INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ENCORE Investment Group Limited (Malta)

v.

Republic of Türkiye

(ICSID Case No. ARB/24/46)

DECISION ON THE RESPONDENT'S RULE 41 APPLICATION

Members of the Tribunal
Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Prof. George A. Bermann, Arbitrator
Ms. Juliet Blanch, Arbitrator

Secretary of the Tribunal
Ms. Ayong Lim

Assistant to the Tribunal
Dr. Adrien Compain

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7 October 2025

Representation of the Parties

Representing the Claimant

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Ms. Binnaz Kaymaz
Mr. Alaattin Anıl Çile
Ms. Bengisu Çelik

Representing the Respondent

The Directorate General for Law and Legislation, Secretariat General of the Presidency of the Republic of Türkiye & Directorate of Administrative Affairs
Mr. Bekir Keleş
Assoc. Prof. Dr. Atike Eda Manav Özdemir
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Mrs. Arzu Yüksel
Ms. Sena Görgülü
Ms. Asude Şahin
Ms. Eda Akış Türkmenoğlu
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Mr. Daniel Rosenberg

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I. INTRODUCTION

1. This arbitration was initiated by ENCORE Investment Group Limited (Malta) ("Encore" or the "Claimant") against the Republic of Türkiye ("Türkiye" or the "Respondent") (together the "Parties") under the Türkiye-Malta BIT ("BIT").

2. This decision resolves the application by the Respondent for expedited dismissal of the claims pursuant to Rule 41 of the ICSID Arbitration Rules.

II. PROCEDURAL HISTORY

3. On 4 October 2024, the Claimant filed its Request for Arbitration ("Request for Arbitration").

4. On 27 June 2025, the Respondent filed its Application for expedited dismissal of Claimant's claims pursuant to ICSID Arbitration Rule 41 ("Rule 41 Application").

5. On 2 July 2025, the Tribunal invited the Claimant to file an answer by 20 August 2025 and informed the Parties that it would give directions regarding the next steps of the proceedings dealing with the Rule 41 Application after reviewing the Parties' submissions.

6. On the same day, the Claimant requested an extension of the time limit for its answer to the Rule 41 Application from 20 August 2025 to 8 September 2025, due to the summer recess.

7. On 7 July 2025, the Tribunal informed the Parties that it was minded to grant the extension requested by the Claimant, subject to the Respondent raising a compelling objection by 9 July 2025, which the Respondent did not.

8. On 8 September 2025, the Claimant filed its Response to Respondent's Rule 41 Objection ("Rule 41 Response").

9. On 19 September 2025, the Respondent, while submitting that its Rule 41 Application should be granted forthwith following the filing of the Claimant's Rule 41 Response, proposed that additional procedural steps be scheduled with respect to its application.

10. Having determined that no further procedural steps were necessary since it was sufficiently enlightened by the Parties' written submissions on record, the Tribunal issues the present decision.

III. OVERVIEW OF THE DISPUTE

11. This section is meant to provide a brief overview of the dispute, insofar as relevant for present purposes. It is not intended to include all potentially relevant facts.

12. The crux of this case relates to the alleged expropriation by Türkiye of the Claimant's [redacted]

13. At this preliminary stage of the proceedings, the Tribunal understands that the following facts are not disputed by the Parties:

a. [redacted]

b. On 12 July 2018, the Kayseri 2nd High Criminal Court handed down a judgment sentencing the Boydak family, ordering the confiscation of their shares [redacted] and affirming the appointment of TMSF as the trustee [redacted]

c. [redacted]

d. On 14 September 2020, Encore acquired 31.86% of Buray's shares and thus indirectly 5.097% of Muradiye's shares.[5]

[redacted]

5 RfA, para. 42; Application, para. 26.5.

e. [redacted]

f. [redacted]

IV. REQUESTS FOR RELIEF

14. In its Request for Arbitration, the Claimant sought the following relief:

> "136. The Claimant will request that, once constituted, the Arbitral Tribunal issue an award:
>
> a. declaring that Türkiye has breached the Türkiye-Malta BIT with respect to Encore Investment Group Limited;
>
> b. ordering Türkiye to pay compensation to the Claimant of no less than USD 11 million plus pre- and post-award compounded interest;
>
> c. ordering Türkiye to pay the costs of this proceeding, including costs of legal representation; and
>
> d. ordering such other relief as the Arbitral Tribunal may deem appropriate in the circumstances".[8]

15. In its Rule 41 Application, the Respondent sought the following relief:

> "For the reasons set out above, the Republic therefore requests that the Tribunal:
>
> 78.1 **DECLARE** that the entirety of the claims presented by ENCORE in its Request for Arbitration are manifestly without legal merit due to a failure to establish a basis for the Tribunal's jurisdiction *ratione temporis*;
>
> 78.2 **DECLARE** that the entirety of the claims presented by ENCORE in its Request for Arbitration are manifestly inadmissible due to the Claimant's commission of an abuse of process;

[redacted]

[redacted]

8 RfA, para. 136.

> 78.3 **DECLARE** that ENCORE's claim for impairment of its purported investment presented in Section V.B of its Request for Arbitration is manifestly without legal merit as it lacks a legal basis in the BIT;
>
> 78.4 **ISSUE** an Award dismissing all claims presented in the Request for Arbitration in accordance with ICSID Arbitration Rule 41(3);
>
> 78.5 **AWARD** Respondent all its costs associated with this arbitration, including legal fees and expenses, in accordance with ICSID Arbitration Rule 52(2); and
>
> 78.6 **AWARD** Respondent any further relief that the Tribunal may deem just and proper".[9]

16. In its Rule 41 Response, the Claimant sought the following relief:

> "139. The Claimant requests that the Arbitral Tribunal issue a decision,
>
> (i) rejecting the Respondent's objection that the Claimant's claims are manifestly without legal merit; and
>
> (ii) ordering the continuation of the proceedings without having further proceedings (such as another round of written submissions, virtual hearing, and etc.) as per Procedural Order No. 1; and issue an interim decision on costs,
>
> (iii) ordering the Respondent to pay all costs of the special procedure under the Rule 41, including the legal fees and expenses of the Claimant's legal representation, the fees and expenses of the Tribunal, Tribunal assistant, and the administrative charges and direct costs of the Centre, plus pre-award and post-award interest thereon".[10]

V. APPLICABLE STANDARD

17. The Parties are generally in agreement on the applicable legal standard to a preliminary objection under Rule 41.

18. Rule 41 of the ICSID Arbitration Rules reads as follows:

> "**Rule 41: Manifest Lack of Legal Merit**
>
> (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.

[9] Application, para. 78.

[10] Response, para. 139.

> (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".

19. As consistently held by decisions on Rule 41 or its predecessor Rule 41(5), such provision sets a high standard for dismissal under which an objection must be established clearly and obviously, with relative ease and dispatch.[11] As the tribunal explained in *Lotus Holding v. Turkmenistan*, this means that "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

[11] See, e.g., **RLA-30**, *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, paras. 88, 105; **RLA-7**, *Brandes Investment Partners, LP 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, paras. 65, 62-64; **RLA-20**, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 6.1.1; **CLA-14**, *PNG Sustainable Development Program Ltd v. 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, para. 88; **CLA-16**, *Bank of Nova Scotia v. Republic of Peru*, ICSID Case No. ARB/22/30, Decision on Respondent's Rule 41 Application, 31 May 2024, para. 99.

claimant, in its submissions under Rule 41(5), can point to an arguable case, the claim should proceed […]".[12]

20. Although they generally concur on the legal standard, the Parties disagree on the application of the standard to this dispute and in particular on whether the Tribunal should make findings of fact at this stage. Relying on *Brandes v. Venezuela*, the Respondent contends that the Tribunal must "take into account the facts and their interpretation as alleged by the claimant as well as the facts and their interpretation as alleged by the respondent and make a decision on their existence and proper interpretation".[13]

21. For its part, the Claimant maintains that the factual premises of the claim must be accepted as alleged by the claimant, unless they are "plainly without any foundation" or "incredible, frivolous, vexatious or inaccurate or made in bad faith". In support, it invokes *Emmis v. Hungary* and *Trans-Global Petroleum v. Jordan* among others.[14]

22. In the Tribunal's opinion, at this preliminary stage of the proceedings, the Tribunal lacks sufficient evidence to resolve issues of fact.[15] Indeed, the *Brandes* tribunal itself had "no difficulty to conclude that the objection on an expedited basis should concern a legal impediment to a claim and not a factual one" and its view was that "basically the factual premise has to be taken as alleged by the Claimant. Only if on the best approach for the Claimant, its case is manifestly without legal merit, it should be summarily dismissed".[16]

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12 **RLA-3**, *Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020, para. 158.

13 Application, para. 35, citing **RLA-7**, *Brandes Investment Partners, LP 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, para. 68.

14 Response, para. 32, citing **CLA-15**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), 11 March 2013, para. 26; **RLA-1**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019, para. 33; **RLA-30**, *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, para. 96.

15 See, e.g., **RLA-30**, *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, para. 97; **CLA-21**, *Eskosol S.p.A in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017, para. 37; **CLA-14**, *PNG Sustainable Development Program Ltd v. 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, para. 90; **CLA-16**, *Bank of Nova Scotia v. Republic of Peru*, ICSID Case No. ARB/22/30, Decision on Respondent's Rule 41 Application, 31 May 2024, para. 101.

16 **RLA-7**, *Brandes Investment Partners, LP 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, paras. 59, 61.

23. Accordingly, the Tribunal will determine whether the preliminary objections raised by the Respondent in its Rule 41 Application are manifestly ill-founded in law on the basis of the facts alleged by the Claimant, whether disputed or not.

24. In the following sections, the Tribunal addresses in turn the three preliminary objections raised by the Respondent in its Rule 41 Application.

VI. FIRST OBJECTION: LACK OF JURISDICTION *RATIONE TEMPORIS*

1. The Parties' positions

(a) The Respondent's position

25. [redacted]

26. [redacted]

[redacted]

(b) The Claimant's position

27. In its Rule 41 Response, the Claimant states that the BIT "applies to all investments, making no distinction between investments made before or after the BIT's entry into force" and that its purported investment, which was made lawfully on 14 September 2020, is protected by the BIT. [redacted]

2. Analysis

28. It is common ground, and rightly so, that the Claimant must have held the investment for which it seeks BIT protection at the time when the alleged breaches occurred.

29. On the basis of the record as it stands, it appears that the conduct complained of occurred not before, but after Encore's acquisition of its purported investment. [redacted]

30. [redacted]

31. [redacted]

[redacted]

[redacted]

32. [redacted]

33. In conclusion, the Tribunal finds that the Respondent has not shown that the Tribunal manifestly lacks temporal jurisdiction over the claims before it.

VII. SECOND OBJECTION: ABUSE OF PROCESS

1. The Parties' positions

(a) The Respondent's position

34. The Respondent submits that Encore's claims constitute an abuse of process and are therefore inadmissible, [redacted]

35. In reliance on *RSM v. Grenada*, Türkiye notes that Rule 41 may be invoked in respect of an objection based on abuse of process.[28] The present dispute, so it says, is "a textbook example of a claimant rerouting assets through shell corporations in low-disclosure jurisdictions to manufacture treaty protection for a purported investment after a dispute with the State had arisen or was, at a minimum, eminently foreseeable", referring thereby to the test to determine whether an investor has committed an abuse of process to gain treaty protection.[29]

36. The first element of the test goes to the foreseeability of the dispute with the respondent State at the time when the investor acquired its purported investment.[30] [redacted]

[redacted]

28 Application, para. 49, citing **RLA-20**, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 6.1.1, 6.2(c), 7.3.

29 Application, para. 61.

30 Application, para. 53. See, e.g., **RLA-13**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 554; **RLA-24**, *Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30, Award, 16 March 2022, paras. 377-380.

[redacted]

37. The second element refers to whether the investment was made or structured in a specific manner in order to access treaty protection.[32] [redacted]

a. The history of Encore's acquisition of the Buray shares is marked by transactions between related entities in low-disclosure jurisdictions: first, a transfer of the shares from the [redacted] to Webster & Porter, a BVI company, in 2018; second, a transfer of the shares from Webster & Porter to Encore, a Maltese company, in 2020, with no evidence of consideration or other documentation of these transactions;[34]

b. There is no information about the ultimate beneficial owner (UBO) of Webster & Porter, which seems related to Encore, and appears to have been incorporated for the sole purpose of temporarily holding Buray shares, as it was dissolved on 19 July 2024, just before the arbitration started;[35]

c. The timing of Encore's incorporation [redacted] indicates that the company was created for the purpose of manufacturing jurisdiction;[36]

d. Encore is a shell company with no apparent business activities other than holding shares in Buray (and a small investment into a Turkish transportation company by the name of Tirport). Further, there is no evidence that Encore's UBO, Mr. Palermino Colamarino, an Italian national, had any management role or legitimate business interests in obtaining an indirect shareholding in Muradiye;[37]

e. [redacted]

[redacted]

32 Application, para. 53. See, e.g., **RLA-13**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paras. 554, 585; **RLA-19**, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award (Redacted), 20 September 2021, para. 340.

33 Application, paras. 25-30, 64-70.

34 Application, para. 65.

35 Application, para. 66.

36 Application, para. 67.

37 Application, paras. 9, 27.5-27.6, 68.

[redacted]

f. [redacted]

(b) The Claimant's position

38. In its Rule 41 Response, the Claimant does not comment on the legal principles set out by the Respondent in support of this objection, but puts forward fact allegations to rebut Türkiye's contentions:

a. Encore's UBO, Mr. Colamarino, was married on 9 November 1995 to a Turkish national and has held a residence permit in Türkiye since that date. Mr. Colamarino is a "bona fide investor", a "legitimate international businessman" with "thirty-five years of experience in international projects", using his own funds for his investments;[40]

b. Mr. Colamarino was the UBO of Webster & Porter, as established by a share certificate;[41]

c. In February 2018, Webster & Porter acquired shares in Buray for EUR 800,000 from the [redacted], which is evidenced by two receipts for payment. Mr. Colamarino and [redacted] were both members of the [redacted]. The former's decision to invest in Buray and obtain an indirect shareholding in Muradiye "was based on a solid business evaluation of Türkiye's renewable energy market" as Muradiye's power plant was "a valuable asset in a growing green industry";[42]

d. In 2019, Mr. Colamarino's legal and tax advisers "recommended to restructure his investments by moving them from BVI, which was increasingly viewed as a low-disclosure jurisdiction facing banking and regulatory challenges, to a reputable, transparent, and stable jurisdiction within the European Union" and "Malta was chosen for this purpose at that time independently from treaty-shopping allegations";[43]

[redacted]

[redacted]

40 Response, paras. 112, 121-122.

41 Response, para. 113; **C-47**, Share Certificate of Webster & Porter Associates Limited.

42 Response, paras. 114-116; **C-48**, Receipt for Payment Made to [redacted]; **C-49**, Receipt for Payment Made to [redacted].

43 Response, para. 118.

e. In 2020, Encore was incorporated in Malta "as part of this planned and legitimate corporate restructuring" and Mr. Colamarino's investments, including the Buray shares, were transferred from Webster & Porter to Encore as a "natural consequence of this strategy";[44]

f. Encore is not a shell company created for the purpose of its claims against Türkiye. Quite to the contrary, it is a "legitimate holding company that manages a portfolio of substantial investments", including a 34% shareholding in an Italian company, BeeGreen SRL, which operates a wind farm producing 7.0 MW renewable energy, a 60% shareholding in a Bulgarian company, SGS Invest, which owns and operates a 1.7 MW solar park, its shares in Buray and a 16,38% participation in Tirport in Türkiye. This "portfolio demonstrates a clear and consistent pattern of substantive, long-term investment in legitimate business operations, particularly in the European energy sector".[45]

2. Analysis

39. The Respondent's second objection concerns the inadmissibility of the claims founded on an abuse of process resulting from a restructuring of an investment for the purpose of obtaining treaty protection.

40. It is undisputed that a Rule 41 objection may pertain to matters of admissibility, including abuse of process, and rightly so. Arbitral decisions have consistently held that objections raised under Rule 41(5) of the 2006 ICSID Arbitration Rules may encompass all objections seeking the early discontinuance of proceedings on the ground that a claim was manifestly unfounded,[46] and ICSID Arbitration Rule 41(1) provides expressly that preliminary objections "may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal" and thereby confirms this understanding.

41. This being so, the Tribunal doubts that an objection for abuse of process arising from an allegedly illegitimate restructuring of an investment effected in order to gain access to treaty protection may in practice be determined through an expedited procedure under Rule 41. Indeed, such an objection has two well-established distinctive features. First, it

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44 Response, para. 119.

45 Response, paras. 122-123; **C-50**, BeeGreen SRL Certificate Registry; **C-51**, BeeGreen SRL Minutes of the Ordinary Shareholders Meeting 2025 (redacted); **C-52**, SGS Invest Certificate Registry; **C-53**, SGS Invest Balance Sheet 2024 (redacted); **C-54**, SGS Invest Income Statement 2024 (redacted); **C-55**, Encore Financial Statement of 2024 (redacted).

46 See, e.g., **RLA-7**, *Brandes Investment Partners, LP 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, para. 55; **RLA-31**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 30; **RLA-20**, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 6.1.1; **CLA-14**, *PNG Sustainable Development Program Ltd v. 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, para. 91.

is subject to a high evidentiary threshold.[47] Second, by its nature, it primarily depends on a comprehensive review of the facts, because a finding of abuse depends on the assessment of the totality of circumstances.[48]

42. In the Tribunal's view, these two distinctive features are hardly reconcilable with a summary procedure like the one envisaged in Rule 41. While a Rule 41 objection primarily involves a legal bar to a claim, a finding of abuse of process for illegitimate restructuring depends mainly on a review of the facts and evidence. In this early phase of the proceedings, the Tribunal is not in a position to fully assess the factual matrix relevant to a determination of abuse of process as it does not have the benefit of the Parties' full submissions on the facts and has not yet heard the evidence. It also appears difficult that the high threshold required for a finding of abuse arising from an illegitimate restructuring could be satisfied in this phase of the proceedings, in particular where the facts as alleged by the claimant are accepted for the purposes of a Rule 41 procedure.

43. Furthermore, the Tribunal notes that, while the *RSM* tribunal addressed the question of whether the arbitration was precluded by reason of an abuse of process under Rule 41, the type of abuse alleged there was different from that pleaded in these proceedings. In that case, the respondent argued that the claims constituted an abuse of process since they were an attempt to circumvent the rule set out in Article 53 of the ICSID Convention according to which ICSID awards are final, binding, and not subject to appeal or review apart from the internal remedies provided by the ICSID Convention.[49] The tribunal accepted that the initiation of the arbitration was an improper attempt to circumvent this rule by examining the claims as pled by the claimant.[50] By its nature, that limited exercise could be conducted within the bounds of a Rule 41 procedure in the *RSM* arbitration. The same cannot be said in this one.

44. Moreover, the review of the record as it stands today does not allow the Tribunal to conclude that the structure of the Claimant's investment was chosen so as to obtain treaty protection. While certain elements may raise questions, [redacted], the Claimant has advanced factual allegations that are at least partially

47 See, e.g., **RLA-13**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paras. 550-554 and the jurisprudence cited; **RLA-19**, *Cascade Investments NV v. Republic of Türkiye*, ICSID Case No. ARB/18/4, Award (Redacted), 20 September 2021, para. 347.

48 See, e.g., *Mobil and others v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 177; **RLA-12**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 193; cited in **RLA-19**, *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award (Redacted), 20 September 2021, para. 357.

49 **RLA-20**, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 4.6.15-4.6.18.

50 **RLA-20**, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 7.3.1-7.3.7.

substantiated, and rule out a finding that the claims are manifestly without foundation or frivolous.

45. In conclusion, the second preliminary objection does not warrant a summary dismissal of the claim.

VIII. THIRD OBJECTION: NO BIT PROTECTION AGAINST IMPAIRMENT

1. The Parties' positions

46. The third and last preliminary objection targets the claim that Türkiye impaired Encore's investment by arbitrary and discriminatory means.[51]

(a) The Respondent's position

47. According to the Respondent, that claim must be dismissed, because there is no protection in the BIT that safeguards an investor's investments from impairment through arbitrary or discriminatory measures. Türkiye contends that the BIT does not provide such a protection standard, stressing that the Claimant failed to cite any provision of the treaty to this effect. It adds that Encore seeks to reframe the definition of an unlawful expropriation found in Article III of the BIT as an additional protection against arbitrary or discriminatory treatment, whereas Article III is a standard provision defining the conditions for a lawful expropriation, not a protection against impairment by unreasonable or discriminatory means.[52]

(b) The Claimant's position

48. In its Rule 41 Response, the Claimant answers that its claims include: (i) "Claims for violation of Türkiye's obligation to ensure fair and equal treatment (FET) (based on the BIT's Preamble and indirectly on Article II(2) of the BIT)"; (ii) "Claims for violation of Türkiye's obligation to accord Most-Favoured-Nation (MFN) (based directly on Article II(2) of the BIT)"; and (iii) "Claims for expropriation (based directly on Article III(1) of the BIT)". It further argues that the prohibition of arbitrary and discriminatory measures falls within the FET standard.[53]

2. Analysis

49. The Tribunal notes that Article II(2) of the BIT provides that "[e]ach Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable".[54] It further notes that tribunals have considered that the prohibition of arbitrary and discriminatory measures falls within the

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51 RfA, paras. 104-123.

52 Application, paras. 71-76.

53 Response, paras. 89-95.

54 **CLA-1**, Türkiye-Malta BIT.

FET standard.[55] Finally, it also notes that the preamble of the BIT states that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources".[56]

50. On this basis, the Tribunal is of the view that there is at least an arguable case in support of the Claimant's position, which turns on the interpretation of the BIT and the application of international law. Consequently, it cannot be said that the Claimant's claim for impairment manifestly lacks a legal basis.

IX. COSTS

51. In its Rule 41 Response, the Claimant seeks an order directing Türkiye to pay all costs of the special procedure under Rule 41.[57] In support, it relies on Rule 52(2) of the ICSID Arbitration Rules, which provides that "[i]f 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".

52. Rule 52(2) applies to situations in which the tribunal issues a final award dismissing the entirety of the claims pursuant to Rule 41(3), as opposed to a decision denying a Rule 41 application. As set out in the ICSID Working Paper #5 of June 2021: "The text of AR 52(2) has been modified to include a presumption in favour of the prevailing party where the Tribunal renders an Award pursuant to Rule 41(3) and thus disposes of the whole case. In such circumstance, the Tribunal would award the prevailing party its reasonable costs unless there are special circumstances justifying a different allocation of costs. If the Tribunal issues a decision that dismisses the objection that a claim manifestly lacks legal merit or that upholds it only in part, the Tribunal could issue an interim decision on costs pursuant to AR 52(3). AR 52(1) would apply to such decision".[58]

53. In the circumstances, the Tribunal finds it more appropriate and expeditious to decide on costs at a later time in the proceeding rather than in an interim decision on costs.

X. DECISION

54. For the reasons set forth above, the Tribunal makes the following decision:

    a. The Respondent's Rule 41 Application of 27 June 2025 is rejected;

    b. The Tribunal reserves all other issues to a further order, decision or award, including costs.

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55 See, e.g., **CLA-32**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 290.

56 **CLA-1**, Türkiye-Malta BIT.

57 Response, paras. 132-138.

58 ICSID Working Paper #5, Vol. 1, 15 June 2021, Proposals for Amendment of the ICSID Rules, p. 305.

Date: 7 October 2025

[*signed*]

Ms. Juliet Blanch
Arbitrator

[*signed*]

Prof. George A. Bermann
Arbitrator

[*signed*]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal