

IN ACCORDANCE WITH THE PROVISIONS OF
THE TREATY ON THE EURASIAN ECONOMIC UNION OF 29 MAY 2014
UNDER THE 2013 UNCITRAL ARBITRATION RULES

Manolium-Processing LLC

Claimant

v.

Republic of Belarus

Respondent

**OBSERVATIONS ON APPLICATION FOR BIFURCATION ON QUANTUM
CS-III**

25 June 2018

**Baker
McKenzie.**

I. INTRODUCTION

1. In accordance with Procedural Order No. 1 of 17 May 2018, Claimant hereby submits Observations on Respondent's Application for Bifurcation on Quantum (the "**Observations**" or "**CS-III**").
2. The Observations include the following sections:
 - I. Introduction;
 - II. Observations on the Summary of the Relevant Factual Background and Jurisdictional Issues Presented by Respondent;
 - III. Observations on the Respondent's Application for Bifurcation;
 - IV. Relief Sought.
3. The abbreviations appearing in the Observations shall have the same meaning which is attributed to them in the Claimant's Notice of Arbitration (**CS-I**) and Statement of Claim (**CS-II**) with Addendum (**CS-II(A)**) as well as the Respondent's Response to the Notice of Arbitration (**RS-1**) and Application for Bifurcation (**RS-2**), unless otherwise specifically provided.

II. OBSERVATIONS ON THE SUMMARY OF THE RELEVANT FACTUAL BACKGROUND AND JURISDICTIONAL ISSUES PRESENTED BY RESPONDENT

4. In its RS-2 Respondent once again elaborated on the factual background of the case and reiterated its Response to the Notice of Arbitration, putting forth no additional relevant facts to its Application for Bifurcation.
5. Claimant has already provided the facts of the Dispute in the Notice of Arbitration. In the interest of judicial economy, Claimant does not consider it necessary to reproduce the facts again in the Observations. Rather, Claimant respectfully refers the Tribunal to its statement of facts in the

Notice of Arbitration.¹ Claimant will also elaborate on the factual circumstances in due course, as appropriate, in its further written submissions.

6. With regard to the jurisdictional objections of Respondent, Claimant would like to make several observations.
7. Respondent does not explain how its objections regarding jurisdiction support its contention that quantum must be bifurcated from liability. By Respondent's own argument, "*the Tribunal's decision on liability will significantly narrow the scope of issues to be addressed at the quantum stage.*"² Indeed, as explained in Section III(B) below, the damages asserted are not complex. Therefore, by Respondent's own logic, it is not clear why quantum would need to be bifurcated from liability and require its own additional standalone proceeding.
8. Further, Claimant would like to once again repeat that its position is based on both Protocol No. 16 to the EEU Treaty and the Investment Law of the Republic of Belarus. Claimant has consistently relied on the Investment Law of the Republic of Belarus as a ground for its claims, in particular, in paras. 328 – 330, 336, 342, 348, 356, 364 of the Notice of Arbitration. Claimant will further elaborate on the issues of application of the Investment Law of the Republic of Belarus at the appropriate time in its subsequent submissions.

III. OBSERVATIONS ON THE RESPONDENT'S APPLICATION FOR BIFURCATION

9. "*Tribunals have been very hesitant in their use of bifurcation...*"³ As the Tribunal stated in *Suez v. Argentina*, "*bifurcation of the merits phase of an ICSID case into determination of liability and a determination of damages is not common.*"⁴ The same should be the case here.
10. One of the many changes to the UNCITRAL Rules in 2010 was to remove any previously existing presumption in favour of bifurcation.⁵

¹ CS-I, Sections III-IV.

² RS-2 (Application for Bifurcation), paras. 59, 68.

³ Exhibit CL-61. Inna Uchkunova and Oleg Temnikov, *Bifurcation of Proceedings in ICSID Arbitration: Where Do We Stand?* // Kluwer Arbitration Blog (2014), Section II.A.

⁴ Exhibit CL-62. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 245.

⁵ See Exhibit CL-63. UNCITRAL Arbitration Rules (as revised in 2010), United Nations Commission on International Trade Law (2011). // Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

11. Bifurcation is only appropriate, if at all, if "*such a staged process is likely to save time and costs of the overall proceedings*".⁶ That is not the case here. Rather, bifurcation will result in significant and unwarranted delays as well as additional costs to the Parties.
12. Further, in *Suez v. Argentina* the Tribunal decided to bifurcate liability and damages "[g]iven the complexity of this case and the extraordinarily voluminous nature of the record [...]"⁷ Neither of these factors weigh in favor of granting bifurcation here.
13. The quantification of damages in this arbitration is not complicated nor is the record so voluminous as to warrant bifurcation of the proceedings on quantum.
14. Therefore, for all of these reasons, Respondent's Application for Bifurcation must be denied.

A. The Bifurcation Will Cause Unnecessary Delay and Additional Costs to the Parties

15. The dilatory effect of bifurcation to overall length of the proceedings is self evident. Commentators have questioned whether bifurcation in fact saves any time or cost since statistical analysis indicates that it does not.⁸
16. In regards to the specific timetable of this case, Respondent submitted the Application for Bifurcation on 11 June 2018. If the Application is rightly denied, the hearing on all issues – jurisdiction, merits, and quantum – shall still only be held on 29 July – 2 August 2019.
17. If bifurcation of the quantum phase is permitted, then this hearing which is more than one year away, will only be held in regards to jurisdiction and merits. After the Award on Liability is

Whereas under the first version of the UNCITRAL Arbitration Rules (as adopted in 1976; available at: <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>), Article 21(4) provided that "*[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question*", its replacement, Article 23(3) of the 2010 UNCITRAL Arbitration Rules (**Exhibit CL-63**), which is also present in 2013 UNCITRAL Arbitration Rules (**Exhibit CL-4**) applicable to the Dispute, establishes that "*[t]he arbitral tribunal may rule on [jurisdictional objections]... either as a preliminary question or in an award on the merits*" and "*may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.*" [Claimant's emphasis].

See also **Exhibit CL-64**. *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014, para 101, ("*The Tribunal agrees with the Claimant that the new version [of the UNCITRAL Rules] can only be interpreted as giving the Tribunal a wider discretion and not providing a presumption in favour of bifurcation*").

⁶ **Exhibit RL-16**. UNCITRAL Notes on Organizing Arbitral Proceedings, para. 70.

⁷ **Exhibit CL-62**. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 244.

⁸ **Exhibit CL-61**. Inna Uchkunova and Oleg Temnikov, *Bifurcation of Proceedings in ICSID Arbitration: Where Do We Stand? // Kluwer Arbitration Blog* (2014), Section II.A ("*Additionally, it must be pointed out that statistics show that bifurcation does not, in fact, lead to reduction of time and costs*").

issued, the proceedings will then take several more months before the straightforward issue of damages in this case can be adjudicated and a Final Award on all of the issues is rendered. There is simply no reason to further delay these proceedings — potentially to 2020 or beyond — without a compelling justification, which Respondent has failed to provide.

18. The longer the proceedings, the greater the cost to the Parties. That is why bifurcation is generally only considered appropriate "*in complex arbitrations*" where "*bifurcation allows the dispute parties and the tribunal to focus first on the merits of the case, to save costs and time and perhaps to settle on the quantum of damages or other discrete issues*".⁹ As explained below, this is simply not one of those cases.

B. The Quantification of Damages Is Not Complicated Enough to Bifurcate the Proceedings on Quantum

19. Usually bifurcation between quantum and the merits is allowed only where the issue of quantum is in itself complex due to:
- (i) The amount of evidence that should be reviewed by the expert,¹⁰ or
 - (ii) The number of alternative scenarios (which could be reduced during the first stage of arbitration) to be considered by the expert.¹¹
20. Neither of these objective criteria appear in the case at hand. The valuation of damages suffered by Claimant is not subject to a complicated or long process of evaluation, as Respondent has tried to misrepresent to the Arbitral Tribunal.¹²

⁹ Meg Kinnear ET AL., Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11, 1135–1139 (2006). Cited by: **Exhibit CL-65**. Lucy Greenwood, *Does Bifurcation Really Promote Efficiency?* // Journal of International Arbitration 28(2): 105–111, 2011, p. 106 (6). Claimant's emphasis in para. 18 above.

¹⁰ For example, in *Suez v Argentina* arbitration, where the case comprised three consolidated claims in relation to concession to operate water services, and "*the tribunal observed that the case was very complex and that the record was extraordinarily voluminous. [...] In these circumstances the tribunal held that it was appropriate to dedicate a separate phase of the proceedings to damages*" [Claimant's emphasis]. **Exhibit CL-66**. Part II. Procedural Issues and the Use of Damages Experts // *Global Arbitration Review's The Guide to Damages in International Arbitration*, 2016, edited by John. A. Trenor, p. 110 (17). **Exhibit CL-62**. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 244.

¹¹ In *Pope & Talbot and SD Myers v. Canada*, quantification of damages was left to be determined in a separate phase, "*presumably on the basis of the complex issues of causation involved*" [Claimant's emphasis], see **Exhibit CL-66**. Part II. Procedural Issues and the Use of Damages Experts // *Global Arbitration Review's The Guide to Damages in International Arbitration*, 2016, edited by John. A. Trenor, p. 110 (17).

¹² **RS-2 (Application for Bifurcation)**, para. 75.

21. Instead, Claimant has outlined two simple and straightforward sets of damages:¹³
- (i) Direct losses resulting from the seizure of the New Communal Facilities (including accrued interest); and
 - (ii) Lost profits resulting from termination of the Investment Contract (as revised by the Amended Investment Contract and further Additional Agreements) and impossibility to construct the Investment Object (including accrued interest).
22. Both the evaluation of direct losses and lost profits does not require examination of a large amount of documents nor a complicated calculation or considering of many different scenarios.
23. First, the costs incurred by Manolium-Engineering to construct the New Communal Facilities (amounted to 67,271,990.1 thousand Belorussian rubles which is equivalent to USD 19,434,679) have been confirmed by the Respondent's Ministry of Finance in its own Report (CAO of the Ministry of Finance Report),¹⁴ that was issued in pursuance of assignment of the Prime Minister of the Republic of Belarus¹⁵ and accepted by Claimant.
24. Thus, Respondent's assertions that there is complexity or ambiguity in regard to the damages being asserted is, in part, based on an assertion that its own Ministry of Finance Report incorrectly calculated Claimant's costs.¹⁶ This contention cannot be taken seriously.
25. Instead, Respondent's attempt to manufacture complexity or uncertainty where none exists should be seen as nothing more than the delay tactic that this Application for Bifurcation is.
26. Second, the "*complex variables*" presented by Respondent as justification for bifurcation are nothing more than the standard decisions on jurisdiction and liability.
27. Respondent puts forth "*a non-exhaustive list ... [of] some of the possible scenarios*" that Respondent would need to consider regarding quantum.¹⁷

¹³ CS-I, paras. 530-532, 576.

¹⁴ **Exhibit C-160**. CAO of the Ministry of Finance Report, pp. 15-16. The Report (audit of Manolium-Engineering operations for the period from 5 April 2004 until 25 January 2016) was prepared by the Controller and Auditor Office of the Ministry of Finance of the Republic of Belarus and Republican Unitary Enterprise Republican Scientific and Development Center for Pricing in Construction **upon the instruction of the Minister of Finance of the Republic of Belarus (Exhibit C-159)**. Order of the Ministry of Finance dated 3 February 2016).

¹⁵ **Exhibit C-159**. Order of the Ministry of Finance dated 3 February 2016. **Exhibit C-160**. CAO of the Ministry of Finance Report, p. 1.

¹⁶ **RS-2 (Application for Bifurcation)**, para. 39.

28. Although Respondent attempts to dress this up as a complicated task for an expert, the scenarios are nothing more than whether Claimant wins or loses on jurisdiction and then liability for each of its two claims.
29. In fact, for a quantum expert, most of the different scenarios presented by Respondent here would not even factor into the analysis. A quantum expert opines on the extent of damages, if any, if a breach is found.
30. Respondent cannot seriously be arguing that this analysis would be effected by a Tribunal's decision on jurisdiction.
31. Respondent is seemingly trying to argue that the fact that Claimant has brought more than one claim makes the case sufficiently complex to warrant bifurcation on quantum.
32. Respondent either fails to understand or intentionally misinterprets that Claimant's claim for damages is based on two causes of actions:¹⁸
- (i) Unlawful expropriation of the Claimant's Investments; and
 - (ii) Violation of the FET Standard towards the Claimant and its Investments.
33. Both causes of actions culminated in the illegal termination of the Investment Contract (as revised by the Amended Investment Contract and further Additional Agreements) and seizure of the New Communal Facilities.
34. Whether the Arbitral Tribunal agrees with the first cause of action, the second, or with both, does not change the quantum.
35. On such a basis, nearly every investment case could be bifurcated and this would no longer be an uncommon application reserved for particularly complex cases.
36. *Third*, the evaluation of lost profit does not require examination of voluminous documents, which may be the case in the context of other disputes that could then warrant bifurcation.

¹⁷ RS-2 (Application for Bifurcation), para. 75.

¹⁸ CS-I, para. 576.

37. The overall amount of exhibits to the Claimant's Expert Report does not exceed 70 documents.¹⁹
38. Therefore, there simply aren't thousands of documents that exist for the Respondent's expert to potentially review. Indeed, Respondent noticeably omits any claim that there are that many documents in its Application for Bifurcation.
39. *Finally*, Respondent's suggestion that introducing an alternative Valuation Date would require "*additional expert evidence, incurring further costs and delay*"²⁰ is incorrect.
40. The Valuation Date is the technical date assumed by the expert for calculation of the Claimant's damages. It is a variable plugged into a formula by the valuation expert.
41. Changing the Valuation Date therefore, by definition, cannot substantially change the calculation of damages in terms of incurring further costs and delay.
42. The Valuation Date could have an impact on the calculation of interest, but this too is a simply arithmetical exercise that also cannot form the basis for bifurcation.
43. Thus, no "*additional expert evidence*" is required, as suggested by Respondent.
44. For all of these reasons, the Application for Bifurcation must be denied.

IV. RELIEF SOUGHT

45. Claimant respectfully requests that the Arbitral Tribunal dismiss the Respondent's Application for Bifurcation and decide that Procedural Timetable B.1 shall be applicable.

Respectfully submitted,



Vladimir Khvalei

Baker & McKenzie CIS, Limited, partner

¹⁹ CER-1. Navigant Expert Report dated 24 April 2017, Appendix B.

²⁰ RS-2 (Application for Bifurcation), para. 73.

LIST OF LEGAL EXHIBITS TO CS-III

- Exhibit CL-61.** Inna Uchkunova and Oleg Temnikov, *Bifurcation of Proceedings in ICSID Arbitration: Where Do We Stand?* // Kluwer Arbitration Blog (2014), Section II.A
- Exhibit CL-62.** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010
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- Exhibit CL-64.** *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014
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