones in furtherance of public interest, the conception of which can change over time. Other countervailing factors affect the investor: it is the investor's duty to perform an appropriate pre-investment due diligence review and to observe a proper conduct both before and during the investment.”
(underlining added)

724. The above reflects what has been said by other tribunals. In **Waste Management v Mexico [RL-0013]**, §98, the tribunal said that the FET standard is infringed by “conduct attributable to the State and harmful to the [investor] if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic...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”. The tribunal went on to say: “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”.
725. In light of the above, the threshold for a breach of the FET standard is high, requiring arbitrary, unfair or unjust conduct, giving allowances for the need to balance the State's sovereign right to legislate, regulate and take other similar measures in the public interest.

726. Hence, the features of FET referred to in §631 of the Memorial are not *per se* controversial, while recognising that how they are to be applied will depend upon the particular context or circumstances of the claim.³¹⁷

J2. CMEC asserts an unduly expansive view of the application of the FET standard

727. CMEC asserts an unduly expansive view of the application of the FET standard, in the following respects:

- (1) By relying, inappositely, on **MTD v Chile [CL-0113]**, §113, one part of the Preamble to the Treaty and Article 3(1) and (2) of the Treaty, CMEC asserts that T&T is obligated not only to refrain from treatment that is not fair or equitable, but also actively to promote CMEC’s investments, apparently unconditionally, through “stable, reliable and supportive behaviour on the part of the State” (Memorial, §§618-622).
- (2) By heavily relying on the dictum in **Tecmed v Mexico [CL-0088]**, §154, CMEC asserts that the application of the FET standard required T&T to provide treatment “that does not affect the basic expectations of [CMEC]” (Memorial, §629).

728. Neither proposition (1) nor proposition (2) is correct.

729. As to **proposition (1) above**, the first point to note is that the tribunal in **MTD v Chile** when making the statement in §113 on which CMEC now relies (in §§620 and 622 of the Memorial) was (necessarily) referring to the specific wording of the Malaysia-Chile BIT which it was considering.³¹⁸ The language of the

³¹⁷ McLachlan et al [RL-0100] §7.16.

³¹⁸ The tribunal records, in §113, that the preamble of the Malaysia-Chile BIT stated the parties desire “to create favourable conditions for investments” and recognition of “the need to protect investments...and to stimulate the flow of investments and individual business initiative with a view to...economic prosperity”.

preamble to the Malaysia-Chile BIT was significantly different from the language of the Preamble to the Treaty.

730. CMEC, in §621 of the Memorial, goes on to say: “A key object and purpose of the BIT is informed by its Preamble, which highlights the creation of favourable conditions for investment in Trinidad and Tobago by Chinese investors.” CMEC thereby refers to one feature only (the third) of the 5 features of the Preamble (all of which are set out below); nor does the Preamble “highlight” the one feature to which CMEC refers.
731. Then, in §622 of the Memorial, CMEC says: “Article 3(2) is part of a wider provision that requires (in Article 3(1)) the State “to encourage and create favourable conditions for investors of the other Contracting Party to invest”.” CMEC thereby inappropriately conflates Article 3(1) with Article 3(2), as to which, see below.
732. The points CMEC makes in §§618 to 622 of the Memorial are consequently skewed to favour of a much more pro-investor view of CMEC’s position than a proper reading of the Treaty allows.
733. The Preamble to the Treaty needs to be considered in its entirety:
- “The Government of the People's Republic of China and the Government of the Republic of Trinidad and Tobago, hereinafter referred to as the Contracting Parties;
- Desiring** to intensify economic cooperation between both States on the basis of equality and mutual benefits;
- Recognizing** that the reciprocal encouragement, promotion and protection of investments will be conducive to stimulating business initiatives of investors and the economic development of both States;
- Intending** to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party;

Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application;
Respecting the sovereignty and laws of the Contracting Party within whose jurisdiction the investment falls"; (underlining added)

734. Thus, in the Treaty, the objectives (including the objective CMEC relies on) are subject to the important caveats (underlined above), which are notably absent from the Malaysia-Chile BIT. The Treaty expressly states that the objectives are to be achieved without relaxing the State's ability to take health, safety and environmental measures and that the investor would have to respect the sovereign and laws of T&T.
735. In **ADF Group Inc v United States**, the tribunal acknowledged that the application of FET is a fact-sensitive enquiry, and in a given case "must take into account relevant State practice and judicial or arbitral case law as well as the text of the BIT and other sources of customary or general international law."³¹⁹
736. In **Saluka v Czech Republic**, the tribunal stressed a "balanced approach" (paying due regard to the preamble of the BIT) in interpreting the substantive provisions for the protection of investments "since an interpretation which exaggerates the protection...may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations".³²⁰
737. The caveats in the Treaty are in line with the above well-established approach to the application of the FET standard under international law and the **Glencore v Colombia** tribunal's observation that "legislation and regulation are dynamic"

³¹⁹ **ADF Group Inc v United States** ICSID Case No. ARB (AF)/00/1 Award, 9 January 2003 [RL-0050], §184, cited in **Total SA v Republic of Argentina** ICSID Case No. ARB/04/1 Award, 27 December 2010 [CL-0129], §§107, 109.

³²⁰ **Saluka v Czech Republic** UNCITRAL Partial Award, 17 March 2006 [RL-0017], §300, which prefaces the above with the following "the protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations".

(§1311). The caveats are entirely at odds with the overly expansive propositions CMEC has advanced.

738. Further, contrary to §622 of the Memorial, the FET standard contained in Article 3(2) of the Treaty is not “part of a wider provision that requires (in Article 3(1)) the State to “encourage and create favourable conditions for investors...to invest””.
739. Article 3 of the Treaty comprises 4 distinct obligations, each of which addresses different aspects of the promotion and protection of investments.
740. Thus Article 3(1), being a distinct obligation, does not inform the FET standard in Article 3(2).
741. Article 3(1) reads: “Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest in its territory and shall admit such investments in accordance with its laws and regulations” (underlining added)
742. Article 3(1) primarily addresses the creation of favourable conditions before the investment is made. CMEC has never alleged that Article 3(1) has been violated. Thus Article 3(1) cannot logically support the proposition, in §622 of the Memorial, that the FET standard “covers much more than a prohibition on treatment that is *not* fair or equitable” (original italics).
743. Yet further, as to the passage in **MTD v Chile** at §113 which CMEC relies on in §§620 and 622 of the Memorial, the Annulment Committee in the same case, in its Decision in Annulment,³²¹ commented as follows,

“... a standard formulated in the terms of paragraph 113 is defensible. No doubt the extent to which a State is obliged under the fair and equitable

³²¹ **MTD v Chile** ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 [RL-0051].

treatment standard to be pro-active is open to debate, but that is more a question of application of the standard than it is of formulation. In any event the emphasis in the Tribunal’s formulation is on “treatment in an even-handed and just manner.” In particular, the Tribunal does not express the obligation in such a way so as to eliminate the distinction between acts or omissions or to avoid all elements of risk for the investor.” (underlining added).³²² (underlining added)

744. The Annulment Committee thus shifted the focus back to “treatment in an even-handed and just manner.” i.e. the classic statement of the FET standard. And this in the context of wording of the preamble to the Malaysia-Chile treaty which was different in any event.

745. And the Annulment Committee’s view is in line with the frequently-repeated proposition that “[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework.”³²³

746. As to **proposition (2) above**, tribunals and authoritative texts have consistently warned that the dictum in **Tecmed v Mexico** requires cautious treatment:

“The Tecmed ‘standard’ is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain.”³²⁴

747. The **MTD v Chile** Annulment Committee also considered the limitations of the Tecmed dictum in affording an authoritative test for when legitimate expectations may arise and require protection under the FET standard. While

³²² Ibid, §71.

³²³ **EDF (Services) Limited v Romania** Award, 8 October 2009 [RL-0052], §217

³²⁴ Z. Douglas, ‘Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex’ (2006) 27 Arbitration International 27, 28. Cited with approval in **White Industries v India**, UNCITRAL, Final Award, 30 November 2011 [RL-0036] §§10.3.5 to 10.3.6. Also cited in McLachlan et al [RL-0100] at §7.18.

the Committee did not annul the tribunal's decision which had adopted the **Tecmed v Mexico** dictum as the applicable FET standard (on the ground that the tribunal had not manifestly exceeded its powers), it nonetheless accepted Chile's criticism of the dictum, holding that:

“[T]he Tecmed Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.”³²⁵ (underlining added.)

748. CMEC's reliance on **Tecmed v Mexico** therefore erroneously imports a subjective approach to the State's FET obligation, i.e., to uphold all of CMEC's (alleged) expectations.

749. Thus, the content of T&T's FET obligation cannot be interpreted in a manner that (1) requires pro-active support for CMEC's investment, nor (2) requires the State to uphold all of the Claimant's subjective expectations.

J3. The legitimate expectations upon which CMEC relies

750. The Memorial splits into two categories the assurances and representatives relied upon as supporting CMEC's two alleged legitimate expectations: see §§638 to 646 of the Memorial.

³²⁵ **MTD v Chile** ICSID Case No. ARB/01/7 Decision on Annulment, 21 March 2007 [RL-0051], para 67.

751. First, CMEC relies on pre-termination assurances and representations, enumerated as (a) to (e) in §638, as the basis for CMEC’s expectation of T&T’s “high confidence in and long-term backing of the Project (including, naturally, its completion)” (§639).
752. Secondly, CMEC relies on post-termination assurances and representations, enumerated as (a) to (h) in §642, as the basis for CMEC’s “legitimate expectations that the outstanding amounts due to CMEC under the EPC Contracts would be settled.” (§643).
753. Before addressing the detail of the law on legitimate expectations and the inadequacies, for multiple reasons, of CMEC’s case in the context of the law, it is worth pausing to make one or two initial observations about the obvious hopelessness of the two legitimate expectations on which CMEC relies.
754. While CMEC’s own case recognises that for an expectation to be legitimate, it needs to be generated by “clear and explicit (or implicit) representations” (§637(a)), it is immediately apparent that even the alleged expectations themselves are extremely vague.
755. As to the expectation alleged in §639, apart from the fact that the expectation is quite complicated (being CMEC’s expectation that another entity, T&T, was highly confident that the Project will be completed), it is notable that the expectation is only to the effect that T&T had “high confidence” in the Project “including, naturally, its completion”. Thus, even putting CMEC’s case at its highest, it accepts, as it has to for the reasons stated below, that the Project might not be carried out to completion and there were no (let alone clear and specific) assurances emanating from T&T that the Project would be carried out to completion. CMEC’s claim of a legitimate expectation arising out of alleged pre-termination assurances and representations therefore fails *in limine*.

756. As to the expectation alleged in §643, “that the outstanding amounts due to CMEC under the EPC Contracts would be settled”, CMEC’s first intimation that it was making a claim that T&T had failed to pay the said amounts was in CMEC’s Notice of a Claim and Request for Consultations and Negotiations dated 26 August 2022 [C-0491]. Prior thereto, CMEC’s claim had only been against Alutrint. See Section I, 5.3(2)(ii), above. Hence, it is impossible for CMEC now to contend that it legitimately expected that outstanding amounts would be settled by T&T when it had never sought settlement from T&T in the first place.
757. For the same reason, the statement in §1 of the Memorial that “the State has repeatedly made false assurances that it will compensate the Claimant” and the reference to “[t]he State’s decade-long avoidance of its obligations” (underlining added) are wholly groundless.
758. Hence CMEC’s claim of a legitimate expectation that T&T would settle amounts owed to CMEC under the EPC Contracts also fails *in limine*.
759. In any event, CMEC’s claim cannot succeed in view of the principles of law relating to legitimate expectations (set out immediately below), as it applies to the two legitimate expectations for which CMEC contends (set out later below).

J4. Legal principles applicable to the legitimate expectations for which CMEC contends

J4.1 Legitimate expectation must exist at the time when the investment is made

760. The investor may rely only on his legitimate expectations at the time he made the investment.
761. In **Bayindir v Pakistan** [CL-0064] it was said at §190: “The Tribunal must first determine the relevant time for the formation of the investor’s expectations.

Several awards³²⁶ have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest.”.

762. This makes sense. The investor obviously cannot rely on expectations which arose only after he made his investment.
763. Arbitral jurisprudence typically adopts the date of entry into the relevant investment contract underlying the investment in question (or the date of the decision to invest) as the time for assessing the investor’s legitimate expectations.³²⁷
764. Here, the relevant date is primarily the date of entry into the 2008 Contract (30 October 2008), and also the date of entry into the 2005 Contract (20 December 2005), insofar as CMEC relies on the 2005 Contract.

J4.2 Assurances and representations must be **clear and specific**

765. “The making of specific representations has been the decisive factor in the cases in which this ground of decision [legitimate expectation] has been successfully invoked...Conversely the absence of specific representations is a material factor in leading to a finding that the standard has not been breached.”³²⁸
766. The tribunal in **White Industries v India**³²⁹ endorsed the view that “State conduct needs to be specific and unambiguous”.

³²⁶ To like effect are the views of the tribunals in, for example, **Duke Energy v Ecuador** ICSID Case No ARB/97/3, Award, 20 August 2007 [CL-0143] §340; **Tecmed v Mexico** [CL-0088] §154; **Biwater Gauff v Tanzania** [CL-0046] §602; **National Grid v Argentina**, UNCITRAL Award, 3 November 2008 [RL-0018]; **Novenergia II v Spain** SCC Arbitration No 2015/063, Final Award, 15 February 2018 [RL-0053] §§538-539.

³²⁷ In **Bayindir v Pakistan** [CL-0064] the investor complained that the State failed to provide a stable framework culminating in its expulsion from the project. The investor alleged that each time there was a change of government the State’s attitude towards the investment changed, commencing with an initial contract in 1993 and its cancellation in 1996, followed by a contract renewal in 1997 and finally the expulsion in 2001. It was the date of 1997 which was adopted, as this (second) contract was “viewed as a new start” (§191).

³²⁸ McLachlan et al [RL-0100] §§7.185, 7.187

³²⁹ **White Industries v India** UNCITRAL, Final Award, 30 November 2011 [RL-0036] §10.3.7

767. In **Antaris Solar GmbH v The Czech Republic [CL-0128]**, §360(3), the tribunal said that a claimant must establish that “clear and explicit (or implicit) representations were made by or attributable to the State”.

J4.3 Assurances and representations must amount to the State’s “**promise**” or “**commitment**”

768. In order to generate a legitimate expectation, the assurances and representations must amount to the State’s “promise” or “commitment”.

769. In **Saint-Gobain Performance Plastics Europe v Venezuela**,³³⁰ the tribunal noted that “a legitimate expectation can be created only by specific promises or commitments made by the State” (§531).

770. In that case the investor argued that Venezuela had undertaken to supply it with bauxite at stable prices. The tribunal held that although the evidence showed that the State was “very involved in the negotiations...and repeatedly voiced its support for the project” (§532), the investor “had not established that there were any promises or commitments made by [the State] in relation to the supply of bauxite at the price agreed...”; hence, the State’s conduct did not give rise to the legitimate expectation contended for (§595).

771. In **EDF (Services) Limited v Romania**,³³¹ the tribunal said, at §217: “Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against a risk of any changes in the host State’s legal and economic framework. Such expectations would neither be legitimate nor reasonable”.

772. In **White Industries v India**, having said this the State’s conduct needs to be specific and unambiguous (see above), the tribunal went on to say, at §10.3.7,

³³⁰ ICSID Case No ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016 [**RL-0054**]

³³¹ ICSID Case No ARB/05/13, Award, 8 October 2009 [**RL-0052**]

that “encouraging remarks from government officials do not of themselves give rise to legitimate expectation. There must be an unambiguous affirmation or definitive, unambiguous and repeated assurances”.

J4.4 Investor must have **relied on** the matters giving rise to the expectation ie those matters must have **induced the investor** to invest

773. The investor must have relied on the matters giving rise to the expectation, which matters must have therefore induced the investor to invest.

774. In **Duke Energy v Ecuador [CL-0143]** the tribunal, having said of legitimate expectations that it was “mindful of their limitations” (§340), went on to set out those limitations, including the reliance point:

“To be protected, the investor’s expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.” (underlining added)

775. The requirement that the investor must have relied on the assurances and representations, with the consequence that the investor was thereby induced to invest, has been referred to by many other tribunals.³³²

³³² See **Biwater Gauff v Tanzania [CL-0046]** §602; **Micula v Romania [CL-0122]** §668; **Antaris Solar GmbH v The Czech Republic [CL-0128]** §360(3); **Suez v Argentina Republic [RL-0001]** §203; **Parkerings v Lithuania** ICSID Case No ARB/05/08, Award, 11 September 2007 **[RL-0055]** §331; **Tecmed v Mexico [CL-0088]** §154.

J4.5 Investor's reliance on the matters giving rise to the expectation **must be reasonable**

776. In **Micula v Romania [CL-0122]**, the tribunal's trilogy of requirements for legitimate expectations at §668, which "is consistent with the elements considered by other international tribunals", was that the investor had to establish (a) that the State made a promise or assurance, (b) the investor relied on that promise or assurance as a matter of fact and (c) such reliance and expectation was reasonable.
777. The same, important, requirement that investor's reliance on the expectation must have been reasonable is referred to by many other tribunals.³³³
778. In **Suez v Argentina Republic [RL-0001]**, dilating on the importance of the reasonableness requirement, the tribunal said the following in §228. In keeping with the Treaty's "basic goal of fostering economic cooperation and prosperity, one must not look single-mindedly at the Claimant's subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view". The tribunal then asked what it called "the fundamental question":
- "What would have been the legitimate and reasonable expectations of a reasonable investor in the position of the Claimants at the time they made their investment [...] in view of the legal framework and bearing in mind that country's history and its political, economic and social circumstances?"
779. In sum, the test for examining whether an expectation is legitimate and reasonable (and therefore subject to protection under the Treaty via the FET standard) is based on what any reasonable and prudent investor would have expected in view of the objective circumstances created by the host State, such

³³³ See, for example, **Duke Energy v Ecuador [CL-0143]** §340 and **Biwater Gauff v Tanzania [CL-0046]** §602

as its legal framework and any specific commitments made to the investor within this legal framework.

J4.6 In assessing whether it was legitimate for the investor to have had the expectations contended for **all the circumstances** must be taken into account

780. That all the circumstances must be taken into account in determining whether CMEC legitimately had the expectations it now contends for is central to this case.
781. As stated above, in **Duke Energy v Ecuador [CL-0143]**, §340, the tribunal said that what must be taken into account included “not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State”.
782. In **Generation Ukraine Inc v Ukraine [CL-0098]** the tribunal said, at §20.37, that “[i]t is relevant to consider the vicissitudes of the economy that is host to the investment in determining the investor’s legitimate expectations”.
783. An investor may not be able to rely upon an alleged legitimate expectation in circumstances in which there is volatility of the political conditions in the host State.
784. In **Bayindir v Pakistan [CL-0064]** the tribunal said that investor “acknowledges that it was well aware of the potentially adverse impact of a change in government...the new government adopted a position opposed to the Project and decided to terminate it...” (§194). The tribunal considered that “Bayindir could not ignore the fact that the future of the Project was linked to the shifts then affecting Pakistan’s politics...Bayindir entered into the Contract in full knowledge of these circumstances. It appears difficult to now accept that Bayindir had wider expectations of stability and predictability so as to justify protection under the FET standard.” (§194). So the tribunal decided that the

investor had “elected to pursue its activities in Pakistan despite a degree of political volatility of which it was fully aware” (§195).

785. Furthermore, a number of tribunals have emphasised that it is incumbent upon the investors to perform proper due diligence to inform themselves of the legal and general economic conditions in the host State before investing.

786. In **MTD v Chile [CL-0113]**, in §164 of the Award, the tribunal said that “it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment”.

787. Similarly in **Glencore v Colombia [RL-0049]** the tribunal said at §1311 that “it is the investor’s duty to perform an appropriate pre-investment due diligence review and to observe a proper conduct both before and during the investment”.

788. In the context of an investor investing in a highly regulated sector, the tribunal in **Invesmart v Czech Republic**³³⁴ said, at §254:

“the due diligence performed when the investor made its investment plays an important role in evaluating its expectation. A putative investor, especially one making an investment in a highly regulated sector... has the burden of performing its own due diligence in vetting the investment within the context of the operative legal regime.”

789. Reflecting the fact that “legislation and regulation are dynamic”³³⁵, in **Antaris Solar GmbH v The Czech Republic [CL-0128]** the tribunal said this at §360 in relation to the investor’s duty to inquire:

“provisions of general legislation [...] do not create legitimate expectations that there will be no change in the law; and given the State’s regulatory powers, in order to rely on legitimate expectations the investor

³³⁴ UNCITRAL Award, 26 June 2006 [**RL-0056**] §254

³³⁵ See **Glencore v Colombia [RL-0049]**, above, §1311

should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.”

J4.7 Different types of host State acts and statements

790. Different types of acts and statements vary in their propensity to create legitimate expectations.
791. “Investment tribunals differentiate between various types of host state commitments in order to assess the reasonableness and legitimacy of investor expectations. It is clear that a firm contractual commitment will rank high, whereas various general assurances will give rise to lower or no legitimate expectations³³⁶....Other forms of host state acts, falling short of contracts, quasi-contractual ones or promises, are less likely to give rise to protected legitimate expectation.”³³⁷

J4.8 Political statements

792. Political statements are said to be normally incapable of giving rise to legitimate expectations. This makes sense. Such statements will invariably not satisfy the requirement that they be clear and explicit promises or commitments, nor that it be reasonable for the investor to rely upon them, particularly when they are made on the hustings and in an adversarial political context.
793. Hence, “mere ‘political statements’ by host state officials are often dismissed as insufficient to create ‘legitimate’ expectations”.³³⁸

³³⁶ “Encouraging remarks from government officials do not of themselves give rise to legitimate expectation. There must be an ‘unambiguous affirmation’ or a ‘definition, unambiguous and repeated assurances’”: **White Industries v India** [RL-0036] §10.3.7

³³⁷ Reinisch [RL-0099] §§1262, 1263, 1292

³³⁸ Reinisch [RL-0099] §1292

794. Similarly, in **El Paso v Argentina [CL-0123]**, the tribunal, at §378, referred to: “Political statements which can – “regrettably but notoriously” says the tribunal³³⁹ – create no legitimate expectations”.

795. In that case, although the tribunal acknowledged that Argentina “aggressively targeted” foreign investors and conducted several road shows in the United States, Europe and Southeast Asia to promote privatisation, it found, at §392, that such “political and commercial incitements cannot be equated with commitments capable of creating reasonable expectations protected by the international mechanism of the BIT”.

J4.9 Investor’s expectations largely shaped by the contractual relationship between the investor and the State

796. Where there is a contract governing the investment, the investor’s expectations will be “largely shaped by the contractual relationship between the [investor] and [the State]”. There is “no basis for the [investor] to expect that [the State] would not avail itself of its contractual rights”.³⁴⁰

797. However, conversely, a breach of contract by the State does not necessarily mean that the investor’s expectation has been thwarted such as to found a claim under international law. “There is an established line of cases holding that a simple breach of contract does not automatically imply a disappointment of legitimate expectations amounting to a breach of FET.”³⁴¹

798. In this context the tribunal in **Parkerings v Lithuania [RL-0055]** said, at §344:

³³⁹ The tribunal was referring to the statement of the tribunal in **Continental Casualty Co v Argentine Republic** ICSID Case No ARB/03/9, Award, 5 September 2008 [RL-0029] §261.

³⁴⁰ **Bayindir v Pakistan [CL-0064]**, §197. In that case the tribunal also said in §197:

“Although the Tribunal has no jurisdiction to assess whether there has been a breach of the Contract under the Contract’s proper law, the Tribunal must nevertheless take into account the terms of the Contract as a factual element reflecting the expectations of the Claimant.”

³⁴¹ Reinisch [RL-0099] §1272

“It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law. Indeed, the party whose contractual expectations are frustrated should, under specific conditions, seek redress before a national tribunal. (original italics, underlining added).

J4.10 No legitimate expectation that the State will pay the investor sums allegedly due under a contract where there is an unresolved dispute as to the amount payable

799. The investor can have no legitimate expectation that the State will pay it a sum allegedly due under a contract when there is an unresolved dispute as to the amount payable: see **SGS v Philippines [RL-0010]** §162 and **BIVAC v Paraguay [RL-0015]** §125.

800. So, insofar as the investor’s treaty claim is for payment of a sum which it alleges is due to it under a contract between the State and the investor and the State disputes the quantum of the claim on proper grounds, the State cannot be held to have breached its FET obligation by reason of its refusal to pay the disputed sum.

J5. Application of the above legal principles to the legitimate expectations for which CMEC contends

801. It is respectfully submitted that CMEC’s case in support of the two legitimate expectations for which it contends is hopeless.

802. It has already been submitted, in Section J, 3, above, that the claims for each of the alleged legitimate expectations fails *in limine*.

803. Below it will be contended that, in multiple respects, the legitimate expectations contended for fall foul of the legal principles referred to in Section J, 4, above.

J5.1 CMEC's alleged legitimate expectation of T&T's "high confidence in and long-term backing of the Project (including, naturally its completion)" (Memorial, §639)

804. Quite apart from the fact that this alleged legitimate expectation plainly fails the clear and specific requirement (see Section J, 4.2, above) and also the promise or commitment requirement (see Section J, 4.3, above), any reliance by CMEC would not have been reasonable (see Section J, 4.4 and 4.5, above).

J5.1.1 This expectation could not have arisen in "all the circumstances"

805. The overarching point is that in light of the requirement to take into account "all the circumstances" (see Section J, 4.6, above), it is impossible for CMEC to establish the alleged legitimate expectation as to the completion of the Project.

806. The relevant circumstances, each of which suggested that the Project might not proceed to completion, included:

- (1) the language of the Treaty which, in the Preamble, provided that the investment objective of the Treaty be achieved without relaxing T&T's health, safety and environmental measures;
- (2) the fact that obtaining the CEC was a necessary pre-condition to the implementation of both of the EPC Contracts;
- (3) the fact that, when the 2008 Contract was entered into, the public interest groups had been granted leave to apply for judicial review of the EMA's decision to grant the CEC and the application for judicial review was under way;
- (4) the fact that there has been no challenge to the independence of the T&T High Court in its dealings with the judicial review proceedings;

- (5) the fact that UNC’s anti-aluminium smelter stance, on the grounds of environmental issues, was well-known;
- (6) the fact that termination of the EPC Contracts at any time was provided by the contractual framework.

807. Neither singly nor cumulatively can the matters prayed in aid to support this alleged legitimate expectation, referred to in §§638 to 640 of the Memorial, trump the circumstances set out above which rendered it inherently uncertain that the Project would be completed.

808. It deserves emphasis that the termination of the Project was the consequence of the quashing of the CEC by the 2009 High Court Judgment. As stated above, CMEC cannot say that this was unexpected, even leaving aside the well-recognised “dynamic” nature of the law (**Glencore v Colombia**).

809. In any event, just the *potential* legal challenges by interest groups (which may not have stopped even after, *arguendo*, a successful appeal) would themselves create numerous repercussions and uncertainties, both in terms of finance and progress. All these matters would have added to the “vicissitudes” of the Project (**Generation Ukraine v. Ukraine**).

810. It bears repeating that the above uncertainties drove Sural to decide to exit the project as early as in 2007³⁴². It is also part of CMEC’s own case that the “significant delay in the issuance of CEC 1033/2005...had profound ripple effects on the overall schedule and budget of the Project” (§165, the Memorial). The fact that the costs of the Project had increased exponentially from 2005, to the knowledge of everyone involved, cannot be in dispute.

³⁴² C-0248: Note for Cabinet, Section E, in particular §195.

811. All the above would have been known to CMEC well before it entered into the EPC Contracts. CMEC's case on legitimate expectations concerning the continuation of the Project is unsustainable.

J5.1.2 The assurances and representation in §638(a) to (e) of the Memorial

812. Below, each of the assurances and representations set out under (a) to (e) of §638 of the Memorial is considered.

813. As to **§638(a)**, this is neither a clear nor explicit assurance, nor does it amount to a promise or commitment on the part of T&T, and any reliance by CMEC on the matters stated would not have been reasonable.

814. In any event, the allegation that there was bipartisan support for the aluminium industry in T&T is incorrect. See Section D, 2.2, above.

815. As to **§638(b)**, reliance on the MOU and the 2 EPC Contracts fails on multiple counts.

816. Paragraphs 638(b) reads:

“The memorandum of understanding dated 23 March 2005, together with the 2005 and 2008 EPC Contracts, gave a legitimate expectation to CMEC that it would be permitted to carry out works and to complete the construction of an aluminium smelter at La Brea. And, for example, if CMEC terminated the 2008 Contract, as it did, Alutrint would pay "the amount of any loss or profit or other loss or damage sustained by [CMEC] as a result of this termination". These representations were clear and specific to CMEC. It was therefore legitimate for CMEC to rely on this legal framework.” (underlining added)

817. There is no identification of any clear and specific assurances or representations on which CMEC can rely.

818. The only example given is incorrect. It is not the case that if CMEC terminated the 2008 Contract Alutrint would pay the amount of any loss of profit. Clause 16.4 of the Particular Conditions of the 2008 Contract specifically omits the reference to Alutrint paying CMEC loss of profit. This shows, indisputably, that CMEC could not have had any legitimate expectation of obtaining loss of profits on termination of the 2008 Contract.
819. In any event, reliance on the wording of a termination clause in a contract to show that the contract cannot be terminated is self-defeating.
820. And, further, Clause 15.5 of both of the EPC Contracts allowed Alutrint to terminate the Contracts “at any time for [its] convenience”. The existence of that provision alone flatly contradicts CMEC’s case that it had a legitimate expectation that it would be permitted to complete construction.
821. CMEC’s case is also at odds with Clause 8.8 of each of the EPC Contracts, which expressly provides that Alutrint may suspend part or all of the works at any time.
822. And all the above does not even address the problem that it was Alutrint, not T&T, which made the alleged assurances and representation contained in the EPC Contracts. Self-evidently, the terms of the EPC Contracts are not assurances and representations by T&T; hence CMEC cannot now rely upon the same as grounding legitimate expectations created by T&T.³⁴³
823. The matters raised in **§638(c)(d)** and **(e)** all post-date the making of both EPC Contracts. Hence they are disqualified for this reason alone from being the basis of CMEC’s legitimate expectations. Nevertheless, below, further consideration will be given to each of these matters.
824. As to in **§638(c)**, it is difficult to see how the MOF’s letter sent to Sinasure dated 15 September 2009 **[C-0206]**, and then allegedly forwarded by Sinasure to

³⁴³ It is also plain that Alutrint’s acts in this regard cannot be attributed to T&T: see Section H, above.

CMEC (as to which CMEC has adduced no evidence), can constitute a clear and specific promise or commitment to CMEC, upon which CMEC can reasonably rely.

825. In any event, the MOF statements in the letter that “we are committed in our resolve to complete the project which is one of the main pillars of the industrialization strategies of the Government of the Republic of Trinidad and Tobago” have all the hallmarks of “encouraging remarks from government officials [which] do not of themselves, give rise to legitimate expectations” (**White Industries v India [RL-0036]** §10.3.7).
826. As to **§638(d)**, quite apart from CMEC’s problem in attributing Alutrint’s statements to T&T (as to which see below), it is impossible to see how Alutrint’s “requests to CMEC to develop a workforce development plan, training proposal and other deliverables” after the smelter was constructed could create the legitimate expectation contended for.
827. These matters lacked the requisite clarity and specificity and were neither promises nor commitments. CMEC, at best, had a “hope” that it would be able to undertake such a post-construction role after the hypothetical completion of the Project. But:

“not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law...[parties] whose contractual expectations are frustrated should, under specific conditions, seek redress before a national tribunal.”³⁴⁴

³⁴⁴ **Parkerings v Lithuania [RL-0055]** §344

828. CMEC's attempt to construct a legitimate expectation out of such requests is therefore hopeless.
829. As to **§638(e)**, the MOF letter of 15 September 2009 stating that "We are confident that the matter [being the appeal against the June 2009 High Court Judgment] will be resolved in favour of the continuation of the aluminium smelter project":
- (1) was sent to Sinosure, not CMEC; and
 - (2) was not capable of creating any legitimate expectation, being mere "encouraging remarks".³⁴⁵
830. Further, as to the reference in §640 of the Memorial to the "complete reversal" of T&T's position in relation not the Project after the UNC's election victory in May 2010, see the material in Section J, 4.6, above, particularly to the effect that there can be no legitimate expectation that there will be no change in the law (**Antaris Solar GmbH v Czech Republic [CL-0128]** §1311) nor that a change of government will not adopt a position opposed to the project in question (**Bayindir v Pakistan [CL-0064]** §§194 to 195). See also **Glencore v Colombia [RL-0049]** above and its reference in §1311 to "the principle that legislation and regulation are dynamic, and that (absent a treaty obligation to the contrary) States enjoy sovereign rights to amend their laws and regulations and to adopt new ones in furtherance of public interest, the conception of which can change over time".
831. The short point is that while CMEC no doubt had a hope that the Project would continue to its completion, the legal and factual circumstances set out above, particularly in Sections J, 4.6 and 5.1.1, above, meant that CMEC could not have had a legitimate expectation to that effect so as to render T&T responsible in international law if the hope was not realised.

³⁴⁵ **White Industries v India [RL-0036]** §10.3.7

J5.2 CMEC's alleged legitimate expectation "that the outstanding amounts due to CMEC under the EPC Contracts would be settled" (Memorial, §643)

832. The point has already been made in Section J, 3, above that the alleged legitimate expectation that T&T would pay outstanding amounts due to CMEC under the EPC Contracts fails *in limine* since, throughout, CMEC had sought payment only from Alutrint and not from T&T.
833. Also, it is not at all clear why the concept of legitimate expectation is engaged at all in relation to payment of outstanding sums said to be due under the EPC Contracts, when those Contracts provided dispute resolution processes, escalating to ICC arbitration, which CMEC initially commenced but then decided to abandon.
834. But there are in any event multiple further reasons why this alleged legitimate expectation must fail.
835. The sums which CMEC was contending were due to it under the EPC Contracts were grossly exaggerated. Details of CMEC's gross exaggerations of its claims are set out in Section G hereof and also in Appendix II hereto. Consistently with the legal principle set out in Section J, 4.10, above, it is impossible for CMEC now to contend that it had a legitimate expectation that it would be paid sums which it itself had grossly exaggerated. Nor can CMEC now contend that it was unfairly and inequitably treated by not being paid the grossly exaggerated sums.
836. Furthermore, it is notable that none of the assurance and representations on which CMEC relies, set out in §642 of the Memorial, was made before CMEC's investment was made (see Section J, 4.1, above). So none of the assurances and representations relied on induced CMEC to make its investment. For this reason alone, this alleged legitimate expectation cannot succeed.

837. It is also notable that none of the assurances and representations on which CMEC relies, set out in §642 of the Memorial, constitutes a clear and specific promise or assurance that T&T would pay CMEC outstanding amounts due to CMEC under the EPC Contracts. Again, for this reason alone, this alleged legitimate expectation cannot succeed.
838. Below certain further comments will be made on the specific matters set out under (a) to (h) of §642 of the Memorial.
839. As to **§642(a)**, the “good faith payment” was to be made by Alutrint, not by T&T. The 3 November 2015 letter from J Li to Prime Minister Rowley [**C-0046**] said:
- [i]n view of the change of the economic situation of Trinidad and Tobago, the former Government of Trinidad and Tobago wished to get grace period for the indemnity from CMEC. To show the good faith, the former Government of Trinidad and Tobago would like to pay fifteen million USD from the account balance of Alutrint Limited to CMEC beforehand.”
(underlining added)
840. So this episode cannot be prayed in aid of any contention that T&T would settle the outstanding sums allegedly due to CMEC.
841. As to **§642(b)(c)(d)(f)(g)(h)**, the various references to “holding discussions”, “friendly negotiations” etc plainly do not amount to the necessary clear and specific promises or commitments that T&T will pay the amounts due to CMEC under the EPC Contracts. T&T had an interest in reviewing CMEC’s claims against Alutrint, since it was the majority shareholder in Alutrint. And indeed T&T did review CMEC’s claims, but settlement would not have been possible in light of the fact that CMEC persisted in advancing increasingly exaggerated claims which, because they were exaggerated, were not supported by evidence.
842. As to **§642(e)**, the alleged agreement that CMEC’s claim would be settled “through cash payment and new potential project co-operation” (see CMEC’s 5

June 2017 letter to Minister Young [**C-0440**]) exemplifies why the §642 matters do not amount to clear and specific promises or commitments. The proposal for settlement is completely lacking in specificity and also in any commitment on the part of T&T.

843. For the above reasons, CMEC’s alleged legitimate expectation that the outstanding amounts due to CMEC under the EPC Contracts would be settled is unsustainable.

844. It has been said that “legitimate expectations of the investors have generally been considered central in the definition of FET”³⁴⁶. That being so, the fact that CMEC’s case on legitimate expectation is unsustainable suggests that its case for breach of the FET standard on any other ground is likely to be problematic. In any event, hereunder consideration is given to CMEC’s FET case insofar as it relates to the FET features of consistency, due process, transparency and good faith.

J6. Consistency, due process, transparency and good faith

J6.1 Consistency

J6.1.1 The law

845. CMEC has inappropriately conflated the concept of consistency under international law with the concepts of stability, predictability and reduction of political risk.

846. The authority CMEC cites (in §647 of the Memorial), **Total v Argentina [CL-0129]** does not define the concept of consistency, but only says that “stability,

³⁴⁶ **El Paso v Argentina Republic [CL-0123]** §348.

predictability and consistency of legislation and regulation are important for investors.” (§647).

847. The consistency standard is not about a State acting consistently with its own conduct, as CMEC suggests (which would be contrary to the authorities referred to above, which recognise that the law and policies of a State are dynamic). Rather, what is required of a State is that it acts consistently in accordance with the State’s laws and administrative systems.
848. Authoritative texts note that whereas stability and predictability relate to the quality of the host State’s legal framework (as to which CMEC has made no complaint), consistency refers to the application of these legal rules by the administrative and judicial organs of the host State.³⁴⁷
849. In **PSEG v Turkey**³⁴⁸ the tribunal held that there was a failure to comply with the consistency standard where Turkey’s administrative organs (1) ignored the Constitutional Court’s decision to uphold the claimant’s rights under a contract and (2) undertook various “inconsistent administrative acts” contrary to the law of the host State.³⁴⁹
850. In **MTD v Chile [CL-0113]**, the tribunal found that Chile had breached its obligation to act consistently where it granted and approved a real estate development project against the State’s own zoning rules. The tribunal explained that the “inconsistency of action between two arms of the same Government vis-à-vis the same investor” was a breach of the consistency obligation.³⁵⁰
851. Whereas, if the State applies the law correctly, no breach of the obligation of consistency can be found. This was the case in **Lauder v Czech Republic**³⁵¹.

³⁴⁷ Reinisch [RL-0099] §1087

³⁴⁸ ICSID Case No ARB/02/5, Award, 19 January 2007 [RL-0058]

³⁴⁹ Ibid §§ 248 and 249

³⁵⁰ See §§163-166 of the Award

³⁵¹ **Lauder v The Czech Republic**, UNCITRAL, Final Award, 3 September 2001 [RL-0059]

There, the claimant alleged that the relevant state organ (the Media Council) had breached its FET obligations by engaging in “inconsistent conduct”, e.g., “by reversing to the detriment of the investor prior approvals on which he justifiably relied.”³⁵² The Tribunal did not find in favour of the claimant, instead holding that the revocation of the approvals “was not inconsistent with any prior conduct of the Media Council”, because “the Media Council had objective reasons to think that [the claimant] was violating the Media Law” and “the Media Council’s duties were, among others, to ensure the observance of the Media Law.”³⁵³

J6.1.2 T&T did not act inconsistently

852. In reversing the previous administration’s policy and terminating the Project, T&T was acting consistently with the decision of the High Court regarding the environmental risks created by the Project. Alutrint then terminated the EPC Contracts in accordance with agreed contractual provisions. On CMEC’s case, it effected the termination, but again in accordance with the agreed contractual provisions. All the above was foreseeable, as stated above. The charge that T&T was in breach of the consistency requirement of FET, as properly understood, in terminating the Project (§652(a) and (b)) cannot be sustained.
853. T&T not settling the claims for payment which CMEC was making (§652(c)) is entirely irrelevant to the question of whether T&T had acted consistently with its own laws and administration. In particular there was no administrative or judicial decision with which T&T was required to be “consistent”. In any event, there were multiple reasons, set out above, why it did not fall to T&T to pay the exorbitant sums T&T was seeking.

³⁵² Ibid, §290.

³⁵³ Ibid, §296.

J6.2 Due Process

J6.2.1 The law

854. Due process denotes a fair procedure. A host State is under the obligation to establish a judicial (and administrative) system that allows for the effective exercise of substantive rights.³⁵⁴ It also largely corresponds to the customary international law guarantee against a denial of justice.³⁵⁵
855. A denial of justice, unlike other aspects of investment protection, is conditioned on a prior exhaustion of local remedies by the investor.³⁵⁶
856. Relevant cases of denial of justice typically relate to access to courts, undue delays, fair procedure, and the right to be heard in judicial or administrative proceedings.
857. However, the standard for finding procedural impropriety amounting to a breach of FET is a high one.
858. The investor must be “directly affected” by procedural shortcomings, e.g. lack of independence or impartiality in court or administrative proceedings.³⁵⁷
859. A mere procedural failing, such as the failure to give formal notice relating to the potential revocation of a licence and the lack of an opportunity to be heard in proceedings culminating in the revocation of the licence, may not be sufficient for the tribunal to find a denial of due process rising to the level of breach of FET. There should be misconduct of a serious kind³⁵⁸.

³⁵⁴ Dolzer [CL-0080] pp.217-218.

³⁵⁵ Ibid; see also Reinisch [RL-0099] §630, f/n 890.

³⁵⁶ Dolzer [CL-0080] p.217, f/n 202.

³⁵⁷ Dolzer [CL-0080] pp.218-220.

³⁵⁸ **Genin, Eastern Credit Ltd Inc v Estonia** ICSID Case No ARB/99/2 Award, 25 June 2001 [RL-0060], §371.

860. The procedural irregularities involved must lead to “an outcome which offends judicial propriety”, such as “a complete lack of transparency and candour”, or be “manifestly unfair or unreasonable (such as would shock, or at least, surprise a sense of judicial propriety.” The standard is not infringed merely because the host State’s administrative procedures did not comply with domestic law.³⁵⁹

J6.2.2 T&T not in breach of the due process requirement

861. It is notable, first, that the nature of CMEC’s allegation that T&T has failed to accord due process has changed.

862. In the Request for Arbitration, CMEC alleged that “The State has failed to accord due process, including by denying CMEC the opportunity to respond to any allegation that the State may assert to have been an obstacle to payment (*quod non*)” (§93(iv)).

863. Now, in the Memorial, CMEC’s complaints have changed and relate to (1) T&T’s withdrawal of its appeal against the 2009 High Court Decision (§652(a)) and (2) the termination of the Project (§652(b)). CMEC says “Essentially, the State’s acts were conducted in a manner that deprived CMEC of the ability to take appropriate action to protect its rights and investments” (§654).

864. This is vague. In what process(es) did CMEC expect that it ought to have been engaged? In what respects was its engagement in such process(es) deficient?

865. The cases CMEC cites in §§650 and 651, namely, **Metalclad v Mexico** and **Tecmed v Mexico** are not in point. In the former, Metalclad was the applicant for a permit³⁶⁰, and the process in question concerned its application for the permit. In **Tecmed v Mexico**, Tecmed (through Cytar, a company organised by Tecmed) was the company running landfill operations, required a permit to

³⁵⁹McLachlan [CL-0067] §§7.195 to 7.198 and the cases cited therein.

³⁶⁰ **Metalclad v Mexico** [CL-0085] §50

operate the landfill, and the process in question concerned the renewal of the permit.³⁶¹ In both cases, the claimants were directly affected by the shortcomings of the process to which they were parties.

866. Here, the context is entirely different. CMEC was Alutrint's contractor. CMEC was not the applicant for the CEC, nor was it a party to the appeal.
867. CMEC's rights and obligations were contained in the EPC Contracts. As the contractor, CMEC could not have expected that it would be consulted on all matters. This is specifically so as regards termination of the EPC Contract, which it was open to Alutrint to effect "for [its] convenience".
868. The EPC Contracts provided various avenues for CMEC "to present its views or objections" (§652), where appropriate.
869. For example, Clause 8.11 of the 2008 Contract permitted CMEC, in the event of prolonged suspension, to request Alutrint's permission to proceed with the works. Had CMEC done so, it would have been able to present its views or objections to Alutrint in this context.
870. Further, the dispute resolution process available under Clause 20 of the EPC Contracts permitted CMEC to present its views or objections as to any alleged contractual misconduct on the part of Alutrint.
871. Not having initiated or been involved in any "process" other than that under the 2008 Contract which it had duly abandoned, the complaint that T&T did not offer it "a true due process opportunity to present its views or objections" nor "an official notification or a warning of the impending acts and omissions" (§652) rings hollow. In any event, as stated in Section I, 9.4, above, T&T had available

³⁶¹ **Tecmed v Mexico [CL-0088]** §§35 and 39.

procedural mechanisms which could have addressed CMEC's alleged concerns, had those concerns been genuinely held at the time.

872. It is also notable that the dispute resolution process under the EPC Contracts escalated to ICC arbitration, ie an entity independent from T&T forum. There cannot possibly be any complaint of lack of due process when it was CMEC which abandoned the process it had started.

J6.3 Transparency

J6.3.1 The law

873. The notion of transparency is “closely related to the protection of the investor’s legitimate expectations”, in that “the legal framework for the investor’s operations [must be] readily apparent and...any decisions affecting the investor can be traced to that legal framework.”³⁶²
874. Multiple tribunals have affirmed that the concept involves “the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made...should be capable of being readily known to all affected investors ... There should be no room for doubt or uncertainty.”³⁶³
875. The duty to be transparent has limits. It should not be unrealistic. The focus is on whether the State has been unfair and inequitable by failing to be transparent. In **Micula v Romania** the tribunal said:

“Whether a state has been unfair and inequitable by failing to be transparent with respect to its laws and regulations, or being ambiguous and inconsistent in their application, must be assessed in light of all of the

³⁶²Dolzer [CL-0080] p.212.

³⁶³**Metalclad v Mexico** ICSID Case No. ARB (AF)/97/1 Award, 30 August 2000 [CL-0085] §76, relating to the refusal to grant a construction permit. See also **LG&E v Argentina**, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006 [CL-0142] §131.

factual circumstances surrounding such conduct. For example, it would be unrealistic to require [total transparency] with the general public in the context of diplomatic negotiations. The question before the Tribunal is thus not whether [the State] has failed to make full disclosure of or grant full access to sensitive information; it is whether in the event that [it] failed to do so, [it] acted unfairly and inequitably with respect to the Claimants.”³⁶⁴

876. The tribunal in **Waste Management v Mexico II** Tribunal said that only a “complete lack of transparency and candour in an administrative process” would infringe the “minimum standard of fair and equitable treatment”.³⁶⁵ Similarly, in **Al Tamimi v Oman**, the tribunal said that only conduct that “reaches the level of ‘manifest arbitrariness’ or ‘complete lack of transparency and candour’” can breach the minimum standard of treatment expected.³⁶⁶

J6.3.2 T&T did not breach the transparency requirement

877. As stated above, CMEC was not a party to the 2009 High Court Judgment and was not the grantee of the CEC in the first place. It is unclear how T&T could have had a duty to be transparent (in the sense of informing CMEC promptly) in respect of the EMA’s reasons for withdrawal.
878. Further, having regard to CMEC’s own cited standards for transparency, i.e., “absence of any administrative ambiguity or opacity, such that the legal and regulatory framework for the investor’s operations is readily apparent” (§648), CMEC in fact has made no complaints regarding the legal and regulatory framework. CMEC know that Alutrint could terminate the EPC Contracts for its convenience, and also that the Project might not be carried out to completion if the CEC were to be revoked. All this was within the framework of the EPC

³⁶⁴ **Micula v Romania [CL-0122]** §533

³⁶⁵ **Waste Management v Mexico II [RL-0013]**, §98.

³⁶⁶ **Al Tamimi v Oman** ICSID Case No ARB/11/33, Award, 3 November 2015 **[RL-0061]** §399.

Contracts. In any event, the termination of the Project, following the 2009 High Court Judgment, did not constitute “manifest arbitrariness” nor “complete lack of transparency and candour”.

879. In respect of the issue of not paying the amounts CMEC was (unreasonably) demanding, it is unclear whether CMEC alleges that Alutrint, being the counter-party to the EPC Contracts and the party CMEC was threatening to proceed against pursuant to their terms, had a duty to be “transparent” – if so, this does not make sense. In any event, CMEC cannot complain that it has suffered any injustice when it chose to abandon the dispute resolution process which it had started.

J6.4 Good faith

880. The principle of good faith is “one of the basic principles governing the creation and performance of legal obligations”, but it is not itself a source of obligation where none would otherwise exist.”³⁶⁷
881. It has been said that allegations of bad faith require a high standard of proof and will often fail³⁶⁸
882. Protecting the environment has been recognised as a legitimate aim.³⁶⁹
883. CMEC contends that T&T violated the principles of good faith “first - by initially encouraging CMEC to carry out extensive work under the EPC Contracts, and – thereafter – by abruptly terminating the Project and effectively avoiding payment for outstanding amounts due to CMEC upon such termination” (Memorial, §657).

³⁶⁷**Border and Transborder Armed Actions (Nicaragua v Honduras)** [1988] ICJ Rep 69 [RL-0062] §94.

³⁶⁸Dolzer [CL-0080] p.226

³⁶⁹See Section I, 7.1, above, and also **Bogdanov v Moldova III** see Arbitration Final Award, 16 April 2013 [RL-0063] §193

884. Applying the approach in **Vigotop v Hungary**, set out in Section I, 5.2.1, above, which explicitly refers to the good faith principles (§330), there is no scope for CMEC to argue that T&T was not acting in good faith. The termination of the Project and of the EPC Contracts was not on “fictitious” or “malicious” grounds, but rather was grounded in public policy reasons, including responding to the 2009 High Court Judgement based on environmental concerns.³⁷⁰
885. The present case also plainly did not concern “[r]eliance by a government on its internal structures to excuse non-adequate and effective compensation” as alleged (Memorial, §656). Alutrint/T&T negotiated with CMEC in good faith, but CMEC (1) made successive and increasingly exaggerated claims (see Appendix II) and (2) did not avail itself of the consensual dispute resolution processes referred to in the EPC Contracts. T&T did not and could not rely on its “internal structure” to excuse its liability for any Treaty breaches, as CMEC made no claim against T&T for any Treaty breaches at all until 26 August 2022.
886. As an example, in **Oxus Gold v Uzbekistan**³⁷¹ the tribunal rejected the investor’s argument that Uzbekistan failed to participate in good faith in, and abruptly interrupted, a negotiation process, amounting to a violation of FET. The tribunal held that, at most, the way in which Uzbekistan handled the negotiation process demonstrated a lack of efficiency, but this did not reach the threshold of a breach of the FET standard.
887. There is nothing in CMEC’s contention that T&T breached the good faith principle.

³⁷⁰ **Vigotop v Hungary** [RL-0044] §§329-330.

³⁷¹ **Oxus Gold v Uzbekistan**, UNCITRAL Award, 17 December 2015 [RL-0064], §§344-346.

J7. T&T’s conduct did not constitute an exercise of sovereign powers

888. The allegations CMEC makes regarding T&T’s breach of the FET standard can be broadly divided into the two categories referred to in Section I, 5, above.

889. For like reasons, none of T&T’s impugned conduct constituted the exercise by T&T of its sovereign powers. Hence, for this reason, there was no breach of the FET obligation.

890. For the above reasons CMEC’s various contentions that T&T acted in breach of the FET standard are unsupportable.

K. Non-Impairment

K1. The relationship between FET and Non-Impairment

891. Article 3(3) reads as follows,

“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”

892. A violation of Article 3(3) of the Treaty (the Non-Impairment standard) does not differ substantially from a violation of Article 3(2) (the FET standard). However, it is a separate and distinct standard of protection from FET. Article 3(3) identifies the more specific effects of a violation and protects against a particular type of State action, thus requiring the investor to demonstrate unreasonable or discriminatory measures by the State which impaired the management, maintenance, use, enjoyment or disposal of the investment.³⁷²

³⁷² *ESPF v Italian Republic* ICSID Case No. ARB/16/5, Award, 14 September 2020 [RL-0065] §698.

893. Tribunals have held that the prohibition against unreasonable (arbitrary) or discriminatory measures is included in the broad scope of the FET standard,³⁷³ and that any such measure would “by definition, [fail] to be fair and equitable”.³⁷⁴ Although the converse is not necessarily true, i.e. acts or omissions falling short of fairness and equity are not necessarily unreasonable or discriminatory measures.³⁷⁵
894. Apart from the additional and belatedly raised averment of “discrimination” (Memorial, §666(c)), the factual particulars of T&T’s alleged violation of the Non-Impairment standard (Memorial, §666) entirely overlap with those of the alleged breach of the FET standard. Thus, if the Tribunal accepts T&T’s submissions in Section J above that there was no breach of the FET standard, it would be incongruous to find that there was nonetheless a violation of the Non-Impairment standard due to the unreasonableness of T&T’s measures.

K2. Impairment

K2.1. The law

895. Impairment is a necessary ingredient of a violation of the Non-Impairment standard.

³⁷³ **Oxus Gold v The Republic of Uzbekistan** UNCITRAL Final Award, 17 December 2015 [RL-0064] §§323, 785.

³⁷⁴ **Joseph Charles Lemire v Ukraine** ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 [RL-0066] §259.

³⁷⁵ **Garanti Koza LLP v Turkmenistan** ICSID Case No. ARB/11/20 Award 19 December 2016 [RL-0012] §§397-399; **Oxus Gold v The Republic of Uzbekistan** supra [RL-0064] §§323, 785. See also **ESPF v Italian Republic** supra [RL-0065] §698.

896. An analysis of the nature of a State’s measures, in order to determine whether they are unreasonable or discriminatory, is only necessary when an impairment of the investment has taken place.³⁷⁶
897. In **Saluka v Czech Republic**³⁷⁷, the Tribunal held that the ordinary meaning of the word “impairment” refers to “any negative impact or effect caused by “measures” taken by [the host State]” (underlining added). CMEC also relies on this proposition (Memorial, §661).
898. Thus, that the State measure(s) in question must have caused the “impairment” is a necessary component of liability under the Non-Impairment standard.
899. It is noted that there are divergent views on whether a breach of this standard requires the impairment caused by the discriminatory or unreasonable measure to be significant.
900. For example, in **Electrabel v Hungary**, the Tribunal rejected the claimant’s argument (§7.149) relying on **Saluka v Czech Republic** *supra* that a mere showing of impairment without it being significant suffices.³⁷⁸
901. Whereas in **Spółdzielnia Pracy Muszynianka v Slovakia Republic** [CL-0137], the Tribunal ruled that the impairment does not have to be “substantial” (§647).
902. But as will be made plain below, this is a non-issue in the present case, as CMEC is unable to show that its investment has suffered any impairment.

³⁷⁶ **AES v The Republic of Hungary** ICSID Case No. ARB/07/22, Award, 23 September 2010 [RL-0067] §10.3.3; **Spółdzielnia Pracy Muszynianka v Slovakia Republic** PCA Case No. 2017-08, UNCITRAL Award [CL-0137] §646.

³⁷⁷ **Saluka Investments BV v The Czech Republic** UNCITRAL Partial Award, 17 March 2006 [RL-0017] §458.

³⁷⁸ **Electrabel SA v Hungary** ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 [RL-0068] §§7.151-7.152.

K2.2. CMEC's investment was not impaired

903. As to “impairment”, CMEC alleges that “[t]he State has harmed the Claimant's investments by unilaterally terminating the Project and not compensating the Claimant for the losses incurred as a result of the termination. The Claimant's investments have therefore been impaired.” (Memorial, §666(a))

904. CMEC does not specify what it considers to be its investments that have been impaired.

905. Thus, the investments in question must be assumed to be the same as the allegedly expropriated investments, namely, CMEC's contractual rights under the EPC Contracts, including investment returns (see Memorial, §§589, 596).³⁷⁹

906. It is not clear how CMEC's contractual rights under the EPC Contracts could have been impaired by T&T's termination of the Project or failure to pay amounts due from Alutrint under the EPC Contracts, in light of the following:

- (1) The termination of the EPC Contracts occurred entirely within the framework of the EPC Contracts (i.e. the provisions governing termination), T&T's legal framework and the legitimate expectations of the parties³⁸⁰. Such contractual termination cannot amount to “impairment” of CMEC's contractual rights, particularly when CMEC was, by contract, granted certain rights upon termination, including the right to various payments.³⁸¹
- (2) The termination of the Project and the EPC Contracts was in the context of, and occasioned by, the 2009 High Court Judgment which quashed the decision of the EMA to issue the CEC. The decision is not the subject of

³⁷⁹ The failure to identify the investment properly is addressed in Section I, 1, above.

³⁸⁰ See Section I on Expropriation and Section J on FET, above.

³⁸¹ See further the analysis of CMEC's alleged “rights” in Section N on Damages, below.

any complaint, CMEC never having suggested that it violates any Treaty obligation, including the Non-Impairment standard.

- (3) CEC and government approvals were always envisaged by the contracting parties to be (contingent rather than guaranteed) conditions-precedent to the coming into operation of the EPC Contracts and the Project. Such approvals formed the very basis of whether the EPC Contracts could continue.
- (4) CMEC was always entitled to, and did, initiate the dispute resolution process under Clause 20 of the 2008 Contract to vindicate its contractual rights. But CMEC then saw fit to abandon the process in or about August 2015.

907. In these premises, CMEC's contractual rights remained intact.³⁸² It was up to CMEC to elect to exercise them. For the avoidance of doubt, it should be noted that the "losses incurred as a result of the termination" do not constitute CMEC's investments, even on its own case (cf. Memorial, §666(a)).

908. It is thus not understood why CMEC asserts in §666(d) of the Memorial that "[t]he State's measures clearly impaired, if not prevented altogether, CMEC's ability to manage, maintain, use, enjoy or dispose its protected investments because the Project and the EPC Contracts were terminated".

909. Further, CMEC has not particularised any causal nexus between the termination of the Project or failure to pay amounts due under the EPC Contracts, and resulting negative impact on its "protected investments". But this omission is inevitable, since CMEC's contractual rights have not been impaired by T&T at all.

³⁸² For similar reasons that CMEC has not been "permanently deprived" of such contractual rights: see Section I, 4, above.

K3. Unreasonable measures

K3.1. The law

910. The standard of reasonableness has no different meaning in the context of the Non-Impairment standard than in the context of the FET standard with which it is associated.³⁸³ In **Ubraser SA v Argentina**, it was held that the prohibition against unreasonable or discriminatory measures “cannot have as its meaning and purpose to provide for an extended guarantee as to the treatment of an investment, above the range of what is understood as “fair and equitable””.³⁸⁴
911. The standard of reasonableness applies to the State measures themselves, as opposed to the impact of those measures on the investment. It has been said that “any reasonableness analysis relates to the reasonableness of the measures and not to whether the impairment was reasonable”.³⁸⁵
912. “Unreasonable” bears substantially the same meaning as “arbitrary” in the sense of something done capriciously without reason.³⁸⁶ Unreasonable or arbitrary measures mean those which are “not founded in reason or fact but on caprice, prejudice or personal preference”.³⁸⁷
913. The ICJ has also defined arbitrariness in **ELSI (USA v Italy)** to mean “something opposed to the rule of law...willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”³⁸⁸

³⁸³ **Saluka v Czech Republic** supra [RL-0017] §460.

³⁸⁴ **Ubraser SA v The Argentine Republic** ICSID Case No. ARB 07/26, Award, 8 December 2016 [RL-0069] §1081.

³⁸⁵ **ESPF v Italian Republic** supra [RL-0065] §698.

³⁸⁶ **National Grid Plc v The Argentine Republic** UNCITRAL Award, 3 November 2008 [RL-0018] §197.

³⁸⁷ **Plama Consortium Limited v Republic of Bulgaria** ICSID Case No. ARB/03/24, Award, 27 August 2008 [CL-0139] §184.

³⁸⁸ **Elettronica Sicula S.p.A. (ELSI) (USA v Italy)** Judgment, 20 July 1989 [1989] ICJ Reports 15 [RL-0070] cited in **Azurix Corp v The Argentine Republic** ICSID Case No. ARB/97/3 Award, 14 July 2006 [CL-0120] §§391-392.

914. In **Invesmart v Czech Republic**, it was held that the requirement of reasonableness was satisfied, provided that the measure was based on reasonable policy considerations and that it was not for the Tribunal to second-guess the merits of the policy considerations in question.³⁸⁹

915. In **Micula v Romania [CL-0122]** (cited by CMEC in §662 of the Memorial), the tribunal went a step further to require that, in the implementation of the policy, the State's acts here to have been appropriately tailored so as to have due regard for the consequences imposed on investors.

916. As to examining whether a host State's action amounted to an unreasonable measure, the **AES v Hungary** tribunal gave the following guidance:

“10.3.7 There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.

10.3.8 A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.

10.3.9 Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.”³⁹⁰ (underlining added.)

917. This approach was followed in **Electrabel v Hungary**, which, after reciting the above quotation, elaborated as follows:

“In the Tribunal's view, this [i.e. the need to be an appropriate correlation between the state's public policy objective and the measure adopted to

³⁸⁹ **Invesmart v Czech Republic** UNCITRAL Award, 26 June 2009 [RL-0056] §§460, 501

³⁹⁰ **AES v The Republic of Hungary** supra [RL-0067] §§10.3.7-10.3.9;

achieve it] includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought. The relevance of proportionality of the measure has been increasingly addressed by investment tribunals ... The test for proportionality ... requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective and not excessive considering the relative weight of each interest involved.”³⁹¹

918. In **LG&E v Argentina**³⁹², the tribunal held that a rational decision-making process would require the State to have had “consideration of the effect of a measure on foreign investment and a balance of interests of the State with any burden imposed on such investments.” There, even though the measures adopted by Argentina were less than ideal and separately violated FET, the Tribunal held that there was no violation of the Non-Impairment standard given that the measures relating to the withdrawal of guarantees to the gas industry were adopted in the context of severe economic and social hardships and were “the result of reasoned judgment rather than simple disregard of the rule of law.” (underlining added.)

919. Thus, where it can be shown that the decisions were taken for proper reasons rather than arbitrarily, there will be no breach of the Non-Impairment standard. In **Enron v Argentina**³⁹³ and **Sempra v Argentina**³⁹⁴, the tribunals found that the measures in question were far from desirable but not surprising in the context of an economic crisis. The measures were found to have “responded to what the Government believed and understood to be the best response to the unfolding crisis.” The tribunals also held that “[i]rrespective of the question of intent, a

³⁹¹**Electrabel SA v The Republic of Hungary** ICSID Case No. ARB/07/19, Award, 25 November 2015 [CL-0138] §179

³⁹²**LG&E Energy Corp v Argentine Republic** ICSID Case No. ARB/02/1 Decision on Liability, 3 October 2006 [CL-0142] §§158, 162.

³⁹³**Enron Corporation Ponderosa Assets LP v Argentine Republic** ICSID Case No. ARB/01/3 Award, 22 May 2007 [RL-0037] §281.

³⁹⁴**Sempra Energy International v Argentine Republic** ICSID Case No. ARB/02/16, Award, 28 September 2007 [RL-0071] §318. See §76 as to why the wording of §318 is the same as the wording of §281 of the Award in **Enron v Argentina**.

finding of arbitrariness requires that some important measure of impropriety be manifest.”

920. Further, whether a measure is good or bad is not for the tribunal to judge. The standard of unreasonableness “recognises that States may make controversial policy choices and even make mistakes in the implementation of those choices without engaging liability”.³⁹⁵ It is not sufficient to show that the host State placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive.
921. Tribunals have required a very high threshold for the standard of reasonableness to be violated. “[A]n actionable finding of arbitrariness must not be based simply on a tribunal’s determination that a domestic agency or legislature incorrectly weighed the various factors...or applied social or economic reasoning in a manner that the tribunal criticizes.”³⁹⁶ (emphasis and underlining added.)

K3.2. T&T’s conduct was not unreasonable

922. As to unreasonableness, CMEC makes 2 assertions, in the Memorial, §666(b), namely:
- (1) “The State's termination of the Project was neither rational nor carried out in pursuit of legitimate objectives” because “It was a politically motivated decision that "chased out" CMEC from Trinidad and Tobago”;
 - (2) T&T “not compensating CMEC for what was due under the EPC Contracts” was “not proportional but abusive and excessive.”

³⁹⁵McLachlan [RL-0100] §7.212.

³⁹⁶Cargill, Incorporated v United Mexican States ICSID Case No. ARB(AF)/05/2, 18 September 2009 [RL-0072] §292.

K3.2.1. T&T's termination of the Project

923. CMEC's assertion that the termination of the Project was "a politically motivated decision that *"chased out"* CMEC from Trinidad and Tobago" refers to a statement made in a party political context and is more rhetoric than substance. As stated in Section I, 9.1.2, above, the fact that the UNC's stance on the aluminium smelter can be characterised as "political" is neither here nor there – a reasonable measure and a political stance are not mutually exclusive. The critical issue in determining whether T&T's conduct was reasonable is whether the termination of the Project was the result of "reasoned judgment rather than a simple disregard of the rule of law" (**LG&E v Argentina**, *supra*).
924. That the termination of the Project was the result of reasoned judgment rather than a simple disregard of the rule of law is plain from the matters relating to this set out in Section D, 8, above.
925. CMEC cannot claim that the termination of the Project was not a possible response to the 2009 High Court Judgment, which quashed the CEC approval and endorsed the environmental concerns of the public interest groups.
926. Pertinently, the 2009 High Court Judgment found that:
- "[T]here could be no doubt that there was considerable scientific evidence before this Court of threats of both serious and irreversible damage to both the environment and human health" (§10)
927. While CMEC says that the Note for Cabinet³⁹⁷ "shed light on a host of compelling reasons to proceed with the Project" (Memorial, §321), CMEC acknowledges that the Note for Cabinet also contained "holdbacks", namely (a) the Project would not be able to meet the 1 µg/m³ HF emission limit in Phase II expansion; and (b) the reservation that any further development of the Project

³⁹⁷ C-0248

would depend on the decision of the Court of Appeal (Memorial, §322). The Cabinet Note is, on any view, not biased or irrational.

928. For completeness, these are not the only “holdbacks” in the Note for Cabinet. It also noted, for example, (a) there would be an opportunity cost of foregoing natural gas to Alutrint annually to generate electricity for the smelter (§§10, 39(g) and 42); and (b) the problems attendant upon excluding Sural from the Project, which was a pre-condition of the participation of Votorantim, whose involvement was necessary for the Project (§§7 and 8).

929. The Cabinet Note states:

“In conclusion, a decision for continuation of the project should be based on factors such as the project economics, opportunity costs of alternative natural gas utilization, generation of employment opportunities and industrial activities and environmental considerations” (§42)

930. It is also noteworthy that in the Memorial, CMEC relies on the following matter when seeking to establish creeping expropriation,

“8 September 2010 – in The Honourable Winston Dookeran, Minister of Finance, Budget Statement for 2011, he declared that *"there has been great uncertainty about both the Alutrint and the Rapid Rail projects. There has been much public criticism of these projects rising from legitimate concerns. In addition to the health and environmental risk, there is also serious concern as to Alutrint's viability and the optimal use of our gas. This project shall cease"*” (§611(b)).

931. CMEC seeks to show that T&T's concerns were “incorrect” or not “valid” (Memorial, §§323, 328). Even if, *arguendo*, CMEC is “correct” (which is denied), this is beside the point. There were indeed public concerns, which the Court shared. T&T made a reasoned judgment, taking into account the relevant factors. It is not for CMEC (or the Tribunal) to decide whether T&T's judgment

was “incorrect” or mistaken under the guise of “unreasonableness”. Even if T&T “incorrectly weighed the various factors” (**Cargill v United Mexican States** *supra*), it would not render its decision unreasonable.

932. Building an aluminium smelter is always controversial and “by [its] very nature raises environmental issues.”³⁹⁸ It cannot be guaranteed that the smelter will be free from any environmental risks. Whether a smelter should be built always involves a balancing exercise of all the relevant factors – and this is a matter exclusively for T&T.
933. As stated above, the allegation that there was a “political” motivation to “*chase out*” CMEC is misconceived. The question is what prompted T&T to make the decision, political or otherwise. As demonstrated above, the impetus behind the termination of the Project was environmental concerns. And, also as stated above, critically, the Treaty reserves to T&T the right to implement environmental policies, and a possible termination of the Project was well within CMEC’s expectations. There was plainly no “disregard of the rule of law” in this case.

K3.2.2. T&T’s non-compensation of CMEC for what was due under the EPC Contracts

934. CMEC’s assertion that “not compensating CMEC for what was due under the EPC Contracts” was “not proportional but abusive and excessive” (Memorial, §666(b)) is not understood.
935. As stated above, T&T was not the contracting party to the EPC Contracts, the terms of which govern payment of amounts due from Alutrint to CMEC upon termination.
936. In any event, Alutrint could not be expected to make any payment to CMEC in view of the ongoing, unresolved dispute regarding the quantum owed under the

³⁹⁸See Leroy Mayers’ witness statement in the Sural v GORTT arbitration [C-0369], §18.

EPC Contracts. The point has been made above that CMEC grossly exaggerated its claim, and it is therefore not open to CMEC now to say that T&T ought to have paid the exorbitant sums CMEC was seeking. CMEC itself chose not to resolve such disputes or pursue its claims against Alutrint. In these circumstances, no question of proportionality, abusiveness or excessiveness arises out of the non-payment.

K4. Discriminatory measures

937. CMEC's contention in §666(c) of the Memorial that T&T's termination of the Project for breach of the Non-Impairment standard on the ground that it was discriminatory is hopeless. See Section I, 9.2.2, above.

938. It is notable that in the Request for Arbitration, while it was said that T&T's termination of the Project was a breach of Article 3(3) on the ground that it was unreasonable, there was no mention that there was a further breach on the ground that T&T's conduct was discriminatory.

939. CMEC's late discovery that it was being discriminated against has been dreamt up in an attempt to bolster its case.

K4.1. The law

940. As to the relevant law, see Section I, 9.2.1, above.

K4.2. T&T's termination of the Project was not discriminatory

941. As stated, CMEC's case that T&T's conduct was discriminatory is hopeless.

942. CMEC's specific allegation is that "the State's decision-making that led to the termination of the Project, without any justifiable ground whatsoever, was based (either wholly or partially) on CMEC's nationality" (Memorial, §666(c)) (underlining added).

943. There is no evidence to support this allegation at all.
944. Specifically, it is impossible to build out of Carolyn Seepersad-Bachan's reported statement made in March 2010 (when she was not a T&T government official) that nationality was a factor in T&T's decision-making process when the decision was made to terminate the Project in September 2010. T&T will rely on the matters set out in Section I, 9.2.2, above.
945. Further, T&T's action had no discriminatory effect. For example, the decision to terminate the Project also affected Sural, the other shareholder of Alutrint. And Sural is a Barbadian company [C-0014 §48].
946. CMEC's argument concerning discriminatory conduct is scraping the barrel and should not have been made at all.

K5. The proviso: "without prejudice to its laws and regulations"

947. Article 3(3) of the Treaty provides that the Non-Impairment standard is "without prejudice to [T&T's] laws and regulations."
948. On a textual reading, the reservation in respect of laws and regulations of the host State allows the host State to maintain or introduce in its laws measures that could otherwise be considered "unreasonable or discriminatory".³⁹⁹
949. Here, the termination of the Project was a consequence of the 2009 High Court Judgment which quashed the EMA's decision to issue the CEC – i.e. an application of T&T's law in reviewing its regulatory regime. Thus, even if T&T breached the Non-Impairment standard (which is of course denied), this is squarely caught by the proviso.

³⁹⁹Shan and Gallagher, 'China' in Chester Brown, Commentaries on Selected Model Investment Treaties (OUP, 2013), [RL-0112] p. 157.

K6. T&T’s non-compensation of CMEC for what CMEC was due under the EPC Contracts does not constitute a “measure”

950. The non-compensation of CMEC by T&T for what CMEC was due under the EPC Contracts was not by reason of any unreasonable or discriminating measure taken by T&T.
951. Article 3(3) of the Treaty exclusively encapsulates “unreasonable or discriminatory measures” (underlining added). So the focus of the Non-Impairment standard is “measures”, as opposed to the FET standard, where the focus is on “treatment”.
952. There are only two other places in the whole text of the Treaty where the word “measures” is used, namely, (1) in the Preamble, i.e. “Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application” and (2) in Article 6(1) concerning expropriation, i.e. “Neither Contracting Party shall expropriate, nationalize or take other similar measures...” (underlining added). Thus, “measures” is used in a formal sense, and is always associated with regulatory acts or practices affecting a State’s subjects (such as an investor operating within its jurisdiction) or matters of public concern.
953. For the reasons set out in Section I, 8.2, above, T&T’s non-payment of CMEC’s claims does not constitute a “measure” within the meaning of “other similar measures” in Article 6(1) of the Treaty. For the same reasons there set out, T&T’s non-compensation of CMEC, which CMEC complains of here, does not constitute a “measure” within the meaning of “unreasonable or discriminatory measures” in Article 3(3) of the Treaty.
954. In **Lauder v Czech Republic**, the tribunal found that a statement made in a letter issued by the Media Council did not constitute a “measure” for the purposes of the prohibition against arbitrary and discriminatory measures in the US-Czech

Republic BIT. In so holding, the Tribunal placed weight on the letter's unauthoritative nature and lack of legally binding force, holding that the letter "merely expresses the general opinion of a regulatory body regarding the proper interpretation which should be given to the Media Law" and "was not aimed at having, and could not have, any legal effect".⁴⁰⁰

955. The same applies *a fortiori* here to CMEC's contention that T&T engaged in discriminatory conduct. A reported comment by someone who was not even an official of T&T cannot possibly amount to a discriminatory "measure" taken by the T&T government.
956. It is noted that in §661 of the Memorial, it is stated that in **Saluka v Czech Republic [RL-0017]** "...the tribunal considered that "*impairment*" related to "*any negative impact or effect*" caused by measures taken by the host State, which the tribunal held could be in the nature of both acts and omissions" (original italics, underlining added).
957. For the avoidance of doubt, this does not mean that any acts or omissions can amount to a "measure".
958. The passage from **Saluka v Czech Republic** which CMEC cites reads as follows:
- "459. The term "measures" covers any action or omission of the Czech Republic. As the ICJ has stated in the *Fisheries Jurisdiction Case (Spain v. Canada)*
- [I]n its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby." (underlining added)

⁴⁰⁰Ronald S. Lauder v Czech Republic UNCITRAL Final Award, 3 September 2001 [RL-0059] §§282-284.

959. The above citation is an extract from the following passage in **Fisheries Jurisdiction Case (Spain v. Canada)**:⁴⁰¹

“The Court need not linger over the question whether a "measure" may be of a "legislative" nature. As the Parties have themselves agreed, in its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby. Numerous international conventions include "laws" among the "measures" to which they refer ... There is no reason to suppose that any different treatment should be applied to the Canadian reservation, the text of which itself refers not to measures adopted by the executive but simply to "Canada", that is to say the State as a whole, of which the legislature is one constituent part.” (underlining added.)

960. Thus, the issue before Tribunal was whether there were any limitations as to “material content” or “aims pursued”, as to prevent a matter of a “legislative” nature from constituting a “measure”. The tribunal ruled that there were no such limitations.

961. Thus, while a measure can cover any “act, step or proceeding”, the converse is not true: not every “act, step or proceeding” can amount to a measure.

962. It is also to be noted that while the **Fisheries Jurisdiction Case (Spain v Canada)** referred to “act, step or proceeding”, it made no mention of omissions.

K7. T&T’s conduct did not constitute an exercise of sovereign power

963. Section J, 7, above, applies *mutatis mutandis* to CMEC’s contention that T&T’s conduct was in breach of the Non-Impairment standard.

⁴⁰¹ **Fisheries Jurisdiction Case (Spain v Canada)**, Judgment on Jurisdiction of the Court, 4 December 1998, ICJ Reports (1998) [RL-0073] §66.

964. For the above reasons, CMEC’s claims under Article 3(3) of the Treaty must fail.

L. The Umbrella Clause

965. Article 13(2) of the Treaty provides:

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

L1. CMEC’s failure to address the “it” problem

966. There is no dispute that Article 13(2) is an umbrella clause, which may have the effect of elevating a State’s contractual breach into a treaty breach (Memorial, §669).

967. CMEC relies on the line of authority represented by **SGS v Paraguay** and says that a State can breach an umbrella clause even though it has not abused its sovereign authority. While accepting that there are decisions to the contrary, CMEC says that the **SGS v Paraguay** line of authority is “considerably more persuasive, particularly because it focuses on a BIT’s text and therefore comports more with the approach prescribed under the Vienna Convention rules on treaty interpretation” (§§669-670).

968. However, a textual approach does not assist CMEC. CMEC omits to refer to the elephant in the room⁴⁰², namely the reference to “it” in the text of Article 13(2). This, as a matter of language, is a reference to the signatory State, in this case T&T. This means that if the EPC Contracts are to be relevant under Article 13(2), the contracting party must be T&T.

⁴⁰² CMEC’s omission to deal with the “it” problem is glaring. It was expressly raised in T&T’s submissions resisting CMEC’s request for bifurcation (at §112), when it was submitted that CMEC’s claim under the umbrella clause was a non-starter because of the “it” problem.

969. But the EPC Contracts were entered into between CMEC and Alutrint.
970. The fact that a contractual commitment was entered into not by the host State directly but by an independent separate entity had been held by various tribunals to be decisive of the inapplicability of the umbrella clause, because the State only has to observe the commitment or obligation “it” has entered into with the investors. This is often called the “it” problem.
971. For example, in **Gavrilovic v Croatia**⁴⁰³, in respect of a similarly worded umbrella clause⁴⁰⁴, the tribunal stated at §1159 that:
- “The term “it” refers to the State, and not to entities that are separate and distinct from the State.** The Tribunal has found that the Respondent is not a party to, or otherwise bound by, the Purchase Agreement. That is, the Respondent did not enter into any contractual obligation towards the Claimants, and is not responsible for any contractual obligations that may have been owed to the Claimants and may not have been performed. It follows that there can be no breach of Article 8(2) of the BIT, and the Tribunal need not further consider this argument.” (emphasis added.)
972. In coming to this conclusion, the tribunal in **Gavrilovic v Croatia** referred to the **Hamester v Ghana** §347(i)⁴⁰⁵, **EDF v Romania**⁴⁰⁶ §§317-319 [CL-0060] and **CMS v Argentina** (Annulment)⁴⁰⁷ §95(c), as examples of tribunals supporting the proposition that “it” refers to the State, not an entity separate and distinct

⁴⁰³ **George Gavrilović v Republic of Croatia** ICSID Case No. ARB/12/39, Award, 26 July 2018 [RL-0020] §§1159.

⁴⁰⁴ See Ibid, §1158: Article 8(2) of the relevant BIT provides, “Each Contracting Party shall observe any contractual obligation it may have entered into towards an investor of the other Contracting Party with regard to investments approved by it in its territory”.

⁴⁰⁵ **Gustav F W Hamester GmbH & Co v Republic of Ghana** ICSID Case No. ARB/07/24, Award, 18 June 2010 [RL-0034] §347(i).

⁴⁰⁶ **EDF (Services) Limited v Romania** ICSID Case No. ARB/05/13, Award, 8 October 2009 [CL-0060] §§317-319.

⁴⁰⁷ **CMS Gas Transmission Company v Argentine Republic** ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007 [RL-0074] §95(c).

from the State. The tribunal in **Impregilo v Pakistan**⁴⁰⁸ [CL-0110] §223 and **Amto v Ukraine**⁴⁰⁹ [CL-0144] §§110-112 said the same thing.

L2. The rationale for “it” referring only to the State

973. In arriving at the conclusion that the term “it” refers to the State, and not to entities that are separate and distinct from the State, tribunals have usually considered one or more of the following matters.
974. First, this conclusion has been reached by adopting a textual interpretation approach (which CMEC also advocates, as stated above). It is relevant to note that Article 31(1) of the Vienna Convention on the Law of Treaties (1969) [CL-0021] provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
975. Secondly, it has been said that the consequence of an automatic and wholesale elevation of any and all contract claims into treaty claims risks undermining the distinction between national legal orders and international law, which is not a result that is in line with the general purpose of the ICSID/BIT mechanism for the international protection of foreign investments.⁴¹⁰
976. Thirdly, as stated in **CMS v Argentina** (Annulment), “[t]he effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e. the persons bound by it and entitled to rely on it) are likewise not changed because of the

⁴⁰⁸ **Impregilo S.p.A v Islamic Republic of Pakistan** ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 [CL-0110] §222.

⁴⁰⁹ **Limited Liability Company Amto v Ukraine** SCC Case No. 080/2005, Final Award, 26 March 2008 [CL-0144] §110-112.

⁴¹⁰ **Hamester v Ghana** supra [RL-0034] §349.

umbrella clause.”⁴¹¹ (underlining added.) Thus, it is not the intended effect of the umbrella clause that it should change the “it” from the State to another entity.

L3. Principles of attribution not applicable to the umbrella clause

977. The principles of attribution are not applicable in construing the ambit of the umbrella clause,⁴¹² i.e. a direct contractual link between the State entering into commitments vis-à-vis investors is required⁴¹³.

978. The reason why attribution does not make the State responsible for the breach of the commitments is explained in **EDF v Romania**⁴¹⁴ [CL-0060],

“318. It is unclear whether Claimant relies on the attribution to the State of certain acts and conduct of AIBO and TAROM on the assumption of their being in breach of the ASRO Contract or the SKY Contract in order to impute to the State the responsibility for such breach. If so, this construction of the umbrella clause would be incorrect since the attribution to Respondent of AIBO’s and TAROM’s acts and conduct does not render the State directly bound by the ASRO Contract or the SKY Contract for purposes of the umbrella clause.

319. Attribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual, nor does it make Romania party to such contracts. In any case, absent a breach of the ASRO Contract or the SKY Contract under the governing law, there can be no State responsibility under international law for violation of the umbrella clause.” (underlining added.)

⁴¹¹ **CMS v Argentina**, supra [RL-0074] §95(c).

⁴¹² See for example **Gavrilovic v Croatia** supra [RL-0020] §§850-865, particularly 856; **Hamester v Ghana** supra [RL-0034] §347(iii).

⁴¹³ Reinisch [RL-0099] §236.

⁴¹⁴ **EDF v Romania** supra [CL-0060] §318.

979. This reasoning relies on the ordinary meaning of the umbrella clause. It can be seen as a corollary to the third point in Section L, 2, above. Indeed, **EDF v Romania** §319 (f/n 151) refers to the passage cited from **CMS v Argentina** in the said third point.

980. It is to be noted that in **EDF v Romania** some of the acts of the entities involved were found to be attributable to the State, and, as a result, it was found that there was a breach of FET.

981. Further, it is not possible to rely on the ILC rules of attribution to render a State liable under the umbrella clause for commitments entered into by other entities, since the ILC rules of attribution relate only to acts which breach international law obligations, not domestic law obligations, which are the subject-matter of umbrella clauses.

982. Thus:

“The ILC rules of attribution apply to acts which breach an international law obligation. The obligation picked up by an umbrella clause is an obligation under domestic law. Notwithstanding that the state parties to the relevant investment treaty have agreed that a breach of that domestic law obligation will entail liability under international law, it remains a domestic law obligation. ... The rules of attribution do not create obligations for a state under a contract to which it cannot be considered a party under its municipal law or under the law chosen by the parties to govern the contract. To find otherwise would be to change the nature or content of the original municipal ‘obligation’.”⁴¹⁵ (underlining added)

⁴¹⁵ Lee Carroll, 'What Place Does an Umbrella Clause Have in the New Generation of Bilateral Investment Treaties?', in Maxi Scherer (ed), *Journal of International Arbitration* 140-141 [RL-0101]. See also Reinisch (Chapter 7, Umbrella Clause [RL-0117] §236).

L4. T&T's alleged "commitments"

983. CMEC alleges (Memorial, §671) that T&T failed to observe the following "commitments":

- “(a) failure to ensure that CMEC was able to complete the construction works as agreed in the EPC Contracts;
- (b) failure to pay the amounts due to CMEC as agreed in the EPC Contracts; and
- (c) failure to observe the commitments made by government officials that the State would pay for the termination of the Contracts.”

984. The reference to “commitments” in Article 13(2) signifies that only actual binding obligations, and not mere expectations, are covered by the clause and become relevant for treaty protection.⁴¹⁶

985. The phrase “entered into with the investors...as regards their investments” indicates that the obligation must be made with respect to “an identifiable investment of a qualifying investor”⁴¹⁷.

986. Thus “commitments” do not include legitimate expectations, which are relevant in the context of the FET standard.⁴¹⁸

987. With respect to (a) and (c), it is plain that they do not even qualify as legitimate expectations: see section J,5.1, above. Hence, *a fortiori*, they cannot qualify as “commitments”.

988. As to (b), it is to be noted that in the Memorial CMEC has changed its case. Formerly CMEC was claiming contractual damages, but in the Memorial it now

⁴¹⁶ Reinisch, Chapter 7, Umbrella Clause [RL-0117] §139.

⁴¹⁷ **Gardabani Holdings BV and Silk Road holdings v Georgia** ICSID Case No. ARB/17/29, Award, 27 October 2022 §691 [RL-0075]. See also Lee Carroll *supra* [RL-0101] pp.131-132.

⁴¹⁸ Reinisch, Chapter 7, Umbrella Clause [RL-0117] §139.

claims “full reparation” (Memorial, §685), and submits that “beyond establishing the existence of contractual rights held by CMEC by way of BIT-covered investments in Trinidad and Tobago at the time they were expropriated by the State, the provisions of [the EPC] contracts – including their ICC dispute resolution provisions – are entirely irrelevant to this case” (Memorial, §453).

989. CMEC has indeed made no attempt to give details of any alleged breaches of the EPC Contracts nor the amounts allegedly due to CMEC in consequence under the EPC Contracts. But, that being so, CMEC’s case that T&T failed to observe alleged commitment (b) is left unparticularised and is therefore hopeless.

M. Causation

M1. The law

990. CMEC, in support of its case seeking “full reparation” for the injury caused by T&T's alleged breaches of the Treaty,⁴¹⁹ relies on **Factory at Chorzów**⁴²⁰ and ILC Article 31,⁴²¹ which provides that:

"1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.” (Memorial, §§698-699)
(underlining added)

991. The phrase “injury caused by the internationally wrongful act” is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the internationally wrongful act, rather than any and all

⁴¹⁹ See Memorial, §685

⁴²⁰ **Factory at Chorzów** (Merits), PCIJ Series A. No. 17, Judgment, 13 September 1928. [CL-0025], p.47

⁴²¹ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001 [CL-0026]

consequences flowing therefrom. The (causal) link between the injury and the wrongful act must exist in order for the obligation of reparation to arise.⁴²²

992. Reparation of damage by financial means should generally come as closely as possible to *restitutio in integrum*. Restitution is both a guideline and a limitation, such that the amount of money awarded as damages shall not have the effect of the injured person being placed in a better financial position than it would have been in without the damaging event.⁴²³

993. Therefore, the responsible State's secondary obligation to make full reparation will depend on whether the breach caused the claimant's injury.

994. The law of State responsibility treats causation as a distinct element of analysis, separate from the question of breach (i.e. liability) and the assessment of damages (i.e. quantum).⁴²⁴ This is borne out by the approach taken by tribunals when applying international investment law. For example:

- (1) In **Lemire v Ukraine**, having established the existence of Ukraine's wrongful acts in breach of the FET standard, the tribunal explained that it would then have to proceed to specifically deal with the causal link between the alleged injury and the established breaches by the State, the burden of proof of which is on the investor.⁴²⁵
- (2) In **Biwater Gauff v Tanzania**, the tribunal emphasised that for the investor to succeed in its claim for compensation, it would have to prove that the value of its investment was diminished or eliminated, and that the

⁴²² Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 [RL-0102], Commentaries (9) and (10) on Article 31.

⁴²³ Marboe, Calculation of Compensation and Damages in International Investment Law 2nd Ed (Oxford University Press: 2017) [RL-0103] §§2.73-2.75.

⁴²⁴ Pearsall & Heath, "Causation and Injury in Investor-State Arbitration". In Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration (Brill/Nijhoff: 2018) [RL-0115] p.89.

⁴²⁵ **Joseph Charles Lemire v Ukraine**, ICSID Case No. ARB/06/18, Award, 28 March 2011 [RL-0078] §171.

actions complained of were the **actual and proximate cause of such diminution in, or elimination of, value.**⁴²⁶

995. The above cases show that causation is treated as a distinct enquiry, independent from liability and quantum, and is the necessary link between the two. **Thus, should an investor fail to establish a causal link between the injury claimed and the breach of treaty, the failure of causation would preclude an award of damages and an inquiry into quantum.**⁴²⁷
996. To meet its burden, the investor must prove that the damages sought in connection with the alleged breaches form part of the “injury caused by” those breaches. In this regard, the tribunal in **Bilcon v Canada** said that the investor has to show that the loss would not have been suffered but for the breach “in all probability” or with “a sufficient degree of certainty”. A “realistic possibility” is insufficient.⁴²⁸
997. And as the tribunal said in **Lemire v Ukraine**, the “causal link” requires **the investor to prove that there is an uninterrupted and proximate logical chain from the initial cause (i.e., the breach of treaty) to the final effect (i.e., the harm/loss claimed). The State may, in turn, “break the chain” by showing that the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes,** such as factors attributable to the investor, to a third party or for which no one can be made responsible (e.g. force majeure).⁴²⁹
998. With respect to proving the “causal link” between the injury and the wrongful act, tribunals have generally agreed that not only must the harm be a consequence

⁴²⁶ **Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania**, ICSID Case No. ARB/05/22, Award, 24 July 2008 [CL-0046] §787.

⁴²⁷ Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice (Oxford University Press: 2011) [RL-0104] p.170. Pearsall and Heath, *supra*, [RL-0115] p.89.

⁴²⁸ **Bilcon of Delaware Inc v The Government of Canada** PCA Case No. 2009-04, Award on Damages, 10 January 2019 [RL-0076] §168.

⁴²⁹ **Lemire v Ukraine** *supra* [RL-0078] §163.

of the wrongful act in fact, but the harm in question must also be “proximate” as a natural consequence of that wrongful act.⁴³⁰ This reflects Commentary (10) on Article 31 of the ILC Articles⁴³¹:

“Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses “attributable to [the wrongful] act as a proximate cause”, or to damage which is “too indirect, remote, and uncertain to be appraised”, or to “any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of” the wrongful act. **Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity”.** ... The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.” (emphasis added.)

999. The tribunal in **Biwater Gauff v Tanzania** endorsed this approach, explaining that: “the requirement of causation comprises a number of different elements, including (inter alia), (a) a sufficient link between the wrongful act and the damage in question; and (b) a threshold beyond which damages, albeit linked to the wrongful act, is considered too indirect or remote”⁴³²
1000. The two requirements of causation are often labelled “factual causation” and “legal causation”. Factual causation involves a “but for” test focused on proving (with evidence) that the unlawful act actually caused the damages claimed. Legal

⁴³⁰ Pearsall and Heath, *supra*, [RL-0115] p.95.

⁴³¹ Commentary (10) on Article 31 of the ILC Articles [RL-0102].

⁴³² **Biwater Gauff v Tanzania** *supra* [CL-0046] §785.

causation, on the other hand, is evaluative in nature and operates to filter out harms that are “too remote” from the alleged breach or were “not proximate” nor “foreseeable”.⁴³³ However, these are interdependent criteria and should not be treated as clear divisions in arbitral practice.⁴³⁴

1001. The ICJ in **ELSI (USA v Italy)** adopted a “dominant or underlying cause” approach in dealing with cases involving multiple concurrent factors. On the facts of that case, the ICJ highlighted that aside from the act of requisition by governmental authorities, the primary cause of ELSI’s difficulties lay in its own mismanagement of their investment. In particular, the ICJ held that “[t]here were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI’s headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition.”⁴³⁵ The tribunal proceeded to dismiss ELSI’s claim that the requisition had deprived it of the possibility of an orderly liquidation of ELSI as “purely a matter of speculation”.⁴³⁶

1002. The “dominant” and “underlying” cause approach was also affirmed by the Tribunal in **Biwater Gauff v Tanzania**. The case concerned the termination of a Lease Contract arguably caused by multiple factors at play, some of which were breaches attributable to Tanzania and some of which were factors attributable to the existing state of the investor’s investment. The tribunal examined the position of the investment prior to the date of expropriation and noted that it was already fraught with financial difficulties before Tanzania’s termination of the Lease Contract.⁴³⁷

⁴³³ Pearsall and Heath, supra [RL-0100] p.95; Sabahi, supra [RL-0104] pp.170-171.

⁴³⁴ Pearsall and Heath, supra, p.95.

⁴³⁵ **Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)**, Judgment, 20 July 1989, ICJ Reports 1989 [RL-0070] §100-101.

⁴³⁶ Ibid, §101.

⁴³⁷ **Biwater Gauff v Tanzania** supra §789.

1003. The tribunal concluded that by the time of the expropriatory act by Tanzania, the investment was of no economic value and “the actual, proximate, or direct causes of the loss and damage for which [the investor] seeks compensation were acts and omissions that had already occurred...In other words, none of [Tanzania’s] violations of the BIT...in fact caused the loss and damage in question, or broke the chain of causation that was already in place.”⁴³⁸ The tribunal held that the fact that the “key element” of causation was absent was alone determinative of all the investor’s claims and rendered unnecessary any further analysis of the precise measure of compensation or any inquiry into quantum.⁴³⁹

1004. The tribunal in **Chevron v Ecuador**⁴⁴⁰ dealt with the uncertainty of a chain of events by way of a “but for scenario”. The tribunal had found that the Ecuadorian courts breached the investment treaty through undue delay in adjudicating the claimant’s court cases, and the question was, but for the delay, what would have happened to the claimant’s court cases if they had been adjudicated in accordance with the treaty. The tribunal said that it “may only award compensation if the Claimants are able to prove that they would more likely than not have prevailed on the merits in their cases before the Ecuadorian courts...In essence, the Claimants must prove the element of causation ie that they would have received judgments in their favour as they allege “but for the breach” by the Respondent”, and in accordance with this principle, the tribunal “must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved [the Claimant’s] claims”.⁴⁴¹ (underlining added.)

⁴³⁸ Ibid, §798.

⁴³⁹ Ibid, §778: see also Pearsall & Heath, supra [RL-0100] p.91.

⁴⁴⁰ **Chevron Corp. (USA) & Texaco Petroleum Co. (USA) v Republic of Ecuador**, PCA Case No. 2007-02 AA277, Partial Award on the Merits [RL-0077] 30 March 2010.

⁴⁴¹ Ibid, §§374-375.

M2. CMEC cannot prove the causal link between the alleged Treaty breaches and the damages claimed

1005. The Memorial, contrary to usual practice, does not deal with the issue of causation as a distinct topic and barely touches upon causation at all.

1006. The only statement which gives some clue as to CMEC's stance on causation appears in §710 of the Memorial, which says:

“Although the Additional Claims implicate a range of State acts (and omissions), the State's act that is common to the Additional Claims is the termination of the EPC Contracts, which was the event that caused the majority of the damage sustained by the Claimants...” (original emphasis and italics, underlining added.)

1007. In §711 of the Memorial CMEC goes on to divide the damages it claims (“Total Damages”) into 2 categories:

- (a) “loss of rights to monies owed for work done, including profits and overheads, and costs incurred on the Project further to the EPC Contracts and the PDC Contract, as detailed out at length above, but remaining unpaid as at the date of the Project's termination by the State in violation of the BIT (Unpaid Amounts)” (original emphasis, underlining added);
- (b) “loss of profits and overheads that CMEC would have derived from future work that CMEC was entitled to perform and would have performed under the EPC Contracts and the PDC Contract but for the State's unlawful termination of the Project (**Lost Profits and Overheads**)” (original emphasis, underlining added) (§711).

1008. So, as best can be discerned, CMEC's case on causation seems to be that T&T's breaches of the Treaty caused the termination of the EPC Contracts which caused CMEC's:

- (a) loss of rights to monies owed for work done but remaining unpaid (Unpaid Amounts); and
- (b) loss of profits and overheads that CMEC would have derived from future work (Lost Profits and Overheads).

M2.1 Unpaid Amounts

1009. The problem with CMEC’s case that T&T’s Treaty breaches thus caused CMEC the loss of its rights to monies owed for work done is that T&T cannot have caused CMEC to suffer such loss since, post-termination, CMEC has retained those rights, as is evidenced by the fact that it has exercised and continues to exercise those rights.
1010. First, CMEC exercised those rights by making successive claims by letter to Alutrint, between 14 February 2011 and 15 August 2022, for loss and expense it had allegedly suffered as a result of the termination of the EPC Contracts: see Section G above and Appendix II hereto.
1011. Second, CMEC exercised those rights by activating the contractual dispute resolution process under the 2008 Contract in January 2015. CMEC then saw fit to abandon that process in or about August 2015. As to this, see Section I, 4.2, above and Appendix IV hereto. Further, CMEC’s abandonment of the contractual dispute resolution process “breaks the chain” of causation: see **Lemire v Ukraine [RL-0078]**, §163, referred to above.
1012. Third, T&T has taken no steps whatsoever to remove or limit the legitimate exercise by CMEC of its rights to monies owed for work done.
1013. Fourth, CMEC is even now exercising those rights within its claim against T&T under the Umbrella Clause in Article 13(2) of the Treaty, as to which see §671(b) of the Memorial.

1014. Hence, CMEC's case on causation concerning the Unpaid Amounts fails *in limine*.

M2.2. Lost Profits and Overheads⁴⁴²

1015. CMEC accepts that to claim Lost Profits and Overheads it has to show that it would have performed under the EPC Contracts and the PDC Contract but for T&T's termination of the Project. i.e. CMEC accepts that it has to satisfy the "but for" test.

1016. By reason of one or more of the matters set out below, CMEC falls far short of discharging its burden that "in all probability" or with "a sufficient degree of certainty", but for T&T's termination of the Project it would have performed the Contracts to completion.

1017. The continuation of the Project to its completion was subject to a host of factors whose effect, singly and cumulatively, was unknown.

1018. First, Alutrint was entitled to terminate the EPC Contracts at any time for its convenience under Clause 15.5. Such termination would not have been a breach of contract but rather an entitlement which Alutrint could exercise whenever it saw fit and for whatever reason.⁴⁴³ It is notable that the Memorial makes no mention of Alutrint's said entitlement nor of Clause 15.5.

1019. Second, the 2009 High Court Judgment, which quashed the decision of the EMA to issue the CEC, meant that the Project could not continue, since the existence of a CEC was a pre-condition for the performance of both EPC Contracts. So,

⁴⁴² This claim is based on future works which CMEC says it was "entitled to perform" (Memorial, §711(b)). As is set out in Section I, 3.2, above, CMEC had only an obligation to carry out the works in accordance with Alutrint's instructions – CMEC had no right, claim or entitlement to perform at all. The submissions below are therefore made against the background of T&T's primary contention that CMEC had no entitlement to perform future work under the Contracts.

⁴⁴³ As set out above, the EPC Contracts were in fact terminated pursuant to Clause 15.5. The point here is that it would always have been open to Alutrint to terminate the EPC Contracts under Clause 15.5, at any time in the future.

after the Judgment, “[t]here was in fact no project because of lack of CEC approval”.⁴⁴⁴

1020. Third, the prospects of appealing the 2009 High Court Judgment were uncertain.

1021. The high point of CMEC’s case in this context appears to be that T&T expressed the view in a letter to Sinasure that “We are confident that the matter will be resolved in favour of the continuation of the aluminium smelter project. We will await the sentiment of the Appeal Court (expected hopefully a few weeks after the hearing) to determine the best way forward, which may be via the judicial system, or through an administrative recovery process with the EMA.” (Memorial, §308) (underlining added).

1022. Thus, even in this statement, T&T made it clear that it would necessarily follow the Court of Appeal’s decision in order to decide upon the best way forward, i.e. the prospects of appeal were uncertain.

1023. It is notable that the Attorney-General, Anand Ramlogan SC, said in September 2010 that “the prospect of the CA reinstating the CEC were not promising.”⁴⁴⁵

1024. But the views of T&T and CMEC⁴⁴⁶ can only be of the most limited help in addressing the issue of the appeal’s prospects of success. The fact of the matter is that the 2009 High Court Judgment was unfavourable to T&T and to the Project. The 2009 High Court Judgment was detailed and fully reasoned. It is impossible for CMEC to contend that, in all probability or with a sufficient degree of certainty, the appeal would have succeeded.

1025. Also it is hopeless for CMEC to cherry-pick comments from the bench during the appeal hearing, as reported in the press⁴⁴⁷, in the hope of showing that the

⁴⁴⁴ See the Final Award in the Sural v GORTT arbitration [C-0014] §137.

⁴⁴⁵ See the Final Award in the Sural v GORTT arbitration [C-0014] §137.

⁴⁴⁶ Thus, the fact that CMEC suggests that environmental issues (like the HF emission limit) could be resolved is neither here nor there (see Memorial, §§288 and 322-323, fn46 of Annex 4 to the Memorial).

⁴⁴⁷ As to the evidential status of press reports, see Section F, 4, above.

Court of Appeal might have been inclined to allow the appeal (Memorial, §306). This is particularly so when the Court of Appeal's indications were decidedly mixed. As to the Chief Justice's various comments which indicated that the Court of Appeal might have been disinclined to allow the appeal, see Section D, 7, above.

1026. Thus, CMEC cannot show that the appeal “would more likely than not have prevailed” (see **Chevron v Ecuador** above).

1027. Fourth, it is similarly uncertain whether any re-application for a new CEC would cure the deficiencies identified in the 2009 High Court Judgment (Memorial, §307). And a new CEC would have had to be applied for in any event, given that the smelter size for the Project, as envisaged with Votorantim's participation, would have been doubled. The Memorial §324 says: “In the context of this fail-safe option, even an unfavourable Court of Appeal judgment (which, however, did not seem likely given the Chief Justice's comments during the hearing) would not have been fatal to the Project”. “Not fatal” is miles away from CMEC establishing that any re-application would have succeeded in all probability.

1028. Fifth, it is uncertain whether the CEC would have been revoked in any event due to the triggering of any of the conditions subsequent set out in the CEC. The CEC's conditions subsequent involved the implementation of various measures to ensure environmental safety.⁴⁴⁸ The EMA would therefore have continued to exercise control even after the CEC was granted.

1029. Importantly, there was no finalised method of over-land transportation of the SPLs.⁴⁴⁹ And it is notable that CMEC “was still offering technical suggestions on the disposal of SPL” in March 2011 (Memorial, §354). Thus, **even if the appeal had proceeded and had been successful, this would not mean that**

⁴⁴⁸ C-0018, the 2009 High Court Judgment, the Facts, §68, p.32

⁴⁴⁹ C-0018, 2009 High Court Judgment, Reasoning and Decision, §§13 and 14, p.175

such problems would inevitably be resolved for the future, i.e. the risk of potential revocation of the CEC was always real.⁴⁵⁰

1030. Sixth, the CEC was always subject to further legal challenges, whether by way of an appeal against the Court of Appeal's decision were it to have been favourable to the EMA, a challenge to any new CEC granted to the EMA on re-application, or otherwise. There was no sign whatsoever that the public interest groups would make no further challenges.
1031. Seventh, there could always be a change in environmental policies, whether due to a change in the ruling political party, a change in public opinion or a change of economic reality. The Treaty expressly states that investment objectives would not prejudice the T&T's ability to take health, safety and environmental measures and that CMEC would have to respect the laws of T&T.
1032. Eighth, as stated above, there were uncertainties regarding the resolution of Alutrint's funding issues, including finding another shareholder to replace Sural and the escalating costs due to general delay caused by the legal challenges raised by the public interest groups. The decision of the appellate court was seriously delayed. The above uncertainty drove Sural to decide to exit the project as early as 2007⁴⁵¹. There was no reason to expect that other shareholders, including both Sural's replacement and T&T, would not consider that it was not financially viable or advisable to proceed with the Project.
1033. Lastly, there are the vicissitudes of commercial life, including the world financial crisis (which occurred in 2008, and which Sural referred to as the reason why the original proposal presented by Votorantim and Sural was left aside).⁴⁵²

⁴⁵⁰ **C-0018** 2009 High Court Judgment, Reasoning and Decision, §§109 and 110, p.196.

⁴⁵¹ **C-0248**, Note for Cabinet, dated 16 July 2010, §§5 to 8

⁴⁵² **C-0369**, Witness Statement of Leroy Mayers in the Sural v GORTT arbitration, §97.

1034. Given the above uncertainties, it is impossible for CMEC to discharge the burden that “in all probability” or with “a sufficient degree of certainty”, but for T&T’s breaches of the Treaty, CMEC would have performed the EPC Contracts to completion.

M2.3. Plainly no causative link between some of the alleged breaches and the damages

1035. There is plainly no causative link between the claimed Total Damages and some of the alleged breaches.

1036. For example, any “post-termination assurances and representations” (Memorial, §641) self-evidently could not have caused the loss of any part of the Total Damages claimed in §711 of the Memorial.

1037. Causation issues concerning specific heads of damages (e.g. interest) will be considered in Section N on Damages, below.

1038. For the above reasons, CMEC has not discharged its burden of establishing the causal link between CMEC’s alleged injuries and T&T’s alleged breaches of the Treaty.

N. Damages

N1. The inconsistencies, confusions and general muddles in CMEC’s case on quantum

1039. CMEC has failed to present a consistent and comprehensible case on quantum ie a case which states with clarity what it is said CMEC has lost and what are said to be the recoverable damages in respect of such loss.

1040. Hence, before analysing the damages recoverable for the breaches of the Treaty which CMEC contends for, it is necessary to set out the inconsistencies and confusions in CMEC’s case, some of which have already been referred to above.

N1.1 CMEC’s “investment” cannot be the subject matter of quantification

1041. To the best of T&T’s understanding, CMEC’s case is that its “investment” or “asset” which has been expropriated comprises its contractual rights under the EPC Contracts.

1042. Thus Clifford Chance’s instructions to CMEC’s quantum expert, Michael Tonkin, are:

“The quantum assessment is undertaken to estimate damages sustained by CMEC as a result of RTT’s expropriation of CMEC’s contractual rights and other violations of the China-RTT investment treaty in relation to the Project.”⁴⁵³ (underlining added)

1043. However the following points, which have been referred to above, are worthy of repetition in the context of quantification of CMEC’s damages for expropriation of its contractual rights:

- (1) CMEC has not been “deprived of” its contractual rights, nor have its contractual rights been “impaired” or “lost” in any way. This is apparent from the fact that CMEC has exercised its contractual rights under the contractual dispute resolution process (see Section I, 4, above) and is even now exercising those rights within its claim against T&T under the Umbrella Clause (see Section M, 2.1, above)
- (2) CMEC did not even have a legitimate expectation that it would be able to perform the EPC Contracts to completion (see Section J, 5.1, above), let alone the “right” to do so (see Section I, 3.2, above). In any event, Alutrint was entitled to terminate the EPC Contracts at any time for its convenience under Clause 15.5.

⁴⁵³ Michael Tonkin’s Report, Appendix MT-1.2, List of Instructions, §1.1.1. Clifford Chance’s instruction to CMEC’s engineering expert, Damian Connelly, is to like effect: see §1.3.1(b) of Damian Connelly’s Report.

- (3) CMEC's contractual rights, not being property or assets, cannot be expropriated (see Section I, 3, above).

1044. Hence it is difficult to discern what is being quantified here.

N1.2 CMEC's inconsistent and confusing attempts to identify its "investment"

1045. As stated above: "The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated".⁴⁵⁴

1046. As stated, to the best of T&T's understanding it is CMEC's case that what was expropriated were CMEC's contractual rights under the EPC Contracts. In addition to the fact that Michael Tonkin's and Damian Connelly's instructions were that they should carry out their assessments of damages on the basis of the expropriation of those rights, there are multiple references in the Memorial to the fact that it was those rights which were expropriated. See the Memorial §§589, 596, 686 and 710.

1047. However what is said to have been taken from CMEC – its "investment", "property" or "asset" – is also differently, inconsistently and confusingly identified in various other parts of the Memorial. As a result, it is impossible to know, with any precision, what is being quantified and how the quantification exercise is being carried out.

1048. The Damages section in the Memorial starts (at §684) by referring to "CMEC's claims for recovery of amounts due to it by the State", identifies 3 such claims ((a), (b) and (c)⁴⁵⁵) and defines them as "Payment Claims". It says these claims

⁴⁵⁴ **Bayindir v Pakistan** ICSID Case No ARB/03/29, Award, 27 August 2009 [CL-0064], §442. See also **Generation Ukraine v Ukraine**, ICSID Case No ARB/00/9, Award, 16 September 2002 [CL-0098], §6.2:

"Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when the allegedly expropriatory acts occurred."

⁴⁵⁵ The 3 identified Payment Claims are:

- "(a) payment for works it has carried out under the EPC Contracts;
- (b) costs it has incurred, and any loss or damage it has sustained, prior to or as a result of the extended suspension and/or the eventual termination of the Project; and
- (c) any other payment from the State to which it is otherwise entitled."

are “assets” within the meaning of Article 1(1) of the Treaty. As Article 1(1) defines “investment” as “every kind of asset...”, it can only be assumed that, here, CMEC is saying that the “Payment Claims” constitute its investment which T&T expropriated.

1049. But the Memorial makes no further reference to the “Payment Claims”. Instead, the Memorial goes on to say (in §695): “In the present case the expropriated investments are (i) the outstanding amounts owed to CMEC and (ii) the rights to carry out the remaining to be performed obligations provided for under the EPC Contracts”.

1050. However, what was expropriated were CMEC’s contractual rights under the EPC Contracts, **not** the “Payment Claims” (§684) and **not** “the outstanding amounts owed to CMEC etc” (§695).

1051. Elsewhere there is further confusion as to what CMEC is saying was expropriated.

1052. Under the heading “Substantial deprivation” (Memorial, §588 et seq), CMEC refers to two classes of assets of which it says it has been deprived.

1053. The first (§589) is “the use and enjoyment of its rights under the EPC Contracts, including investment returns”. This may constitute CMEC’s case that what was expropriated were its contractual rights.

1054. But the Memorial goes on to say (in §590 et seq) that CMEC was also deprived of a second class of assets:

“590. Second, the Expropriation Orders deprived the Claimant of the use, enjoyment and/or value of all other covered investments that it made in Trinidad and Tobago for the exclusive purpose of carrying out its obligations under EPC Contracts. These include:

- (a) Design and engineering work (whether complete or incomplete) for the smelter;
- (b) Design and engineering work (whether complete or incomplete) for upstream and downstream sections of the Project;
- (c) Equipment and materials purchased and/or delivered;
- (d) Other related works whether complete or incomplete;
- (e) Payments due for piling and dynamic compaction;
- (f) Training;
- (g) Testing;
- (h) Management costs;
- (i) Downtime costs;
- (j) Site maintenance;
- (k) Demobilisation;
- (l) Personnel dispatch costs; and
- (m) Cost of breaching employment contracts.

591. These will be further explained below in the Valuation section.

592. A more detailed breakdown of the investments that were made in Trinidad and Tobago is provided in the fact sections above. These assets are also discussed in detail in the Damages section below.”

(underlining added.)

1055. As to these “other covered investments”, §591 says they will be “further explained” in the Valuation section. But there is no Valuation section in the Memorial. If the reference should be to the Damages section, (1) there is no further “explanation” of items (a) to (m) in the Damages section and (2) as stated above, the Damages section creates more confusion than clarity as to what investments were allegedly expropriated.

1056. As to §592, which says that a more detailed breakdown of the investments is provided in “the fact sections above”, it is not clear what is meant by “the fact sections above”. If this is a reference to the section on Facts and Circumstances of the Dispute (section E), it is not apparent where within that section “a more detail breakdown of the investments” is to be found.

1057. It is also notable that CMEC’s quantum experts have not been instructed to assess damages on the basis of the expropriation of the “other covered investments”, only on the basis of expropriation of CMEC’s contractual rights.

1058. Finally, on the topic of inconsistency and confusion, §711 of the Memorial says CMEC’s damages are divided into two main categories:

“(a) loss of rights to monies owed for work done...and costs incurred on the Project...but remaining unpaid as at the date of the Project’s termination” (**Unpaid Amounts**); and

“(b) lost profits and overheads that CMEC would have derived from future work...(**Lost Profit & Overheads**)”

1059. Thus CMEC’s contractual rights which it claims to have been expropriated include the “rights to monies owed for work done” ie the right to claim those monies owed. But, as stated above, CMEC has not lost the right to claim those monies – CMEC has made such claim in the past (by exercising its contractual rights under the contractual dispute resolution process) and is pursuing such claim even now (within its claim under the Umbrella Clause).

N1.3 CMEC’s failure to identify and establish the contents of its contractual rights

1060. CMEC’s case on the extent to which it is necessary to consider the provisions of the EPC Contracts is hopelessly inconsistent and irreconcilable.

1061. What CMEC asserts in §453 of the Memorial is referred to in Section E above and is directly relevant again here:

“In relation to the law to be applied in this case, a trite yet fundamental point must be reiterated for the avoidance of any doubt: CMEC's claims in this ICSID arbitration are based on Trinidad and Tobago's violation of its obligations under the BIT and international law exclusively, *not* for breaches of the EPC Contracts. It follows that beyond establishing the existence of contractual rights held by CMEC by way of BIT-covered investments in Trinidad and Tobago at the time they were expropriated by the State, the provisions of these contracts – including their ICC dispute resolution provisions – are entirely irrelevant to this case.” (underlining added.)

1062. As stated in Section E above, since what CMEC says has been expropriated are its contractual rights, it is the provisions of the EPC Contracts which identify and define the scope of those rights and also which affect what constitutes proper reparation for the loss of those rights.

1063. So, here, §711 of the Memorial says that the quantification of CMEC’s damages claim consequent upon the expropriation of its contractual rights comprises:

- (a) CMEC’s loss of rights to monies owed for work done under the EPC Contracts, being the “Unpaid Amounts”; and
- (b) lost profits and overheads CMEC would have derived from future work under the EP Contracts, had CMEC been allowed to exercise its right to perform the Contracts until completion, being the “Lost Profits and Overheads”.

1064. How can the content of any of these rights be determined without considering the provisions of the EPC Contracts?

1065. As to the Unpaid Amounts, why is CMEC entitled to such amounts? How, when and in what circumstances did such amounts become due and owing to CMEC?⁴⁵⁶
1066. It is obvious that these questions can only be answered by reference to the provisions of the EPC Contracts.
1067. But, by virtue of its said stance that the provisions of the EPC Contracts are “entirely irrelevant”, CMEC often sidesteps the questions and resorts to mere assertions.
1068. As to the Lost Profits and Overheads, as stated above, CMEC did not even have a legitimate expectation that it would be able to perform the EPC Contracts to completion, let alone the right to do so. And also, Alutrint was entitled to terminate the EPC Contracts at any time for its convenience. Nowhere in the Memorial does CMEC say why it had a right to perform the EPC Contracts to completion.
1069. The above matters point up the serious problems with CMEC’s assessment of quantum, which are addressed below.
1070. The fact is that CMEC’s burden is to show not only the “existence” of the contractual rights which it held by way of investments under the Treaty, but also the content of such rights and how, in the present context, they impact the assessment of CMEC’s damages claim.

N1.4 Adoption of CMEC’s 28 November 2012 claim against Alutrint as a “reference”

1071. Michael Tonkin was instructed as follows:

⁴⁵⁶ The same questions arise in respect of each of the 3 “Payment Claims” referred to in §684 of the Memorial and set out above.

“The quantum assessment is to be by reference to CMEC’s final account position as detailed in CMEC letter 242 to Alutrint dated 28 November 2012.” [C-0032]

1072. Mr Tonkin makes modest references to the 28 November 2012 claim in §§3.4.1, 3.4.2, and 5.1.1 to 5.1.4 of his Report, the primary point being to identify an arithmetical error in the calculation of the claim in that letter.

1073. The following points are noteworthy.

1074. First, as stated in Section G, 3, above, using the 28 November 2012 claim as the referential claim is surprising since, prior to the Memorial, CMEC had consistently presented its 17 May 2013 claim [C-0035] as its final consolidated claim, with subsequent claims said only to involve updating to reflect interest and other accrued costs and losses.⁴⁵⁷ This is likely to be because the 17 May 2013 claim represented the apogee of CMEC’s exaggerated claims, as was apparent at the Bifurcation Hearing.

1075. Secondly, the fact that Mr Tonkin needs a referential claim at all creates some confusion.

1076. The 28 November 2012 claim constituted CMEC’s **contractual claim** following the suspension of work and termination of “the EPC Contract”.⁴⁵⁸ Thus the claim was based on contractual provisions. If such provisions are now “entirely irrelevant” (beyond establishing the existence of contractual rights held by CMEC by way of investments under the Treaty), why does CMEC need to refer to the 28 November 2012 claim at all?

⁴⁵⁷ See also the Memorial, §377 which refers to the 17 May 2013 claim as the “updated consolidated statement of claim.”

⁴⁵⁸ The letter is headed “Outstanding Payments due Upon Contract Termination” and refers in the text to Alutrint’s 19 January 2012 letter having “formally terminated the EPC Contract for construction of the Smelter”.

1077. Thirdly, if it is considered necessary for Mr Tonkin to refer to any contractual claim, it would seem appropriate for him to refer to all CMEC's contractual claims and not to focus on one claim alone. However, were he to do so, CMEC's relentless exaggeration of the amounts it said it was due would be further exposed.⁴⁵⁹

1078. Fourthly, as a consequence of the fact that the 28 November 2012 letter constituted CMEC's **contractual claim** against Alutrint for suspension and termination of the EPC Contract, the question arises as to what its relationship is to CMEC's **Treaty claim**, particularly in view of CMEC's present stance that contractual provisions are irrelevant.

N1.5 Blowing hot and cold

1079. As to CMEC's present stance that the provisions of the EPC Contracts are entirely irrelevant to its Treaty claim, CMEC has blown hot and cold.

1080. Prior to service of the Memorial, the damages claim CMEC was consistently advancing was identical to its contractual claim against Alutrint. See Section E, 3, above, in which reference is made to the fact that CMEC was asserting that its damages claim in the Treaty action was the same as its contractual claim in CC's Notification of a Claim of 26 August 2022 [**C-0491**], the Request for Arbitration, dated 27 March 2023 and at the Bifurcation Hearing on 24 April 2024.

1081. Now, in the Memorial, CMEC is at pains to emphasise how irrelevant the contractual provisions are to its Treaty claim. CMEC has given no explanation for this complete volte-face.

⁴⁵⁹ It is noteworthy that the 28 November 2012 letter itself contained a number of exaggerated claims: see Section G, 3, above.

1082. And CMEC continues to blow hot and cold. CMEC's present stance does not prevent it from relying on contractual provisions when doing so appears to assist its case.
1083. For example, as regards CMEC's present claim for loss of profits and overheads, Clifford Chance has instructed Michael Tonkin that CMEC had a right to 5% profit and 5% overhead in addition to the 2008 Contract lump sum price of US\$414 million, together representing a 10% mark up (Memorial, §721). This instruction is explicitly based on PCC Clause 1.2 of the 2008 Contract. While this interpretation of that provision is plainly incorrect (as to which, see Section N, 4.3.2, below), CMEC is now squarely basing this significant feature of its damages claim on a contractual provision.
1084. As a further example, as regards CMEC's interest claim, Clifford Chance has instructed Mr Tonkin that his assessment "is to be based on the annual rate of 2% above the US discount rate, as provided for under the 2008 EPC Contract" (Memorial, §§724 to 729; Appendix MT-1.2 to Mr Tonkin's Report). The application of this interest rate while incorrect (as to which, see Section N, 4.3.4, below) is plainly based on a contractual provision.
1085. CMEC thus blowing hot and cold, both in the past and at present, demonstrates that the quantification of its damages claim has not been carried out on a principled basis.

N2. No principled and rational basis for Clifford Chance's instructions as to the assessment of quantum

1086. Given the lack of clarity as to what constitutes CMEC's "investment" which T&T has allegedly expropriated, it is perhaps not surprising that the quantification of its damages claim has not been carried out on any principled or rational basis.

1087. Clifford Chance has instructed Mr Tonkin to assess some of the claimed items on the basis of value and some on the basis of cost.
1088. It is not understood why the assessment of the market price of CMEC's contractual rights should be represented by any valuation of the claimed items, still less why any such assessment should contain a mix of value-based items and cost-based items.
1089. Nevertheless, §718 of the Memorial says:
- “Michael Tonkin has been instructed to assess the TWC and temporary works, the dynamic compaction works, and the cargoes shipped to Venezuela on the basis of value (together with the engineering design work assessed by Mr Connelly, **Value-Based Items**) and the balance of the work items on the basis of costs (**Costs-Based Items**)”(original emphasis)
1090. Also in §718, CMEC says that the rationale for assessing certain items on a value basis is that they have “an intrinsic value that can be ascertained “*generally by reference to prices already set out and agreed in the contract*””. The rationale for assessing certain items on a cost basis is that they “correspond to “*actual and demonstrable expenditure incurred*”” and CMEC was entitled “to be placed “*in the same financial position it would have been but for the circumstances giving rise to the claim*””. (original italics, underlining added)
1091. As stated, this mix of value-based and cost-based items does not identify the market price of CMEC's contractual rights. And in any event, the above are not principled or coherent reasons for valuing the items in these different ways.
1092. As to the value-based items, it is not easy to see what is meant by their having an “intrinsic value” by reference to “prices set out and agreed in the contract”,

when CMEC is at the same time saying that no regard should be had to the contractual provisions.

1093. Also as to the value-based items, there are “no prices already set out and agreed in the contract”.
1094. Damian Connelly has assessed CMEC’s claim in respect of the engineering design drawings on a value basis.
1095. His reason for doing so is that “the engineering design has been completed with work products provided to Alutrint” (§5.2.1 of Mr Connelly’s Report).
1096. The fact that the work product was provided to Alutrint is not a proper reason for using the value basis and is inconsistent with the rationale for using the value basis stated in §718 of the Memorial, viz that value can be ascertained by reference to “prices already set out and agreed in the contract”.
1097. Insofar as the rationale in §718 of the Memorial remains of any relevance to the valuation of the engineering design drawings, it is to be noted that there are no prices already set out and agreed for them in either of the EPC Contracts.
1098. In §§5.1.1 and 5.1.2 of his Report, Mr Connelly says that, although the 2 EPC Contracts were fixed price lump sum contracts, the contract performance was more like EPCM contracts (underlining added). This allows him to ascribe a value to the value-based items which exceeds any price agreed by the parties. In so characterising the 2 EPC Contracts, Mr Connelly has seen fit to depart in his assessment from what the parties have agreed, without any legal basis and in direct contradiction to the approach in §718 of the Memorial.
1099. Mr Connelly’s adoption of the value basis to assess CMEC’s claim in respect of the engineering design drawings enables CMEC to get out of the problem it has if the cost basis is adopted (which is the proper basis, as referred to below).

1100. The problem is that CMEC seems to have incurred no cost in respect of the design drawings. This is because:

- (1) CMEC did not do the drawings themselves; the design work was carried out by a Chinese entity, NEUI.
- (2) CMEC has not sought to rely on any contractual or other obligation to pay NEUI for the drawings.
- (3) Furthermore, most unusually, neither CMEC nor NEUI kept timesheets.⁴⁶⁰

See Section G, 1 and 2, above.

1101. So the documents are silent as to CMEC having incurred any cost in respect of the engineering drawings. Hence the advantage to CMEC of an assessment on a value basis.

1102. The investor is entitled to be placed in the same financial position it would have been in but for the circumstances giving rise to the claim (Memorial, §718). If, as appears to be the case, CMEC has incurred no cost in respect of the engineering drawings, it is not entitled to any recovery in respect of them. It is not the function of these proceedings to provide CMEC with a windfall.

1103. The confusion as to the rationale behind CMEC's valuation methodology is further compounded by §686 of the Memorial:

“As noted in the introduction to this Memorial of Claim, the fair market value of the Claimant's investments can be readily assessed using conventional valuation methods applicable to construction contract works, because the Claimant's investments that have been expropriated or otherwise been the subject of BIT violations by the State are the Claimant's contractual rights under the EPC Contracts. These valuations

⁴⁶⁰ §5.2.3 of Damian Connelly's Report says: “I understand that CMEC and its main design subcontractor NEUI did not keep timesheets. This does not affect the appropriateness of a value-based assessment.”

place the Claimant's damages to be approximately USD **156,022,913**, as currently assessed” (underlining added).

1104. However, the “conventional valuation methods applicable to construction contract works” are not “noted” in the Memorial, whether in the “introduction” (which presumably refers to section A, Executive Summary) or elsewhere.

1105. It is also difficult to understand how CMEC can reconcile its stances that the valuation method for its Treaty claims and contractual claims are simultaneously the same (as suggested in §686 of the Memorial) and entirely different (as suggested in §453 of the Memorial).

N3. The law

N3.1. Burden and standard of proof

1106. In **Crystallex v Venezuela** the tribunal, having found that Venezuela had breached the FET standard and expropriated the investor’s investment, said the following about the burden and standard of proof.⁴⁶¹

1107. The claimant bears the burden of proof “in relation to the fact and the amount of loss”.⁴⁶²

1108. As for the standard of proof of the fact (i.e. existence) of the damage, this must be “proven with certainty”.⁴⁶³

⁴⁶¹ **Crystallex International Corporation v. Bolivarian Republic of Venezuela**, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 [CL-0072] §§623, 718.

⁴⁶² Ibid, §864.

⁴⁶³ Ibid, §867.

1109. Once the fact of the damage has been established, the standard of proof of the actual amount of damage, is that it must be proved “with reasonable confidence” or “sufficient certainty”⁴⁶⁴.

1110. As the **Lemire v Ukraine** tribunal observed, the claimant “needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.”⁴⁶⁵

1111. And in **Amoco v Iran** the tribunal said:

“One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damages can be awarded. This holds true for the existence of the damage and of its effect as well. Such a rule, therefore, applies in the case of unlawful expropriation. A fortiori, the reasoning on which it rests must also apply in the case of compensation for a lawful expropriation. It does not permit the use of a method which yields uncertain figures for the valuation of damages, even if the existence of damages is certain.”⁴⁶⁶

1112. Thus, CMEC must prove “with certainty” the fact that T&T suffered a loss of the Unpaid Amounts and the Lost Profits and Overhead as a result of T&T’s alleged breaches of the Treaty. Once having done so, CMEC must prove the extent of that loss “with reasonable confidence” or “sufficient certainty”.

⁴⁶⁴ Ibid, §§868-869, 875

⁴⁶⁵ **Joseph Charles Lemire v Ukraine** ICSID Case No. ARB/06/18 Award, 28 March 2011 [RL-0078] §246.

⁴⁶⁶ **Amoco International Finance Corporation v The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited**, IUSCT Case No. 56, Partial Award No. 310-56-3, 14 July 1987 [CL-0069] §238

N3.2 Full reparation

N3.2.1 Expropriatory claims

1113. It is correct in principle for CMEC to consider the amount of compensation having regard to (1) the terms of Article 6(2) of the Treaty, (2) the ILC Articles 31 to 36⁴⁶⁷, and (3) the principle established in the **Chorzów Factory Case** (Memorial, §§689 et seq).

1114. However, CMEC's distillation of the principles as they apply to its loss of profit claim is incorrect.

1115. In particular, it is incorrect to assert that “[i]n the present case, the loss of profit would include the profit built into the unpaid invoices that form part of CMEC's claim as well as the profit margin on the entire EPC Contracts (less the profit claimed on unpaid invoices)” (Memorial, §701) and “Reparation would not be full where an award does nothing more than reimburse the injured investor for its sunk costs and fails to recognise the profits and chances it has lost (nor would such an outcome be fair)” (Memorial, §702).

1116. In **Vivendi v Argentina (“Vivendi II”)** the tribunal found that Argentina breached the FET standard in respect of the investors' investment (a concession agreement) and also expropriated the investment.⁴⁶⁸

1117. The tribunal, having applied the sources of international law set out above, concluded that the investors were entitled to recover only the amount which they had actually invested.

⁴⁶⁷ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001 [CL-0026], Articles 31 to 36; Draft articles on responsibility of States for internationally wrongful acts (with commentaries), Yearbook of the International Law Commission, 2001, Vol II, Part Two [CL-0099] pp.91-105.

⁴⁶⁸ **Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic** ICSID Case No. ARB/97/3 Award (post-annulment resubmission) [CL-0111] 20 August 2007 §§7.4.46, 7.5.34.

1118. The tribunal first observed that the provision of the treaty in question, as in Article 6(2) of the Treaty, “*mandates* that compensation for *lawful* expropriation be based on the *actual value* of the investment, and that interest *shall* be paid from the date of dispossession. However, it does not purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations. As to the appropriate measure of compensation for the breaches other than expropriation, the Treaty is silent.”⁴⁶⁹ (original italics)

1119. The tribunal then stated the principle in **Chorzów Factory Case**, and observed: “There can be no doubt about the vitality of this statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ’s successor, the International Court of Justice. It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for *lawful* expropriations.”⁴⁷⁰

1120. The tribunal further stated: “Disputing parties also cite to the ILC Articles on State Responsibility. Article 36 requires that a “state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution” and that such compensation “shall cover any financially assessable damage, including loss of profits insofar as it is established”.”⁴⁷¹

1121. Having regard to the above principles, the tribunal said:

“8.2.7. Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is

⁴⁶⁹ Ibid, §8.2.3

⁴⁷⁰ Ibid, §§8.2.4, 8.2.5

⁴⁷¹ Ibid, §8.2.6

supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.

8.2.8. Of course, the level of damages necessary to compensate for a breach of the fair and equitable treatment standard could be different from a case where the same government expropriates the foreign investment. The difference will generally turn on whether the investment has merely been impaired or destroyed. Here, however, we are not faced with a need to so differentiate, given our earlier finding that the same state measures infringed both relevant Articles of the BIT and that these measures emasculated the Concession Agreement, rendering it valueless. Put differently, the breaches of Articles 3 and 5 caused more or less equivalent harm.

8.2.9. Claimants' principal claim for compensation is based on the "fair market value" of the concession established by a lost profit analysis. Respondent did not seriously contest that fair market value could be an appropriate basis upon which to award damages for breach of the Treaty, but challenged Claimants' methodology and calculations.

8.2.10. "Fair market value" can be considered the equivalent of "actual value" as those words are used in Article 5. This standard has also generally been accepted as appropriate compensation for expropriation. However, as pointed out by the tribunal in *CMS Gas Transmission Co. v. Argentine Republic*, a "fair market value" standard might also be appropriate for other breaches which result in long-term losses. The *Azurix* tribunal also concluded that it could properly resort to fair market value to compensate breaches other than expropriation – in particular the fair and equitable standard. In its award, it noted the particular relevance of the government having taken over the concession.

8.2.11. On the facts before us, and having regard to the parties' approaches to damages, the Tribunal is of the view that it is appropriate to assess

compensation, *at least in part*, based on the fair market value of the concession.” (original italics.)

1122. Regarding whether fair market value should be determined by reference to loss of future profits, the tribunal said:

“8.3.3. At international law, depending on the circumstances arising in a particular case, there are a number of ways of approximating fair market value. The Tribunal accepts, in principle, that fair market value may be determined with reference to future lost profits in an appropriate case. Indeed, theoretically, it may even be the preferred method of calculating damages in cases involving the appropriation of or fundamental impairment of going concerns. However, the net present value provided by a DCF analysis is not always appropriate and becomes less so as the assumptions and projections become increasingly speculative. And, as Respondent points out, many international tribunals have stated that an award based on future profits is not appropriate unless the relevant enterprise is profitable and has operated for a sufficient period to establish its performance record. The Tribunal notes that even in the authorities relied on by Claimants, compensation for lost profits is generally awarded only where future profitability can be established (the fact of profitability as opposed to the amount) with some level of certainty.

8.3.4. In the Tribunal’s view, the likelihood of lost profits must be sufficiently established by Claimants in order to be the basis of compensable damages. The Tribunal also recognises that in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting *sufficient* evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.”

(emphasis and underlining added).

1123. In **Vivendi II**, the lion's share of the investors' claim for damages for expropriation was in respect of the investors' future loss of profits over the 27.5 years remaining of the concession agreement.⁴⁷² The investors used a DCF analysis which discounted anticipated future cash flow to the present value.⁴⁷³
1124. The tribunal rejected this approach. It held that the DCF methodology was inappropriate for the purposes of valuing the rights under the concession agreement because the investors could not "lead convincing evidence of its ability to produce profits in the particular circumstances it faced"⁴⁷⁴ (underlining added). From a very early stage, the concessionaire was struck with difficulties, experiencing *inter alia* technical and commercial deficiencies, disputes which arose with the authorities etc. In essence, the concession was in its early days and there was no evidence of profitability under the investors' control.
1125. The tribunal in **Vivendi II** then went on to examine alternative methods of calculating the fair market value of the concession. The tribunal decided that the "investment value of the concession agreement" (i.e., **the amount actually invested prior to the injurious acts**) offered "the closest proxy, if only partial, for compensation sufficient to eliminate the consequences of [the State's] actions".⁴⁷⁵
1126. The analysis and conclusion of the **Vivendi II** Tribunal are based on the "best settled rules of the law of international responsibility of States" (referred to in **Amoco v Iran**, above).

⁴⁷² Note that the concession agreement in **Vivendi II** concerned the investors' rights to operate the water and sewerage services in the Argentine Province of Tucuman and earn revenues from its operations.

⁴⁷³ Ibid, §§8.1.1-8.1.2

⁴⁷⁴ Ibid §8.3.8

⁴⁷⁵ Ibid §8.3.13

1127. Arbitral jurisprudence shows that there is a general reluctance to award damages for loss of future profits from as yet unperformed work where the relevant enterprise does not have an established track record. For example:

- (1) In **S.P.P. v Egypt**, the tribunal denied the claimant's claim for valuing its enterprise on the basis of the present value of future earnings expected to be generated had expropriation not occurred. The tribunal's reasoning was that the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful discounted cash flow calculation and that the project was in its infancy with little history on which to base projected revenues at the time of its cancellation. It was held that such an approach "would...result in awarding "possible but contingent and undeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account."⁴⁷⁶
- (2) Similarly, in **Autopista v Venezuela**, the Tribunal rejected the claimant's claim for future lost profits for being speculative because the bridge, the subject-matter of the concession, was never built. The tribunal observed that the main purpose of the agreement in question was to build the bridge for which the claimant would receive a "fair and equitable remuneration". The tribunal went on to say that "[a]s a matter of contractual interpretation, one cannot rely exclusively on the figures set forth in the original EFP without taking into account that the Bridge was never built. Otherwise, [the claimant] would obtain the same compensation that it would have received had it built the Bridge and, for that purpose, invested the amounts forecast...For these reasons, the Tribunal is not convinced that the figures set forth in the original EFP represent a sufficient basis to assess [the claimant's] lost profits in a non-speculative way..."⁴⁷⁷

⁴⁷⁶ **S.P.P. (Middle East) Limited, Southern Pacific Properties, Ltd. v the Arab Republic of Egypt** ICC Arbitration No. YD/AS No. 3493, Award, 20 May 1992 [CL-0106] §§184-189.

⁴⁷⁷ **Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela** ICSID Case No. ARB/00/5 Award, 23 September 2003 [RL-0079] §§357-358.

1128. **Himpurna California Energy Ltd v PT (Perseo) Perusahaan Listrik Negara [CL-152]**, relied on by CMEC (Memorial, §702), is to the same effect. The question in that case, as in other such cases, was whether, having regard to all the “relevant circumstances”, it could be shown that profits would have been made.⁴⁷⁸
1129. The approach in **Vivendi II** and in the other decisions referred to above further underlines that CMEC’s assertion in §695 of the Memorial that the “fair market value” of its expropriated investments is “the intrinsic value as identified/bargained for under the EPC Contracts themselves” is unprincipled.

N3.2.2 Non-expropriatory claims: the Additional Claims

1130. As regards treaty breaches other than expropriation, the effect of the measure in question will determine how damages are to be properly assessed.
1131. When other treaty breaches have resulted in the same effect as an expropriation, tribunals have applied the fair market value standard. But for treaty breaches that are non-expropriatory in nature, damages are limited to the actual losses incurred as a result of the wrongful act, in accordance with the full reparation principle. So in the case of non-expropriatory breaches, the tribunal should engage in a fact-based analysis to ascertain the harm actually caused by the non-expropriatory treaty violation.⁴⁷⁹
1132. The case of **Casado v Chile** highlights the importance of quantifying the particular economic injury caused by a non-expropriatory breach. The claimants sought compensation for Chile's expropriation of the El Carin newspaper in 1973. The claimants’ expropriation claim was rejected *ratione temporis* (i.e., the

⁴⁷⁸ **Himpurna California Energy Ltd v PT (persero) Perusahaan Listrik Negara** UNCITRAL Final Award, 4 May 1999 [CL-0152] §§290-297

⁴⁷⁹ **Vivendi II** supra §8.2.8; Christina L. Beharry and Elisa Méndez Bräutigam, ‘Damages and Valuation in International Investment Arbitration’ in J. Chaisse et al. (eds) *Handbook of International Investment Law and Policy* (Springer: 2021) [RL-0113] pp.1436-1437.

breach occurred before the BIT entered into force), but their breach of the FET claim was accepted due to Chile’s continued denial of justice. Nevertheless the tribunal awarded damages calculated on the basis that an expropriation had taken place.⁴⁸⁰ The *ad hoc* Committee then partially annulled the award, concluding inter alia that it was “manifestly inconsistent” for the tribunal to apply an expropriation-based calculation to claims of non-expropriatory breaches.⁴⁸¹ In the reinstated proceedings, the claimants attempted to reshape their expropriation claim according to a “continuing act” theory instead of quantifying their FET damages claim. But the tribunal dismissed the claimants’ claim entirely as the claimants had not shown “what particular injury and damage could be proved to have been caused to them by the breach of guarantee of fair and equitable treatment...which the First Tribunal had also established was legally and factually distinct from the original expropriation claim that had been dismissed *ratione temporis*.”⁴⁸²

1133. The passage in **Gold Reserve v Venezuela**⁴⁸³ [CL-0127] relied on by CMEC (Memorial, §708) shows that an expropriation-based award of damages is appropriate only when the claimant can establish “the total deprivation” of the investment in question. This is in line with the well-established principles set out above.

1134. In view of this, it is not understood why T&T’s “abusive conduct”, as alleged in §709 of the Memorial, can be said to have led to CMEC “suffering a total deprivation of their investment” or otherwise can be said to affect the issue of whether the non-expropriatory breaches alleged had an expropriatory effect.

⁴⁸⁰ **Victor Pey Casado v Republic of Chile (I)**, ICSID Case No. ARB/98/2, Decision on the Application for Annulment, 18 December 2012 [RL-0080] §§261-269, 282-286.

⁴⁸¹ Ibid, §287.

⁴⁸² **Victor Pey Casado v Republic of Chile (I)** ICSID Case No. ARB/98/2, Award (Re-submission), 13 September 2016 [RL-0081] §§88, 228-229, 244.

⁴⁸³ **Gold Reserve Inc. v Bolivarian Republic of Venezuela (I)** ICSID Case No. ARB(AF)/09/I, Award, 22 September 2014 [CL-0127].

N3.3. The limiting factors

1135. The ILC Articles prescribe limits to the recoverability of damages even where it can be established that the State's internationally wrongful act caused the injury suffered by the claimant.

N3.3.1 Duty to mitigate

1136. Commentary (11) on Article 31 of the ILC Draft Articles⁴⁸⁴ recognises the general duty that “even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury” caused by the State's act.

1137. This is not a legal obligation which itself gives rise to responsibility, but the failure to mitigate may preclude recovery to that extent. In the **Gabčíkovo-Nagymaros Project** case, having found an internationally wrongful act by Slovakia, the ICJ observed that a victim is still nonetheless under an obligation to mitigate the damages sustained, and that an injured party which has failed to take the necessary measures to limit its damages would not be entitled to claim compensation for the damage which could have been avoided.⁴⁸⁵

N3.3.2 Contributory fault

1138. ILC Article 39 provides that “[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.” This limits the scope of damages recoverable to the extent that the injured party has wilfully or negligently contributed to his own injury. The terms of the provision also encompass the situation where the claimant has (by act or omission) wilfully or negligently failed to mitigate such losses as would have

⁴⁸⁴ Commentary (11) on Article 31 of the ILC Draft Articles [CL-0099], p.93.

⁴⁸⁵ **Case Concerning The Gabčíkovo-Nagymaros Project (Hungary/Slovakia)** Judgment, 25 September 1997, ICJ Reports 1997 [RL-0082] p.55, §80.

been avoided by the taking of reasonable steps. It has been observed that this provision “is used in investment law to reduce damages where the investor either failed to mitigate damages or where its conduct concurrently contributed to the loss.”⁴⁸⁶

1139. The failure to use due diligence on the part of the investor can constitute contributory fault. The tribunal in **MTD v Chile** held that although Chile was in breach of its FET obligation by approving an investment when in fact the investment was not permissible according to Chile’s regulations and policies, nonetheless the investor had contributed to the loss of its investment by its failure to conduct a due diligence assessment which would have revealed the impermissibility of the investment. The tribunal contrasted the inaction of the investor with the practices “followed by diligent foreign investors” and considered that **the investor’s lack of proper due diligence constituted the voluntary assumption of risk by the investor notwithstanding Chile’s breaches which caused the loss.** Accordingly, the Tribunal reduced the claimant’s damages by 50%.⁴⁸⁷ Thus, contributory fault will be found if the investor’s conduct has contributed to its own losses.

1140. However, it is important to recognise that tribunals are concerned with examining the investor’s contributory fault only once it has been shown that the investor’s losses have passed the “but for” test ie if the investor’s losses would not have occurred but for the State’s breach of its international obligations. If the losses have not passed the “but for” test, then no question arises as to either the State’s liability or the investor’s contributory (concurrent) fault.

⁴⁸⁶ Wolfgang Alschner ‘Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration’ in M. Jansen et al (eds.). *The Use of Economics in International Investment Disputes: Liability and Damages* (CUP 2017) [RL-0105] p.314.

⁴⁸⁷ **MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile** ICSID Case No ARB/01/7, Award, 25 May 2004 [CL-0113] §§166-178, 188-189, 243-246.

N3.3.3 Prohibition against double recovery

1141. There is a general prohibition against double recovery for the same loss. The principle of prohibiting double recovery is to ensure that damages awarded are compensatory in nature and do not result in a windfall for the claimant, i.e. the investor is only made “whole” and does not benefit beyond full reparation.⁴⁸⁸
1142. The prohibition against double recovery is also relevant where damages sought under one heading may be included under another heading.⁴⁸⁹

N3.4. Interest

1143. For expropriatory claims, Article 6(2) of the Treaty states: “compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment.” (underlining added). See §693 and §723 of the Memorial.
1144. As to the awarding of compound interest, Commentaries (8) and (9) on Article 38 of the ILC Draft Articles⁴⁹⁰ say:

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest....In *R J Reynolds Tobacco Co v The Government of the Islamic Republic of Iran*, the tribunal failed to find:

any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, “[t]here are few rules within the scope

⁴⁸⁸ Borzu Sabahi et al, ‘Principles Limiting the Amount of Compensation’ in Christina L. Beharry (ed) *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill Nijhoff: 2018) [RL-0116] p.343.

⁴⁸⁹ Ibid, p.344.

⁴⁹⁰ Commentaries (8) and (9) on Article 38 of the ILC Draft Articles [CL-0099] pp.108-109.

of the subject of damages in international law that are better settled than the one that compound interest is not allowable”...

...

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that “compound interest reasonably incurred by the injured party should be recoverable as an item of damage”. This view has also been supported by arbitral tribunals in some cases. But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(underlining added)

1145. Although compound interest has been awarded in some cases of unlawful expropriation, this has by no means been the universal practice of ICSID tribunals. And the practice of awarding simple interest has prevailed in the following situations: (1) non-expropriatory breaches, such as violation of the FET standard (and the Non-Impairment standard) and pure breaches of contract which simultaneously give rise to a breach of the treaty (i.e. the Umbrella Clause); (2) where the investor has not convincingly demonstrated a need for compounding (e.g. where the investor has not provided proof that compound interest would have been spent or earned), and (3) where the investor never asked for compound interest in the first place.⁴⁹¹

1146. In circumstances in which tribunals have awarded compound interest, there has been no standard compounding period. Tribunals have normally used a one-year compounding interval. If a certain financial product has been chosen as a

⁴⁹¹ Marboe Calculation of Compensation and Damages in International Investment Law, Chapter 6 – Interest (OUP, 2nd Ed, 2017) [CL-0154] §§6.249-6.258

reference for setting the interest rate, then the compounding interval of this instrument should be used as the compounding interval of pre-award interest.⁴⁹²

1147. The compounding interval may also be influenced by the reference rate chosen by the tribunal. Where the tribunal has applied the US Treasury Bill rate, the period of compounding is typically one year, whereas if the tribunal has applied the 6-month LIBOR rate, the compounding interval is semi-annual.⁴⁹³

1148. Compensation for lost future revenues (or lost profits) is typically characterised as forward-looking damage, as distinct from “overdue amounts” that accrue interest.

1149. Commentary (11) on Article 38 of the ILC Draft Articles provides that “where a sum for loss profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery.”⁴⁹⁴ (underlining added)

1150. In this context, Commentary (11) highlights the mutual exclusivity of a claim for interest and a claim for loss of profits, stating that “a capital sum cannot be earning interest and notionally employed in earning profits at one and the same time.”

1151. For post-award interest, grace periods have been allowed in cases of BIT violations.⁴⁹⁵

1152. As to the duration of grace periods, there is no general rule applicable:

⁴⁹² Ibid §§6.223, 6.236-6.248.

⁴⁹³ Inna Uchkunova and Oleg Temnikov ‘A Procrustean Bed: Pre- and Post-Award Interest in ICSID Arbitrations’ in Meg Kinnear and Campbell McLachlan (eds) ICSID Review – Foreign Investment Law Journal (OUP: 2014) Vol. 29, Issue 3 [RL-0106] pp,648-668, p.660.

⁴⁹⁴ Commentary (11) on Article 38 of the ILC Draft Articles [CL-0099] p.109.

⁴⁹⁵ Marboe, supra [CL-0154] §§6.274-6.281.

- (1) **Southern Pacific Properties v Egypt**⁴⁹⁶, **Wena Hotels v Egypt**⁴⁹⁷, **LG&E v Argentina**⁴⁹⁸, and **Siag v Egypt**⁴⁹⁹ – 30 days
- (2) **Metaclad v Mexico**⁵⁰⁰ – 45 days
- (3) **Lemire v Ukraine**⁵⁰¹ and **CMS v Argentina**⁵⁰² – 60 days.
- (4) **Yukos v Russia** - 180 days “in view of the significant amount of damages which Respondent owes the Claimants”.⁵⁰³

N4. Application of legal principles to quantification of damages in this case

N4.1 Full reparation – a cost-based approach should be adopted as CMEC cannot show with the requisite degree of certainty that the profits would be earned

1153. CMEC cannot prove “with certainty” that it would have earned any future profits. Nor can CMEC prove “with reasonable confidence or sufficient certainty” the amount of any future profits, assuming that it could show with certainty that it would have earned some future profits.

1154. T&T repeats the factors set out in Section M, 2.2, above which demonstrate that there had always been major uncertainties concerning the future of the Project. The Tribunal can have no confidence that CMEC would have earned any profits in the future, even if there had been no breach of the Treaty by T&T.

⁴⁹⁶ **Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt** ICSID Case No. ARB/84/3, Award, 20 May 1992 [CL-0033] §257.

⁴⁹⁷ **Wena Hotels Ltd v Arab Republic of Egypt** ICSID Case No. ARB/98/4, Award, 8 December 2000 [CL-0090] §130.

⁴⁹⁸ **LG&E Energy Corp, LG&E Capital Corp and LG&E International, Inc. v Argentine Republic** ICSID Case No. ARB/02/1, Award, 25 July 2007 [RL-0083] §115.

⁴⁹⁹ **Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt** ICSID Case No. ARB/05/15, Award, 1 June 2009 [RL-0004] §631(VI)(b).

⁵⁰⁰ **Metalclad Corporation v The United Mexican States** ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 [CL-0085] §131.

⁵⁰¹ **Lemire v Ukraine** supra [RL-0078] §363.

⁵⁰² **CMS Gas Transmission Company v Republic of Argentina** ICSID Case No. ARB/01/8, Award, 12 May 2005 [CL-0124] §47.

⁵⁰³ **Yukos Universal Limited (Isle of Man) v Russian Federation** PCA Case No. AA 227, Final Award, 18 July 2014 [RL-0084] §1691.

1155. For the avoidance of doubt, the above is true, regardless of whether CMEC had any contractual right to claim loss of profits against Alutrint (which it did not: see Section G, 3, above) or any proper basis for recovering the loss of profit presently claimed (which it does not, as to which see Section N, 4.3.2, below).
1156. CMEC prays in aid the principle that no party is permitted to take advantage of its own wrong (Memorial, §§703 and 704). But none of the factors referred to above concerns any wrongdoing on T&T's part.
1157. Hence, applying the principles in **Vivendi II**, given CMEC's inability to prove with the requisite degree of certainty that it would have earned future profit, the best touchstone for full reparation in the present case is the amount CMEC actually invested in the Project (ie CMEC's investment costs).
1158. *A fortiori*, the investment costs approach should also be adopted for non-expropriatory breaches. Hence CMEC's recovery in respect of such breaches should be the cost it can show it incurred in consequence of any such breach.

N4.2. The limiting factors

1159. For the following reasons, there has been contributory fault on the part of CMEC in causing its loss and/or CMEC has failed to mitigate its loss:
- (1) If CMEC had conducted proper or adequate due diligence it would have known that the Project might not proceed to completion. T&T repeats the matters set out in Section J, 5.1, above. See also **MTD v Chile [CL-0113]**, referred to above.
 - (2) CMEC initiated but then unaccountably abandoned the contractual dispute resolution process in the 2008 Contract. See Section I, 4.2, above and Appendix IV hereto.

- (3) CMEC allowed more than a decade to elapse after the occurrence of the alleged Treaty breaches before intimating and then pursuing its Treaty claim against T&T in August 2022.
- (4) CMEC consistently and relentlessly presented exaggerated claims. It could not be expected that there could be any settlement of claims for such exorbitant sums. See Section G above and Appendix II hereto.
- (5) During the negotiations with government officials, CMEC consistently, over a period of several years, linked the settlement of its claim to the T&T government awarding it another large-scale industrial or infrastructural project in Trinidad and Tobago.⁵⁰⁴ See Section I, 9.2.2, above.

1160. There is a serious problem of double recovery in the present case.⁵⁰⁵

N4.3 CMEC's specific heads of claim

1161. T&T's submissions on certain of CMEC's specific heads of claim are as follows.

N4.3.1 CMEC's claim in respect of the engineering design drawings

1162. Damian Connelly has assessed CMEC's claim in respect of the engineering design drawings on a value basis.

1163. As stated above, this has enabled CMEC to get out of the problem it has if the cost basis is adopted viz that CMEC seems to have incurred no cost in respect of the design drawings. See Section N, 2, above.

1164. The best touchstone for full reparation in this case is the amount CMEC actually invested in the Project. See Section N, 4.1, above. And, in any event, the

⁵⁰⁴ See CMEC's 3 November 2015 letter to Dr Keith Rowley [C-0046] p.5.

⁵⁰⁵ See, for example, Tim Tapper's expert Report, §75.

underlying approach is that CMEC is entitled to be placed in the same financial position it would have been in but for T&T's Treaty breach.

1165. That being so, unless CMEC can establish that it has incurred some cost in respect of the engineering design drawings (and, if so, how much), it should not be entitled to any recovery under this head.

1166. In any event, NEUI has produced design works (eg drawings) for similar aluminium-smelter projects previously. Thus, CMEC/NEUI did not have to produce brand new bespoke design works specifically for the Project. This (1) affects the proper quantum of the design works (see Chris Hillier's expert Report) and (2) gives rise to a duty to mitigate on CMEC's part, given that the design works can be reused in the future. See also Leroy Mayers' witness statement of 29 May 2025, §139.

N4.3.2 CMEC's claim for loss of profits

1167. Irrespective of T&T's contention above that CMEC's loss of profits claim should be rejected on the ground that CMEC cannot show with the requisite degree of certainty that it would have earned profits in the future, T&T also contends that CMEC's present claim for loss of profits is plainly unsustainable for the following reasons.

1168. CMEC's loss of profits claim is presented on the basis of the following instructions which Michael Tonkin has received from Clifford Chance concerning the Overhead and Profit Claim:

“For the Overhead and Profit claim quantum assessment is to be based on Sub-clause 1.2 of the PCC of the 2008 EPC Contract which included 5% for overhead and 5% for profit. The 2008 Contract provided a direct cost of US\$414,000,000 plus 5% for overhead (USD20,700,000) and 5% for profit (USD20,700,000)” (see Mr Tonkin's report, Appendix 1.2).

1169. So CMEC's present claim is boosted by more than USD40 million as a result of Mr Tonkin following Clifford Chance's said instructions.

1170. But Clifford Chance's instructions regarding CMEC's entitlement to 5% for overhead and 5% for profit are obviously incorrect, for the reasons set out in Section D, 4.2.1, above.

1171. Hence CMEC's claim for loss of profits is plainly unsustainable.

N4.3.3 CMEC's claim for interest

1172. CMEC's claim for interest is a massive US\$70,268,628. See Michael Tonkin's Final Account: MT-1.3. This is approaching half of CMEC's total claim.

1173. For the assessment of interest, Clifford Chance's instructions to MT (in Appendix MT-1.2) were to:

- (1) Calculate interest **for works done but not paid** with start dates **from:** (i) invoice due date (if provided) or (ii) the 15th day of the month after invoice issuance (if no due date provided), or (iii) 28 December 2012 (if no invoice), and in each case **to** the expected date of the Tribunal's Award, being 31 December 2027;
- (2) Calculate interest **for works not done (ie future work)** at the start dates of 23 January 2012 and 18 June 2013 (ie two separate scenarios based on the respective dates of expropriation for CMEC's indirect and creeping expropriation claims) to the expected date of the Tribunal's award (31 December 2027);
- (3) Use the annual rate of **2% above the US discount rate** as provided for under the 2008 Contract; and
- (4) Compound **monthly**.

1174. Clifford Chance's approach is incorrect.

1175. First, perhaps as a corollary of the muddle in failing to adopt a coherent approach to properly valuing the expropriated investment (namely, CMEC's contractual rights), CMEC also fails to articulate a coherent theory on when interest should start running.
1176. §723 of the Memorial states that "...interest shall be calculated from "*before the expropriation*" or "*before the expropriation [became] public knowledge* (whichever arose earlier) until the date of payment".
1177. It is not explained however how the "invoice due date" or "invoice issue date" (referred to in the said instructions to Mr Tonkin) correlate with the date "before the expropriation" or "before the expropriation [became] public knowledge".
1178. Secondly, applying Commentary (11) on Article 38 of the ILC Draft Articles, it is inappropriate to award interest on the loss of profits claim, as this will amount to double recovery.
1179. Thirdly, using the annual rate of 2% above the US discount rate provided for in the 2008 Contract is inappropriate.
1180. In §724 of the Memorial CMEC does not cite the specific clause in the 2008 Contract that it relies upon. But it is clear that CMEC's claim for interest at the annual rate of 2% above the US discount rate, compounded monthly, is based on Clause 14.8 of the 2008 Contract, as amended by the PCC.
1181. However, the rate prescribed under Clause 14.8 of the 2008 Contract does not extend to *all payments* under the Contract.
- (1) Clause 14.8 provides that it is (only) when "the Contractor does not receive payment in accordance with Sub-Clause 14.7" that the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay, calculated at 2% above the US discount rate.

- (2) Clause 14.7 provides for when payment is to be made for (a) the first instalment of the advance payment (to be paid within 42 days after the date on which the Contract came into full force and effect etc); (b) the amounts due in respect of the Statements submitted by CMEC (within 56 days after receiving the “Statement” and supporting documents) – *note, under Clause 1.1.4.8 “Statement” is defined as “a statement submitted by the Contractor as part of an application for payment under Clause 14”*; and (c) the final amount due (within 42 days after receiving the Final Statement and written discharge in accordance with Sub-Clause 14.11).

1182. Clause 14.8 of the 2008 Contract therefore provides no basis for CMEC to claim interest at the annual rate of 2% above the US discount rate compounded monthly on the items invoiced, which are not payments to be made under Clause 14.7. **Karkey v Islamic Republic of Pakistan**,⁵⁰⁶ relied on by CMEC in §726 of the Memorial, is not applicable.

1183. CMEC asserts that the interest rates contended for constitute “commercially reasonable interests in investor-state disputes such as this one” (Memorial, §724).

1184. But Article 6(2) of the Treaty refers to “interest at a normal commercial rate from the date of expropriation until the date of payment”. Interest compounded monthly is plainly not “a normal commercial rate”.

1185. Fourthly, while compound interest has been awarded in some cases of unlawful expropriation, Commentaries (8) and (9) on Article 38 of the ILC Draft Articles point against the award of compound interest, as does Article 6(2) of the Treaty in its reference to “interest at a normal commercial rate”. As the present case is essentially a breach of contract claim (see Memorial, §710, the “common” act

⁵⁰⁶ **Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan** ICSID Case No. ARB/13/1, Award, 22 August 2017 [CL-0022]

being “the termination of the EPC Contracts”) it is an appropriate case for the award of simple interest.⁵⁰⁷

1186. Furthermore, since CMEC chose not to bring the Treaty claim until August 2022, the rationale for awarding compound interest, namely, that the investor has been out of funds which it would have reinvested, is not applicable. Nor has CMEC “convincingly demonstrated a need for compounding” (e.g. proof that compound interest would have been spent or earned).
1187. Fifthly, there is no basis for compounding the interest monthly. As stated above, tribunals have normally used a one-year compounding interval. The compounding interval may also be influenced by the chosen reference rate i.e., if the Tribunal applies the US Treasury Bill rate, the period of compounding is typically one year, whereas if the Tribunal applies the 6-month LIBOR rate, the compounding interval is semi-annual. See Section N, 3.4, above.
1188. Sixthly, CMEC’s interest claim should be heavily discounted on account of its contributory fault and/or failure to mitigate, to reflect inter alia (1) its decade-long delay in intimating this Treaty claim, and (2) its relentless presentation of grossly exaggerated claims. See Section N, 4.2, above.
1189. Finally, a grace period at the Tribunal’s discretion should be allowed for post-award interest. See Section N, 3.4, above.

⁵⁰⁷ See Section N, 3.4, above.

RESPONDENT'S MEMORIAL ON PRELIMINARY OBJECTIONS

1190. Pursuant to Rule 43(2) of the ICSID Arbitration Rules, T&T notified the Tribunal and CMEC of its intent to file preliminary objections, which is recorded in Procedural Order No 1, §28.

1191. The preliminary objections, are recorded in the Procedural Order, and are:

- (1) that the essential basis of CMEC's claims is breach of the EPC Contracts between CMEC and Alutrint, which falls outside the jurisdiction of ICSID and the Tribunal; and
- (2) that CMEC's claims are barred on the grounds of extinctive prescription, acquiescence and estoppel, abuse of process and bad faith.

O. Jurisdiction

O1. The law

1192. For the Tribunal to have jurisdiction over CMEC's claim it is necessary that the jurisdictional requirements under both the ICSID Convention (primarily Article 25) and the BIT (here, Article 10 of the Treaty) are satisfied.⁵⁰⁸

1193. So it is necessary to consider the provisions on jurisdiction in both the Convention and the Treaty, to see whether CMEC's claim falls within the requirements of each.

1194. Article 25 of the Convention states that "The jurisdiction of [ICSID] shall extend to any legal dispute arising directly out of an investment between a Contracting State...and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre". (underlining added)

⁵⁰⁸ **Spyridon Roussalis v Romania** ICSID Case No ARB/06/1, Award, 7 December 2011 [RL-0085] §57

1195. It is the part underlined above which is important, as it leads on to consideration of the language of the Treaty, in order to determine whether T&T and CMEC have, by such language, consented (in writing) to CMEC's claim being submitted to ICSID.

1196. It is thus because of Article 25 of the Convention that the nature of the legal dispute which CMEC may submit to ICSID is circumscribed by Article 10 of the Treaty.

1197. Article 10 of the Treaty provides (relevantly):

“1. For purposes of this Agreement, an “investment dispute” is a dispute between a Contracting Party and an investor of the other Contracting Party, concerning an obligation of the former under this Agreement in relation to an investment of the latter.

2. In the event of an investment dispute...the investor that is a party to an investment dispute may submit the investment dispute for resolution ...

3. ...to...[ICSID]”

(underlining added)

1198. So the only investment dispute which CMEC may submit to ICSID for resolution, is a dispute between T&T and CMEC concerning an obligation of T&T under the Treaty in relation to CMEC's investment, ie CMEC cannot submit a purely contractual dispute to ICSID for resolution.

1199. Whether there has been a breach of a treaty and whether there has been a breach of contract are different questions. Each of these claims will be determined by

reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the contract, by the proper law of the contract.⁵⁰⁹

1200. The fact that CMEC has itself characterised its claims as Treaty claims does not mean that they are. It is for the Tribunal to decide whether CMEC’s claim can properly be characterised as a claim for breach of the Treaty or whether, in truth, its claim is a claim for breach of contract.

1201. **Vivendi** has been recognised in many ICSID cases as providing the touchstone for distinguishing the two types of cases.

1202. **Vivendi** distinguishes between:

- (1) a case where “the essential basis” of the claim brought before the international tribunal is a breach of contract, on the one hand (§98); and
- (2) a case where “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, on the other hand (§101).⁵¹⁰

1203. Applying this distinction in the present case, if the “essential basis” of CMEC’s claim brought before ICSID is the alleged breach of the EPC Contracts, the necessary consequence is that the claim will not concern an obligation of T&T under the Treaty. In that circumstance, the claim would fall outside the definition of “investment dispute” under Article 10 of the Treaty and no dispute would have been submitted by CMEC which was subject to ICSID’s jurisdiction.

⁵⁰⁹ **Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale Des Eaux v Argentine Republic (“Vivendi”))** ICSID Case No ARB/97/3 Decision on Annulment, 3 July 2002 [RL-0086] §§95-96.

CMEC has made a similar point in the Memorial §453, but has gone on to state incorrectly that the provisions of the EPC Contracts are, essentially, irrelevant to this case (as to which see **above/below**).

⁵¹⁰ See also **Azurix Corp v The Argentine Republic** ICSID Case No ARB/01/12, Award, 14 July 2006 [CL-0120] §§65-68 on the interaction between municipal/local law and international law.

O2. The essential basis of CMEC's claim is the alleged breach of the EPC Contracts

1204. It is plain that the “essential basis” of CMEC’s claim is the alleged breach of the EPC Contracts.

1205. As a starting point, while CMEC was regularly sending Alutrint its 15 letters containing its claims arising under the EPC Contracts over an 11-year period (between 14 February 2011 and 15 August 2022), CMEC made no mention whatsoever of any Treaty claim against T&T. And this, in spite of the fact that the centerpiece of CMEC’s present Treaty claim, the “Expropriation Orders”, were made many years before, in January 2012 (Memorial, §§580-581). CMEC first made its Treaty claim in CC’s Notification of a Claim of 26 August 2022 [C-0491], pursuant to Article 10(2) of the Treaty. As stated above, this was just 11 days after the 15th claim by letter CMEC had made against Alutrint.

1206. All the signs are that CMEC simply switched from making repeated claims against Alutrint under the EPC Contracts to belatedly making a Treaty claim against T&T in order to exert pressure on T&T to settle outstanding amounts allegedly due under the EPC Contracts.

1207. This is supported by the fact that when CMEC first intimated its claim, in CC’s Notification of a Claim of 26 August 2022, the claim was said to concern “the State’s failure to pay amounts due for works CMEC has carried out under the two EPC Contracts” [C-0491, §5]. And for the next 2 years, until the Memorial was served on 11 November 2024, the amount of the Treaty claim was identical to the amount CMEC had sought from Alutrint under the EPC Contracts.⁵¹¹ It is

⁵¹¹ The amount of CMEC’s Treaty claim was identical to the amount CMEC had sought from Alutrint under the EPC Contracts, in the Request for Arbitration dated 27 March 2023, §70, and at the Bifurcation Hearing, held on 24 April 2024: see Section I, 9.3.2, above.

only in the Memorial that, for the first time, CMEC's presented its claim as other than for the identical amount it had been claiming against Alutrint.⁵¹²

1208. Next, the essential basis of a claim, in circumstances such as those presently under consideration, will be a breach of contract unless it is apparent that the State was acting in the exercise of its sovereign powers. "[T]he Tribunal will need to determine the extent to which the [State] was acting in the exercise of its sovereign authority...or as a party to a contract": **Azurix v Argentine Republic [CL-0120]** §53.⁵¹³

1209. Here, T&T's impugned conduct was not carried out in the exercise of its sovereign powers. See, in relation to this, Section I, 5, above (as regards Expropriation), Section J, 7, above (as regards FET) and Section K, 7, above (as regards the Non-Impairment standard).

1210. Hence the essential basis of CMEC's claim is the alleged breach of the EPC Contracts.

1211. It is notable that there is no mention in the Memorial of the all-important and well-known distinction between the two types of cases set out in **Vivendi** and referred to above, in spite of the facts:

- (1) that T&T had made it explicit that its case was that the essential basis of CMEC's claim was breach of the EPC Contracts and that therefore CMEC's claim falls outside the jurisdiction of the ICSID Convention and the Tribunal: see Procedural Order No 1 §28.1.1 and
- (2) that §§472 to 523 of the Memorial deal at length with numerous other, uncontroversial matters relating to jurisdiction.

⁵¹² CMEC is now anxious to divorce its Treaty claim from its previous contractual claim. The Memorial, §453 purports to do this by saying that, in substance, CMEC's contractual rights "are entirely irrelevant to this case", as to which, see Section E, above.

⁵¹³ See also **Impregilo v Pakistan [CL-0110]**, §260, to like effect.

1212. For the above reasons, the Tribunal has no jurisdiction over CMEC's claim.

1213. Finally, for a separate reason, the Tribunal has no jurisdiction over CMEC's expropriation claim. This is because CMEC's contractual rights do not confer on CMEC any property right (or asset) and CMEC had no "investment" within the meaning of Articles 1(1), 6(1) and 10(1) of the Treaty: see Section I, 3, above.

1214. Hence the Tribunal has no jurisdiction over CMEC's claim that T&T was in breach of Article 6(1). Note that in **Emmis v Hungary [RL-0087]** the tribunal, having found that the investor did not have the requisite property interest (or asset), dismissed the investor's claim for lack of jurisdiction (§161).

P. CMEC's claims are barred on the grounds of (1) extinctive prescription, (2) acquiescence and estoppel and (3) abuse of process and bad faith

1215. Preliminary objections (1) (2) and (3), referred to above, do not go to the question of jurisdiction, but nevertheless constitute preliminary objections within the meaning of ICSID Arbitration Rule 43(1).⁵¹⁴

P1. Relevant factual background

1216. These preliminary objections are based on principles of good faith and equity which are generally applied by ICSID tribunals and set out in ICSID literature.

1217. The background against which these preliminary objections arise is the indisputable fact that there was a very substantial delay between the date of the

⁵¹⁴ Article 41(2) of the ICSID Convention and Arbitration Rule 43(1) of the ICSID Arbitration Rules address not only objections to jurisdiction but also objections that the dispute is "for other reasons not within the competence of the Tribunal" and characterise both as "preliminary objections".

The authoritative texts and tribunal decisions make it plain that all the following are included in the objections which are referred to in Article 41(2) and Rule 43(1):

- (1) objections to the jurisdiction of ICSID, if a condition stipulated in Article 25 of the Convention is not fulfilled;
- (2) objections to the competence of a tribunal to hear a particular dispute; and
- (3) objections to the admissibility of a particular claim.

As an example, see Schreuer's Commentary on the ICSID Convention CUP 2022 Article 41 [RL-0107] §§12-14, 87-88, 92.

events which CMEC now says constitute T&T's breach of its treaty obligations (which go back to **2012**) and the date when CMEC first notified T&T that it was making a Treaty claim against T&T, in CC's Notification of a Claim (dated **26 August 2022**). Prior to the end of August 2022⁵¹⁵ T&T had no idea that CMEC was proposing to bring a Treaty claim against it since, prior thereto, CMEC had been exclusively engaged in making a series of increasingly exaggerated claims against Alutrint under the EPC Contracts.

1218. An elaboration of the relevant factual background is as follows:

- (1) Between 14 February 2011 [**R-0004**] and 15 August 2022 [**C-0044**] CMEC made 15 claims by letter to Alutrint for loss and expenses it had allegedly suffered in connection with, and as a result of the termination of, the EPC Contracts. See Section G, above and Appendix II hereto.
- (2) The sums claimed by CMEC in the letters sent to Alutrint were for ever-increasing, grossly exaggerated sums. See Section G, above and Appendix II hereto.
- (3) CMEC conducted a series of negotiations with T&T personnel in an attempt to settle CMEC's claims, the intention being that any payment to CMEC would be made by Alutrint. See Section D, 11, above. The context of CMEC's negotiations was its claims for the grossly exaggerated sums set out in its letters to Alutrint.
- (4) CMEC's negotiations were on the basis that, should they fail, CMEC would proceed against Alutrint pursuant to the dispute resolution processes set out in the EPC Contracts. See Section D, 11, above.
- (5) In July 2014 CMEC activated the dispute resolution process under the 2008 Contract. Alutrint participated in that process. Then CMEC

⁵¹⁵ The day before the Notification of a Claim, it was apparent from CMEC's 25 August 2022 letter to T&T's Minister of Finance [**C-0490**] and the attached Power of Attorney, that CMEC was proposing to commence arbitration proceedings under the Treaty against T&T.

unaccountably abandoned the process in about July 2015. See Section I, 4.2, above, and Appendix IV hereto.

- (6) Years later, CMEC suddenly changed tack and served on T&T CC's Notification of a Claim on 26 August 2022. This came out of the blue. CMEC had given no previous indication that it had in mind to target T&T, whether under the Treaty or at all.⁵¹⁶
- (7) As stated above, when CMEC first intimated its claim against T&T in CC's Notification of a Claim and thereafter in the Request for Arbitration and at the Bifurcation Hearing, CMEC's Treaty claim was linked to its previous claims against Alutrint, as it was for the same amounts as were allegedly due for works CMEC had carried out under the EPC Contracts. Now, in the Memorial, CMEC says that beyond establishing the existence of contractual rights held by it as investments under the Treaty, the EPC Contracts are "entirely irrelevant" to its Treaty claim.

P2. Extinctive prescription

P2.1 The law

1219. "Extinctive prescription" is the term used by international tribunals for barring a claim on the grounds of delay.

1220. CMEC accepts that the doctrine of extinctive prescription exists under international law (Memorial, §674).

1221. The term expresses the notion that lapse of time may lead to the extinction of legal positions ie where a claimant fails to present claims within an appropriate

⁵¹⁶ From the timing, it looks as if Clifford Chance must have been preparing the detailed 16-paragraph Notification of a Claim sent to T&T, with its 47-paragraph Annex [C-0491], at the very time when CMEC sent its 15 August 2022 claim by letter to Alutrint [C-0490], only 11 days previously.

period of time, it permanently loses the right to do so, even where it has not acquiesced in their extinction.⁵¹⁷

1222. It is widely accepted in general international law and by the majority of ICSID tribunals that the extinctive prescription principle will operate to bar a claim even where the applicable treaty does not stipulate a time limit within which claims are to be brought.⁵¹⁸

1223. The issue of delay is to be resolved on the basis of international law governing the BIT.

1224. There is no hard and fast rule as to what period amounts to undue delay. “International law has no rule that specifies the time period which must elapse in order to render extinctive prescription operative. Instead of rules providing for precise time limitations, international law refers to a general principle that a claimant shall not unreasonably delay the pursuit of its claim”.⁵¹⁹

1225. But extinctive prescription may be established if the respondent State has been placed at a disadvantage in establishing its defence.⁵²⁰ The decisive factor is not the length of the elapsed time in itself but whether the respondent State has

⁵¹⁷ Christian J Tams, ‘Waiver, Acquiescence, and Extinctive Prescription’ in James Crawford et al, *The Law of International Responsibility* OUP 2010, Chapter 72 [RL-0108] at p.1045.

⁵¹⁸ **Case concerning Certain Phosphate Lands in Nauru (Nauru v Australia)**, Preliminary Objections, Judgment, 26 June 1992, ICJ Reports 1992 p.240 §32 cited in **ICS Inspection and Control Services Limited (UK) v Argentina** PCA Case No 2010-9, Award on Jurisdiction, 10 February 2012 §201 [RL-0088]. See also **Case of Ann Eulogia Garcia Cadiz (Loretta G. Barbarie) v Venezuela**, opinion of the Commissioner, Mr Findlay, Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885, United Nations Reports of International Arbitral Awards Vol.XXIX, pp.293-298, particularly pp.293, 297-8 [RL-0089].

⁵¹⁹ **Nordzucker AG v. Republic of Poland**, UNCITRAL Partial Award 10 December 2008 [RL-0090] §221.

⁵²⁰ Kaj Hober, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (Iustus Forlag 2001) [RL-0109], p.285 (noting that the extinctive prescription principle requires, at least prima facie, the simultaneous existence of the following four criteria: an unreasonable delay in the presentation of a claim; imputability of the delay to negligence of the claimant; absence of a record of facts; and the respondent must be placed at a disadvantage in establishing his or her defense), p.302 (submitting that these four criteria “in fact boil down to two, viz, (i) delay in presenting a claim and (ii) the delay must put the respondent at a disadvantage, “and the remaining two requirements are “difference aspects – sub-categories – of these two requirements.”)

suffered prejudice because it could reasonably have expected that the claim would no longer be pursued.⁵²¹

1226. In the Memorial, §§679 to 682, CMEC contends that among the factors tribunals considered when deciding whether a claim is barred by extinctive prescription are (a) whether the investor has persistently pursued its claim against the State, and (b) whether the reason for the investor's delay was a good faith belief that a fair resolution of the dispute could be achieved without having to commence arbitration.

1227. CMEC cites **Kardassopoulos v Georgia [CL-079]**, where factors (a) and (b) were present and the tribunal rejected the extinctive prescription defence. Here, CMEC also relies on factors (a) and (b) and says the extinctive prescription defence should similarly be rejected.

1228. For the reasons stated below, CMEC's reliance on **Kardassopoulos v Georgia** is misplaced.

P2.2 CMEC's claim should be barred on the grounds of extinctive prescription

1229. CMEC accepts that "CMEC's dispute with the State had its origins over 10 years ago" (Memorial, §682). This understates the amount of time that has now passed since the matters occurred of which CMEC now complains, but at least acknowledges that the delay in bringing this Treaty claim against T&T has been very long indeed.

1230. The unique feature of this claim is that T&T had no indication whatsoever that CMEC would be pursuing a claim against it until the end of August 2022 ie after a lapse of the period of at least a decade.

⁵²¹ J Crawford, *State Responsibility: the General Part*, CUP 2013 [RL-0110] p.563. It is notable that in the treatment of extinctive prescription in the Memorial (§§673 to 683), no mention is made of the factor of the State suffering prejudice, but this factor is referred to in various of the tribunal awards and in the authoritative texts.

1231. In the usual case where the State raises the extinctive prescription defence, the investor has accused the State of breaching the treaty, engaged in protracted negotiations with the State and then, several years later, commenced treaty proceedings against the State. In such a case, factors (a) and (b), referred to above, come into play. **Kardassopoulos v Georgia** was such a case.⁵²²
1232. But here CMEC gave no indication that it was alleging any breach of Treaty by T&T, all of its claims having been contractual claims directed at Alutrint and all negotiations having been conducted in the context that any payment would be made by Alutrint. Then, out of the blue, more than a decade later and with no warning, CMEC made its Treaty claim against T&T. This is the unique feature of this claim. See the relevant factual background, set out in Section P, 1, above.
1233. CMEC's delay in raising any claim under the Treaty until August 2022 has caused considerable prejudice to T&T in preparing its defence to claims brought in respect of events which occurred over a decade ago.
1234. First, T&T has been caught entirely off guard. Not only has T&T been deprived of a fair opportunity of preparing its defence to claims under the Treaty for the past decade (which it could have done if it had been given timely notice and warning by CMEC), but also, T&T's conduct in facilitating settlement negotiations between CMEC and Alutrint in respect of the former's claims for payment under the EPC Contracts is now being utilised by CMEC in these proceedings as part of its case that T&T violated various provisions of the Treaty.
1235. Secondly, as a consequence of not having been able to anticipate claims under the Treaty in light of CMEC's consistent posture of pursuing contractual claims

⁵²² In **Kardassopoulos v Georgia**, Georgia had by presidential decree cancelled the oil exploitation and extraction rights of the investors. Shortly after the cancellation of the investors' rights by decree in 1995 the State admitted its liability to compensate the investors for losses occasioned by its decree (§196). Thereafter the investors persistently pursued their claim against Georgia. It was in these circumstances that the tribunal observed that "the [State] has been on notice of the claims since 1995 and, during the period from 1997 to 2004, claimed to be calculating the compensation payable to the [investors]" (§255, and see also §§163-164) and that "the Claimants had good reason to suppose that a fair resolution of the dispute could be achieved in the manner proposed by the [State] if the [investors] did not have recourse to arbitration" (§261).

against Alutrint, significant difficulty has been caused to T&T with regard to preserving and obtaining evidence. This includes obtaining the relevant documents and locating relevant witnesses, particularly as witnesses. See Leroy Mayers' witness statement of 29 May 2025, §§17, 20, 22 and 147.

1236. Hence, CMEC's claim should be barred on the grounds of extinctive prescription.

P3. Acquiescence and Estoppel

P3.1 The law

1237. The doctrines of acquiescence and estoppel have links with the extinctive prescription principle where there is a significant delay on the part of the investor in bringing its claim against the State.

1238. **Acquiescence** requires the following elements: (i) the investor's inaction or failure to assert a claim (and thereby its implicit acceptance of its extinction); (ii) such failure must have extended over a certain period of time, and (iii) such failure must have occurred in circumstances that would have required the investor's action.⁵²³

1239. The investor's failure to assert claims may amount to acquiescence "where it has energetically pursued other, related claims" or where the passivity of the investor has meant that the State "could legitimately expect that the claim would no longer be asserted".⁵²⁴

1240. By contrast, **estoppel** operates to preclude a party from acting inconsistently where the inconsistency results in prejudice the other party. The essence is "a

⁵²³ Christian J. Tams, *supra*, [RL-0108] pp.1042-1044.

⁵²⁴ *Ibid*, at p.1044.

statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.”⁵²⁵

1241. Estoppel in international law typically comprises the following elements: (1) “a statement of fact which is clear and unambiguous”; (2) this statement “must be voluntary, unconditional and authorised”; and (3) “there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement”.⁵²⁶

1242. Estoppel may also arise where a party “demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct” (underlining added). But mere inactivity, as opposed to an act, is not sufficient to constitute estoppel (and is separately covered by the extinctive prescription principle).⁵²⁷

1243. Hence, while under the doctrine of acquiescence it is necessary to show that the investor has accepted, by implication, the loss (extinguishment) of its claim, the concept of estoppel operates on a different level, namely that the investor is precluded from asserting its claim because it has conducted itself in a manner which is inconsistent and misleading to the other party. Thus, for a State to rely on estoppel precluding a claim, it must establish detrimental reliance in that it has been prejudiced by the investor’s change of attitude.⁵²⁸

1244. So the focus of acquiescence is the conduct of the investor, while the focus of estoppel is detrimental reliance by the State on what the investor has said or done.

P3.2 CMEC’s Treaty claim is precluded by acquiescence and/or estoppel

⁵²⁵ **Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)**, Application to Intervene, Judgment, 13 September 1990, ICJ Reports 1990, [RL-0057] p. 92, §63.

⁵²⁶ **Pope & Talbot Inc v Government of Canada**, UNCITRAL Interim Award, 26 June 2000 [RL-0091] §111. See also Christian J. Tams, *supra*, [RL-0108] p.1047.

⁵²⁷ **Mamidoil Jetoil Greek Petroleum Products Société Anonyme SA v Republic of Albania** ICSID Case No. ARB/11/24, Award, 30 March 2015 [RL-0092] §469.

⁵²⁸ Christian J. Tams, *supra*, [RL-0108] p.1045.

1245. CMEC's Treaty claim is precluded as a result of the application of the doctrines of acquiescence and/or estoppel. T&T relies on the relevant factual background set out in Section P, 1, above.
1246. In particular, as regards **acquiescence**, T&T points to CMEC's inaction and failure to assert its Treaty claim against T&T for more than a decade (and thereby CMEC's implicit acceptance of its extinction). T&T also points to the fact that CMEC energetically pursued its contractual claim against Alutrinc over the same period, both in its 15 claims by letter and in its activation of the dispute resolution process under the 2008 Contract. When CMEC activated the contractual dispute resolution process it took no steps to reserve its right to make a Treaty claim against T&T.
1247. In particular, as regards **estoppel**, T&T points to the fact that CMEC demonstrated by its conduct over the decade-long period of pursuing its contractual claim against Alutrinc that it had an intention of making any claim against T&T under the Treaty. CMEC thereby misled T&T into believing that it would not be asserting any such claim.
1248. Had T&T been given fair and timely advance warning and notice regarding CMEC's intent to pursue T&T under the Treaty (or had CMEC at least reserved its right to do so), T&T would not have participated in or facilitated the settlement negotiations between CMEC and Alutrinc to its detriment and prejudice. The detriment and prejudice caused to T&T by CMEC's sudden change of attitude from pursuing and negotiating its contractual claims against Alutrinc and then switching to pursuing T&T for violations of the Treaty is apparent from the fact that CMEC is now utilising the manner in which T&T conducted those negotiations as ammunition in support of its allegations of breach of Treaty against T&T.⁵²⁹

⁵²⁹ See in particular §§641-646 of the Memorial in relation to T&T's alleged breaches of the FET standard.

1249. All in all, CMEC's institution and pursuance of the present arbitration is entirely inconsistent with CMEC's conduct and posture from the very beginning, i.e. since as early as 2010 when the material events which are the subject of the complaints in these proceedings arose. CMEC ought to be precluded on one or other of the above grounds from blowing hot and cold and having its cake and eating it too.

P4. Abuse of process and bad faith

P4.1 The law

1250. Abuse of process has been defined as “the malicious, frivolous or wrongful use of procedural rights contrary to their intended purpose.”⁵³⁰ The doctrine prohibits the exercise of rights for purposes other than those for which the right was established.⁵³¹

1251. 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,⁵³² which requires examining the claimant's intent or purpose in exercising the right.⁵³³

1252. The categories of abuse are not closed.⁵³⁴ The deliberate pursuit of a knowingly frivolous claim may also amount to an abuse of process.⁵³⁵

⁵³⁰ 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) [RL-0021] pp.70-98, at p.72 fn10.

⁵³¹ **Orascom TMT Investments v Algeria** ICSID Case No ARB/12/35 Award, 31 May 2017 [RL-0022] §§540-541.

⁵³² Solis, *supra*, [RL-0021] pp.70-72.

⁵³³ Solis, *supra*, [RL-0021] pp.86, 97; see also John David Branson, 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration', in Maxi Scherer (ed), *Journal of International Arbitration*, Kluwer Law International 2021, Volume 38 Issue 2, pp.187-214 [RL-0023] pp.187-188.

⁵³⁴ **Orascom v Algeria** [RL-0023] §541.

⁵³⁵ Solis *supra*, [RL-0021] p.85. See also **Gavrilovic v Croatia** ICSID Case No ARB/12/39, Award, 26 July 2018 [RL-0020] §412.

1253. For instance, abuse was upheld when an investor brought a manifestly ill-founded and fraudulent claim, fabricating transactions after the fact and considerably delaying the proceedings. In particular, the Tribunal was of the view that the investor intentionally and in bad faith abused the ICSID arbitration process by purporting to be an investor when it knew this was not the case.⁵³⁶

1254. It has been said that “the 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.”⁵³⁷ (underlining added.)

P4.2 CMEC has abused the process and acted in bad faith

1255. CMEC has conducted itself in the following manner:

- (1) Having pursued its contractual claim against Alutrint for more than a decade, CMEC, without warning, switched to bringing this Treaty claim against T&T. Its intention was to exert pressure on T&T to settle a purely contractual claim which it had been pursuing against a different party (Alutrint) on its desired terms as to quantum.
- (2) CMEC consistently exaggerated its claims against Alutrint with no justification whatsoever, simply plucking bigger and bigger figures out of the air (see Section G, above and Appendix II hereto).
- (3) When CMEC switched its line of attack to the Treaty claim against T&T, it initially sought from T&T exactly the same grossly exaggerated sums which it had previously sought to recover from Alutrint.

⁵³⁶ **Cementownia ‘Nowa Huta’ SA v Republic of Turkey** ICSID Case No. ARB(AF)/06/2 Award, 17 September 2009 [RL-0024] §§157-159.

⁵³⁷ Solis supra fn138 [RL-0021].

- (4) After T&T pointed out these stark facts in the bifurcation proceedings, CMEC pivoted again and changed the basis of quantification of its Treaty claim entirely (from a claim for contractual damages to a claim for so-called full reparation, in an attempt to mask the exaggerations in its previously presented claim).
- (5) CMEC's damages claim in these proceedings is still plainly unsustainable for the multiple reasons set out above in Section N and in T&T's experts' reports.
- (6) CMEC's Treaty claim is wholly without merit on liability issues, for the multiple reasons set out above in the Counter-Memorial on the Merits. In substance, CMEC has sought to shoehorn a purely contractual claim into a Treaty claim for the ulterior purposes referred to above, but with the consequence that the Treaty claim simply does not fit.
- (7) And while re-presenting its contractual claim against Alutrint as a claim under the Treaty, CMEC has seen fit recently to add for good measure the contention that T&T was guilty of serious discriminatory conduct ("undoubtedly a grave and extreme form of discrimination": Memorial, §666(c)). This contention is plainly as hopeless as it is reckless. It should never have been made.

1256. T&T respectfully submits that CMEC's bringing of this Treaty claim constitutes an abuse of the ICSID arbitration process.

APPENDIX I

DIFFERENCES BETWEEN CMEC'S CASE IN THE REQUEST FOR ARBITRATION (RfA) AND ITS CASE IN THE MEMORIAL

1. Why CMEC did not pursue the DAB procedure under the 2008 Contract

1. By Pinsent Masons' 13 March 2015 letter to Alutrint (copied to 3 T&T government Ministers),⁵³⁸ CMEC gave formal Notice of Intention to refer to a DAB, pursuant to Clause 20.2 of the 2008 Contract, all claims which CMEC had against Alutrint in respect of the Project.
2. Alutrint agreed to CMEC's claim being referred to a DAB and made some proposals as to how the DAB procedure should be conducted.⁵³⁹
3. CMEC failed to pursue the DAB procedure. It has given different reasons for doing so.
4. In the RfA, §57, CMEC said that it agreed "to put its case on hold" as a result of T&T's assurances and promises:

"Discussions between CMEC and the State in the midst of the 2015 Trinidad and Tobago general election led to CMEC agreeing to put its claim on hold. It did so in reliance on the State's assurances that (i) a substantial good faith payment would initially be made to CMEC before the general election and (ii) shortly after the election, CMEC's claims would be settled in full. Yet, once again, the State failed to carry out its promises."

⁵³⁸ C-0048.

⁵³⁹ See Hogan Lovells' letter to Pinsent Mason dated 1 May 2015: C-0398.

5. No particulars of T&T's alleged assurances and promises were given, nor was any explanation given as to why, when T&T did not carry out its alleged promises, CMEC did not resume the DAB process.
6. CMEC had given a similar account regarding putting its case on hold in CC's Notification of a Claim dated 26 August 2022.⁵⁴⁰
7. However, the Memorial, §411, gives a different account of why CMEC did not proceed with the DAB process:

“At that time, as the next general election had been scheduled to be held imminently on 7 September 2015 CMEC decided to put further negotiations on hold until after the election to assess the way forward.”
(underlining added)
8. So CMEC's present case is simply that it decided not to proceed with the DAB process. Again, no explanation is given as to why it did not resume the DAB process after the September 2015 general election.

2. CMEC's changing case on expropriation

9. CMEC's case on what has been expropriated and the type of expropriation relied on has changed each time it has been presented.
10. In CC's Notification of a Claim of 26 August 2022 **[C-0491]** it was said (in §§5 and 11) that it was T&T's failure to pay amounts due for works which CMEC had carried out under the two EPC Contracts which violated the expropriation provision (and other provisions) of the Treaty.

⁵⁴⁰ In §38 of the Annex to CC's Notification of a Claim **[C-0491]**, CMEC said:

“On 13 March 2015, CMEC referred its claims to a DAB pursuant to clause 20.2 of the 2008 EPC Contract. Discussions between CMEC and the State led to CMEC agreeing to put these claims against Alutrint on hold in the midst of the 2015 Trinidad and Tobago general election on the understanding that the State would settle the claims after the election.”

11. In the RfA, CMEC's case was that there had been indirect expropriation of "outstanding amounts owing to CMEC under the EPC Contracts" (§89) ("the contractual debt") and direct expropriation of "all performance by [CMEC] that was stipulated under the EPC Contracts" (§90) ("all performance etc").
12. In the Memorial, CMEC has abandoned both the claim for indirect expropriation of the contractual debt and the claim for direct expropriation of all performance etc.
13. Instead, CMEC now makes two expropriation claims, both based on indirect expropriation,⁵⁴¹ one being in respect of CMEC's rights under the EPC Contracts⁵⁴² and the other, in the form of creeping expropriation, being in respect of CMEC's "covered investments".⁵⁴³

3. CMEC's new allegation that T&T's termination of the Project was discriminatory

14. In the Memorial, CMEC has alleged, for the first time, that T&T's termination of the Project was discriminatory, because CMEC was a Chinese contractor.
15. This allegation is made in support of CMEC's contentions that the termination did not constitute lawful expropriation, by reason of non-compliance with Article 6(1)(c) of the Treaty ("without discrimination"),⁵⁴⁴ and also that it breached the Non-Impairment standard in Article 3(3) (as being a "discriminatory" measure).⁵⁴⁵
16. The RfA had not alleged that T&T was guilty of any discriminatory conduct.

⁵⁴¹ Memorial, §548: "the expropriation in this case is indirect in nature".

⁵⁴² Memorial, §§589, 590.

⁵⁴³ Memorial, §610.

⁵⁴⁴ Memorial, §§584 and 613(a)(ii).

⁵⁴⁵ Memorial, §666(c).

17. It is notable that:
- (1) while the RfA, §91, said that T&T's termination of the Project did not satisfy the public purposes and compensation requirements of Article 6(1), there was no mention of any non-compliance with the non-discrimination requirement: and
 - (2) while the RfA, §96, said that the termination of the Project was an "unreasonable" measure within the meaning of Article 3(3), there was no mention of its also being a "discriminatory" measure.
18. The late introduction of this allegation of discriminatory conduct on the part of T&T is obviously scraping the barrel.

4. CMEC's changing case on T&T failing to accord it due process

19. CMEC has changed its case as to how T&T failed to accord it fair and equitable treatment by denying it due process.
20. The RfA, §93(iv), said that T&T had failed to accord CMEC due process "by denying CMEC the opportunity to respond to any allegation that the State may assert to have been an obstacle to payment (*quod non*)".
21. This allegation of denial of due process has now been abandoned.
22. The denial of due process relied on in the Memorial has changed into the following:
- (a) "the State's sudden withdrawal of its appeal against the 2009 High Court Decision...with no warning or opportunity to be heard given to CMEC" (Memorial, §652(a));
 - (b) "the State's abrupt and unilateral decision to terminate the Project" (Memorial, §652(b)).

23. Consistency might have been expected in respect of any genuine and serious allegation of denial of due legal process.

5. Which of its notices of termination is CMEC relying on?

24. CMEC's case on which of its notices of termination it relies on as having terminated the EPC Contracts has been inconsistent.
25. In §31 of the Annex to the Notification of a Claim **[C-0491]**, CMEC's 10 March 2013 Notice of Termination **[C-0033]** is relied on as having terminated the 2008 Contract.
26. In §48 of the RfA the 10 March 2013 Notice of Termination **[C-0033]** is again relied upon.
27. But in §370 of the Memorial CMEC's 1 March 2013 Notice of Termination **[C-0343]** is relied on.
28. Hence CMEC's case on how it terminated the EPC Contracts is confusing, particularly in light of the fact that it had earlier, and on multiple occasions, acknowledged that it was Alutrint which had effected the termination.

6. CMEC's change of referential claim

29. Prior to the Memorial, CMEC had consistently presented its **17 May 2013** claim **[C-0035]** as its final consolidated claim, with subsequent claims said only to involve updating to reflect interest and other accrued costs and losses: see CC's Notification of a Claim of 26 August 2022 **[C-0491]**, Annex, §32 and the RfA of 27 March 2023, §§49 and 51.
30. However, Michael Tonkin was instructed by Clifford Chance to undertake his quantum assessment by reference to CMEC's **28 November 2012** letter to

Alutrint [C-0032] and then make adjustments to that assessment. See the Memorial, §715.⁵⁴⁶

31. The Memorial does not explain why there has been a change of referential claim from the 17 May 2013 claim to the 28 November 2012 claim.
32. It may be that the focus has shifted from the 17 May 2013 claim to the 28 November 2012 claim because the former represented the apogee of CMEC's exaggerated claims, as became apparent at the Bifurcation Hearing.

7. CMEC's changing damages claims

33. In the latest of its contractual claims against Alutrint, in its 15 August 2022 letter **[C-0044]**, CMEC's claim was for **US\$304,870,269**.
34. In CC's Notification of a Claim of 26 August 2022 **[C-0491]**, CMEC's claim mirrored the contractual claim it had been making against Alutrint. Hence CMEC there said that the value of its outstanding claims **"exceeds US\$300 million"** (CC's Notification of a Claim, Annex, §47).
35. CMEC's Treaty claim continued to mirror its previous contractual claim against Alutrint in the RfA of 27 March 2023 (§70 said CMEC's claim **"exceeds US\$310 million"**) and also at the Bifurcation Hearing before the Tribunal on 24 April 2024 (§4 of CMEC's Written Submissions said CMEC's claim was **"over US\$300 million"**).
36. However, in the Memorial, the amount CMEC now claims is **US\$156 million**.⁵⁴⁷

⁵⁴⁶ See also, Section 5 of MT's report, Appendix MT-1.2 and the Final Account set out in Appendix MT-1.3.

⁵⁴⁷ Memorial, §686, 713 and 730.

37. No explanation is given in the Memorial as to why the Treaty claim CMEC was previously making was in excess of US\$300 million, nor why the claim CMEC is now making has been so substantially reduced.
38. One feature of CMEC's damages claim has dramatically increased with the service of the Memorial.
39. Prior to the service of the Memorial, CMEC had consistently been advancing a loss of profit claim of **5%** of the price of the 2008 Contract (the price being US\$414 million).⁵⁴⁸ Hence, within CMEC's pre-Memorial damages claim of some US\$300 million, the loss of profit element had been, consistently over a period of more than a decade, **US\$20,700,000** (being 5% of US\$414 million).
40. Now, in the Memorial, it is said that CMEC is entitled to a loss of profit claim of **10%** of the price of the 2008 Contract.⁵⁴⁹ So, with the service of the Memorial, CMEC's loss of profit claim has suddenly **doubled**.
41. The fact that CMEC's said present claim for loss of profit is based on a misinterpretation of the 2008 Contract, and therefore unsustainable, is addressed in Section D, 4.2.1 of the Counter-Memorial.

⁵⁴⁸ It should be noted however that, as was contended before the Tribunal at the Bifurcation Hearing, T&T's case is that any loss of profit suffered by CMEC is contractually irrecoverable: see T&T's Submissions for the Bifurcation Hearing, dated 10 April 2024, §§61 to 71.

⁵⁴⁹ See the Memorial, §§126 and 721, relying on Sub-Clause 1.2 of the PCC of the 2008 Contract.

APPENDIX II

CMEC's successive quantified claims made by letter against Alutrint

1. **14/2/11** Letter from CMEC (Duo Jinhai) to Alutrint:
 [R-0004]
 - Refers to “**remaining uninvoiced amount expended by CMEC**” as being “**approximately 40m USD**”
 - No details provided of computation of the US\$40 million

2. **21/9/11** Letter from CMEC (Duo Jinhai) to Alutrint:
 [R-0005]
 - Says total amount due is **US\$39,279,896.30**, being uninvoiced items of CMEC's expenditure; within this sum is **US\$37,410,000**, as the amount due under the EPC Contract alone
 - Full details of how the amount due is computed are set out
 - The following claims are made for the following items (before credited sums):
 1. **Design cost (preliminary design): \$13,248,000**
 Design cost (construction drawings): \$11,823,840
 [being a total cost of: \$25,071,840]
 2. **Design cost of upstream and downstream: \$1,040,000**
 3. **Management Cost for CMEC: \$12,800,000**
 4. **Goods delivered by CMEC: \$7,120,000**
 5. **Site Management Cost: \$4,530,000**

NOTES

- (1) The letter says: “...we hereby submit the cost breakdown and relative supporting documents for un-invoiced items which are attributed to the smelter project which was suspended since June 17, 2009...”

- (2) The total amount said to be due in this letter (\$39,279,896.30) seems to be the same as the sum referred to as “approximately 40m USD” in CMEC’s 14/2/11 letter [R-0004].

3. **4/9/12**
[R-0006]

Letter from CMEC (Duo Jinhai) to Alutrint:

- Says “total claim” for its expenditure and costs is **US\$67,531,256.60**
- Full details of how sum claimed is computed are set out
- The major item (1.1) is “Claim under the contract and agreements” and is for **US\$39,279,896.30**; the “Remarks” column refers to CMEC’s 21/9/11 letter [R-0005].

NOTES

- (1) This is CMEC’s first post-termination letter, which says that Alutrint had terminated: “As for the Aluminium Smelter Project was terminated by Alutrint with letters dated January 19th, 2012 and January 23rd, 2012...we [CMEC]...has accepted and confirmed the letters mentioned above...”.
- (2) This figure of US\$39,279,896.30 is the same sum that is said to be due in CMEC’s 21/9/11 letter, which shows that the costs sought here for both the preliminary design drawings and the construction drawings are the same as in the 21/9/11 letter.
- (3) So the following claims are made for the following items:
1. **Design cost (preliminary design): \$13,248,000**
Design cost (construction drawings): \$11,823,840
[being a total cost of \$25,071,840]
 2. **Design cost of upstream and downstream:**
\$1,040,000

3. **Management cost for CMEC: \$12,800,000**
4. **Goods delivered by CMEC: \$7,120,000**
5. **Site Management Cost: \$4,530,000**

4. **28/11/12**
[C-0032]

Letter from CMEC (Duo Jinhai) to Alutrint:

- Total claim in respect of its expenses is **US\$106,493,209.86**
- Full details of how sum claimed is computed are set out
- The major item (1.1) is “Claim on EPC Contract [alone] to Oct 31st 2012” and is for **US\$72,532,800**
- The following claims are made for the following items within the US\$72,532,800 (before credited sums):

1. **Design cost (preliminary design): \$23,248,000**

[NOTE: this figure is exactly \$10 million more than in the previous letter claims.]

Design cost (construction drawings): \$20,823,840

[NOTE: this figure is exactly \$9 million more than in the previous letter claims.]

[being a total cost of: \$44,071,840]

2. **Design cost of upstream and downstream: \$1,040,000**
3. **Management Cost for CMEC: \$14,800,000**

[NOTE: this figure is exactly \$2 million more than in the previous letter claim.]

4. **Goods delivered by CMEC: \$7,120,000**

5. **Site Management Cost: \$8,530,000**

[NOTE: this figure is exactly \$4 million more than in the previous letter claims.]

NOTES

- (1) This is CMEC’s second post-termination letter which repeats that Alutrint had terminated: “We note that Alutrint

through its correspondence...dated January 19th, 2012 has formally terminated the EPC Contract...”.

- (2) The 28/11/12 letter refers to the claim as “our comprehensive statement of claim...following the suspension of the Alutrint Smelter Project on 17 June 2009”.
- (3) The attached breakdown of Item 1.1 of the claim, on p 2/3, says “During the period between 23 June, 2009 and 1 July 2009, the Employer reviewed the construction drawings.”
- (4) Clifford Chance has instructed Michael Tonkin to undertake his quantum assessment by reference to this claim: Memorial, §715.

5. **17/5/13**
 [C-0035]

Letter from CMEC (Duo Jinhai) to Alutrint:

- Total claim is **US\$169,597,715**
- Full details of how the sum claimed in computed are set out
- The major item (1.1) is “outstanding payment due” on “Claim in EPC Contract [alone] to May 10th, 2013”, which is **US\$125,730,130**
- The major items within the US\$125,730,130 are (before credited sums):
 1. **Design cost (preliminary design): \$33,120,000**
 Design cost (construction drawings): \$33,534,000
 [being a total cost of: \$66,654,000]
 2. **Design cost of upstream and downstream: \$9,530,000**
 [NOTE: this figure is \$8,490,000 more than in the previous letter claims.]
 3. **Management Cost for CMEC: \$14,800,000**
 4. **Goods delivered by CMEC: \$15,380,000**

[NOTE: this figure is \$8,260,000 more than in previous letter claims.]

5. **Site Management Cost: \$8,530,000**

NOTES

- (1) For the first time, CMEC says that it terminated the EPC Contracts: “[CMEC] served a Notice of Termination to [Alutrint] pursuant to the EPC Contracts and which by effluxion of time Alutrint has accepted”.
- (2) This claim was referred to in §49 of the Request for Arbitration as CMEC’s “finalised consolidated outstanding claims” (see also §51 to like effect) and was the claim primarily relied upon, the subsequent claims being said to be updated “from time to time to reflect interest and other accrued cost and losses”. The Notification of a Claim and Request for Consultations and Negotiations (26 August 2022: C-491), Annex §32, also put the central focus on this claim.
- (3) The attached breakdown of Item 1.1 of the claim, on p 2/3, says: “During the period between 23 June, 2009 and 1 July 2009 the Employer reviewed the construction drawings.”

6. **21/3/14**
[C-0036]

Letter from CMEC (Duo Jinhai) to Alutrint:

- Total claim is **US\$195,768,874**
- The major item (1.1) is “Amount Due” on “Claim on EPC Contract to June 2009” and is for **US\$98,484,000**

NOTES

- (1) This claim for US\$98,484,000 is US\$26,886,130 less than the equivalent claim (US\$125,370,130) in CMEC’s 17/5/13 letter [C-0035]. This is because the claim in the 17/5/13 letter for bank interest, of US\$26,886,000, has been

stripped out of this 21/3/14 claim. This means that the claims for the items enumerated as Nos 1 to 5, above, re previous claims, are in the same sums in this 21/3/14 claim.

- (2) This claim for US\$98,484,000 in re the EPC Contract is consistently made in all subsequent claims (see below).

7. **23/9/14**
[C-0037] Letter from CMEC (Duo Jinhai) to Alutrint:
- Total claim is **US\$200,906,304**
 - The major item (1.1) is “Claim on the EPC Contract to June 2009” and is for **US\$98,484,000**
8. **23/1/15**
[C-0038] Letter from CMEC (Duo Jinhai) to Alutrint:
- Total claim is **US\$204,338,346**
 - The major item (1.1) is “Claim on the EPC Contract to June 2009” and is for **US\$98,484,000**
9. **6/8/15**
[C-0039] Letter from CMEC (Duo Jinhai) to Alutrint:
- Total claim is **US\$209,493,746**
 - The major item (1.1) is “Claim on the EPC Contract to June 2009” and is for **US\$98,484,000**
10. **15/4/16**
[C-0040] Letter from CMEC (Duo Jinhai) to Alutrint:
- Total claim is **US\$217,243,731**
 - The major item (1.1) is “Claim on EPC Contract to June 2009” and is for **US\$98,484,000**
11. **24/8/16**
[C-0041] Letter from CMEC (Duo Jinhai) to Alutrint:
- Total claim is **US\$201,193,388**

- The major item (1.1) is “Claim on EPC Contract to June 2009” and is for **US\$98,484,000**
- 12. **19/3/17** Letter from CMEC (Duo Jinhai) to T&T, re-submitting copies of
 [C-0042] the claim documents to T&T.
- 13. **31/7/19** Letter from CMEC (Duo Jinhai) to Alutrint:
 [R-0007]
 - Total Claim is **US\$246,308,297**
 - The major item (1.1) is “Claim on EPC Contract to June 2009” and is for **US\$98,484,000**
- 14. **17/1/20** Letter from CMEC (Qingchi Wang) to Alutrint:
 [C-0043]
 - Total claim is **US\$255,995,902**
 - The major item (1.1) is “Claim on EPC Contract to June 2009” and is for **US\$98,484,000**
- 15. **15/8/22** Letter from CMEC (Qingchi Wang) to Alutrint:
 [C-0044]
 - Total claim is **US\$304,870,269**
 - The major item (1.1) is “Claim on EPC Contract to June 2009” and is for **US\$98,484,000**

APPENDIX III

ANALYSIS OF CASES CITED IN THE MEMORIAL TO SUPPORT THE BROAD PROPOSITION THAT CONTRACTUAL RIGHTS CAN BE EXPROPRIATED

1. In §§596-600 of the Memorial reference is made to 7 older cases to support the proposition that “a longstanding principle of international law is that it protects the expropriation of contractual rights” (§597) ie that “pure” contractual rights can be expropriated.
2. However, as appears below:
 - (1) general statements in these cases to the effect that contractual rights may be expropriated are often made in the context of a contract which has in fact generated property rights, whether tangible or intangible;⁵⁵⁰ and
 - (2) none of these cases provides a principled basis (nor any persuasive support) for the broad proposition that pure contractual rights can be expropriated.
3. Each of CMEC’s 7 cases is considered below.

(1) Rudolph Case (1903)⁵⁵¹

4. Paragraph 597 of the Memorial cites the following from p.250 of the Opinion in this case:

“The taking away or destruction of rights acquired, transmitted and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property.”

⁵⁵⁰ See **Accession Mezzanine v Hungary**, §156, to this effect. [RL-0038]

⁵⁵¹ Commission US-Venezuela, Opinion of Bainbridge, American Commissioner (Interlocutory), 1 January 1903, 9 RIAA 244 [CL-0105]

5. This citation is taken out of context and is misleading. Read on its own, it appears to conflate contractual rights generally with tangible property rights and says that both types of rights may be expropriated.
6. However, it is plain from the case that it is only when contractual rights give rise to a property right that the same may be expropriated; otherwise, not.
7. In this case a contract had been made between the predecessor in interest of the claimants and Venezuela, for the construction of a market building in Caracas (p.244). Venezuela then declared the contract null, took possession of the market and demolished the work which had been done (p.246). The Commissioner held that Venezuela had seen fit to abrogate the contract itself “and then to appropriate or destroy the property or the property rights of the claimants” (pp.249-250, underlining added).
8. The fact that the case was concerned with the claimants’ contractual rights only insofar as the same gave rise to property rights is further affirmed by:
 - the Commissioner’s close analysis of what the term “property” embraced (p.250)
 - the Commissioner’s statement that “The law of Venezuela recognises that property rights may rest in contracts” (p.250)
 - the fact that the award was made for “value of property arbitrarily destroyed” (p.244, underlining added).

(2) Southern Pacific Properties v. Egypt (1992)⁵⁵²

9. Paragraph 598 of the Memorial cites the following from §164 of the award in this case:

⁵⁵² **Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt** ICSID Case No ARB/84/3, Award, 20 May 1992 [CL-0106].

“There is considerable authority for the proposition that contract rights are entitled to the protection of international law and the taking of such rights involves an obligation to make compensation therefor. Moreover, it has long been recognised that contractual rights may be indirectly expropriated.”

10. The case involved a joint venture company (ETDC) between SPP (ME), the wholly-owned subsidiary of SPP, and Egypt, to develop tourist complexes in Egypt. ETDC had rights, inter alia, to buy, sell, lease, rent etc desert lands. Construction was duly undertaken and ETDC sold a number of the lots on which villas and other accommodation were to be built.
11. Egyptian authorities then withdrew approval for the project in view of the threat it posed to undiscovered antiquities.
12. Egypt argued that expropriation applied only to real property rights and not to contractual or other incorporeal rights (§160). However, the tribunal upheld SPP’s expropriation claim, saying that what had been expropriated were SPP (ME)’s contractual rights as a shareholder in ETDC (§164).
13. But this finding that SPP (ME)’s contractual rights had been expropriated led to confusion when it came to determining the appropriate compensation for such expropriation.
14. The confusion arose out of the problems attendant upon ascribing a monetary value to SPP (ME)’s pure contractual rights.
15. The tribunal said that the “cardinal point” to be borne in mind when determining appropriate compensation was that SPP was entitled to receive “fair compensation for what was expropriated” as distinct from “damages for breach of contract” (§183).

16. But if what was expropriated were SPP (ME)'s contractual rights, the value of the same fell to be assessed by reference to the benefit which would have accrued to SPP (ME) had the contract been performed, which is the same as the measure of damages for breach of contract. That being so, the said sharp distinction which the tribunal sought to draw disappears.
17. The tribunal went on to find that compensation for the expropriation comprised a combination of (1) restitution of out of pocket expenses and (2) expectation damages for breach of contract (§198). The premise of this approach, for which the tribunal cited no authority, was therefore the simultaneous non-existence and existence of SPP (ME)'s contractual rights.
18. The lack of coherence in the tribunal's consideration of the appropriate compensation was the consequence of the conceptual problems in its finding that there was expropriation of SPP (ME)'s pure contractual rights.⁵⁵³

(3) Phillips Petroleum v Iran (1989)⁵⁵⁴

19. Paragraph 598, f/n 1037 of the Memorial cites the following from §76 of the award in this case:

“(E)propriation by or attribution to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present case.”

⁵⁵³ The same lack of coherence exists in respect of CMEC's approach to the proper compensation in this case, as to which see T&T's submissions in respect of CMEC's damages claim, below.

⁵⁵⁴ **Phillips Petroleum Company Iran v The Islamic Republic of Iran, The National Iranian Oil Company** (Iran-US Claims Tribunal) Case No 39, Award No 425-39-2, 29 June 1989 [CL-0107]

20. In this case Phillips Petroleum entered into a Joint Structure Agreement (JSA) in 1965 with the National Iranian Oil Company for the exploration and exploitation of petroleum reserves in a certain offshore area of the Persian Gulf (§1).
21. Phillips Petroleum's claims, brought in the pre-investment treaty arbitration era, arose as a result of the Islamic Revolution in Iran in and around 1979 and Iran's declaration of the JSA as null and void (§48).
22. Phillips Petroleum brought two claims in the alternative: an expropriation claim in respect of its rights under the JSA, and a breach of contract claim in relation to the same contractual rights. There was no doubt that the tribunal had jurisdiction in respect of both claims under the Claims Settlement Declaration.
23. The tribunal decided to adjudge the claim as one of expropriation rather than breach of contract (§75).
24. However, in the course of its treatment of the expropriation claim, the tribunal appeared regularly to acknowledge that what had been taken from Phillips Petroleum were its "property", its "property interests" and its "property rights" under the JSA: see §§76, 88, 89, 97, 98, 100, 105, 106 (underlining added). There is no analysis of the precise character of the rights which the tribunal held to have been expropriated.
25. This case therefore provides no convincing support for the view that contractual rights which do not confer a property right, can nevertheless be expropriated.

(4) Consortium RFCC v Morocco (2003)⁵⁵⁵

⁵⁵⁵ **Consortium RFCC v Kingdom of Morocco** ICSD Case No ARB/00/6, Award, 22 December 2003 [CL-0108]

26. Paragraph 599 of the Memorial says that the tribunal's award in this case, at §60, held that "any right arising out of a contract that is an investment constitutes a right that may be the object of an expropriation".
27. In this case Consortium RFCC made a contract with Morocco for the construction of a motorway in Morocco between Rabat and Fès.
28. Consortium RFCC duly alleged that Morocco has expropriated certain property rights ("droit de propriété": see §§59 and 60) which it had under the contract.
29. The tribunal duly held that what had been expropriated was "debts owed to the investor" ("Les creances détenues par l'investisseur": §60) which constitute intangible property.

(5) Starrett Housing Corporation v Iran (1983, 1987)⁵⁵⁶

30. Paragraph 600 of the Memorial recites §74 of the Interlocutory Award in this case, to the effect that the expropriation related to "the [investor's] physical property as well as the right to manage the Project and complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sales as provided in the Apartment Purchase Agreements".
31. In that case the Tribunal considered whether a contractual obligation to construct, develop and sell apartments may amount to a contractual right that is capable of being the subject-matter of an expropriation:
 - (1) Pursuant to an agreement, Shah Goli (an Iranian subsidiary of Starrett Housing) undertook to purchase parcels of land on land adjacent to Farahzad (adjacent to northwest Tehran), and to develop and construct on those parcels, and to market, condominium apartments, being individual

⁵⁵⁶ The Interlocutory Award in this case is at (1983) 4 Iran-USCTR (19 December 1983) 122, 156-7 [CL-0109]; the Final Award is at (1987) 16 Iran-USCTR (14 August 1987) 112, 230-1 [RL-0093].

apartment units, the title to which would be conveyed to separate purchasers.⁵⁵⁷

- (2) Shah Goli duly developed and sold various of the apartments.
 - (3) But the Government of Iran then introduced various legislative and other changes which restricted the rights of companies to manage housing projects.
 - (4) Starrett Housing made a claim for expropriation, asserting that its being prevented from completing the project amounted to an unlawful taking of its property interest in the project, since it has been deprived of the effective use, control and benefits of its property.⁵⁵⁸
 - (5) In the Interlocutory Award the tribunal held that Starrett Housing “had been deprived of the effective use, control and benefits of their property rights in Shah Goli” (§67) and then the Government of Iran “had interfered with the Claimants’ property rights in the Project to the extent that rendered these rights so useless that they must be deemed to have been taken” (§69).
32. The tribunal emphasized that it was Starrett Housing’s property rights that were taken⁵⁵⁹, and then went on to say that there had been expropriation not only of Starrett Housing’s real property rights but also of its “closely-related” contractual rights.⁵⁶⁰
33. In its Final Award the tribunal had to determine whether Starrett Housing was entitled to compensation with respect to the funds which it had loaned and which were used in connection with the project. The tribunal held that it was so entitled,

⁵⁵⁷ Interlocutory Award, §§2-4 [CL-0109]

⁵⁵⁸ Interlocutory Award, §§57, 61 [CL-0109]

⁵⁵⁹ See §§66, 67, 68, 69, 72 and 73 of the Interlocutory Award. [CL-0109]

⁵⁶⁰ See §§73 and 74 of the Interlocutory Award. [CL-0109]

since Starrett Housing's "property rights in the project were intimately linked to their rights to be repaid such loans".

34. The following points arise out of the **Starrett Housing** case:

- (1) In the Final Award the focus was on whether Starrett Housing was entitled to compensation with respect to the loans it had made and it was held that it was so entitled (§§353-362). Such loans did, of course, constitute intangible property.
- (2) T&T does not accept the proposition of law that where there has been expropriation of a property right, such expropriation may also encompass closely-related pure contractual rights. As pure contractual rights cannot be expropriated, the same remains true even if they are closely associated with a property right.
- (3) But in any event, CMEC's claim for expropriation of its contractual rights in the present case does not involve any property rights. CMEC did not, for instance, own the land upon which it was to perform the obligation of designing and building the aluminium smelter.

(6) Impregilo v Pakistan (2005)⁵⁶¹

35. Paragraph 600 of the Memorial says that in this case the tribunal held, at §274, that contracts for the construction of hydroelectric facilities could be the subject of an expropriation claim.
36. In this case, two contracts were entered into between Impregilo (on behalf of a joint venture) and the Pakistan Water and Power Development Authority for the construction of hydroelectric power facilities in Pakistan (§13).

⁵⁶¹ **Impregilo SpA v Islamic Republic of Pakistan** ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005 [CL-0110].

37. Construction work began but later came to a halt after various disputes between the parties. Impregilo duly alleged breached of contract and indirect expropriation of its investment in the project (§34).
38. The decision was on jurisdiction alone, the tribunal finding that it did not have jurisdiction over the contract claims (§225) but that it did have jurisdiction over the treaty claims.
39. As to whether the tribunal had jurisdiction over the expropriation claim, the tribunal simply said, at §274:
- “The Tribunal recognises that the taking of contractual rights could, potentially, constitute an expropriation or a measure having an equivalent effect. It notes that the present case does not concern a situation of nationalisation or expropriation in the traditional sense of those terms, but behaviour that could, at least in theory, constitute an indirect expropriation or a measure having an effect equivalent to expropriation.”
(underlining added)
40. There was no necessity for the tribunal to analyse the character of the interests Impregilo had acquired under the contracts, nor was there any such analysis. The decision cannot be said to support the broad proposition that pure contractual rights can be expropriated.

(7) ADC v Hungary (2006)⁵⁶²

41. Paragraph 600 of the Memorial says that in this case, at §§423-445, “the tribunal found that a concession contract for the design, construction and operation of the Budapest Airport had been expropriated”.

⁵⁶² **ADC Affiliate Limited & Anor v The Republic of Hungary** ICSID Case No ARB/03/16, Award, 2 October 2006, [CL-0075].

42. ADC was a participant in a project company which was granted a concession contract by Hungary for the design, construction and operation of certain terminals at Budapest Airport.
43. In due course Hungary issued a decree, which was followed by the taking over of all activities of the project company at the airport.
44. ADC's case was that it was thereby deprived of a stream of dividends on its quota in the project company and payments due on a promissory note (§220). ADC contended that Hungary's conduct constituted a depriving measure under Article 4 of the Hungary-Cyprus BIT (§222). Hungary's case was that it had not taken such a depriving measure (§237).
45. The issue between the parties was therefore whether Hungary had taken "any measures depriving, directly or indirectly [ADC] of their investments" within the meaning of Article 4 of the BIT (§368).
46. The tribunal held that Hungary had taken measures which deprived ADC of its stream of dividends and payment due on the promissory note (§§426-7).
47. The case therefore provides no support for the proposition that pure contractual rights can be expropriated. And it is to be noted that, in any event, the dividends stream and payments due on the promissory note constituted intangible property rights.

APPENDIX IV

CMEC'S ACTIVATION OF THE DISPUTE RESOLUTION PROCESS **UNDER THE 2008 CONTRACT**

1. CMEC activated the dispute resolution process under the 2008 Contract, in the following manner:

22/7/14: CMEC letter to Alutrint **[C-0047]**:

“You are hereby notified that CMEC will proceed the arbitration [sic] in accordance with the contract and formal legal notice will be served by first week of August 2014.”

5/1/15: CMEC letter to Minister of Energy & Energy Affairs **[C-0392]** re CMEC's claim and terminating:

“4. If both parties can not come to a conclusion, the dispute resolution clause stipulated in the EPC Contracts should be applied to solve the dispute with DAB, and Adjudication Board should be appointed by both parties in January 2015 to start the DAB procedure.”⁵⁶³

28/1/15: Pinsent Masons (“PM”), for CMEC, letter to Alutrint **[C-0393]**:

States that CMEC has “resolved to refer its claims to dispute resolution” and “is taking the necessary steps to prepare and refer its claims to dispute resolution”.

13/3/15: PM letter to Alutrint **[C-0048]**:

Gives formal Notice of Intention to refer to a DAB all claims of CMEC in relation to the Project, pursuant to Clause 20.2 of the 2008 Contract.

⁵⁶³ CMEC's threat in this letter was of contractual proceedings against Alutrint, not Treaty proceedings against T&T. Hence, it is plain that in its negotiations with T&T, CMEC was dealing with T&T qua majority shareholder in Alutrint, not as a potential respondent to proceedings brought by CMEC against T&T under the Treaty.

Proposes that a single-member DAB be substituted for the three-member DAB provided for in the Contract. Requests a response by 20/3/15.

20/3/15: Alutrint's email to PM:

Requests a further two to three weeks to respond to proposals in PM's 13/3/15 letter. (This email is referred to in C394, below.)

24/3/15: PM letter to Alutrint **[C-0394]**:

Agrees to extension to 10 April 2015 for Alutrint to respond to proposals in PM's 13/3/15 letter.

Notes that "the 28-day period within which the parties are required to appoint a DAB under Clause 20.2 continues to run and CMEC reserves its right to refer the dispute to arbitration after the expiry of this 28-day period". (Note that the 2008 Contract does not accord CMEC such a right.)

10/4/15: Alutrint letter to PM **[C-0395]**:

Refers to CMEC's 24/3/15 letter, says Alutrint is in the process of retaining external legal counsel and says that they will provide a substantive response to PM's 13/3/15 letter in the course of next week.

14/4/15: PM letter to Alutrint **[C-0396]**:

Agrees to a final time extension for Alutrint to respond to PM's 13/3/15 letter, by 17/4/15.

17/4/15: Hogan Lovells ("HL"), for Alutrint, letter to PM **[C-0397]**:

Says HL will respond substantively to PM's DAB proposals after a meeting with client (Alutrint).

1/5/15: HL letter to PM **[C-0398]**:

Without prejudice to Alutrint's primary position that neither 2008 Contract nor 2005 Contract may have come into full force and effect,

Alutrint is prepared to agree that CMEC's claims be referred to a DAB on the basis of terms set out in the letter, including that the number of DAB members shall be three.

12/5/15: PM letter to HL **[C-0399]**:

PM says it is taking client's instructions re Alutrint's agreement to DAB and the proposed terms of the DAB process and says it will "respond substantively shortly".

14/7/15: HL letter to PM **[C-0049]**:

Refers to PM's 12/5/15 letter and says that HL has not yet received CMEC's substantive response to Alutrint's proposed DAB process. HL would be grateful for PM's confirmation as to whether PM have received CMEC's instructions on Alutrint's proposal.

2. HL received no response from PM to its 14/7/15 letter **(C-0049)**, which therefore marked the end of the PM/HL correspondence and the abandonment by CMEC of its activation of the dispute resolution process in the 2008 Contract.