INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SPENTECH ENGINEERING LIMITED

Claimant

and

UNITED ARAB EMIRATES

Respondent

ICSID Case No. ARB/24/16

AWARD

Members of the Tribunal
Ms. Loretta Malintoppi, President of the Tribunal
Sir Christopher Greenwood, GBE, CMG, KC, Arbitrator
Mr. Christopher Adebayo Ojo SAN, Arbitrator

Secretary of the Tribunal
Ms. Leah W. Njoroge

Assistant to the Tribunal
Ms. Fedelma C. Smith

Date of dispatch to the Parties: 28 July 2025

REPRESENTATION OF THE PARTIES

Representing Spentech Engineering Limited:

Dr. Jotham O. Arwa
Ms. Edith Chepng'eno Koros
Jural Consulting Limited
Suite No. 44, The Stables Office Suites
Karen Road, Karen
P.O. Box – 37030 – 00200
Nairobi
Republic of Kenya

and

Prof. Githu Muigai
Ms. Wambui Githu Muigai
Mohammed Muigai LLP
MM Chambers, 4th Floor
K.Rep Centre, Wood Avenue
P.O. Box 61323-00200
Nairobi
Republic of Kenya

Representing United Arab Emirates:

H.E. Mr. Abdulla Hamdan Al Naqbi
Director
Mr. Kevin Lee
Dr. Paolo Busco
Mr. Simon Olleson
Ms. Caroline Balme
Ms. Tanishtha Vaid
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Abu Dhabi
United Arab Emirates

TABLE OF CONTENTS

I. PROCEDURAL HISTORY

A. COMMENCEMENT OF ARBITRATION

1. On 26 April 2024, the Claimant filed its Request for Arbitration under the Agreement between the Government of the United Arab Emirates ("**UAE**") and the Government of the Republic of Kenya ("**Kenya**") on the Promotion and Protection of Investments dated 23 November 2014 ("**Treaty**").

2. By letter dated 2 May 2024, the ICSID Secretariat requested that the Claimant provide certain confirmations, clarifications, and further documentation in respect of the Request for Arbitration.

3. On 6 May 2024, the Claimant submitted its Response to the ICSID Secretariat's Request for Clarifications on Issues Relating to Jurisdiction and Merit ("**Clarifications**").

4. On 24 May 2024, the Acting Secretary-General registered the Claimant's request for the institution of arbitration proceedings.

B. THE PARTIES AND THEIR REPRESENTATIVES

5. The Claimant is Spentech Engineering Limited, a limited liability company registered in Kenya.

6. The Respondent is the Government of the United Arab Emirates.

7. The Claimant and the Respondent are collectively referred to as the ("**Parties**"). The Parties' representatives and their addresses are listed above on page (i).

C. CONSTITUTION OF THE TRIBUNAL

8. On 28 August 2024, following appointment by the Respondent, Sir Christopher Greenwood, GBE, CMG, KC (British) accepted appointment as arbitrator.

9. On 1 September 2024, following appointment by the Claimant, Christopher Adebayo Ojo SAN (Nigerian) accepted appointment as arbitrator.

10. On 14 September 2024, following appointment by agreement of the parties, Loretta Malintoppi (Italian) accepted appointment as presiding arbitrator.

11. On 16 September 2024, the Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention.

D. INITIAL CORRESPONDENCE

12. By a letter dated 26 September 2024, the Secretary of the Tribunal, acting on instructions of the President of the Tribunal, explained to the Parties that the President considered that it would benefit the overall cost and time efficiency of the proceedings if the Tribunal had an assistant, who would undertake the tasks described in that letter. In the same letter, the Tribunal proposed that Ms. Fedelma C. Smith be appointed as Assistant to the Tribunal and enclosed Ms. Smith's *curriculum vitae*.

13. By letter dated 1 October 2024, the Secretary of the Tribunal, on behalf of the Tribunal, invited the Parties to submit a joint proposal by 15 October 2024 advising the Tribunal of (i) the Parties' agreements on procedural matters, (ii) the Parties' respective positions regarding any items on which they do not agree, and (iii) any additional matters that the Parties would like to discuss during the first session in the proceedings.

14. On 2 October 2024, the Secretary of the Tribunal, on behalf of the Tribunal, circulated draft Procedural Orders No. 1 and No. 2.

15. On 3 and 8 October 2024, the Parties confirmed their consent to the appointment of Ms. Fedelma C. Smith as Assistant to the Tribunal.

16. On 15 October 2024, the Respondent requested an extension of time for the Parties' joint proposal on procedural matters, and informed the Tribunal that it intended to make an objection under Rule 41 of the ICSID Rules of Procedure for Arbitration Proceedings 2022 ("**Arbitration Rules**") by 31 October 2024.

17. On 20 October 2024, the Parties submitted their respective comments on draft Procedural Order No. 1, in which they advised the Tribunal of matters agreed and of their respective positions where no agreement was reached.

E. FIRST SESSION AND PROCEDURAL ORDERS

18. On 21 October 2024, the Tribunal held a first session by video conference ("**First Session**").

19. Participating in the First Session were:

<u>Members of the Tribunal</u>:
Ms. Loretta Malintoppi, President of the Tribunal
Sir Christopher Greenwood, GBE, CMG, KC, Arbitrator
Mr. Christopher Adebayo Ojo SAN, Arbitrator

<u>ICSID Secretariat</u>:
Ms. Leah W. Njoroge, Secretary of the Tribunal
Ms. Ivania Fernandez, ICSID Paralegal

Assistant to the Tribunal:
Ms. Fedelma C. Smith

On behalf of the Claimant:
Dr. Jotham Arwa
Ms. Edith Chepng'eno Koros
Jural Consulting Limited
Prof. Githu Muigai, SC
Ms. Wambui Githu Muigai
Mohammed Muigai LLP
Eng. Maurice Owiti
CEO, Spentech Engineering Ltd

On behalf of the Respondent:
H.E. Ambassador Abdalla Hamdan Al Naqbi
Mr. Kevin Lee
Ms. Caroline Emilie Balme
Ms. Tanishtha Vaid
Dr. Paolo Busco
Mr. Simon Olleson
Dr. Scott Sheeran
Office of International Legal Affairs, Presidential Court of the United Arab Emirates

20. A recording of the First Session was made and deposited in the archives of ICSID. The recording was subsequently uploaded to the Box folder established for the case to be accessed by the Members of the Tribunal and the Parties.

21. During the First Session, the Tribunal and the Parties considered, *inter alia,* the following:

- The timetable and procedure for the hearing of an application intended to be submitted by the Respondent under Rule 41 of the ICSID Arbitration Rules;
- The draft Procedural Orders No. 1 and No. 2 circulated by the Secretary of the Tribunal on behalf of the Tribunal on 2 October 2024; and
- The Parties' comments on draft Procedural Order No. 1 received on 20 October 2024.

22. On 25 October 2024, having considered the Parties' submissions, the Tribunal issued Procedural Order No. 1.

23. By Procedural Order No. 1, after consultation with the Parties, the Tribunal set the timetable for the Parties' submissions on the Respondent's Rule 41 objection.

24. On 24 and 29 October respectively, the Parties exchanged their comments on draft Procedural Order No. 2.

25. On 31 October 2024, the Respondent submitted its objection that the Claimant's claims are manifestly without legal merit under Rule 41 of the ICSID Arbitration Rules (the "**Rule 41 Objections**") together with **Exhibits RL-001-ENG to RL-079-ENG**.

26. On 5 November 2024, the Parties submitted to the Tribunal their joint proposal on Draft Procedural Order No. 2.

27. On 8 November 2024, the Tribunal issued Procedural Order No. 2, concerning the transparency regime governing these proceedings.

F. WRITTEN SUBMISSIONS ON THE RULE 41 OBJECTIONS

28. On 14 December 2024, the Claimant submitted its Response on the Rule 41 Objections, together with **Exhibits C-0002-ENG** and **Exhibits CL-001-ENG to CL-053-ENG** ("**Response**").

29. On 29 January 2025, the Respondent submitted its Reply on the Rule 41 Objections, together with **Exhibits RL-080-ENG to RL-104-ENG** ("**Reply**").

30. On 14 March 2025, the Claimant submitted its Rejoinder on the Rule 41 Objections, together with **Exhibits CL-054-ENG to CL-058-ENG** ("**Rejoinder**").

G. PRE-HEARING CONFERENCE

31. On 26 March 2025, the Tribunal circulated to the Parties a draft Procedural Order No. 3 on the organization of the hearing and invited the Parties to submit their respective comments on the draft by 15 April 2025.

32. On 15 April 2025, the Parties submitted their respective comments on draft Procedural Order No. 3.

33. On 30 April 2025, the President of the Tribunal and the Parties held a pre-hearing case management conference by video conference starting at 8:00 a.m. Washington, D.C. time (the "**Pre-Hearing Conference**").

34. Participating in the Pre-Hearing Conference were:

Members of the Tribunal:
Ms. Loretta Malintoppi, President of the Tribunal

ICSID Secretariat:
Ms. Leah W. Njoroge, Secretary of the Tribunal
Ms. Ekaterina Minina, ICSID Paralegal

Assistant to the Tribunal:
Ms. Fedelma C. Smith

On behalf of the Claimant:
Dr. Jotham Arwa
Ms. Edith Koros
Jural Consulting Ltd
Ms. Wambui Githu
Ms. Brenda Ogonyo
Mohamed Muigai LLP
Eng. Maurice Owiti
Spentech Engineering Ltd

On behalf of the Respondent:
Mr. Kevin Lee
Ms. Caroline Emilie Balme
Ms. Tanishtha Vaid
Mr. Paolo Busco
Mr. Simon Olleson
Office of International Legal Affairs, Presidential Court of the United Arab Emirates

35. A recording of the Pre-Hearing Conference was made and deposited in the archives of ICSID. The recording was subsequently uploaded to the Box folder established for the case to be accessed by the Members of the Tribunal and the Parties.

36. During the Pre-Hearing Conference, the Tribunal and the Parties considered the following documents:

– The draft Procedural Order No. 3 circulated by the Secretary of the Tribunal on behalf of the Tribunal on 26 March 2025; and

– The Parties' comments on draft Procedural Order No. 3 received on 15 April 2025, advising the Tribunal of any agreements reached by the Parties on the various items, as well as their respective positions where no agreement was reached.

37. On 30 April 2025, the Tribunal issued Procedural Order No. 3.

H. HEARING

38. A hearing on the Rule 41 Objections was held on 28 May 2025 by video conference starting at 6:00 a.m. Washington, D.C. time ("**Hearing**") and was attended by the following:

Members of the Tribunal:
Ms. Loretta Malintoppi, President of the Tribunal
Sir Christopher Greenwood, GBE, CMG, KC, Arbitrator
Mr. Christopher Adebayo Ojo SAN, Arbitrator

ICSID Secretariat:
Ms. Leah W. Njoroge, Secretary of the Tribunal

Ms. Ekaterina Minina, ICSID Paralegal

<u>Assistant to the Tribunal:</u>
Ms. Fedelma C. Smith

<u>On behalf of the Claimant</u>:
Prof. Githu Muigai, SC
Ms. Wambui Githu
Ms. Brenda Ogonyo
Mohammed Muigai LLP
Dr. Jotham O. Arwa
Ms. Edith Koros
Jural Consulting LTD
Eng. Maurice Owiti
CEO, Spentech Engineering Ltd

<u>On behalf of the Respondent</u>:
H.E. Ambassador Abdalla Hamdan Al Naqbi
Mr. Kevin Lee
Ms. Tanishtha Vaid
Dr. Paolo Busco
Mr. Simon Olleson
Dr. Scott Sheeran
Ms. Patricia Jimenez Kwast
Office of International Legal Affairs, Presidential Court of the United Arab Emirates

39. On 27 May 2025, pursuant to paragraph 27 of Procedural Order No. 3, the Respondent distributed electronic copies of the demonstrative presentation it intended to use at the Hearing. The Claimant informed the Tribunal that it did not intend to use demonstrative slides.

40. At the Hearing, the opening statement on behalf of the Respondent was presented by H.E. Ambassador Abdalla Hamdan Al Naqbi, Mr. Kevin Lee, and Ms. Tanishtha Vaid. The opening statement on behalf of the Claimant was presented by Prof. Githu Muigai, SC and Dr. Jotham O. Arwa. Members of the Tribunal posed questions, and each Party made submissions in response. Each of the Parties declined to present arguments in rebuttal.

41. Following the Parties' submissions, the President advised that the Tribunal would provide directions for any corrections to the transcript, and that it would inform the Parties promptly should it have further questions for the Parties to address in writing. The President invited the Parties to state whether they had any further comments or submissions to add. The Parties each confirmed that they did not. The President then closed the Hearing.

I. POST-HEARING PROCEDURE

42. On 30 May 2025, in accordance with paragraph 23.3 of Procedural Order No. 1, the Tribunal invited the Parties to agree upon the dates by which they would submit their agreed corrections to the transcript and to inform the Tribunal of such agreement by 6 June 2025. The Tribunal further invited the Parties to confer and to report their agreement to the Tribunal by 6 June 2025 on a timetable for submitting statements of costs for this stage of the proceeding. The Tribunal informed the Parties of its preference for a simple tabulation of costs claimed, rather than substantive submissions.

43. On 6 June 2025, the Parties informed the Tribunal that they had agreed upon submission of their agreed transcript corrections by 13 June 2025 and of their statements of costs by 24 June 2025.

44. On 12 June 2025, the Parties submitted their agreed corrections to the transcript. On 16 June 2025, the Tribunal noted the need for a further correction to the transcript, for which the Tribunal proposed a text for insertion and invited the Claimant to submit a corrected version of the transcripts by 18 June 2025.

45. On 20 June 2025, the court reporter distributed the corrected hearing transcript.

46. On 24 June 2025, the Parties submitted their statements of costs.

II. FACTUAL BACKGROUND

47. This section sets out, in brief, the material facts as alleged by the Claimant in its Request for Arbitration and Clarifications, and in its Response and Rejoinder on the Rule 41 Objections.

48. In view of the principles to be applied under Rule 41, and for the avoidance of doubt, the Tribunal does not make any determinations of fact at this stage.

A. THE CONSTRUCTION CONTRACTS

49. The Claimant alleges that, between 2016 and 2020, the Claimant and the UAE Embassy in Mogadishu executed several contracts under which the Claimant was engaged to undertake various construction projects (the "**Contracts**").[1]

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[1] Request for Arbitration, paras. 5, 7, 36-40; **Exhibit C-005** (the "**Contracts**"). The Tribunal notes that **Exhibit C-005** comprises, in the following order:

- Agreement for the "construction and maintenance of **Villa Somalia Flag Pole** project" dated 23 May 2016; "Commencement Date" letter concerning the "Villa Somalia Flag Pole project" with Reference No. UAE-PJT-SOM-16-011 dated 23 May 2016;

50. The Contracts were signed in the Federal Republic of Somalia ("**Somalia**") and were subject to UAE law as the agreed applicable law and the jurisdiction of the courts of the UAE as the agreed choice of forum.[2]

51. The construction projects included *inter alia* an army barracks known as the Hodan Project, a hospital known as the Sheikh Zayed Hospital, flagpoles, roadworks, landscaping, work on the Embassy known as Embassy Project Phase I, and the supply of hospital equipment.[3]

52. All of the physical construction sites concerned were located entirely within the territory of Somalia.[4] With the exception of the Hodan Project, the construction sites were within the premises of the Embassy, including the Sheikh Zayed Hospital.[5] However, according to the Claimant, the Hospital was intended to serve both the general public as well as Embassy staff.[6]

53. The Claimant alleges that its work under the Contracts entailed certain activities in the territory of the UAE, including the preparation of architectural and engineering drawings, all project management meetings, the determination of the qualities and quantities of building materials required, sourcing of materials, purchasing such materials, all meetings discussing and agreeing on compliance with UAE standards,[7] and the processing of most of the transactions.[8] The Claimant contends that it was not feasible to operate entirely from Somalia because all the UAE technical experts were

- "Contract Award" letter dated Agreement concerning the "**Hodan Project** Reference No. UAE-SOM-16-024," dated 12 May 2016; Agreement dated 23 May 2016 for the "construction and maintenance of Hodan Project," dated 23 May 2016;
- "Contract Award" letter concerning "the project of '**Sheikh Zayed Hospital** Project Reference No. UAE-PJT-SOM-16-001, dated 11 April 2016 (a duplicate of which appears on the last page of the exhibit); and
- Agreement for the "construction and maintenance of **UAE Embassy Project Phase1**" dated 23 May 2016; "Commencement Date" letter concerning "the 'UAE Embassy Phase1' Project with Reference No. UAE-PJT-SOM-16-002 dated 21 May 2016; "Advance Payment Security" letter concerning "UAE Embassy Phase 1 Project: UAE-PJT-SOM-16-002" dated 1 June 2016; "Performance Guarantee" concerning "Contract No. UAE-PJT-SOM-16-001 on 10/05/2016 to execute: UAE Embassy Project Phase 1."

2 Response, para. 10(iv). See **Exhibit C-005**, Contracts, pp. 68, 81, 91, at Clause 18 of the respective Agreements dated 23 May 2016.

3 Request for Arbitration, paras. 36-39.

4 Rule 41 Objections, para. 24, referring to Request for Arbitration, paras. 5, 35, 36, 40, 53, 70, 84.

5 Tr., p. 112, line 22 to p. 113, line 2.

6 See Tr., p. 114, lines 22-25.

7 Rejoinder, paras. 29(c) and 131.

8 Rejoinder, para. 133.

based in Dubai. The Claimant further asserts that in February 2020, its CEO purchased an office/residential property in Dubai from which some of its staff operated.[9]

54. In order to perform its obligations under the Contracts, the Claimant alleges that it used its own money and, in addition, borrowed the sum of USD 3,050,000 from Kenya Commercial Bank Limited, which had accrued interest in the sum of USD 2,550,000 as at 23 April 2024.[10]

55. The Claimant states that in addition to the construction projects provided for in the Contracts, certain further construction projects were envisaged to be commissioned in the future.[11]

B. COMMENCEMENT OF WORKS, SUSPENSION, AND BALANCE OF PAYMENTS

56. According to the Claimant, construction works commenced under the Contracts but were temporarily halted on 31 October 2020 in light of the Covid-19 pandemic.[12] The Claimant alleges that the suspension of works was due, additionally, to a diplomatic row between the UAE and Somalia.[13]

57. The Claimant contends that in November 2022, as of which time the project was 92% complete, officials of the Respondent invited the Claimant's Chief Executive Officer, Eng. Maurice O. Owiti ("**Eng. Owiti**") to visit the UAE Embassy in Somalia to discuss the status of the project. During that visit, Eng. Owiti was met by a team of accountants, led by Mr. Salim Alzaabi ("**Mr. Alzaabi**") who were undertaking a reconciliation exercise to determine the amounts owed to the Claimant (the "**Reconciliation Exercise**").[14]

58. The Claimant affirms that in the reconciliation exercise, the Respondent's agents incorrectly stated that the outstanding balance was USD 6,790,097, although the correct figure according to the Claimant was USD 8,641,797.[15]

59. According to the Claimant, agents of the Respondent unreasonably insisted on the incorrect figure, then falsely claimed that the Claimant had previously collected part of that outstanding amount in the cash sum of USD 4,139,529.[16]

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9 Rejoinder, para. 132.

10 Request for Arbitration, para. 8.

11 Response, para. 19.

12 Request for Arbitration, para. 9.

13 Response, paras. 23-27.

14 Request for Arbitration, paras. 10-11.

15 Request for Arbitration, para. 12.

16 Request for Arbitration, paras. 14-15, 41-43.

C. SEIZURE OF PROPERTY AND DETENTION OF THE CLAIMANT'S CEO

60. The Claimant states that, on several occasions between August and October 2022, staff of the UAE Embassy in Somalia invaded the Claimant's working premises and took various items of property including construction tools and equipment, valuables, computers, printers, office equipment, money safes, and kitchen equipment.[17] The Claimant alleges that on 22 August 2022, staff of the UAE Embassy threatened the Claimant's staff with imprisonment if they did not leave the Embassy by 30 September 2022.[18]

61. Among the other properties, the Claimant alleges that the Respondent appropriated intellectual property rights in connection with certain materials including the architectural plans, technical and engineering drawings, the buildings themselves, and trade secrets.[19]

62. The Claimant contends that upon his visit to the UAE Embassy in Somalia at the invitation of the Respondent in November 2022, Eng. Owiti was detained by officials of the Respondent for a period of four months, during which he was subjected to very inhuman and degrading treatment by officials of the Respondent.[20]

D. ATTEMPTS AT SETTLEMENT AND PURSUIT OF LEGAL REMEDIES

63. The Claimant claims that on 17 and 18 February 2023, Mr. Alzaabi and other agents of the Respondent discussed a proposed settlement with Eng. Owiti as to the amounts owed to the Claimant.[21] The Claimant alleges that Eng. Owiti accepted the terms proposed under duress and while reserving the right to sue for the balance.[22]

64. The Claimant states that it initially sought amicable settlement of the dispute and was unsuccessful.[23] It then instituted proceedings before the Administrative Court – Abu Dhabi, which dismissed the case without giving the Claimant the opportunity to be heard; the Claimant lodged an appeal against that decision, but withdrew the case when it considered that the appeal would not achieve justice.[24]

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[17] Request for Arbitration, paras. 56-59.

[18] Request for Arbitration, para. 58.

[19] Response, para. 128, at Table 4, item 6.

[20] Request for Arbitration, paras. 45-55.

[21] Request for Arbitration, paras. 19-23.

[22] Request for Arbitration, para. 20.

[23] Request for Arbitration, para. 25.

[24] Request for Arbitration, paras. 25-26.

III. THE PARTIES' REQUESTS FOR RELIEF

65. The Respondent requests that the Tribunal[25]:

(1) **DECLARE** that the Claimant's claims are manifestly without legal merit;

(2) **DISMISS** the Claimant's claims pursuant to Rule 41 of the ICSID Arbitration Rules;

(3) **ORDER** the Claimant to pay to the Respondent all costs incurred in connection with the arbitration including, without limitation to, the fees and expenses of the arbitrators and ICSID, as well as all other costs and expenses incurred by the Respondent including the fees of its counsel and consultants on a full indemnity basis, plus interest thereon at a reasonable rate; and

(4) **AWARD** such other or further relief against the Claimant as the Tribunal deems appropriate.

66. The Claimant requests that the Tribunal[26]:

(1) **DECLARE** that the Respondent's Preliminary Objection pursuant to Rule 41 lacks merit and is denied;

(2) **DECLARE** that this dispute is within the jurisdiction of the Centre and the competence of the Tribunal;

(3) **ORDER** that the Respondent shall bear the additional costs incurred in respect of and in connection with the Rule 41 Application;

(4) **ISSUE** the necessary Order for the continuation of these proceedings on the merits; and

(5) **AWARD** any other or further relief that the Tribunal deems appropriate in the circumstances.

IV. THE PARTIES' POSITIONS ON THE STANDARD FOR DISMISSAL UNDER RULE 41 OF THE ICSID ARBITRATION RULES

67. This section sets forth the Parties' positions on the standard for dismissal and certain aspects thereof, namely: (1) the standard for dismissal and general applicable principles, (2) the novelty or complexity of disputed issues of law, and (3) the complexity of disputed issues of fact.

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25 Rule 41 Objections, para. 128.

26 Response, para. 205.

A. STANDARD FOR DISMISSAL: GENERAL PRINCIPLES

68. Rule 41 of the 2022 ICSID Arbitration Rules provides:

> *(1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.*
>
> *(2) The following procedure shall apply:*
>
> *(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;*
>
> *(b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;*
>
> *(c) the Tribunal shall fix time limits for submissions on the objection;*
>
> *(d) if a party files the objection before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and*
>
> *(e) the Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection.*
>
> *(3) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding.*
>
> *(4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 or to argue subsequently in the proceeding that a claim is without legal merit.*

69. It is common ground between the Parties that in order to meet the standard set forth by Rule 41, two requirements must be satisfied: first, the case must lack legal merit,[27] and, second, such lack of legal merit must be "*manifest.*"[28] The term "*legal merit*" is distinct

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[27] **Respondent:** Rule 41 Objections, para. 13. **Claimant:** Response, para. 40.

[28] **Respondent:** Rule 41 Objections, paras. 14-15, citing **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global Petroleum, Inc. v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 ("***Trans-Global Petroleum***"), para. 88; **Exhibit RL-003-ENG**, *Bank of Nova Scotia v Republic of Peru,* ICSID Case No. ARB/22/30, Decision on Respondent's Rule 41 Application, 31 May 2024 ("***Bank of Nova Scotia***"), para. 99; **Exhibit RL-006-ENG**, *AHG Industry GmbH & Co. KG v Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application under ICSID Rule 41(5), 30 September 2022 ("***AHG***"), para. 58. **Claimant:** Response, paras. 41-43, citing **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global Petroleum*

from factual merit.[29] A tribunal considering the legal merits of a claim in the summary manner required by Rule 41 must take the factual premise as alleged by the claimant party.[30] According to the term "*manifest,*" the respondent party must "*establish its objection clearly and obviously, with relative ease and despatch*."[31]

70. The Parties' respective submissions place emphasis on the following general principles.

(1) The Respondent

71. The Respondent emphasizes that lack of evidence should not bar a decision on manifest lack of legal merit, if a claim is fundamentally flawed no matter what evidence is adduced.[32] The Tribunal need not accept all allegations at face value, or accept legal submission dressed up as fact.[33] The Respondent underscores that the Tribunal's assessment must be a practical one, and must exclude counter-arguments of mere theoretical possibility.[34]

(2) The Claimant

72. The Claimant emphasizes that the term "*manifest*" in Rule 41 sets a high and rigorous standard.[35] The Claimant refers to the decision in *RSM Production Corporation and others v Grenada* ("***RSM Production***"), in which the tribunal held it appropriate "*that*

v Hashemite Kingdom of Jordan, ICSID Case No. ARB/07/25, Award, 8 April 2009 ("***Trans-Global Petroleum***"), para. 75, **Exhibit CL-003-ENG**, *Ansung Housing Company, Ltd. v Peoples' Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 ("***Ansung Housing***").

29 **Respondent:** Rule 41 Objections, para. 16, citing **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global Petroleum*, para. 97. **Claimant:** Response, paras. 44-46, citing **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global Petroleum*, paras. 75, 105.

30 **Respondent:** Rule 41 Objections, para. 18 citing **Exhibit CL-005-ENG / RL-007-ENG**, *Brandes Investment Partners v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009 ("***Brandes Investment Partners***"), para. 61. **Claimant:** Response, para. 44, citing **CL-005-ENG / RL-007-ENG**, *Brandes Investment Partners,* paras. 42, 102.

31 **Respondent:** Rule 41 Objections, para. 14 citing **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global Petroleum*, para. 88. **Claimant:** Response, para. 42, citing **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global Petroleum,* para. 75.

32 Rule 41 Objections, para. 17, citing **Exhibit CL-056-ENG / RL-004-ENG**, *Lotus Holding Anonim Şirketi v Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 ("***Lotus Holding***"), paras. 158, 160, 171; **Exhibit RL-003-ENG**, *Bank of Nova Scotia,* para. 101.

33 Rule 41 Objections, para. 19, citing **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global Petroleum*, para. 105.

34 Rule 41 Objections, para. 20, citing **Exhibit CL-056-ENG / RL-004-ENG**, *Lotus Holding*, paras. 158, 160, 171.

35 Response, para. 39, citing **Exhibit CL-008-ENG / RL-083-ENG**, *PNG Sustainable Development Program Ltd. v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2014 (**"*PNG Sustainable Development*"**), para. 88.

a Claimant's Request for Arbitration is to be construed liberally and that, in case of doubt or uncertainty as to the scope of a Claimant's allegation(s), any such doubt or uncertainty should be resolved in favour of the Claimant."[36]

B. NOVEL OR COMPLEX ISSUES OF LAW

(1) The Respondent

73. The Respondent submits that an objection that a claim is "*manifestly without merit*" does not fail just because the claim is "*novel*" or "*complex*" as argued by the Claimant in this case.[37] The Tribunal is competent under Rule 41 to decide complex or novel arguments that may require substantive briefing.[38]

74. The Respondent does not accept that those cases in which tribunals rejected Rule 41 applications support the Claimant's arguments that novel or complex legal issues cannot be determined in a Rule 41 hearing. According to the Respondent, those decisions actually turn on the significance of disputed questions of fact. In this context, it refers to the case of *PNG Sustainable Development Program Ltd. v Independent State of Papua New Guinea* ("***PNG Sustainable Development***"), in which the tribunal found that the respondent's objections "*call[ed] for a factual analysis of the character*" of the claimant "*and the circumstances behind its economic activity in PNG.*"[39]

75. The Respondent refers, further, to the case of *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia* ("***MOL v Croatia***"), in which the tribunal found "*hotly disputed*" factual questions regarding the circumstances in which the relevant contractual agreements were entered into, as well as the manner in which Croatia had conducted a criminal investigation, ruling that it could not pass summary judgment at a preliminary stage "*without full opportunity…to establish in full **the facts** that are relevant to a proper understanding of the acquisition and operation*" of the claimant's investments.[40]

76. According to the Respondent, it follows that the Claimant cannot avoid the dismissal of its claims by alleging that its case raises "*novel,*" "*complex*" or "*elaborate*" legal

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[36] Response, para. 47, citing **Exhibit CL-009-ENG / RL-104-ENG**, *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada*, ICSID Case No. ARB/10/16, Award, 10 December 2010 ("***RSM Production***").

[37] Reply, paras. 44-56, citing **Exhibit CL-008-ENG / RL-083**, *PNG Sustainable Development,* paras. 93-94; **Exhibit CL-011-ENG / RL-084-ENG**, *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (***"MOL Hungarian Oil"***), paras. 13, 46.

[38] Reply, paras. 44-46.

[39] Reply, para. 47, citing **Exhibit CL-008-ENG / RL-083-ENG**, *PNG Sustainable Development,* paras. 93-94.

[40] Reply, para. 48, citing **Exhibit CL-011-ENG / RL-084-ENG**, *MOL Hungarian Oil*, paras. 13 and 46.

issues.[41] The Respondent denies that the Claimant's case is novel, complex or elaborate[42] but submits that in any event, the Tribunal is not precluded from deciding the Rule 41 Objections even if such decision entails novel and complex issues or arguments that may require substantive briefing by the Parties.[43]

(2) The Claimant

77. The Claimant submits that Rule 41 is not intended to resolve novel, difficult or disputed legal issues but only to apply undisputed or genuinely indisputable rules of law to uncontested facts.[44]

78. According to the Claimant, the legal standard under Rule 41 cannot be met if the legal issues in dispute are novel or complex.[45] The Claimant submits that the Respondent misconstrues the *ratio decidendi* of *PNG Sustainable Development* and *MOL v Croatia*.[46] A distinction must be drawn between a claim that can properly be rejected out of hand and one which requires more elaborate arguments for its eventual disposition.[47] The Claimant submits that its case is of the latter type and that contrary to the Respondent's arguments, the case is both novel[48] and complex.[49]

79. According to the Claimant, the complex issues arising in the case include *inter alia* the question "*whether the possession of beneficial interests in a property owned by the UAE, which is located in Somalia and outside the territory of the UAE, constitutes a financial asset whose situs is in UAE*";[50] the question of the "*centre of gravity*" of the Claimant's investments that comprise tangible assets in one country and intangible assets in another country;[51] and the question, where a claimant has made several "*separate and independent investments that are equally protected*" and has instituted arbitral claims in respect of some of those investments and not others, whether the situs

41 Reply, paras. 30-33.

42 Reply, paras. 35-43.

43 Reply, paras. 44-56.

44 **Exhibit CL-008-ENG / RL-083-ENG**, *PNG Sustainable Development*, paras. 89, 94.

45 Response, paras. 42, 56(II)-(iii).

46 Rejoinder, paras. 205-209.

47 Response, paras. 61-63, citing **Exhibit CL-011-ENG / RL-084-ENG**, *MOL Hungarian Oil,* at para. 45; **Exhibit CL-012-ENG**, *Emmis International Holding v Hungary,* ICSID Case No. ARB/12/2, Decision on the Respondent's Objections under ICSID Arbitration Rule 41(5), 28 October 2014, para. 83.

48 Rejoinder, paras. 211-217.

49 Response, paras. 218-222 (viii).

50 Rejoinder, para. 220.

51 Rejoinder, para. 222(i).

of an investment that is not the subject of the arbitral proceedings would be relevant to the claim.[52]

C. COMPLEX ISSUES OF FACT

(1) The Respondent

80. The Respondent maintains that the Tribunal's decision in these Rule 41 proceedings does not require a complex analysis of disputed issues of law or fact.[53]

81. The Respondent submits that the Claimant has raised new allegations of fact in its responsive submissions, such as the geopolitical background of the Respondent's diplomatic presence in the Horn of Africa and the "*diplomatic row*" leading to the suspension of works under the Contracts.[54] The Respondent does not accept the Claimant's new factual allegations on these matters and considers them to be speculative and immaterial to the issues currently before the Tribunal.[55]

82. The Respondent asserts that the Claimant's attempt to present the factual matrix as being complex and complicated is "*inappropriate*" given that objections under Rule 41 "*should be based on the facts as pleaded by the Claimant*" without the Tribunal rendering a full determination on disputed issues.[56]

83. The Respondent submits, further, that the facts of the Claimant's claim are not complex, and the facts on which Respondent bases its case are straightforward.[57] In particular, the Respondent "*takes the Claimant's case as presented that the construction projects, construction work done, and alleged misconduct of the Respondent's staff were located or occurred entirely within the premises of the UAE Embassy in Mogadishu*."[58]

(2) The Claimant

84. The Claimant maintains that its case is not suitable for decision under Rule 41 because it raises complex and difficult factual issues that are indispensable to the determination of the Rule 41 Objection, but whose resolution is impossible in the context of a

52 Rejoinder, para. 222(viii).

53 Reply, paras. 25-29.

54 Reply, para. 20.

55 Reply, paras. 19-24.

56 Reply, para. 23.

57 Reply, paras. 25-29.

58 Reply, para. 27.

summary procedure.[59] According to the Claimant, such "*complex factual issues*" include:

> *i. Whether all services that were entailed by the contracts signed between the Claimant and the Respondent had to be rendered within Somalia;*
> *ii. Whether there were other services that were entailed by the said contracts which were rendered in UAE;*
> *iii. Whether there were services that were entailed by the said contracts that were never rendered at all;*
> *iv. Whether the projects that were supposed to be erected within the UAE embassy in Somalia were intended to benefit the people of Somalia or the people of UAE;*
> *v. Whether the Claimant funded the entire projects using their own money;*
> *vi. Whether the funds intended for the construction of the projects in Somalia ought to have emanated from the public coffers of UAE;*
> *vii. Whether the Claimant's funding of projects that ought to have been funded by UAE, and which - upon being constructed formed part of the assets of UAE that are owned absolutely by the people of UAE - constituted injection of funds into the economy of UAE;*
> *viii. Whether it is the Claimant who prepared all the engineering and architectural drawings for the construction projects that were carried out in Somalia;*
> *ix. Whether the said engineering and architectural drawings were prepared in the UAE;*
> *x. Whether it is the Claimant who - using the services of hired experts in UAE - determined the qualities and qualities of building materials that were needed for the construction projects which were to be undertaken in Somalia;*
> *xi. Whether such determinations were undertaken in UAE; whether it is the Claimant who sourced for all the requisite building materials and whether that was done in UAE;*
> *xii. Whether all the project management meetings were held in UAE; and whether the payments made to the Claimant by the Respondent were made in UAE.*[60]

85. The Claimant contends that the factual details given in its Response are relevant and material to the Rule 41 Objections because they demonstrate *inter alia* that the Claimant's economic activities under the Contracts were intended to promote the economic development of UAE and benefit UAE employees, and were not just confined to the physical infrastructure projects erected in Somalia, but included activities carried out in UAE that formed part of the contracted-for services.[61] The Claimant further asserts that the factual details establish that the works were stopped by the UAE in the

[59] Rejoinder, para. 203.

[60] Rejoinder, para. 204.

[61] Rejoinder, para. 85.

exercise of its sovereign powers and for reasons that had nothing to do with the Claimant.[62]

V. THE CASE TO BE ASSESSED UNDER RULE 41

A. INTRODUCTION

86. The Parties are in dispute as to the scope of the case to be assessed by the Tribunal.

87. The Respondent submits that (i) the Claimant has modified its case, (ii) such modification is impermissible and therefore to be disregarded, and (iii) as a result, the Rule 41 Objections are to be decided on the basis of the claim only as set forth in the Request for Arbitration and Clarifications.

88. The Claimant submits that (i) the allegedly new case is encompassed within the summary contained in the Request for Arbitration and Clarifications, (ii) the allegedly new arguments are permissible because they do no more than expand on the matters summarised in the Request for Arbitration, and (iii) as a result, the Rule 41 Objections are to be decided on the basis of the claim as expanded upon in its Response and subsequent submissions.

89. In specific terms, the alleged changes to the Claimant's case are as follows:

   a. Concerning the "*investment*" said to have been made in the UAE, the Respondent objects to the allegedly new argument that the claim is mostly "*premised on purely contractual rights that have absolutely no contact with the geographic territory of Somalia.*"[63]

   b. Concerning the alleged breaches of the Treaty, the Respondent objects to the allegedly new claims enumerated in the Response, which it says include *"the addition of several entirely new claims."*[64]

   c. Concerning the definition of the term *"territory"* under Article 1(1)(a) of the Treaty, the Respondent objects to the allegedly new argument that this term means areas over which the UAE exercises *"territorial prescriptive and enforcement jurisdiction"* and the Claimant's allegedly new arguments, based on that premise, that the *"territorial nexus"* of the investments is the UAE.[65]

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62 Rejoinder, para. 85.

63 Response, para. 136; Reply, paras. 59, 63-64 and "*Table 1: Comparison of Claimant's description of its investment' in its Pleadings and Response.*"

64 Response, paras. 127-137; Reply, para. 59, 68, and "*Table 2*: "*Comparison of Claims Asserted by Claimant in its Request for Arbitration and in its Response.*"

65 Response, paras. 67-124; Reply, para. 59.

90. The Parties' positions on the alleged changes are set forth below.

B. THE "INVESTMENT"

(1) The Respondent

91. The Respondent asserts that the Claimant has changed its case on what constitutes its "*investment*" under the Treaty.[66] The Respondent presents the following contrast:

a. In its Request for Arbitration dated 26 April 2024 and Clarifications dated 7 May 2024, the Claimant described the investment on which its claim was based by reference to the "*infrastructural projects*" at the UAE Embassy in Somalia.[67] The Claimant describes its investments in terms such as "*investments at the UAE Embassy in Mogadishu*"[68] and "*the various infrastructural projects that were undertaken by the claimant within the premises of the Respondent's embassy in Mogadishu within the Republic of Somalia*."[69]

b. In its Response, the Claimant states that its claim is "*primarily*" anchored on "*intangible investments*" comprising "*contractual rights*" within the meaning of Articles 1(1)(a)(iii) and (iv) of the Treaty.[70] The Claimant is "*not claiming any part of the infrastructural projects erected within the premises of the UAE embassy in Mogadishu and cannot thereby be relying on them as the investment*" but rather "*is claiming the value of the services that they rendered to UAE, which is a 'claim to money' that is a protected investment under Article 1(1)(a)(iii) of the said BIT*."[71]

92. The Respondent submits that the Claimant's description of the investments on which its claims are based, as advanced in its Response, amounts to a change of case[72] and that it is "*misleading*" for the Claimant to assert that the Rule 41 Objections only deal with one out of seven "*distinct claims*" when those other claims were not contained in the Request for Arbitration.[73]

93. The Respondent contends that the Claimant's attempt to change its case is impermissible, and that, following the approach taken in *Lotus Holding Anonim Şirketi*

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66 Reply, paras. 63-64 and "*Table 1: Comparison of Claimant's description of its 'investment' in its Pleadings and Response.*"

67 Request for Arbitration, paras. 5, 6, 36, 70, 81; Clarifications, paras. 35, 40, 48-49, 53.

68 Request for Arbitration, para. 81.

69 Clarifications, para. 35.

70 Response, paras. 10(i).

71 Response, para. 57.

72 Reply, paras. 57-70, 71-79, 176.

73 Reply, para. 81, referring to Response, paras. 7(a), 56, 59, 125, and 127-137.

v Republic of Turkmenistan ("***Lotus Holding***"), the Tribunal must assess the claims as set forth in the Request for Arbitration. [74]

(2) The Claimant

94. The Claimant submits that, save for its claim in respect of "*movable assets*" under Article 1(1)(a)(i) of the Treaty, its claims concern the following separate and distinct categories of "*incorporeal claims*":[75]

a. "*money due under contract*" (Article 1(1)(a)(iii) of the Treaty) for unpaid money due to the Claimant on account of services rendered prior to stoppage of works, and for moral damages for subjecting the Claimant's CEO to mistreatment aimed at coercing him into dropping the Claimant's claim for work done;[76]

b. "*rights to performance under contract*" (Article 1(1)(a)(iii) of the Treaty) for loss of profits for work which Claimant was denied opportunity to perform; claim for losses sustained under collateral contracts with subcontractors; and the Respondent's contractual obligation "*to dispense justice*" through its domestic courts, the contractually agreed forum being the UAE courts;[77] and

c. "*intellectual property rights*" (Article 1(1)(a)(iv) of the Treaty) in respect of expropriation of architectural plans, technical and engineering drawings, and other items of intellectual property.[78]

95. The Claimant denies the allegation that it has changed its case in respect of the investment out of which the dispute has arisen.

96. According to the Claimant, the meaning of the term "*investment*" in its Request for Arbitration is same as in its Response.[79]

97. The Claimant in particular refers to the following components of the "investment" as described in the Request for Arbitration: (i) "*several written agreements*"[80] and (ii) "*employed to undertake*"[81], which the Claimant states encompass intangible contractual

[74] Reply, para. 78, citing **Exhibit CL-056-ENG / RL-004-ENG**, *Lotus Holding*, paras. 156, 164 and 185.

[75] Response, paras. 130-133, 135.

[76] Response, paras. 128, 130.

[77] Response, paras. 128, 131.

[78] Response, paras. 128, 132.

[79] Rejoinder, paras. 25-47.

[80] Rejoinder, para. 28.

[81] Rejoinder, paras. 26-27.

rights. On this basis, the Claimant denies that it is precluded from arguing that its investments included intangible rights that have no connection to Somalia.[82]

98. The Claimant states that the intangible components of the "*said investment projects*"[83] as described in the Request for Arbitration comprised claims to money under the Contracts, as well as (i) the rights to effect performance of the works that the Claimant was "*employed to undertake,*"[84] (ii) the value of services actually rendered in the UAE that were necessarily incidental to, or constituted integral components of, the infrastructural projects.[85]

99. In its Rejoinder, the Claimant "*clarifies*" that it injected funds into the economy of the UAE by funding the performance of the construction works from its own money and loan arrangements.[86]

100. The Claimant denies that the claims as articulated in its responsive submissions are impermissible. The Claimant asserts that pursuant to Article 36(2) of the ICSID Convention it is not obliged to include all details of the dispute in the Request for Arbitration.[87] On the contrary, the Claimant asserts that it is prohibited from giving all the details of the relevant facts and claims by Rule 2(2)(a) of the ICSID Institution Rules.[88]

C. ALLEGED BREACHES OF THE TREATY

(1) The Respondent

101. The Respondent asserts that the Claimant has abandoned certain of the claims made in the Request for Arbitration and has made new claims in its Response.[89]

102. According to the Respondent, the Claimant made the following claims in the Request for Arbitration that it abandoned in the Response:

82 Rejoinder, para. 47.

83 Rejoinder, para. 29.

84 Rejoinder, paras. 29(b), 31-32.

85 Rejoinder, paras. 29(c), 33, 43, 45-46.

86 Rejoinder, paras. 39, 96-98.

87 Rejoinder, paras. 67-77, 113; Tr., p. 79, lines 15-32; Tr., p. 82, line 9 to p. 85, line 15; Tr., p. 93, line 8 to p. 94, line 2.

88 Rejoinder, paras. 69-70.

89 Reply, paras. pp. 27-28, "*Table 2: Comparison of Claims Asserted by Claimant in its Request for Arbitration and in its Response.*"

1. A breach of the "*fair and equitable treatment*" standard under Article 3(2) of the UAE-Kenya as a result of "*ignor[ing] a foreign investor's property rights.*" (para. 90)
2. A breach of the "*fair and equitable treatment*" standard under Article 3(2) of the UAE-Kenya BIT as a result of "*breach[ing] the investor's legitimate expectations that it would be paid and to also getting its assets together with equipment upon completion of the Claimant's work.*" (para. 91)
3. A breach of "*full protection and security*" under Article 3 of the UAE-Kenya BIT as a result of "*fail[ing] to accord legal security to Claimant's investment and d[oing] nothing whatsoever to protect the claimant's equipment.*" (paras. 98, 100 and 101)
4. A breach of "*full protection and security*" under Article 3 of the UAE-Kenya BIT as a result of subjecting the "*Claimant's person*" to "*harassment and wrongful imprisonment.*" (para. 99)
5. A breach of "*national or most-favored nation treatment*" and "*fair and equitable treatment*" through the "*selling of Claimant's property at will*" and by "*impair[ing] by unreasonable or discriminatory measures the management, maintenance, use, enjoyment and disposal of Claimant's investments, in violation of Article 3(2)*" of the UAE-Kenya BIT. (para. 106)

103. According to the Respondent,[90] the Claimant's Response asserted for the first time the following claims that had not been raised in the Request for Arbitration:

1. The Claimant has asserted a new claim for expropriation under Article 7, for the "*value of services rendered by the Claimant before the stoppage of works*" which it says remains outstanding. (paras. 69-74)
2. The Claimant has asserted a new claim for expropriation under Article 7, for the "*value of the services that the Claimant had become entitled to perform under the said contracts but which were not performed owing to the stoppage of works*" (paras. 75-80).
3. The Claimant has asserted a new claim under Article 4(1) for breach of the "*fair and equitable treatment*" standard through the "*wilful subjection of the Claimant to ruinous third-party losses.*" (paras. 81-89)

[90] Reply, pp. 28-29, "*Table 2: Comparison of Claims Asserted by Claimant in its Request for Arbitration and in its Response.*"

4. The Claimant has asserted a new claim under Article 7 for "*expropriation of the Claimant's properties that were kept within the premises of the Respondent embassy in Mogadishu.*" (paras. 90-102)
5. The Claimant has asserted a new claim for "*expropriation of the Claimant's intellectual property rights*" under Article 7 of the UAE-Kenya BIT. (paras. 103-113)
6. The Claimant has asserted a new claim for denial of justice before the UAE domestic courts under Articles 4(1) and 3(2) of the UAE-Kenya BIT. (paras. 116-124)

(2) The Claimant

104. The Claimant submits that the claims made in Request for Arbitration are exactly the same as in its Response.[91] In respect of the Treaty protections invoked, the Claimant asserts that in its Response, it has not abandoned any of the claims made in the Request for Arbitration or advanced any new claims not made in the Request for Arbitration.[92]

105. The Claimant denies that it has abandoned any of the claims made in the Request for Arbitration.[93] According to the Claimant, the specific claims which the Respondent alleges are abandoned are dealt with in the Response as follows:[94]

1. The breach of the *"fair and equitable treatment"* standard under Article 3(2) of the UAE-Kenya as a result of *"ignor[ing] a foreign investor's property rights" (para. 90)* is dealt with in the Response in **part 4.1** (paragraphs 69-74).
2. The breach of the "*fair and equitable treatment*" standard under Article 3(2) of the UAE-Kenya BIT as a result of "*breach[ing] the investor's legitimate expectations that it would be paid and to also getting its assets together with equipment upon completion of the Claimant's work*" (para. 91) is dealt with in the Response in **part 4.2** (paragraphs 75-80).
3. The breach of "*full protection and security*" under Article 3 of the UAE-Kenya BIT as a result of "*fail[ing] to accord legal security to Claimant's investment and d[oing] nothing whatsoever to protect the claimant's equipment*" (paras. 98, 100 and 101) is dealt with in the Response at **part 4.4** (paragraphs 90-102).

91 Rejoinder, paras. 48-59.

92 Rejoinder, paras. 60-66.

93 Rejoinder, paras. 60-62.

94 Rejoinder, para. 61.

4. The breach of *"full protection and security"* under Article 3 of the UAE-Kenya BIT as a result of subjecting the *"Claimant's person"* to *"harassment and wrongful imprisonment"* (para. 99) is dealt with in the Response at **part 4.5** (paragraphs 103-113).
5. The breach of "*national or most-favored nation treatment*" and "*fair and equitable treatment*" through the "*selling of Claimant's property at will*" and by "*impair[ing] by unreasonable or discriminatory measures the management, maintenance, use, enjoyment and disposal of Claimant's investments, in violation of Article 3(2)*" of the UAE-Kenya BIT (para. 106) is dealt with in the Response at **part 4.3** (paragraphs 81-89).

106. The Claimant denies that it has asserted new claims.[95] According to the Claimant, all of the allegedly new claims "*were actually made in the Request for Arbitration*."[96]According to the Claimant, the phrase "*[t]he dispute also entails the Respondent's illegal expropriation of the Claimant's investments*" at paragraph 6 of the Request for Arbitration "*basically meant that the Claimant's suit sought relief in connection with such investments made by themselves as were disclosed by the facts of their case*."[97]

107. In respect of the components of its claim, the Claimant asserts that in its Request for Arbitration and Response, it makes the same heads of claim, which are the following: refusal to pay for works done; unfairly and inequitably preventing the Claimant from completing the investment projects which the Claimant had been contracted to undertake; harassment and mistreatment of the Claimant's CEO; illegal expropriation of the Claimant's investments; illegal sale of properties belonging to the Claimant; and denial of justice before the Respondent's courts.[98]

108. The Claimant asserts that all of the items at columns 6 through 10 of the Respondent's Table 2 were raised in the Request for Arbitration because they were "*disclosed by the facts of the Claimant's case as brought out in the Request for Arbitration and further substantiated in the Claimant's Response to the Preliminary Objection*."[99]

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95 Rejoinder, paras. 63-66.

96 Rejoinder, para. 63.

97 Rejoinder, para. 64.

98 Rejoinder, paras. 51-59.

99 Rejoinder, para. 65, referring to Reply, pp. 28-29, "*Table 2*: "*Comparison of Claims Asserted by Claimant in its Request for Arbitration and in its Response.*"

109. Concerning the claim for denial of justice, the Claimant states that this claim was raised in paragraph 109 of the Request for Arbitration.[100]

D. THE DEFINITION OF "*TERRITORY*"

110. The following are the Parties' positions on the admissibility of the allegedly new arguments concerning the definition of "*territory*" and test for territorial nexus. The Parties' positions on the substance of those arguments are set forth in sections VI.(2) and (3) below.

(1) The Respondent

111. The Respondent asserts that the Claimant has abandoned in its Response the argument that its investments were made "*in the territory*" of the UAE on the basis that the UAE Embassy in Somalia is part of the territory of the UAE under international law.[101]

112. Instead, the Claimant's Response makes the completely new argument that the definition of the term "*territory*" under Article 1(1)(a) of the Treaty means areas over which the UAE exercises "*territorial prescriptive and enforcement jurisdiction*."[102] The Respondent submits that the Claimant relies on this "*entirely new premise*" to argue that the investments are "*made in the UAE*" based on the choice of law and choice of forum agreements in the relevant contracts.[103]

(2) The Claimant

113. The Claimant denies that its arguments on the localization of the investment in the UAE based on "*territorial prescriptive and enforcement jurisdiction*" are new.

114. The Claimant submits that the test for determining the "*territorial nexus*" is the same in the Request for Arbitration and Response.[104] The claim is that it was the infrastructural projects the Claimant was engaged "*to undertake*" that "*formed the basis*" of the dispute before the Tribunal; such engagement gave rise to tangible and intangible assets protected under the Treaty in the form of financial assets, claims to money, right to performance under contract, and intellectual property rights.[105]

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[100] Rejoinder, para. 66.

[101] Reply, paras. 91-92, 98.

[102] Response, paras. 67-124; Reply, para. 59.

[103] Response, paras. 10(iii)-(vi); Reply, para. 59.

[104] Rejoinder, paras. 78-86.

[105] Rejoinder, paras. 90-92.

VI. THE PARTIES' POSITIONS ON THE ALLEGEDLY MANIFESTLY UNMERITORIOUS CLAIMS

115. The Respondent submits that the Claimant's claims, in their entirety, are manifestly without legal merit and should be dismissed under Rule 41 of the ICSID Arbitration Rules, based on the following legal arguments.

A. General Principles of Law on Premises of Diplomatic Missions

(1) Introduction

116. It is not in dispute that the premises of the UAE Embassy in Somalia are not considered as part of the territory of the UAE under general principles of international law.

(2) The Respondent

117. According to the Respondent, the premises of the diplomatic mission of a sending State are the territory of the receiving State, and do not constitute the territory of the sending State.[106]

118. The Respondent submits that the jurisprudence of international and domestic courts illustrates the settled position that an embassy is not the territory of the sending State,[107] as does the Vienna Convention on Diplomatic Relations.[108]

(3) The Claimant

119. The Claimant does not challenge the proposition that an embassy is not the territory of the sending State, which it acknowledges as "*the prevailing school of thought in the international law community*."[109] The Claimant states that the Respondent incorrectly presumes and surmises that the Claimant's claims rely on a flawed understanding to the contrary.[110]

[106] Rule 41 Objections, paras. 40-70.

[107] Rule 41 Objections, paras. 41-54.

[108] Rule 41 Objections, paras. 55-70.

[109] Response, para. 55.

[110] Response, para. 55.

B. INTERPRETATION OF THE TERM "*IN THE TERRITORY OF THE OTHER CONTRACTING PARTY*" UNDER ARTICLE 1(1)(A) OF THE TREATY

(1) Introduction

120. Article 1(1)(a) of the Treaty provides[111]:

> *For the purposes of this Agreement:*
>
> *1. (a) The term 'investment' means every kind of asset invested by the investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws, and regulations of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes: […]*

121. Article 1(1)(e)(ii) of the Treaty provides that for the purposes of the Treaty, "*territory*" means

> *ii) In respect of United Arab Emirates: the territory of the United Arab Emirates its territorial sea, airspace and submarine areas over which the United Arab Emirates exercises in conformity with international law and the law of United Arab Emirates sovereign rights, including the Exclusive Economic Zone and the mainland and islands under its jurisdiction in respect of any activity carried on in connection with the exploration for or the exploitation of the natural resources[.]*

(2) The Respondent

122. The Respondent submits that the UAE-Kenya BIT has no territorial application to the UAE Embassy in Somalia.[112] According to the Respondent, the definition of "*territory*" of the UAE under Article 1(1)(e)(ii) does not include the UAE Embassy in Mogadishu,[113] because: (a) the ordinary meaning of the term "*territory*" in the Treaty does not include the embassies of the UAE;[114] (b) the UAE Embassy in Mogadishu is not an area in respect of which the UAE exercises sovereignty;[115] and (c) the UAE Embassy in Mogadishu is also not an area in respect of which the UAE exercises sovereign rights to explore or exploit natural resources.[116]

123. The Respondent's arguments are as follows.

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[111] **Exhibit CL-001-ENG**, Agreement between the Government of The Republic of Kenya and the Government of The United Arab Emirates on the Promotion and Protection of Investments, 23 November 2014.

[112] Rule 41 Objections, paras. 71-117; Reply, paras. 3 and 101.

[113] Rule 41 Objections, paras. 75-92.

[114] Rule 41 Objections, paras. 76-83.

[115] Rule 41 Objections, paras. 84-88.

[116] Rule 41 Objections, paras. 89-92.

a. Ordinary meaning of the term "territory"

124. Based on a "*plain reading*" of the text of Article 1(1)(e)(ii) of the Treaty, the Respondent submits that it is "*clear*" that the word "*territory*" of the UAE is defined under the Treaty as comprising:

> *a. "the territory of the United Arab Emirates", "its territorial sea" and "airspace" (**"First Limb"**); and*
>
> *b. "submarine areas over which the United Arab Emirates exercises in conformity with international law and the law of United Arab Emirates sovereign rights, including the Exclusive Economic Zone and the mainland and islands under its jurisdiction in respect of any activity carried on in connection with the exploration for or the exploitation of the natural resources" (**"Second Limb"**).*[117]

125. According to the Respondent, as regards the ordinary meaning of the text, the First Limb parallels the ordinary meaning of the term "*territory*" under international law, as reflected in international conventions such as for instance Article 2 of the UN Convention on the Law of the Sea (**"UNCLOS"**).[118]

126. The Second Limb sets out a distinct category of areas over which the UAE exercises sovereign rights for the specified purpose, even though such areas do not fall under the territorial sovereignty of the UAE.[119]

127. The Respondent submits that Article 1(1)(e)(ii) demonstrates that when the Contracting Parties intended to extend the territorial scope of the Treaty beyond areas over which they exercise territorial sovereignty, they did so explicitly through the inclusion of express text to that effect. The deliberate inclusion of such areas while omitting mention of embassies confirms, in accordance with the principle *expressio unius est exclusio alterius*, that embassies were not intended to fall within the definition of "*territory*" under the Treaty.[120]

128. The Respondent asserts that that there does not appear to be any investment treaty in which States have expressly included embassies or the premises of diplomatic missions

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[117] Rule 41 Objections, para. 77.

[118] Rule 41 Objections, para. 78, citing **Exhibit RL-011-ENG**, United Nations Convention on the Law of the Sea, 1982 (**"UNCLOS"**); **Exhibit RL-052-ENG** United Nations Convention on the Territorial Sea and the Contiguous Zone, 1958 ("***1958 Convention on the Territorial Sea***"), Articles 1 and 2; **Exhibit RL-053-ENG,** Convention on International Civil Aviation, 1944 ("***Chicago Convention***"), Article 1.

[119] Rule 41 Objections, para. 79.

[120] Rule 41 Objections, paras. 80-81, citing **Exhibit RL-054-ENG,** *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2019, p. 7, Separate Opinion of Judge *ad hoc* Brower, p. 65, pp. 70-71, paras. 15-16.

within the scope of application, which "*confirms that what is not stated is not meant to be included.*"[121]

b. The UAE Embassy in Mogadishu is not an area in respect of which the UAE exercises sovereignty

129. The Respondent submits that for an area to fall under the First Limb, it must be one over which the UAE exercises territorial sovereignty.[122] This approach, the Respondent says, is reflected in Article 29 of the Vienna Convention on the Law of Treaties ("**VCLT**") and the domestic law of the UAE applying to any UAE Embassy in any State, as set forth in Article 4 of the Federal Law No. 19 of 1993 for Defining the Maritime Areas of the United Arab Emirates (**"UAE Federal Decree"**).[123]

130. According to the Respondent, diplomatic premises such as the UAE Embassy in Mogadishu do not constitute areas over which the UAE exercises sovereignty under international law, even where the sending State acquires ownership of the premises used for a diplomatic mission.[124] The premises used for a diplomatic mission of a sending State are part of the sovereignty of the receiving State, and the laws and regulations of the receiving State continue to apply there.[125]

c. The UAE Embassy in Mogadishu is not an area in respect of which the UAE exercises sovereign rights to explore or exploit natural resources

131. According to the Respondent, it is clear that the "*sovereign rights*" in referred to in the Second Limb of Article 1(1)(e)(ii) must be exercised for the purpose of "*exploration for or the exploitation of the natural resources.*"[126] The express reference to this purpose "*implies that other areas which are subject to the exercise of other kinds of 'sovereign rights' are excluded from the definition of 'territory' under the Treaty*."[127] Such a reading is supported by the principle of effectiveness, whereas the Claimant's

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121 Rule 41 Objections, para. 82.

122 Rule 41 Objections, paras. 84-85.

123 Rule 41 Objections, paras. 86-87, citing **Exhibit RL-055-ENG**, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2008, p. 412, Separate Opinion of Judge Tomka, p. 515; **Exhibit RL-056-ENG**, Federal Law No. 19 of 1993 for Defining the Maritime Areas of the United Arab Emirate, Article 4.

124 Rule 41 Objections, para. 88.

125 Rule 41 Objections, para. 88.

126 Rule 41 Objections, paras. 89-90.

127 Rule 41 Objections, para. 91.

proposed interpretation would render the words "*exploration for or the exploitation of natural resources*" otiose.[128]

132. The Respondent points out that the UAE Embassy in Mogadishu is not an area in which the UAE exercises sovereign rights for the purpose of exploration and exploitation of natural resources.[129]

133. Responding to the Claimant's argument that the definition of "*territory*" includes all areas over which the Respondent "*exercises limited privileges and entitlements*" under international law,[130] the Respondent contends that the Claimant errs in seeking to extend the scope of sovereign rights under the Treaty without regard to the limitations inherent in the language of Article 1(1)(e)(ii) of the Treaty. According to the Respondent, while the exercise of sovereign rights over an area may involve the exercise of specific entitlements by a State in that area, "*the reverse does not automatically hold true.*"[131] The exercise of entitlements does not equate to the exercise of sovereign rights, and the Claimant's proposition is inconsistent with the plain text of Article 1(1)(e)(ii) of the Treaty.[132]

d. Object and purpose of the Treaty

134. According to the Respondent, recourse to the object and purpose of the Treaty does not permit an expansive interpretation of Article 1(1)(e)(ii) that includes the UAE Embassy in Mogadishu.[133]

135. The Respondent submits that the Claimant's reliance on the Preamble to the Treaty is "*misplaced*" and "*wholly circular.*"[134] The Respondent refers to prior decisions which support the principles that the reference to creating "*conditions favourable to foster greater investments*" does not create any presumption as to the meaning or effect, or as

[128] Rule 41 Objections, para. 91, citing **Exhibit RL-057-ENG**, *Murphy Exploration & Production Company – International v The Republic of Ecuador (II),* PCA Case No. 2012-16, Partial Award on Jurisdiction, 13 November 2013, paras. 171, 179-183; **Exhibit RL-058-ENG**, *Renco Group Inc. v Republic of Peru [I]* (UNCITRAL), ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent Preliminary Objections under Article 10.20.4, 18 December 2014, para. 177; **Exhibit RL-059-ENG**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 151.

[129] Rule 41 Objections, para. 92.

[130] Reply, paras. 85-88, referring to Response, para. 99.

[131] Rule 41 Objections, para. 86.

[132] Rule 41 Objections, paras. 86-87.

[133] Rule 41 Objections, paras. 93-100.

[134] Rule 41 Objections, para. 95.

to the scope of application of the provisions of the treaty, or any presumption in favour of jurisdiction, and cannot be used to add words to the text of a treaty.[135]

136. The Respondent contests the argument that, because the alleged investment has contributed to the "*promotion of economic development of the Respondent,*" it should benefit from the protection of the Treaty. The Respondent asserts that investments made outside the "*territory*" of the UAE are not covered by the UAE-Kenya BIT, notwithstanding any alleged benefits to the UAE.[136]

137. According to the Respondent, interpreting "*territory*" in the Treaty to include the UAE Embassy in Mogadishu leads to a manifestly absurd and unreasonable result because (*inter alia*) the Claimant's interpretation of the word "*territory*" under the UAE-Kenya BIT is incompatible with other substantive provisions of the Treaty and would render them unworkable.[137]

138. According to the Respondent, the Treaty sets out a network of substantive investment treaty obligations that are "*intimately based*" on a territorial nexus to the host State of the investment.[138] The express requirement of a territorial nexus with the host State is critical to such provisions in the Respondent's submission, because "*the substantive content of these rules assumes and depends upon the kind of regulatory power and authority exercised by the host State in its territory – i.e. they depend on the exercise of fundamental tenets of a State's sovereignty over its territory.*"[139]

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[135] Rule 41 Objections, paras. 95-96, citing **Exhibit RL-060-ENG**, *Alcor Holdings Ltd. v The Czech Republic*, PCA Case No. 2018-45, Award, 2 March 2022, para. 245; **Exhibit RL-061-ENG**, *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 193; **Exhibit RL-062-ENG**, *Dispute concerning the course of the frontier between B.P. 62 and Mount Fitzroy ("Laguna Del Desierto") (Argentina/Chile)*, Arbitral Award of 21 October 1994, (1995) 113 ILR 1, para. 75; **Exhibit RL-063-ENG**, *Interpretation of Peace Treaties (second phase), Advisory Opinion,* I.C.J. Reports 1950, p. 221, p. 229.

[136] Rule 41 Objections, para. 98, citing **Exhibit CL-020-ENG / RL-064-ENG**, *Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 ("***SGS v Philippines***"), para. 99.

[137] Rule 41 Objections, paras. 102-109. On the related reason, the Respondent asserts that such an interpretation would overturn fundamental principles of international investment law: Rule 41 Objections, paras. 110-117.

[138] Rule 41 Objections, para. 102, citing Articles 3(2), 4(1), 8, and 12.

[139] Rule 41 Objections, para. 103, citing **Exhibit RL-068-ENG**, *The Channel Tunnel Group Limited and France-Manche S.A. v United Kingdom and France (The Eurotunnel Arbitration*), PCA Case No. 2003-06, Partial Award, 30 January 2007, paras. 305, 310, 315; **Exhibit RL-069-ENG**, R. Dolzer, U. Kriebaum, C. Schreuer, "Chapter VIII: Standards of Protection," *Principles of International Investment Law* (3rd edition) (OUP, 2022), ("***Dolzer et al.***"), pp. 231, 234; **Exhibit RL-070-ENG**, *Pantechniki S.A. Contractors & Engineers (Greece) v The Republic of Albani*a, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 77; **Exhibit RL-071-ENG**, *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 522; **Exhibit RL-072-ENG**, C. McLachlan QC, L. Shore, and M. Weiniger QC, "Chapter 1: Introduction," *International Investment Arbitration: Substantive Principles* (2nd edition) (OUP, 2017), paras. 1.41-1.44; **Exhibit RL-073-ENG**, A. Kolo, T. Wälde, "Chapter 10: Capital

139. The Respondent sets forth examples of the ways in which the exercise of police powers, financial control, immigration control, and regulatory power and authority is required to fulfil the obligations of Full Protection and Security, Fair and Equitable Treatment, the Payment Transfer Obligation, and the Entry and Sojourn Obligation under the Treaty.[140] For these reasons, the Respondent considers that expanding the meaning of "*territory*" under Article 1(1)(e)(ii) of the Treaty to cover an investment in the UAE Embassy in Mogadishu would be "*fundamentally incompatible*" with Articles 3(2), 4(1), 8 and 12 of the Treaty because it would render them unworkable.[141]

(3) The Claimant

140. According to the Claimant, the phrase "…*in the territory of the other contracting party*…" in Article 1(1)(a) of the said BIT refers to "*territorial prescriptive and enforcement jurisdiction*" as opposed to "*territorial geographic jurisdiction*."[142]

a. Ordinary meaning of the term "territory"

141. The Claimant submits that while a "*literal*" interpretation of the phrase "*in the territory of the other contracting party*" in Article 1(1)(a) of the Treaty "*connotes territorial jurisdiction,*" a completely different meaning emerges when considering the same provision in the light of jurisprudence developed under Article 31 of the VCLT.[143]

Transfer Restrictions under Modern Investment Treaties," in A. Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008), ("***Kolo et al., Chapter 10***"), pp. 206, 221, 226, 230; **Exhibit RL-074-ENG**, A. Kolo, "Chapter 11: Transfer of Funds: The Interaction between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective," in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, 2010), pp. 345-374, p. 364, and p. 374; **Exhibit RL-075-ENG**, *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 ("***OI European Group***"), para. 624; **Exhibit RL-076-ENG**, M. Waibel, "Investment Arbitration: Jurisdiction and Admissibility," in M. Bungenberg and others (eds), *International Investment Law* (1st edition) (Bloomsbury T&T Clark, 2015), pp. 1212-1287, p. 1248, para. 144, and p. 1249, para. 145; **Exhibit RL-077-ENG**, *Swissbourgh Diamond Mines (Pty) Limited and others v Kingdom of Lesotho* [2018] SGCA 81, pp. 50-52, paras. 99-102.

[140] Rule 41 Objections, paras. 105-108, citing **Exhibit RL-078-ENG**, C. McLachlan QC, L. Shore, and M. Weiniger QC, "Chapter 7: Treatment of Investors," *International Investment Arbitration: Substantive Principles* (2nd edition) (Oxford, 2017), paras. 7.263-7.264; **Exhibit RL-069-ENG**, *Dolzer et al.*, p. 206; **Exhibit RL-073-ENG** *Kolo et al., Chapter 10,* pp. 206, 242; **Exhibit RL-075-ENG**, *OI European Group*, p. 135, para. 624; **Exhibit RL-067-ENG**, A. Reinisch, C, Schreuer, "Chapter 8: Transfer Clauses," *International Protection of Investments: The Substantive Standards* (CUP, 2020), para. 88; G. Sacerdoti, "The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties," (2000) 1 *The Journal of World Investment & Trade* 105, p. 116.

[141] Rule 41 Objections, para. 109.

[142] Response, paras. 92-101, 138-154.

[143] Response, para. 140.

b. The terms "sovereignty" and "sovereign rights"

142. The Claimant relies on Article 1(1)(e)(ii) of the Treaty and distinguishes between "*sovereignty*" and "*sovereign rights.*"[144]

143. The Claimant submits that the UAE enjoys limited privileges and entitlements within its Embassy in Mogadishu pursuant to the 1961 Vienna Convention on Diplomatic Relations ("**VCDR**"), and that therefore the moveable assets within the precincts of that Embassy "*obviously meet the requisite territoriality requirement under International Investment Law.*"[145]

144. The Claimant posits that regard must be had to the choice of law and choice of forum clauses of the governing instruments to determine whether given investments fall within the host State's territorial prescriptive or enforcement jurisdiction.[146] In the present case, all the relevant contracts expressly provided that the governing law was the law of the UAE and that all disputes arising therefrom would be referred to the courts of the UAE.[147]

c. Object and purpose of the Treaty

145. The Claimant submits that its position is supported by a good-faith interpretation of Article 1(1)(a) of the Treaty, taking into account the object and purpose of the Treaty.

146. The fact that Article 1(1)(a) of the Treaty defines "*investments*" so as to include intangible as well as tangible assets indicates that the word "*territory*" does not refer to "*territorial geographic jurisdiction*" because "*the intangible assets enumerated thereunder cannot be geographically located.*"[148]

147. The Claimant submits that a consideration of Article 1(1)(a) in light of the object and purpose of the Treaty "*as captured in its preambular provisions which* inter alia *glorifies as it recognises value of* 'reciprocal protection of investments made in accordance with the laws and regulations of the host contracting party'" makes it "*extremely clear*" that *"the underlying premise of the word 'territory' as used in*

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[144] Response, paras. 92-99, citing **Exhibit CL-047-ENG**, Pratna Shree Basu, "Sovereignty vs. Sovereign Rights: De-escalating Tensions in the South China Sea" 558 *ISSUE BRIEF* June 2022 (A publication by Observer Research Foundation) p. 8; **Exhibit CL-048-ENG**, Haroun Alfarsi, "Sea Dispute: Sovereignty vs. Sovereign Rights" PROFOLUS; **Exhibit CL-049-ENG**, Yuriy Bytyak, Ivan Yakovyuk, Olesia Tragniuk, Tatiana Komarova and Sergey Shestopal, "The State Sovereignty and Sovereign Rights: The Correlation Problem" 97 MAN IN INDIA (2023) 577-588, p. 581.

[145] Response, paras. 100-101.

[146] Response, para. 147.

[147] Response, para. 148.

[148] Response, para. 142.

Articles 1(1)(a) and 2 of the said BIT is 'territorial prescriptive and enforcement jurisdiction', and not 'geographic territory'."[149]

148. The Claimant considers that the territoriality requirements in international investment treaties "*usually refer to the host state's territorial prescriptive and enforcement jurisdiction and not its geographic territory*."[150]

149. In support of this position, the Claimant relies on the following writings on the object and purpose of the requirement in international investment treaties of a territorial link to the host State of the investment:

> *The intent of states parties in imposing a requirement of territoriality is to limit the scope of protection to investments which are subject to the host state's territorial prescriptive and enforcement jurisdiction. These two types of jurisdiction are generally accepted as the foundation of a state's regulatory authority in international law. In general, prescriptive jurisdiction delineates the power of the host state to prescribe laws and to define their scope of application, whether through legislation, executive decrees or judicial decisions. Enforcement jurisdiction delineates the power of the host state to enforce its laws through police or other executive action or judicial orders. The common denominator underlying the two types of jurisdiction is that of territoriality - a state can generally only exercise its enforcement and prescriptive jurisdiction over property, persons and events in its territory."*[151]
>
> *"Investment treaties require the contracting states parties to enforce their national laws and regulations consistently with the substantive obligations of protection in respect of investments... [The] territorial link to the host state... is necessary because a state's jurisdiction in international law to enforce its laws and regulations is territorial and the raison d'être of an investment treaty is precisely to reduce the sovereign risk associated with a state's enforcement jurisdiction.*[152]

150. The Claimant refers, further, to commentary stating that the territoriality requirement targets "*investments that fall directly under the control of the host state's legislative executive and judicial power.*"[153] The Claimant finds support in scholarly writings to

[149] Response, para. 143.

[150] Response, para. 144.

[151] Response, para. 144, citing **Exhibit CL-051-ENG**, Christopher R Zheng, "The Territorial Requirement Investment Treaties: A Constraint on Jurisdictional Expansionism" 34 SINGAPORE LAW REVIEW ("**Zheng**"), p. 145; Rejoinder, para. 152.

[152] Response, para. 145, citing **Exhibit RL-101-ENG**, Zachary Douglas, **"**Property, Investment and the Scope of Investment Protection Obligations" in Zachary Douglas, Joost Pauwelyn & Jorge E Vinuales (eds) *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford: Oxford University Press; 2014) 363 at 383.

[153] Response, para. 146, citing **Exhibit RL-076**, Michael Waibel, "Investment Arbitration: Jurisdiction and Admissibility" in Marc Bungenberg et al, (eds) *International Investment Law: A Handbook* (Baden: Nomos Verlagsgesellschaft, 2015) 2012, at 1248- 49.

the effect that reference to "*territorial prescriptive and enforcement jurisdiction*" is an approach that "*demonstrates fidelity to the scope of the consent of states parties to investment treaties*."[154]

C. WHETHER THE *SITUS* OF THE INVESTMENT WAS THE UNITED ARAB EMIRATES UNDER PRINCIPLES OF INTERNATIONAL INVESTMENT LAW

(1) Introduction

151. As described above in Part VI(3), the Respondent has objected to the admissibility of the Claimant's arguments concerning the investment being situated in the UAE under principles of investment law, for reasons other than the claim made in the Request for Arbitration. The Parties' positions on the substance of those arguments are set forth below.

(2) The Respondent

152. According to the Respondent, the principle of unity of the investment requires assessing Claimant's economic activities in their entirety rather than solely the alleged intangible investments.[155] Following the approach adopted in *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* ("***Inmaris Perestroika***")*,* the Tribunal must adopt a holistic approach in accordance with the principle of unity by considering the Claimant's economic activities "*as a whole.*"[156]

a. Unity of the investment

153. The Respondent invokes the principle of unity as articulated in *Holiday Inns SA and others v Morocco*[157] ("***Holiday Inns***") and *Inmaris Perestroika*.[158] The Respondent also refers to the combined locations case of *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* ("***SGS v Philippines***") which concerned claims for money for services rendered abroad, where the tribunal refused to subdivide the investments

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154 Response, para. 147, citing **Exhibit CL-051-ENG**, Zheng, pp. 147-148.

155 Reply, paras. 106-114.

156 Reply, para. 106, citing **Exhibit CL-015-ENG / RL-090-ENG**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 ("***Inmaris Perestroika***"), para. 92; **Exhibit RL-089-ENG**, C. Schreuer, "The Unity of an Investment," (2021) 19 ICSID Reports 3, p. 3.

157 Reply, para. 110, citing **Exhibit RL-091-ENG**, *Holiday Inns SA and Others v Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 12 May 1974 ("*Holiday Inns*") (not public) see, e.g., *Holiday Inns v. Morocco*, as described in P. Lalive, "The First 'World Bank' Arbitration (*Holiday Inns v Morocco*)—Some Legal Problems," (1981) 51 British Yearbook of International Law 123, p. 159.

158 Reply, para. 111, citing **Exhibit CL-015-ENG / RL-090-ENG**, *Inmaris Perestroika,* para. 92.

and services rendered by the claimants.[159] The Tribunal "*must evaluate the alleged investments as part of a unified, indivisible economic activity.*"[160]

154. The Respondent considers that the Claimant's position on the principle of unity is internally inconsistent.[161]

b. Centre of gravity

155. The Respondent submits that the relevant test to determine territorial nexus is the "*centre of gravity*" or "*focal point*" of a claimant's economic activities.[162] According to the Respondent, in cases where claimants have rendered services partly or largely outside the host State, tribunals have applied the "*centre of gravity*" or "*focal point*" test to determine whether the territorial nexus requirement under the relevant investment treaties has been met.[163]

156. The Respondent refers to the decision in *Alpha Projektholding GmbH v Ukraine* ("***Alpha Projektholding***") which concerned construction works in Ukraine, and where the tribunal held that the location of the activity, not the flow of funds, determined the territorial nexus.[164] The Respondent submits that as underscored by that case, "*tribunals are careful not to disregard the presence of a physical* situs *when one is evident*," as "*unlike in cases involving purely intangible assets, the physical location of tangible assets constitute a clear starting point for determining the* situs *of the investment*."[165]

157. The Respondent refers further to the case of *SGS v Philippines* in which the tribunal evaluated the claimant's activities as a whole to identify the "*substantial and non-severable aspect*" of the overall service, and concluded that there was "*no distinct or separate investment made elsewhere than in the territory of the Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionably an investment 'in the territory of' the Philippines*."[166]

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159 Reply, para. 113, citing **Exhibit CL-020-ENG / RL-064-ENG**, *SGS v Philippines*, paras. 101, 112.

160 Reply, para. 114.

161 Reply, paras. 107-109, 114.

162 Reply, paras. 115-122.

163 Reply, para. 116, citing **Exhibit CL-020-ENG / RL-064-ENG**, *SGS v Philippines,* para. 101.

164 Reply, para. 116, citing **Exhibit RL-095-ENG**, *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 279.

165 Reply, para. 117.

166 Reply, para. 118.

c. *The benefits thesis*

158. The Respondent contends that the benefits theory is inapposite in cases that do not involve purely financial investments.[167] The Tribunal in *Abaclat and others (formerly Giovanna A. Beccara and others) v Argentine Republic (“**Abaclat**”)* “*expressly noted*” that the test before it was concerned with investments of a purely financial nature, stating that “*the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property*.”[168]

159. The Respondent distinguishes the cases invoked by the Claimant (see below at paragraph 176) on the basis that in those cases, the benefits thesis focused on an “*injection of funds into the territory of*” the host State or whether “*the invested funds [were] ultimately made available to the Host State*” and whether the funds supported the host State’s economic development.[169] The Respondent considers that the benefits thesis is “*narrowly tailored to cases involving the injection or availability of funds to the host State*” and “*demands a precise nexus between the benefit to the host State and the specific funds at issue*.”[170]

160. In the case of *FEDAX N.V. v Republic of Venezuela* (“***Fedax***”), the Respondent emphasizes for example that the case concerned financing provided directly to the Venezuelan government.[171]

161. Concerning the *Inmaris Perestroika* case, the Respondent submits that the investment had a “*demonstrable and substantial connection to the territory of the host State, Ukraine*.”[172] The Respondent contends that the Claimant’s report of the case is inaccurate, since it is not true that the renovation works were carried out outside Ukrainian territory and the Claimant does not cite any paragraph in support of its “*direction and authority*” contention.[173] The tribunal in *Inmaris* confirmed that the delivery of a renovated ship to Ukraine within its territory was relevant to its conclusion on the territorial nexus of the investment; the case did not turn on whether the

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167 Reply, paras. 127-142.

168 Reply, para. 127, citing **Exhibit RL-088-ENG**, *Abaclat and others (formerly Giovanna A. Beccara and others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (“***Abaclat***”), para. 374.

169 Reply, para. 129, citing in particular **Exhibit CL-021-ENG / RL-099-ENG**, *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 (“***SGS v Pakistan***”), para. 136; **Exhibit RL-088-ENG**, *Abaclat*, para. 374.

170 Reply, para. 129.

171 Reply, para. 130, citing **Exhibit CL-006-ENG / RL-096-ENG**, *FEDAX N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997 (“***Fedax***”), para. 41.

172 Reply, paras. 133-137.

173 Reply, paras. 133-135, referring to Response, para. 160.

investments were "*done under the direction and authority*" of the host State.[174] In any event, the Respondent distinguishes the case of *Inmaris* because it concerned the purely financial contributions made by the claimant in return for contractual rights to operate the vessel.[175]

162. The Respondent refers to the dictum of the tribunal in *SGS v Philippines* observing that the construction of or provision of services to an embassy in a third State, "*however beneficial to that State would not involve investments in the territory of the State whose embassy it was*."[176] The Respondent states that this dictum is "*directly applicable and instructive*" in the present case.[177]

d. Territorial prescriptive and enforcement jurisdiction is not the test

163. According to the Respondent, the test for determining the territorial nexus of Claimant's alleged investments is not the "*exercise of territorial prescriptive and enforcement jurisdiction"* by the UAE over the investments.[178] The Respondent submits that the Claimant's purported test, hinging on benefits, choice of law and forum, and location of debt, is without legal merit.[179] The Respondent contests the materiality of the factors put forward by the Claimant, as follows.

e. Choice of law and choice of forum are not determinative

164. The Respondent submits that contractual choice of law and choice of forum are not determinative of territorial nexus.[180] In this regard, even if the legal authorities relied on by the Claimant are applicable, they support the Respondent's position because the mere inclusion of choice of law and forum selection clauses are not determinative of the *situs* of an investment.[181]

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174 Reply, para. 136.

175 Reply, para. 137.

176 Rule 41 Objections, para. 98, citing **Exhibit CL-020-ENG / RL-064-ENG**, *SGS v Philippines*, para. 99; Reply, paras. 140-141.

177 Reply, para. 141.

178 Reply, paras. 123-165.

179 Reply, paras. 124-125.

180 Reply, paras. 143-151, citing in particular **Exhibit RL-088-ENG**, *Abaclat,* para. 379; **Exhibit CL-016-ENG / RL-097-ENG**, *Ambiente Ufficio v Argentina,* ICSID Case No. ARB/08/9 Decision on Jurisdiction, 8 February 2013 ("***Ambiente Ufficio***"), para. 506; **Exhibit CL-022-ENG / RL-098-ENG**, *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 ("***Deutsche Bank***"), para. 291.

181 Reply para. 143.

165. The Respondent considers that the Claimant's approach is "*unduly narrow and divorced from the reality of modern contractual agreements*"[182] and would "*distort the notion of territoriality under international investment law and reduce it to a legal fiction*"[183] with absurd results.[184]

f. Location of recovery of contractual debt is not determinative

166. According to the Respondent, the location where the "*debt*" is recoverable is immaterial for determining the *situs* of the investment.[185] The Respondent submits that the Claimant "*fails to cite a single case where investments involving physical infrastructure or the performance of services were deemed to have their situs based on the location of debt recovery*."[186] The only authority referenced, the Dissenting Opinion of Prof. Abi-Saab in *Abaclat*, is a misplaced reliance as the investments in *Abaclat* bear no resemblance to the present case and in the majority in that case as well as the tribunals in *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v Argentine Republic* ("***Ambiente Ufficio***") and *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* ("***Deutsche Bank***") took a consistent approach to the contrary.[187] The Claimant's contention is "*particularly unsubstantiated and inapposite*" in the context of construction of infrastructure projects.[188]

g. The situs of alleged tangible investment is determined by physical location

167. According to the Respondent, the situs of the alleged tangible investment is determined by physical location.[189] The Respondent reiterates that a territorial connection of the alleged investment must be with the UAE's "*territory*" as defined in Article 1(1)(e)(ii) of the Treaty, and a territorial connection with the UAE Embassy in Mogadishu is insufficient to satisfy this requirement.[190]

168. As to the Claimant's argument that the *situs* of its alleged tangible investment is "*governed by territorial prescriptive and enforcement jurisdiction*" of the UAE, the

[182] Reply, para. 146.
[183] Reply, para. 147.
[184] Reply, para. 148.
[185] Reply, paras. 152-154.
[186] Reply, para. 152.
[187] Reply, para. 153.
[188] Reply, para. 154.
[189] Reply, paras. 155-164.
[190] Reply, para. 158.

Respondent contends that the decisions relied on by the Claimant are entirely inapplicable because they "*pertain exclusively to the territorial nexus of intangible assets, such as financial instruments or contractual rights, where the territorial connection to the host State was not easily discernible*."[191]

169. The Respondent asserts that in the case of *Inmaris Perestroika,* the tribunal recognized the principle that the exercise of prescriptive and enforcement jurisdiction over an investment is immaterial to the question of whether a territorial nexus exists.[192] The tribunal considered as "*potentially quite far-reaching*" a proposition that territorial nexus could be established on the basis of the host State's exercise of flag state jurisdiction over a vessel, and did not rely on this argument in its finding of a territorial nexus.[193]

170. Unlike intangible assets, says the Respondent, tangible assets have a physical presence, making their location sufficiently ascertainable, such that the *situs* of the asset can be "*readily established … as an observation of fact*."[194]

h. Undermining the notion of territoriality

171. The Respondent submits that applying the test advanced by Claimant would undermine the notion of territoriality in international investment law.[195] While territoriality is context-specific and driven by the characteristics of the type of asset in question, the Claimant's argument rests on the "*erroneous premise that the territorial nexus of an investment can – and should – be determined without regard to the nature of the investment in question.*"[196] The Claimant's test, according to the Respondent, would fundamentally undermine the principle of unity,[197] would incentivize treaty-shopping by claimants via choice of law or forum provisions,[198] and would render the territoriality requirement in investment treaties effectively meaningless because any

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191 Reply, para. 159.

192 Reply, para. 160.

193 Reply, para. 160 citing **Exhibit CL-015-ENG / RL-090-ENG**, *Inmaris Perestroika*, p. 57, fn. 137.

194 Reply, para. 162 citing **Exhibit RL-101-ENG**, Z. Douglas, "Property, Investment, and the Scope of Investment Protection Obligations," in Z. Douglas, J. Pauwelyn, J.E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014), p. 373.

195 Rule 41 Objections, paras. 110-117; Reply, paras. 166-173.

196 Reply, para. 167.

197 Reply, para. 168.

198 Reply, para. 169.

complex investment will involve some financial payment, contractual provision, or ancillary activity that connects to a third State.[199]

i. Application

172. According to the Respondent, under the relevant test to determine territorial nexus, the "*centre of gravity*" of Claimant's economic activities is in Somalia.[200]

173. While the Respondent maintains that the benefits theory is inapposite, the Respondent asserts that this factor locates Claimant's investment in Somalia.[201]

174. According to the Respondent, interpreting "*territory*" in the Treaty to include the UAE Embassy in Mogadishu overturns fundamental principles of international investment law[202] and leads to a result that is manifestly absurd and unreasonable.[203]

(3) The Claimant

175. As far as the fundamental principles of investment law are concerned, the Claimant contends that settled judicial and arbitral practice confirm that the *situs* of investment is governed by "*territorial prescriptive and enforcement jurisdiction,*" rather than "*geographic territory.*"[204] The Claimant cites the following proposition of Christoph Schreuer:

> *Tribunal practice indicates that the performance of the relevant activity need not take place in the territory of the host State. Neither is a physical transfer of assets into the host State's territory necessary. What matters is that the economic effect of the investment is felt in the host State's territory.*[205]

176. The Claimant refers to prior arbitral decisions in which investments that claimants had carried out outside the geographic territory of the host State have nevertheless been held to have been made within the territory of the host State, namely, *Inmaris Perestroika*;[206]

[199] Reply, para. 170.

[200] Reply, paras. 115, 119-121.

[201] Reply, paras. 132, 138-139.

[202] Rule 41 Objections, paras. 110-117.

[203] Rule 41 Objections, paras. 101-117.

[204] Response, paras. 155-182.

[205] Response, para. 157 citing **Exhibit CL-039-ENG**, Christoph Schreuer, "The Unity of An Investment." The Response does not provide a reference for the source of this exhibit. The same item is exhibited by the Respondent as **Exhibit RL-089-ENG**, C. Schreuer, "The Unity of an Investment," (2021) 19 *ICSID Reports* 3, p. 3.

[206] Response, paras. 159-162, citing **Exhibit CL-015-ENG / RL-090-ENG**, *Inmaris Perestroika*.

Fedax;[207] *Ceskoslovenska Obchodni Banka, a.s. v The Slovak Republic* ("***CSOB v Slovakia***");[208] *Abaclat*;[209] *Ambiente Ufficio*;[210] *Giovanni Alemanni and others v Argentine Republic* ("***Alemanni***");[211] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v Republic of Paraguay*, ("***BIVAC v Paraguay***");[212] *SGS v Paraguay*;[213] *SGS Société Générale de Surveillance S.A.* ("***SGS v Philippines***");[214] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* ("***SGS v Pakistan***");[215] and *Deutsche Bank*.[216]

177. The relevant factors according to the Claimant are, first, the "*benefits thesis,*" and secondly, the exercise by the relevant State of "*territorial prescriptive and enforcement jurisdiction*" which is determined by "*indicia of territorialit*y" other than physical location, including (i) location of recovery of contractual debts, and (ii) contractual choice of law and choice of forum. The factors advanced and discussed by the Claimant are set forth below.

a. The benefits thesis

178. The Claimant invokes the "*benefits thesis,*" which was applied in the *Inmaris Perestroika* case and originated in the *Fedax* case. According to the tribunal in *Inmaris Perestroika*:

> *[A]n investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself. Here, the benefits of Claimants' investments, considered as an integrated whole were received by Respondent.*[217]

[207] Claimant's Response, paras. 163-165, citing **Exhibit CL-006-ENG / RL-096-ENG**, *Fedax*, paras. 41-42.

[208] Response, para. 166., citing **Exhibit CL-004-ENG**, *CSOB v Slovakia*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, paras. 41-42.

[209] Response, paras. 167-170, citing **Exhibit RL-088-ENG**, *Abaclat*, para. 374 [The Claimant incorrectly cites to CL-002 which is the Consent Award, the correct reference is to the Decision on Jurisdiction, which is RL-088].

[210] Response, paras. 167-170, citing **Exhibit CL-016-ENG / RL-097-ENG**, *Ambiente Ufficio*, para. 508.

[211] Response, para. 169, citing **Exhibit CL-017-ENG**, *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction, 17 November 2014 ("***Alemanni***").

[212] Response, paras. 171-178, citing **Exhibit CL-018-ENG**, *BIVAC v Paraguay,* ICSID Case No. ARB/07/9 Decision on Jurisdiction, 29th May 2009.

[213] Response, paras. 171-178, citing **Exhibit CL-019-ENG**, *SGS Société Générale de Surveillance S.A.,* ICSID Case No. ARB/07/29 Decision on Jurisdiction, 12 February 2010 ("***SGS v Paraguay***"), para. 115.

[214] Response, paras. 171-178, citing **Exhibit CL-020-ENG / RL-064-ENG**, *SGS v Philippines*, paras. 102-112.

[215] Response, paras. 171-178, citing **Exhibit CL-021-ENG / RL-099-ENG**, *SGS v Pakistan,*.

[216] Response, para. 179, citing **Exhibit CL-022-ENG / RL-098-ENG**, *Deutsche Bank*, para. 292.

[217] Response, para. 162, citing **Exhibit CL-015-ENG / RL-090-ENG**, *Inmaris Perestroika*, para. 124.

179. In the *Fedax* case, the tribunal held that promissory notes issued by the government of Venezuela for the purpose of "*raising funds … for the needs of national interests*" did constitute an investment "*in the territory*" of Venezuela pursuant to the provisions of the Netherlands-Venezuela BIT because "*the government of Venezuela*" received an amount of credit that was put to work during a period of time for its financial needs.[218]

180. The Claimant refers, further, to the cases of *Abaclat, Ambiente Ufficio,* and *Alemanni*, which concerned bonds traded in secondary markets outside the geographic territory of Argentina.[219] The majority in the *Abaclat* case held that for determining the *situs* of "*investments of a purely financial nature*" the relevant criteria should be "*where and for the benefit of whom the funds are ultimately used*."[220] In the *Ambiente Ufficio* case the tribunal held that "*the decisive elements, notably the fact that the funds involved were destined to contribute to Argentina's economic development and were actually made available to it for that purpose, qualify the investments pertinent to the present case as having been made in Argentina.*"[221]

b. "Territorial and enforcement jurisdiction"

181. The Claimant submits, with reference to academic commentary, that the *ratio decidendi* of the *Fedax* case was that the promissory notes were "*subject to the host State's territorial and enforcement jurisdiction*"[222] because (i) "*the general private international law rule is that 'a debt is situate in the country where the debtor resides' since that is where the debt is properly recoverable or can be enforced*";[223] and (ii) "*the promissory notes contained an exclusive forum selection clause and governing law clause in favour of Venezuela's courts and law*."[224]

182. In the case of *CSOB v Slovakia,* the tribunal held that a loan made to a Slovak company and guaranteed by the Slovak Ministry of Finance was an investment made within the territory of Slovakia, which according to the Claimant was "*because it ensured for the*

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[218] Response, para. 163, citing **Exhibit CL-006-ENG / RL-096-ENG**, *Fedax,* ICSID Case No. ARB/96/3 Decision on Jurisdiction, 11 July 1997, paras. 41-42.

[219] Response, paras. 167-170.

[220] Response, para. 168, citing **Exhibit RL-088-ENG**, *Abaclat*, para. 374 [The Claimant incorrectly cites to CL-002 which is the Consent Award, the correct reference is to the Decision on Jurisdiction, which is RL-088].

[221] Response, para. 169, citing **Exhibit CL-016-ENG / RL-097-ENG**, *Ambiente Ufficio*, para. 508.

[222] Response, para. 164.

[223] Response, para. 164, citing text found in **Exhibit CL-051-ENG,** Zheng, pp. 152-153. The footnote to para. 164 of the Response (fn. 79), reference is made (possibly in error) to "ICSID Case No. ARB/96/3 Decision on Jurisdiction, 11 July 1997."

[224] Response, para. 164, citing text found at **Exhibit CL-051-ENG**, Zheng, p. 152-153. NB: Zheng cites a third reason, namely, that "t*he promissory notes were tied to a specific project carried out in Venezuela.*"

benefit of Slovakia, and also because the consolidation agreement underlying the project was expressed to be governed by the law of Slovakia."[225]

183. In respect of jurisprudence to the contrary, the Claimant submits that the decisions reached in the cases of *Abaclat, Ambiente Ufficio* and *Deutsche Bank* not to use the forum selection clause to determine the *situs* of the investment were based on flawed reasoning and should not be followed.[226] The Claimant refers to commentary in which the tribunals' decisions in those cases are criticized.[227]

c. Choice of law and choice of forum are indicia of territoriality

184. The test the Tribunal should apply here, according to the Claimant, is "*to ascertain whether there are facts from which an inference can reasonably be drawn that UAE exercised territorial prescriptive and enforcement jurisdiction with respect to them*."[228] The Tribunal needs to seek "*indicia of territoriality of investments,*" which according to the Claimant ordinarily include "*geographic location, derivation of benefits[,] choice of law clauses, choice of forum clauses, and location where the debt is recoverable*."[229] Any one of such "*indicia of territoriality*" may be "*determinative in one case and not in another case, depending on the peculiar facts of each case*," and none is conclusive in the manner the Respondent suggests.[230]

185. In respect of investments involving combined locations, the Claimant refers to cases in which the territoriality requirement was found satisfied "*where some investments have been made within the host state's geographic territory, while other investments have been made outside its geographic territory and where several other connecting factors link the relevant contracts with the host state*."[231]

186. The cases of *SGS v Pakistan, SGS v Paraguay,* and *SGS v Philippines* concerned contracts for the provision of pre-shipment customs certification and inspection services at the point of export. The *SGS v Philippines* tribunal found that "*a substantial and non-severable part of the service was provided in the Philippines.*"[232] The *SGS v*

[225] Response, para. 166, footnote 80.

[226] Rejoinder, paras. 195-196.

[227] Rejoinder, paras. 195-196, citing **Exhibit CL-038-ENG**, Caroline Kleiner & Francesco Costamagna, "Territoriality in Investment Arbitration.: the Case of Financial Instruments," Journal of International Dispute Settlement (2018).

[228] Rejoinder, para. 153.

[229] Rejoinder, para. 153.

[230] Rejoinder, para. 154.

[231] Response, para. 171.

[232] Response, para. 173 citing **Exhibit CL-020-ENG / RL-064-ENG**, *SGS v Philippines,*, paras. 102-112.

Paraguay tribunal held that the services provided by SGS in Paraguay "*were not severable or ancillary; they were part and parcel of the services for which SGS expected to be paid under the contract*."[233] The Claimant relies on commentary observing *inter alia* that the contracts contained choice of law and forum clauses in favour of the host states, the contracts were "*closely tied to overarching projects to improve the host states' customs and tax infrastructures,*" and the service provision was supported by "*substantial liaison offices in the host states*."[234]

d. State of direction, control, and influence

187. As an additional factor the Claimant refers to the provision of services being "*directed, controlled and influenced*" by the host State and "*carried out under its authority*."[235]

188. In the case of *Deutsche Bank,* the majority held that an oil price hedging agreement between Deutsche Bank and Sri Lanka's national petroleum corporation was an investment made within the territory of Sri Lanka, which according to the Claimant was "*simply because the funds paid by Deutsche Bank in the execution of the hedging agreement were made available to Sri Lanka and served to finance its economy*."[236]

e. Geographic location is not conclusive

189. The Claimant submits that the exercise of territorial prescriptive and enforcement jurisdiction is the primary criterion determining the *situs* of all investments, and the physical location of investments comprising tangible assets "*normally determines the* situs *of such investments because physical location of such assets is always conclusive on the question of which state exercises territorial prescriptive and enforcement jurisdiction with respect to such assets*."[237]

190. The Claimant submits that "*it is only when the tangible assets are the **only** investments made by the Claimant, or alternatively, when the tangible assets 'constitute the ONLY investments claimed in the suit' that their physical location can be decisive on the question of territoriality*."[238]

191. The Claimant asserts that the dictum in the case of *SGS v Philippines,* relied on by the Respondent, is quoted out of context and is *obiter,* considering that the observations

233 Response, para. 174 citing **Exhibit CL-019-ENG**, *SGS v Paraguay,* para. 115.

234 Response, para. 177 citing **Exhibit CL-051-ENG**, Zheng, p. 160.

235 Response, para. 178 referring to the present case.

236 Response, para. 179, citing **Exhibit CL-022-ENG / RL-098-ENG**, *Deutsche Bank*, para. 292.

237 Rejoinder, paras. 155-164, at para. 157.

238 Rejoinder, para.158; part of this passage is placed in quotes without attribution.

were made in passing and *ex hypothesi,* were not based on any specific facts or anchored on the provisions of any bilateral investment treaty, and did not specify facts corresponding to the Claimant's investments.[239]

f. The notion of territoriality under investment law

192. The Claimant asserts that its position is consistent with the notion of territoriality in investment law and refers in support of its position to academic commentary on the object and purpose of BIT clauses that introduce territoriality requirements.[240]

g. Application

193. According to the Claimant, applying the principles which it considers relevant, "*investments made by the Claimant herein,*" which comprised intangible assets, were all localised in the UAE.[241]

194. The "*benefits theory*" locates Claimant's investment in UAE because the construction projects were ultimately for the benefit of the UAE, and the implementation of the projects involved the injection of funds into the economy of the UAE by the Claimant in financing its performance from its own money and loans, which otherwise would have had to be funded from the public resources of the UAE.[242]

195. Under the choice of law and choice of forum clauses of the Contracts, the investment was subject to the law of the UAE and the jurisdiction of the UAE courts.[243] Private international law rules by reference to rules on the law applicable to choses in action, which locates contractual debts in the jurisdiction in which they are recoverable, locate Claimant's investment in UAE.[244]

196. Referring to the principles that the Respondent argues are decisive, the Claimant asserts that by reason of the same indicia of territoriality, the "*centre of gravity*" of the investments is in the UAE.[245] The Claimant contends that it has not violated the principle of the unity of investments.[246]

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[239] Rejoinder, paras. 165-170.

[240] Rejoinder, para. 152 citing **Exhibit CL-051-ENG**, Zheng, p. 145.

[241] Response, paras. 183-204; Rejoinder, paras. 87-119.

[242] Rejoinder, paras. 171-185.

[243] Response, paras. 147-150; Rejoinder, paras. 196-197.

[244] Response, paras. 151-154; Rejoinder, paras. 190-193.

[245] Rejoinder, paras. 120-137.

[246] Rejoinder, paras. 138-145.

VII. THE TRIBUNAL'S ANALYSIS

197. The central question before the Tribunal in order to decide the Respondent's Rule 41 Objections is whether the Respondent has established that there is a manifest lack of jurisdiction because the Claimant's claim to have had an "*investment*" in the Respondent's territory is manifestly lacking in legal merit.

198. The issue of whether the Claimant did or did not have an "*investment*" in the territory of the Respondent is dispositive of all of the Claimant's claims, because if there was no such investment then the dispute is not one that the Respondent consented to submit to arbitration under the Treaty and the Tribunal would therefore lack jurisdiction.

199. At this stage of the proceedings, the Tribunal's analysis must focus only on whether it has jurisdiction to entertain the Claimant's case. The Tribunal need not examine the substance of the case. In other words, the Tribunal need not assess any of the Claimant's claims that the Respondent allegedly breached its substantive obligations under Articles 3, 4, or 7 of the Treaty, such as by expropriation, arbitrary or discriminatory impairment, failure to accord fair and equitable treatment, failure to accord full protection and security, or protection from denial of justice. Article 10 of the Treaty does not empower this Tribunal to adjudicate such claims in the absence of an "*investment*" in the Respondent's territory. If the Claimant's case fails on jurisdiction, the Tribunal does not have any basis on which to proceed any further.

200. It follows that the Claimant's claims that such obligations were breached are not material to the Tribunal's determination at this stage of the proceedings and the Claimant's arguments in support of those claims will not be considered herein.

A. THE RULE 41 STANDARD

201. As noted above, there is no dispute between the Parties as to the standard to be applied in deciding an objection under Rule 41, or that this is a high standard. The Tribunal considers, in the light of the principles enunciated in prior cases,[247] that an objection under Rule 41: (i) must be established at an early stage; (ii) must be established clearly and obviously, with relative ease and dispatch;[248] (iii) must raise a legal impediment to

[247] The Tribunal notes that such prior cases were almost all decided under Rule 41(5) of the 2006 version of the ICSID Arbitration Rules (the **"2006 Rules"**). However, the analysis under Rule 41 of the 2022 Rules is not materially different. In particular, the standard for an objection is identical, i.e. "*a claim is manifestly without legal merit*." The time limit for making an objection is, under both versions, fixed by reference to the constitution of the Tribunal, with the period under the 2006 Rules being 30 rather than 45 days.

[248] *See* **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global Petroleum*, para. 88; **Exhibit RL-003-ENG**, *Bank of Nova Scotia,* para. 99; **Exhibit RL-006-ENG**, *AHG* para. 58; **Exhibit CL-003-ENG**, *Ansung Housing*, para. 62.

a claim, not a factual one; and (iv) may may relate to "*the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal*."

202. The Claimant alleges that "*complex*" and "*novel*" issues are present in this case which require more detailed arguments and cannot be dismissed at an early stage. The Tribunal does not accept the Claimant's argument – even assuming that the issues at the heart of the Claimant's case are indeed novel or complex – as sufficient ground to dismiss the Rule 41 Objections in this case. It is inherent in the word "*manifest*" that the lack of legal merit in a Rule 41 decision must be apparent, obvious. The fact that it should be capable of being easily ascertained does not however mean that the legal issues that form a claimant's claims should be simple or ordinary, i.e. not novel, for a tribunal to dismiss a claim under Rule 41. As held by the tribunal in *AHG v Iraq*:

> *This Tribunal, too, finds that the high threshold inherent in the word "manifest" does not imply that an ICSID Rule 41(5) procedure somehow proscribes extended and even elaborate arguments by the parties. What is the subject of the inquiry under this provision is not the length or complexity of the parties' arguments, as it would then be enough, for a party resisting such an objection, to create a number of convoluted and complex defenses in order to justify that the "manifest" threshold is not met under that provision; rather, the subject of the inquiry is the claim itself and whether that claim is, on its face, legally meritless.*[249]

203. Similar reasonings were adopted by other tribunals.[250] Thus, only if a matter is so difficult that it cannot be decided without more detailed argument can the issue of complexity preclude a "*manifest*" lack of legal merit argument from meeting the Rule 41 standard.

204. It follows that the focus of the analysis for a Rule 41 determination should not be on the complexity of the arguments adduced by a claimant, or of the factual issues underlying the dispute, but on whether the claimant's claims, on their face, have legal merit. It is on that legal merit aspect that the Tribunal must centre its attention. In this regard, the Tribunal agrees with the *AHG v Iraq* tribunal's statement that "*the elaborate or intricate nature of the Parties' arguments is no reason, as such, to dismiss the Application out of hand. The Respondent will prevail if it appears that the Claimant has no tenable arguable case and that the absence of legal merit in each of the Claimant's claims to jurisdiction is clear and obvious*."[251]

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[249] **Exhibit RL-006**, *AHG*, para. 58.

[250] *See*, *for instance*, **Exhibit RL-003**, *Bank of Nova Scotia*, para. 228; **Exhibit CL-010-ENG / RL-005-ENG**, *Trans-Global*, para. 88, holding as follows, referring to the previous Rule 41(5): "*this exercise may not always be simple*, (...) *requiring successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but it should never be difficult*."

[251] **Exhibit RL-006**, *AHG*, para. 58.

205. A different issue raised in this case is whether it is the Claimant's case as pleaded in its Request for Arbitration that should be assessed against the legal standard of Rule 41. The Respondent contends that it is impermissible for the Claimant to "*try and recast all its claims as relating to intangible contractual rights and to create the impression that such claims are disconnected from the underlying construction projects in Somalia,*"[252] as the Claimant has allegedly done in the "*new case*" that is pleaded *"across both the Claimant's Response and Reply submissions.*"[253]

206. The Tribunal notes that, regarding the time limit for filing a Rule 41 objection, Rule 41(2)(a) stipulates that "*a party shall file a written submission no later than 45 days after the constitution of the Tribunal*."[254] The Tribunal concurs with the reasoning of the tribunal in *Lotus Holding*, which stated:

> *The timing is significant. It necessarily means that the application must be made before the timetable for the submission of pleadings has been set down, and therefore when the only available statement of the case is that set out in the Request for Arbitration. It is on the basis of the Request that the application under ICSID Arbitration Rule 41(5) is made and the tribunal must decide.*[255]

207. While the time limit concerned in *Lotus Holding* was 30 days after constitution of the tribunal rather than 45, the same reasoning applies here because the objection must be filed at the same procedural stage. It seems evident to the Tribunal on that basis that the case against which the application is introduced, and the case on which a tribunal must decide in a Rule 41 application, is the case as it stands at that time, i.e. the case submitted in the request for arbitration.

208. The Claimant argues that ICSID Institution Rule 2(2)(a) only requires "*a summary of the relevant facts and claims*"[256] and that Article 36(2) of the ICSID Convention does not "*require the Claimant to provide all the detailed particulars or full memorials on*

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252 Tr., p. 38, lines 4-8.

253 Tr., p. 44, lines 9-12 ("*And when we return to this issue, and we look* ***across both the Claimant's Response and Reply submissions****, it's apparent that the Claimant's new case is premised on what we say are two planks.*") (emphasis added). *See also* Tr., p. 12, line 25 to p. 13, line 2 ("*even if one were to consider* ***the Claimant's new case in its Response and Reply****, its claims are still destined for failure*."); Tr., p. 31, lines 11-14 ("*even if the Tribunal were minded to consider* ***the Claimant's new case in its Response and Reply****, these claims are likewise manifestly without legal merit.*"); Tr., p. 59, lines 11-14 ("*You will also have heard from me about how* ***the Claimant's new case in its Response and Reply submissions*** *meets that same fate*") (emphasis added).

254 Similarly, Rule 41(5) of the 2006 Rules provides that a party "*may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.*"

255 **Exhibit CL-056-ENG / RL-004-ENG**, *Lotus Holding*, para. 156.

256 Rejoinder, para. 69; Tr., p. 84, lines 16-19.

the merits upfront."[257] According to the Claimant, "*the purpose of Article 36(2) was merely to ensure that the responding party had adequate notice about the nature of the dispute*."[258] The Claimant contends that the submissions made in its Response and Rejoinder are "*observations and supporting evidence*" that may be considered by the Tribunal,[259] and that "*the Claimant has not changed its case; it has simply provided details, and these details had been deferred by the rules to this stage of the proceedings*."[260]

209. The Tribunal does not agree. The Respondent has formulated its Rule 41 Objections by reference to the legal claims made in the Request for Arbitration and not based on the reformulated claims contained in the Claimant's Response which are quite different from the original ones. In the Tribunal's view, neither Rule 2(2)(a) of the ICSID Institution Rules nor Article 36(2) of the ICSID Convention gives the Claimant *carte blanche* to recast its case following the Respondent's Application under Rule 41. Article 36(2) of the ICSID Convention states that the request for arbitration "*shall contain information concerning the issues in dispute*" and Institution Rule 2(2)(a) expressly prescribes that a request for arbitration "***shall*** *include* (…) *a description of the investment and of its ownership and control, a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising directly out of the investment*" (emphasis added).

210. The Commentary to Rule 2 describes the purpose of this provision as follows:

> [T]*he purpose of Rule 2 is to ensure that parties are to file a complete Request in order to expedite the registration process and also to enable responding parties to assess the claim, retain appropriate counsel, and make procedural decisions that can reduce the duration of the proceeding.*
>
> (…)
>
> [A] *claimant may be well-advised to provide sufficient detail of its legal claim in order to rebut the objection (pursuant to Article 41) that the case presented is manifestly without legal merit.* (…)
>
> (…)

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[257] Tr., p. 82, lines 22-24.

[258] Tr., p. 83, lines 12-14.

[259] Tr., p. 86, line 10 to p. 87, line 4.

[260] Tr., p. 87, lines 13-15. *See also* Tr., p. 79, lines 21-23 ("*It is our own understanding that the Claimant is free to amend, free to supplement its claim as it deems fit in the Memorial. The claim is in the Memorial*."; Tr., p. 81, lines 1-4 ("*The Claimant's Response, therefore, merely expands on these claims, providing particular and legal classification. No new causes of action have been pleaded*.")

> [A]*s noted above, prudent parties will not want to underestimate the possibility of a* ***Rule 41 preliminary objection application****. Thus, a careful balance should be maintained between a succinct Request of Arbitration and a fuller statement of case.*[261]

211. It is also important to stress that Rule 2(2)(a) requires a claimant to provide in the Request for Arbitration "*a description of the investment and of its ownership and control,*" thus implying that a complete change of case regarding what constitutes an investment would not be allowed. This, in the Tribunal's opinion, is particularly the case when it comes to an attempt by a claimant to change the description of its investment in response to a Rule 41 application.

212. The Tribunal finds the following passage in *Lotus Holding* (referring to Rule 41(5) as it then was) particularly apposite for this case:

> *It is true that a Request for Arbitration is not a completely rigid delimitation of the claim(s) before a tribunal. (…)*
>
> *Nonetheless, the Claimant does not have complete freedom to amend its case. The Claimant in this case specifically "requests the institution of an ICSID arbitration proceeding against Turkmenistan." The arbitration is accordingly subject to the ICSID Arbitration Rules. ICSID Arbitration Rule 40(1)*[262] *provides that:*
>
> > *…a party may present an incidental or additional claim or counterclaim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.*
>
> *That is, however, only a basis for making ancillary claims. If an additional claim is not ancillary to the primary claim(s) set out in the Request for Arbitration, a party has no right under ICSID Arbitration Rule 40 to present it by way of an 'amendment' to the primary claim. There is no right under ICSID Arbitration Rule 40 to present "additional claims" that are fundamentally different from the primary dispute, and to abandon the primary claims.*
>
> *The Claimant thus has the right to develop its claim to some extent. It is not obliged to keep its claim strictly within the literal terms of its original*

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261 *See* the Commentary to Rule 2 at paras. 8, 10 and 18 (emphasis added), in **Exhibit RL-086**, L. Shore, M. Sasson, "*Part 2: ICSID Institution Rules [Rules 1-8],*" in R. Happ, S. Wilske (eds.), *ICSID Rules and Regulations 2022: Article-by-Article* (Verlag C.H. Beck 2022), pp. 77-100 ("**ICSID Institution Rules Commentary**"). As recalled by the Respondent (Reply, para. 73), a number of scholars have stressed that a claimant must describe the basis and contents of its claims in the request for arbitration: *see* **Exhibit RL-086**, ICSID Institution Rules Commentary, paras. 7, 15, 17, and 24; **Exhibit RL-087**, C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary, Second Edition* (Cambridge University Press 2009), Article 36, at p. 462, para. 25.

262 The equivalent provision in the 2022 ICSID Arbitration Rules is Rule 48(1) which does not materially differ for purposes of this case from Rule 40(1) cited herein.

> *Request for Arbitration. But if the Claimant has purported to modify its claim in a manner that is not permitted by the principle set out in ICSID Arbitration Rule 40, and has transformed the original claim into a new claim materially different from that set out in the Request for Arbitration, the Tribunal cannot make its decision under ICSID Arbitration Rule 41(5) by focusing on the new claim. If the original claim which the Tribunal was established to determine, as set out in the Request for Arbitration, was one that should properly have been dismissed because it was manifestly without legal merit, that defect cannot be cured by transforming it into a different claim. Even less can it be cured by an assertion that the Claimant might in future 'modify' the original claim, again outside the limits of the initial claim.*[263]

213. In the present instance, the Claimant changed its case with regard to its investment in a significant manner, shifting the bulk of its claims from infrastructural projects in Somalia, to "*intangible contractual rights,*" e.g. claims to money, rights to performance under a contract and intellectual property rights, emphasizing that these claims have "*absolutely no connection with the infrastructural projects erected by the Claimant in Somalia.*"[264]

214. More specifically, in the Request for Arbitration, the Claimant's investment is described as follows:

> *several investment projects within the precincts of* [the UAE's] *Embassy in Mogadishu* (…) *collectively referred to as "the said investment projects"*[265]
>
> (…)
>
> *several infrastructural projects in the Republic of Somalia*[266]
>
> (…)
>
> *the various components of the said project were carried out within the UAE Embassy in Mogadishu,* [w]*ithin the Republic of Somalia, which pursuant to the Vienna Convention form part of the United Arabs* [*sic*] *Emirates*[267]
>
> (…)

[263] **Exhibit CL-056 / RL-004-ENG**, *Lotus Holding*, paras. 190-193.

[264] Response, para. 135.

[265] Request for Arbitration, para. 5.

[266] Request for Arbitration, para. 36.

[267] Request for Arbitration, para. 70.

> *the UAE Embassy in Mogadishu is without doubt a place where the UAE exercises its sovereign power in conformity with international law and is therefore indubitably a territory of the United Arab Emirates*[268]
>
> (…)
>
> *investments at the UAE Embassy in Mogadishu.*[269]

215. In its Clarifications responding to ICSID's request, the Claimant stated that:

> Its "*investments*" were the "*various infrastructural projects that were undertaken by the claimant within the premises of the Respondent's Embassy in Mogadishu within the Republic of Somalia.*"[270]
>
> (…)
>
> *The question which arises, herein, and which ICSID Secretariat wants the claimant to answer, is whether the economic activities which were carried out by the claimant within premises of the Respondent's embassy in Mogadishu, constitute investments within the meaning of Article 25(1) of ICSID Convention.*[271]
>
> (…)
>
> *Under articles 21-25 of the Vienna Convention on Diplomatic Relations, all embassies of the Respondent, including its embassy in Mogadishu, within the Republic of Somalia, form part of its territory. Indeed, the Respondent exercises sovereign rights within all its diplomatic missions within the meaning of Article 1(1)(e) of the said BIT. That the Respondent exercises sovereign rights in all its embassies abroad was expressly admitted by itself in the case of Abla Abdel Baset Youssef v. Embassy of the United Arab Emirates.*[272]
>
> (…)
>
> *It follows therefore that the infrastructural projects undertaken by the claimant within the Respondent's embassy in Mogadishu (which form the subject to the request for arbitration) constitute investments within the meaning of Article 1(1) of the said BIT as read together with Article 25(1) of the ICSID Convention.*[273]

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268 Request for Arbitration, para. 79.

269 Request for Arbitration, para. 81.

270 Clarifications, para. 35.

271 Clarifications, para. 36.

272 Clarifications, para. 51, citing authorities [*as subsequently numbered and submitted in evidence by the Respondent*] **Exhibit RL-045-ENG**, Vienna Convention on Diplomatic Relations, 1961 ("***VCDR***"); **Exhibit RL-020-ENG**, *Abla Abdel Baset Youssef v Embassy of the United Arab Emirates*, No. 17-CV-263 (KBJ) (D.D.C. 2021) 23 August 2021 ("***Youssef***").

273 Clarifications, para. 53.

216. The above submissions clearly show that the Claimant consistently referred in the Request for Arbitration and the subsequent Clarifications to the construction projects carried out at the Respondent's Embassy in Mogadishu, Somalia. Neither the Request for Arbitration nor the Clarifications mentioned any "*intangible assets*." It was not until the Response, after it was confronted with the Respondent's Rule 41 Objections, that the Claimant raised new and different claims and asserted that these claims have no territorial connection whatsoever with Somalia but were made in the territory of the UAE.[274]

217. In its Response, the Claimant argued in particular that:

> [T]*he bulk of the Claimant's claim against the Respondent is anchored on "intangible contractual rights" (which constitute independent and separate investments under Articles 1(1)(a)(iii) and 1(1)(a)(iv) of the said BIT), which investments cannot be physically localized within Somalia.*[275]
>
> (…)
>
> *The Claimant is not claiming any part of the infrastructural projects erected within the premises of the UAE embassy in Mogadishu and cannot thereby be relying on them as the "investment" for purposes of Article 25 of the ICSID Convention. The Claimant is claiming the value of the services that they rendered to UAE, which is a "claim to money" that is a protected investment under Article 1(1)(a)(iii) of the said BIT. A claim to money owing under a contract is not a tangible asset that can be said to be located within the premises of the UAE Embassy in Mogadishu.*[276]
>
> (…)
>
> [S]*ix (6) out of seven (7) claims brought by the Claimant against the Respondent are premised on purely contractual rights that have absolutely no contact with the geographic territory of Somalia and which* (…) *were actually made within the United Arab Emirates.*[277]

218. The Response contains multiple references to the Claimant's investment being constituted by "*intangible rights,*" "*contractual rights*" or "*claims to money under a contract,*" all localised in the UAE, arguing that the Respondent's Preliminary Objections proceed "*on the fallacious notion that the Claimant's dispute is anchored on the infrastructural projects erected by the Claimant in Somalia*."[278]

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[274] Response, paras. 130-132.
[275] Response, para. 9(b).
[276] Response, para. 57.
[277] Response, para. 136.
[278] Response, para. 8.

219. The Rejoinder affirms the content of the submissions advanced in the Response and denies that these change the case stated in the Request for Arbitration.[279] In particular, concerning ICSID Institution Rule 2(2)(a),[280] the Rejoinder invokes the requirement to include "*a summary of the relevant facts and claims,*" and asserts that the Request for Arbitration is neither required nor permitted to include "*ALL THE DETAILS of the relevant facts and claims.*"[281] It states:

> *One of the relevant facts that claimants are obliged under Rule 2(2)(a) of the ICSID Institution Rules to include in the Request for Arbitration are facts constituting the protected investment. Like all other relevant facts, Claimants are prohibited from giving "**all the details**" of the facts constituting the protect* [*sic*] *Investment. They are only obliged to give a SUMMARY of such facts.*[282]

220. The Claimant's submissions on Rule 2(2)(a) pay little attention to the fact that "*a description of the investment and of its ownership and control*" is a distinct item required in addition to "*a summary of the relevant facts and claims*," save to assert that the Request for Arbitration met this requirement.[283]

221. In light of the above, the Tribunal considers that the question of whether a claim manifestly lacks legal merit should be determined by reference to the Request for Arbitration, supplemented in the present case by the Clarifications. In the present circumstances, the Tribunal finds that the Claimant's attempt to modify the description of its investment following the Respondent's Rule 41 Objection is impermissible under the terms of Rule 41 of the Arbitration Rules and Rule 2(2) of the Institution Rules. Accordingly, for purposes of a determination under Rule 41, the Claimant's claims should be assessed on the basis of its Request for Arbitration and the Clarifications.

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[279] Rejoinder, para. 71. *See also* paras. 64-65, where the Claimant quotes the Request for Arbitration, para. 6 ("*The dispute also entails the respondent's illegal expropriation of the Claimant's investments*"), stating that this "*basically meant that the Claimant's suit sought relief in connection with such investments made by themselves as were disclosed by the facts of their case. All the investments referred to in columns 6, 7, 8, 9 and 10 of the Respondent's table 2 were disclosed by the facts of the Claimant's case as brought out in the Request for Arbitration and further substantiated in the Claimant's Response to the Preliminary Objection*."

[280] Rejoinder, paras. 67-72.

[281] Rejoinder, para. 69.

[282] Rejoinder, para. 71 (emphasis original).

[283] *See* Tr., p. 95, line 19 to p. 96, line 5 ("*Allow me now to take you through the investments or* ***the description of investment that was included in the Request for Arbitration.*** *And I will make reference to clause 5 of the Request for Arbitration. And this is what clause 5 said: by several written arguments executed as between the Claimant and the Respondent, through the Respondent's ambassador in Mogadishu, within the Republic of Somalia, the Respondent employed the Claimant to undertake on its behalf several investments within the precincts of its embassy in UAE, and* ***then it proceeds to describe them as the 'Said investment projects'***.") (emphasis added).

222. That being said, the Tribunal considers that, given that the Respondent has also addressed the Claimant's claims as formulated in its Response and Rejoinder, it is appropriate to review these new claims as well, in order to establish whether the Tribunal's conclusion with regard to the Rule 41 Objections would be different. This analysis will be carried out at sub-section VII.B below.

B. WHETHER THE CLAIMANT MADE AN INVESTMENT IN THE TERRITORY OF THE RESPONDENT UNDER THE TREATY

223. The Tribunal's analysis starts with the relevant provisions of the Treaty, Article 1(1)(a), which defines the term "*investment*" as "*every kind of asset invested by the investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws, and regulations of the Contracting Party in whose territory the investment is made*." Article 1(1)(e)(ii) further defines the word "*territory*" with respect to the UAE, as "*its territorial sea, airspace and submarine areas over which the United Arab Emirates exercises in conformity with international law and the law of United Arab Emirates sovereign rights, including the Exclusive Economic Zone and the mainland and islands under its jurisdiction in respect of any activity carried on in connection with the exploration for or the exploitation of the natural resources*."

224. These definitions are straightforward. The whole premise of the notion of investment under the Treaty is that it be made "*by the investors of one Contracting Party in the territory of the other Contracting Party*"; in this case by the Claimant, an investor of Kenya, in the territory of the host State, the UAE, as defined in careful detail at Article 1(1)(e)(ii). This is the central element of the analysis.

225. The Tribunal does not accept the Claimant's position that the "*territoriality requirement in international investment treaties usually refer* [*sic*] *to the host state's territorial prescriptive and enforcement jurisdiction and not its geographic territory*."[284] The plain and ordinary meaning of the terms of the Treaty clearly refers to well-defined geographic areas: the territory of the UAE covers the land territory, territorial sea and continental shelf of the UAE over which, under international law, the UAE has sovereignty, and the areas where the UAE exercises "*sovereign rights, including the Exclusive Economic Zone and the mainland and islands under its jurisdiction in respect of any activity carried on in connection with the exploration for or exploitation of the natural resources.*"

226. The question before the Tribunal is thus whether the Claimant has made an investment in the territory of the UAE as defined in the Treaty, on any of the bases advanced by the Claimant. After careful consideration of the record and the Parties' respective

[284] Response, para. 144.

positions, the Tribunal concludes that the Claimant did not make an investment in the territory of the UAE under the terms of the Treaty.

227. *First*, it is a well-established principle of international law that the premises of a diplomatic mission, such as an embassy, are not part of the territory of the sending State, but constitute territory of the receiving State.[285] Applying this principle to the present case, the Embassy of the UAE in Mogadishu is part of the territory of Somalia and not of the UAE.

228. In the Response, the Claimant argues that the definition of the term territory in Article 1(1)(e)(ii) of the Treaty is not limited to "*areas over which UAE exercises full sovereign authority"* but includes "*areas over which they exercise limited privileges and entitlements by international law and its* [UAE's] *laws.*"[286] In essence, the argument goes, given that the UAE has limited privileges and entitlements on the embassy premises, it exercises sovereign rights therein and thus the moveable assets located within the precincts of the UAE Embassy in Mogadishu meet the requisite territoriality requirement of the Treaty.[287]

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285 The Tribunal refers to the legal authorities cited by the Respondent in Section IV.A.1 of the Rule 41 Objections. *See* **Exhibit RL-013-ENG**, M. G. Kohen (ed.), Review Article, *Territoriality and International Law* (Elgar Online, 2016), p. 2; **Exhibit RL-017-ENG**, *Colombian-Peruvian Asylum Case*, Judgment of 20 November 1950, *I.C.J. Reports* 1950, p. 266, p. 274; **Exhibit RL-018-ENG**, *Persinger v Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984) 13 March 1984; **Exhibit RL-020-ENG**, *Youssef*, ; **Exhibit RL-021-ENG**, *McKeel v Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983) 30 December 1983, pp. 587-588; **Exhibit RL-022-ENG**, *U.S. . Bin Laden*, 92 F.Supp.2d 189 (S.D.N.Y 2000) 13 March 2000, p. 214; **Exhibit RL-023-ENG**, *Radwan v Radwan* (Fam. D.) [1972] 3 W.L.R. 735 (Cumming-Bruce J.), p. 740; **Exhibit RL-024-ENG**, *Dukali v Lamrani* [2012] EWHC 1748 (Fam); **Exhibit RL-025-ENG**, *Solovyev v Solovyeva* [2014] EWFC 1546; **Exhibit RL-026-ENG**, *Mharapara v The State* [1986] LRC (Const) 235 (Supreme Court, Zimbabwe); **Exhibit RL-027-FR**, *MB and DV v Belgium*, 11 March 2011, Belgium, Court of cassation, Case No. F.10.0011.N; **Exhibit RL-028-FR**, *Nikitschenkoff case*, 13 October 1865, France, Court of cassation (criminal Chamber), (1866) *Journal du Palais* 51; **Exhibit RL-029-FR**, *Ministère Public v Trochanoff*, 8 February 1909, France, criminal Tribunal of the Seine, (1910) 37 *Journal de Droit International* 551; **Exhibit RL-030-FR**, *Munir Pacha v Aristarchi Bey,* 26 June 1909, France, civil Tribunal of the Seine, (1910) 37 *Journal de Droit International* 549; **Exhibit RL-031-FR**, *Ministère Public v. Basiliadis*, 1 March 1922, France, Paris Court of appeal, (1922) 49 *Journal de Droit International* 407; **Exhibit RL-032-ENG**, *Gnome and Rhone Motors v Cattaneo*, 26 May 1930, Italy, Court of cassation, (1936) 5 ILR 307, Case No. 199; **Exhibit RL-033-ENG**, *Afghan Embassy Case*, 8 November 1934, Germany, Reichsgericht (in Criminal Matters), (1940) 7 *Annual Digest* 385, Case No. 166; **Exhibit RL-034-ENG**, *Trenta v Ragonesi*, 3 May 1935, Italy, Court of Rome, (1945) 8 *Annual Digest* 235, Case No. 93; **Exhibit RL-035-ENG**, *In re Moriggi*, 22 March 1939, Italy, Court of cassation, (1942) 9 *Annual Digest* 436, Case No. 172; **Exhibit RL-036-ENG**, *Consul Barat v Ministère Public*, 10 February 1948, France, civil Tribunal of the Seine, (1953) 15 *Annual Digest* 311, Case No. 102; **Exhibit RL-037-ENG**, *Belgian State (Minister of Public Works and Reconstruction) v Maréchal*, 30 April 1954, Belgium, Conseil d'Etat, (1957) 21 ILR 249; **Exhibit RL-038-ENG**, *La Mercantile v Kingdom of Greece*, 30 January 1955, Italy, Tribunal of Rome, (1958) 22 ILR 240; **Exhibit RL-039-ENG**, *Tietz et al. v People's Republic of Bulgaria*, 10 July 1959, Federal Republic of Germany, Supreme Restitution Court for Berlin, (1963) 28 ILR 369.

286 Response, para. 99.

287 *See* Response, paras. 92-102.

229. This position is not correct. Contrary to what is asserted by the Claimant, the Vienna Convention on Diplomatic Relations ("**VCDR**") does not provide support to its position that the premises of the embassy of a sending State are in the territory of the receiving State.[288] The VCDR does not assign sovereignty or sovereign rights, but, rather, regulates the privileges and immunities that are necessary for the functioning of diplomatic missions in the territory of the receiving State.[289] As recognized by the ICJ and domestic courts, the principle of inviolability and immunity of diplomatic premises established in the VCDR is rooted in the need to protect these premises from any intrusion by the receiving State precisely because they are under the territorial sovereignty of the receiving State.[290] As noted in particular by Judge Gaja in his Declaration in the *Immunities and Criminal Proceedings (Equatorial Guinea v France)* case:

> [T]*he conception that these premises are "extraterritorial" has long been abandoned and has not been endorsed by the Convention. The premises of the mission are inviolable, but they do not impinge on the territorial sovereignty of the receiving State.*[291]

230. *Second*, the text of the Treaty does not deviate from the principle that diplomatic missions are not part of the sending State and does not extend the definition of "*territory*" to cover the Parties' diplomatic missions.

231. In the Tribunal's opinion, interpreting the term "*territory*" to include a UAE diplomatic mission in a third country would not only run counter to well established principles of international law but would also conflict with the plain and ordinary meaning of Article 1(1)(e)(ii). The Tribunal agrees with the Respondent that such an interpretation would be incompatible with other provisions of the Treaty which are closely connected with a territorial nexus with the host State. Moreover, the Claimant's interpretation, if

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288 Rule 41 Objections, Section IV.A.2.

289 **Exhibit RL-044-ENG**, (1958) Vol. II *Yearbook of the International Law Commission*, Documents of the tenth session; Draft articles on diplomatic intercourse and immunities and commentary, UN Document A/CN.4/SER.A/1958/Add.1, pp. 94-95 ("***ILC Yearbook 1958***"), at p. 95; **Exhibit RL-045-ENG**, *VCDR*, Preamble ("*to ensure the efficient performance of the functions of diplomatic missions as representing States*").

290 Rule 41 Objections, paras. 57-63, citing **Exhibit RL-046-ENG**, *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Judgment, *I.C.J. Reports* 2020, p. 300 paras. 66, 72; and citing the academic writings in **Exhibit RL-047-ENG**, R. Jennings, A. Watts (eds.), "*Chapter 10: Diplomatic Envoys,*" in *Oppenheim's International Law: Volume 1 Peace* (9th edition) (OUP, 2008), pp. 1053-1131, para. 499; **Exhibit RL-048-ENG**, A. Clapham (ed.), "*Chapter VI: Jurisdiction,*" in *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edition) (OUP, 2012), pp. 206-301, p. 296; **Exhibit RL-044-ENG**, *ILC Yearbook 1958*, p. 95.

291 **Exhibit RL-049-ENG**, *Immunities and Criminal Proceedings (Equatorial Guinea v France),* Judgment, ICJ Reports, 2020, p. 300, Declaration of Judge Gaja, para. 8.

accepted, would have a destabilizing impact on all other international investment agreements that contain similar definitions of the word "*territory.*"[292]

232. *Third*, even though UAE law applied to the Claimant's rights under the relevant contracts and UAE courts had jurisdiction under those contracts, this does not change the fact that the very purpose of these contracts was the construction of various buildings in Somalia, not the UAE, and this was the investment on which the Claimant relies. Choice of law and forum selection clauses have nothing to do with the territory where an investment is located; they may apply to dispute resolution processes or to a party's performance under a contract but cannot be used to determine, or *a fortiori* to displace, the place where an investment is situated.[293]

233. The Tribunal agrees with the following statement by the *SGS v Philippines* tribunal:

> [I]*nvestments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT. For example, the construction of an embassy in a third State, or the provision of security services to such an embassy, would not involve investments in the territory of the State whose embassy it was, and would not be protected by the BIT.*[294]

234. Even though, as the Claimant notes, this statement is *obiter* and hypothetical, it concerns precisely the type of situation before this Tribunal, i.e. construction projects within the precincts of the UAE Embassy in a third State, Somalia, and is consonant with other authorities and general principles of international law.

235. Regarding the intangible contractual rights put forward by the Claimant as independent investments, the Tribunal notes that there is an inherent contradiction in the Claimant's arguments in this regard. On the one hand, the Claimant argues that the principle of unity does not apply to intangible assets because these are separate from, and unconnected to, the physical projects; and, on the other hand, the Claimant relies on the same principle to plead a close connection between its moveable and intangible assets which "*still clothe this Tribunal with jurisdiction in the sense that they comprised of financial assets made directly into the territory of the UAE.*"[295] In the Tribunal's view, this inconsistent manner of pleading its case underscores further the fundamental flaws of the Claimant's interpretation of the notion of "*territoriality.*" In this case, the intangible rights which the Claimant asserts arise from the main contracts cannot be disaggregated, or seen in isolation, from those contracts.

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292 Rule 41 Objections, paras. 101-109, 116.

293 **Exhibit RL-088-ENG**, *Abaclat*, para. 379.

294 **Exhibit CL-020-ENG / Exhibit RL-064-ENG**, *SGS v Philippines*, para. 99.

295 Tr., p. 106, lines 4-7.

236. *Fourth*, the Tribunal is not convinced by the Claimant's argument based on the "*benefits thesis,*" i.e. that an investment can be considered made in the host State if the latter ultimately benefits from it, as held by the *Fedax* and *Inmaris Perestroika* tribunals.[296] The Tribunal finds this theory far-fetched in the circumstances of the present case and agrees with the Respondent that this theory only finds application in cases involving financial instruments and where there is a strong connection between the investments in question and the host State. This was for instance the case in the *Abaclat, Ambiente Ufficio*, *Alemanni* and *Fedax* arbitrations which concerned financing directly provided to the host State for use in its economy or funds that contributed to the host State's economic development and can thus easily be distinguished from this case.[297]

237. *Fifth*, all the activities undertaken by the Claimant in this case concerned the infrastructure projects in Somalia and were done in support of those projects. Very little has been said by the Claimant regarding the work allegedly carried out in the UAE apart from references to "*drawings,*" "*design plans*" and other preparatory works in connection with two additional projects that the Respondent intended to commission but were never commissioned.[298] What is clear, however, is that all this work was meant for construction projects in Somalia; the central focus of the work, its centre of gravity, was always in Somalia, not the UAE. The Tribunal agrees with the view that, when it comes to the territorial requirements of a treaty, investments should be assessed holistically according to the principle of unity. It follows that, in this case, the activities carried out by the Claimant must be seen as a whole with the investment to which they closely pertain.

238. Finally, the Claimant contends that the tribunal in *SGS v Philippines* "*adopted a very liberal interpretation of the requirement that investment should be made in the territory of the host state*" and "*held that activities carried out abroad may still be deemed to have been carried out within the territory of the host state, and be covered under the BIT 'provided that they are connected to some activities in the host state's territory'*."[299] The Tribunal notes that the facts in *SGS v Philippines* are distinguishable from this case: SGS was to carry out pre-shipment inspections on behalf of the Philippines in the country of export and had to complete import certificates in the

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296 Response, paras. 162-163; **Exhibit CL-015-ENG / RL-090-ENG**, *Inmaris Pereistroika*, para. 124; **Exhibit CL-006-ENG / RL-096-ENG**, *Fedax*, paras. 41-42.

297 Response, paras. 163 and 167-170; **Exhibit RL-088-ENG**, *Abaclat*, para. 374 [The Claimant incorrectly cites to CL-002 which is the Consent Award, the correct reference is to the Decision on Jurisdiction, which is RL-088]; **Exhibit CL-016-ENG / RL-097-ENG**, *Ambiente Ufficio*; **Exhibit CL-017-ENG**, *Alemanni*; **Exhibit CL-006-ENG / RL-096-ENG**, *Fedax*.

298 *See*, *for example*, Response, paras. 6, 20, 104, 106; Rejoinder, paras. 29(c), 33, 43, 45, 170.

299 Rejoinder, para. 168.

importing country, i.e. the Philippines, for which purpose SGS had a liaison office in the Philippines where it provided certificates and issued reports. The Philippines argued that this Philippines-based liaison office was peripheral to SGS's activities and thus the investments were not covered by the underlying BIT. The tribunal disagreed and held that the focal point of the relevant contracts was an overall service with its focus in the Philippines.[300] By contrast, in the present case, there was nothing to be built in the UAE. The fact that meetings were held, or other related activities undertaken, in the UAE, cannot give rise to an investment in that State.

C. WHETHER THE CLAIMANT'S CLAIMS ARE "*MANIFESTLY WITHOUT LEGAL MERIT*" UNDER RULE 41

239. The Tribunal is mindful that, if a decision under Arbitration Rule 41 leads to a summary dismissal of the Claimant's case, this would conclude these arbitration proceedings. The following ruling of the *Lotus Holding* tribunal is particularly apposite in this regard:

> *The consequence of a summary dismissal under Rule 41(5) is that the claim set out in the request for arbitration proceeds no further. The tribunal rules, in effect, that there is no point in proceeding with the claim because it cannot succeed: no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal. The inevitability of dismissal must be manifest. It must be obvious from the submissions of the parties that there is some unavoidable and indisputable fact, or some legal objection in relation to which no possible counter-argument is identified. If the claimant, in its submissions under Rule 41(5), can point to an arguable case, the claim should proceed: but if the tribunal is satisfied that no such arguable case has been identified, it is in accordance with the sound administration of justice that the claim should be halted and dismissed at that point.*[301]

240. While the *Lotus Holding* tribunal was making its decision under Rule 41(5) of the 2006 ICSID Arbitration Rules, the reasoning is equally applicable to the present case. The Tribunal has also examined carefully the Claimant's submissions to assess whether its claims are tenable and would survive a deeper analysis should the Rule 41 Objections be rejected and should the arbitration continue. In the Tribunal's opinion, this is not the case as the Claimant's claims are fundamentally flawed and cannot succeed. The scope of the territory as defined under the Treaty and the principle that an embassy is not part of the territory of the sending State are genuinely indisputable rules in this case and nothing could emerge at a later stage of these proceedings that could change that conclusion.

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[300] **Exhibit CL-020-ENG / RL-064-ENG**, *SGS v Philippines*, paras. 99-106.

[301] **Exhibit CL-056-ENG / RL-004-ENG**, *Lotus Holding*, para. 158.

241. In conclusion, the Tribunal finds that the Claimant's claims lack "*manifest legal merit*" under Arbitration Rule 41 and this conclusion is also in line with considerations of good administration of justice.[302]

VIII. COSTS

242. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

243. Rule 52(2) of the ICSID Arbitration Rules provides:

> *If the Tribunal renders an Award pursuant to Rule 41(3), it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs.*

244. Rule 50 of the ICSID Arbitration Rules defines the costs of the proceedings as follows.

> *The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:*
>
> *(a) the legal fees and expenses of the parties;*
>
> *(b) the fees and expenses of the Tribunal, Tribunal assistants approved by the parties and Tribunal-appointed experts; and*
>
> *(c) the administrative charges and direct costs of the Centre.*

245. Each of the Parties has requested an award of costs in its favour.

A. THE RESPONDENT

246. The Respondent submits that the Claimant should bear all the costs associated with and arising out of the arbitration.[303]

247. The Respondent refers to the case of *RSM Production*, in which the tribunal had concluded that the claims were manifestly without legal merit and could not be raised in new proceedings and considered it appropriate that the respondent "*should be fully indemnified for all of its costs, reasonably incurred or borne, in this proceeding*."[304]

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302 **Exhibit RL-006-ENG**, *AHG*, para. 228.

303 Objection, para. 128(c); Reply, paras. 180, 181(d).

304 Reply, para. 180, citing **Exhibit CL-009-ENG / RL-104-ENG**, *RSM Production,* para. 8.3.4.

248. The Respondent submits that it is entitled to recover its legal representation costs in respect of work undertaken by in-house legal counsel as opposed to external counsel, so long as such costs are reasonable. The Respondent submits that "*its counsel team has spent an aggregate total of more than 800 hours*" working on these proceedings since the commencement of the arbitration, for which it requests "*the award of a symbolic sum of USD 6,000.*"[305]

249. The Respondent quantifies its legal fees in the amounts of **USD 6,000.00** and its expenses in the sum of **USD 6,137.46**.[306] The Respondent presents the following details:

Description	Amount
Advances paid to ICSID	USD 200,000
Printing of bundles and courier of documents to Mr. Christopher Adebayo Ojo SAN	USD 6,137.46 (AED 22,539.30)
Legal representation	USD 6,000
Total	**USD 212,137.46**

250. The Respondent requests that "*interest be paid on any amounts ordered by the Tribunal in favour of the Respondent, from the date of such order until the date of payment, at a reasonable commercial rate determined by the Tribunal*."[307]

B. THE CLAIMANT

251. The Claimant submits that the Respondent should bear the additional costs in respect of and in connection with the Rule 41 Objections.[308]

252. The Claimant quantifies its costs in the amounts of **USD 830,368.35** in legal fees and **USD 308,352.12** in expenses, in the total sum of **USD 1,138,720.47**. The Claimant presents the following details:

[305] Respondent's Statement of Costs, para. 5.

[306] The Respondent's statement of costs includes the advance paid to ICSID in the amount of USD 200,000.00, which is subject to any refund made to the Respondent, which is considered separately under Rule 50(c) of the ICSID Rules.

[307] Respondent's Statement of Costs, paras. 3, 7.

[308] Response, para. 205(III); Rejoinder, para. 226.

Description	Amount
Professional fees	
Mohammed Muigai LLP	USD 450,426.86
Jural Consulting Ltd	USD 379,941.49
Total Professional fees	**USD 830,368.35**
Administrative costs	
Mohammed Muigai LLP	USD 50,485.37
Jural Consulting Ltd	USD 80,801.86
Total taxes	USD 157,064.89
Other Administrative expenses	USD 20,000.00
Total administrative costs	**USD 308,352.12**
Total	**USD 1,138,720.47**

253. The Claimant's statement of expenses does not include advances paid to ICSID. The Claimant requests that the Tribunal award it "*the full costs of the proceedings […] and interest from the date of the award to the date of payment*."[309]

C. THE TRIBUNAL'S DECISION ON COSTS

254. Given that the Respondent has prevailed in full in these Rule 41 proceedings, and in the absence of any special circumstances justifying a different allocation of costs, the Tribunal holds that the Claimant should bear all reasonable legal and other costs incurred by the Respondent.

255. Pursuant to Rule 50(a) of the ICSID Rules, the costs of these proceeding are all costs incurred by the parties in connection with the proceeding, including: (a) the legal fees and expenses of the parties; (b) the fees and expenses of the Tribunal and the Tribunal Assistant approved by the Parties; and (c) the administrative charges and direct costs of the Centre.

256. As for the Respondent's legal fees and expenses, the Tribunal has reviewed the Respondent's statement of costs, including in particular the Respondent's claim for an aggregate of 800 hours' work carried out by its in-house counsel team in the "*symbolic*" sum of USD 6,000.00. The Tribunal finds that the costs for legal representation claimed by the Respondent are extremely low in light of the conduct and complexity of these Rule 41 proceedings but takes note that the Respondent states that this amount is "*symbolic.*" The Tribunal determines that the Respondent's total legal fees and expenses in the amount of **USD 12,137.46** are more than reasonable and should be reimbursed by the Claimant.

[309] Claimant's Statement of Costs, para. 4.

257. As to the other costs, stated under Rule 50(b) and (c) of the ICSID Rules, the Secretary-General has advised the Tribunal that these costs are detailed as follows:

Arbitrators' fees and expenses	USD
Ms. Loretta Malintoppi	47,729.07
Sir Christopher Greenwood	20,668.51
Mr. Christopher Adebayo Ojo	40,000.00
Ms. Fedelma Smith's fees and expenses	21,527.75
ICSID's administrative fees	104,000.00
Direct expenses	10,112.99
Total	**244,038.32**

258. In total, the fees and expenses of the Tribunal, the fees and expenses of the Tribunal Assistant, and the administrative charges and direct costs of the Centre, at the time of this Award, amount to **USD 244,038.32.** The Tribunal determines that the Claimant shall be liable for 100% of these costs.

259. The Tribunal notes that each Party advanced the sum of USD 200,000, and that each Party's share of the unexpended balance will be refunded to it. The Tribunal orders the Claimant to pay the Respondent **USD 122,019.16** for the expended portion of the Respondent's advances to ICSID, being 50% of the arbitration costs.

260. The Tribunal turns to the Respondent's request for an order that interest be paid on the sums awarded to it and that the Tribunal determine a "*reasonable commercial rate*" for such interest.

261. The Tribunal considers that it would be justified in the circumstances to award interest, in order to reflect the time value of the sums to be paid to the Respondent and finds that a "*reasonable commercial rate*" would be a suitable measure of such interest.

262. In the Tribunal's view, it would be useful to refer to a specific benchmark when determining a "*reasonable commercial rate*." A relevant starting point in this regard is the express provision for interest at Article 7(1)(b) of the Treaty, which concerns the measure of compensation when expropriating assets. Article 7(1)(b) provides for "*interest at the prevailing commercial market rate, however, in no event less than the prevailing six month LIBOR-rate of interest or equivalent[.]*"

263. While Article 7(1)(b) of the Treaty is not applicable to an award of costs, it provides guidance as to what the Contracting Parties to the Treaty considered a suitable objective minimum benchmark interest rate. The Tribunal will take guidance from this measure.

264. The Tribunal notes that the LIBOR was discontinued from 2021 onwards, making it necessary to identify an "equivalent" source. Since 2021, the World Bank has adopted

the Secured Overnight Financing Rate ("**SOFR**") as the alternative reference rate for US dollar-denominated loans.[310] The Tribunal considers that the SOFR is an appropriate benchmark rate for the purposes of the present analysis.

265. The SOFR is published by the Federal Reserve Bank of New York on a daily basis, along with the "SOFR Averages," which are "*compounded averages of the SOFR over rolling 30-, 90-, and 180-calendar day periods*." The Tribunal finds that a six-month average would be desirable for the purpose of predictability and notes that the SOFR 180-day average as of 1 July 2025 is 4.37%.[311]

266. As further non-binding guidelines, the Tribunal finds it appropriate to have regard to national benchmark rates in the States Parties to the Treaty, namely their respective Central Bank ("**CB**") base rates. The current CB base rates are 4.40% in the UAE[312] and 9.75% in Kenya.[313] The Tribunal finds it significant that the lower of the two rates is that of the CB in the party requesting interest, namely the UAE, and that the latter is fixed by reference to the SOFR. In the Tribunal's view, this comparison supports the view that the figure of 4.37% is "*commercially reasonable*" in the circumstances.

267. The Respondent has not requested compounding of interest. In any event, the Tribunal finds that simple interest would best serve the interests of efficiency and would be commercially reasonable in the circumstances.

268. The Tribunal therefore upholds the Respondent's request for an award of interest and decides to award simple interest at a rate of 4.37% per annum, to be calculated semi-annually from a period of 60 days counting from the date of this Award until the date of full payment.

[310] *See* World Bank press release dated 22 July 2021: "World Bank Approves New Reference Rates for Existing and New Loans in Preparation for End of LIBOR" available at: https://www.worldbank.org/en/news/press-release/2021/07/22/world-bank-approves-new-reference-rates-for-existing-and-new-loans-in-preparation-for-end-of-libor.

[311] *See* "Reference Rates Historical Data Search" for "SOFR Averages and Index" published by the Federal Reserve of New York, available here: https://www.newyorkfed.org/markets/reference-rates/sofr

[312] *See* the "UAE Interest Rates" published by the Central Bank of the UAE and last updated on 18 June 2025, available at https://www.centralbank.ae/en/; UAE press release dated 18 June 2025: "CBUAE Maintains the Base Rate at 4.40%" available at https://www.centralbank.ae/media/4padftu0/cbuae-maintains-the-base-rate-at-4-40-en.pdf.

[313] *See* the "Central Bank Rate (CBR)" published by the Central Bank of Kenya and last updated on 10 June 2025, available at: https://www.centralbank.ae/media/4padftu0/cbuae-maintains-the-base-rate-at-4-40-en.pdf

IX. DECISION

269. For the reasons set forth above, the Tribunal:

(1) **FINDS** that it manifestly lacks jurisdiction under any and all of the grounds for jurisdiction invoked by the Claimant, taken both individually and in combination;

(2) **DECLARES** that all the Respondent's Objections are well-founded under ICSID Arbitration Rule 41;

(3) Consequently, **DISMISSES** the claims brought by Spentech against the UAE as being manifestly without legal merit within the meaning of ICSID Arbitration Rule 41; and

(4) **DECIDES** that the Claimant shall bear all costs of the proceedings to date;

(5) **ORDERS** that the Claimant shall pay to the Respondent its legal and other costs of these proceedings in the amount of **USD 12,137.46**;

(6) **ORDERS** that the Claimant shall pay to the Respondent its expended share of the advance on costs paid to the Centre in the amount of **USD 122,019.16**; and

(7) **ORDERS** that each of the sums awarded in (5) and (6) above shall bear simple interest at a rate of 4.37%, calculated semi-annually from a period of 60 days counting from the date of this Award until the date of full payment.

Signed by the Tribunal

Date: 28 July 2025

[signed]

Mr. Christopher Adebayo Ojo SAN
Arbitrator

Sir Christopher Greenwood, GBE, CMG, KC
Arbitrator

Ms. Loretta Malintoppi
President of the Tribunal

Signed by the Tribunal

Date: 28 July 2025

[signed]

Mr. Christopher Adebayo Ojo SAN
Arbitrator

Sir Christopher Greenwood, GBE, CMG, KC
Arbitrator

Ms. Loretta Malintoppi
President of the Tribunal

Signed by the Tribunal

Date: 28 July 2025

Mr. Christopher Adebayo Ojo SAN
Arbitrator

Sir Christopher Greenwood, GBE, CMG, KC
Arbitrator

[signed]

Ms. Loretta Malintoppi
President of the Tribunal