

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**RTI Rotalin Gas Trading AG and Rotalin Gaz Trading S.R.L.**

**v.**

**Republic of Moldova**

**(ICSID Case No. ARB(AF)/22/4)**

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**PROCEDURAL ORDER NO. 2**

***Members of the Tribunal***

Prof. Maxi Scherer, President of the Tribunal

Ms. Inka Hanefeld, Arbitrator

Ms. Jean E. Kalicki, Arbitrator

***Secretary of the Tribunal***

Mr. Oladimeji Ojo

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11 October 2023

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## I. PROCEDURAL BACKGROUND

1. This Procedural Order No. 2 addresses the Respondent's Request for Bifurcation dated 19 July 2023 (the "**Request for Bifurcation**").
2. On 19 July 2023, the Respondent filed the Request for Bifurcation in accordance with Annex A to Procedural Order No. 1.
3. On 30 August 2023, the Claimants filed their Reply to the Request for Bifurcation (the "**Reply**") in accordance with Annex A to Procedural Order No. 1.
4. After summarizing the Parties' positions in Section II of this Procedural Order, the Tribunal provides the reasons for its decision in Section III. The Tribunal's decision is set out in Section IV.

## II. PARTIES' POSITIONS

### A. *Respondent's Position*

5. In the Request for Bifurcation, the Respondent asks the Tribunal to bifurcate the proceeding, suspend the proceeding on the merits and decide the Respondent's jurisdictional objections as a preliminary matter.<sup>1</sup>
6. The Respondent contends that the Tribunal is entitled to decide jurisdictional objections as a preliminary question and relies on Article 41(2) of the ICSID Convention and Rule 45(4) of the ICSID Additional Facility Arbitration Rules. The Respondent argues that these provisions confer a wide discretion on the Tribunal as to whether to bifurcate the proceeding.<sup>2</sup>
7. In exercising this discretion, the Respondent submits that it is undisputed that the guiding consideration "*should be procedural efficiency and fairness*".<sup>3</sup> The Respondent also relies

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<sup>1</sup> Request for Bifurcation, ¶ 95.

<sup>2</sup> Request for Bifurcation, ¶ 26.

<sup>3</sup> Request for Bifurcation, ¶ 26.

on *RWE AG RWE Eemshaven Holding II BV v. The Kingdom of the Netherlands*<sup>4</sup> in order to submit that bifurcation is standard practice in ICSID proceeding and a decision to bifurcate on the basis of a jurisdictional objection should take into account the following factors:<sup>5</sup>

- a. whether the objection is substantial or frivolous or a dilatory tactic;
  - b. whether jurisdiction and merits are so intertwined as to make bifurcation impractical; and
  - c. whether the objection, if successful, would materially reduce time and costs.
8. In this instance, the Respondent submits that bifurcation is appropriate because its objections meet these criteria: “(a) Moldova’s jurisdictional objections are substantial; (b) they are entirely distinct from the merits; and (c) if successful, the objections will materially reduce time and costs as it would eliminate the entirety of Claimants’ claims”.<sup>6</sup>
9. As a preliminary point, the Respondent argues that the Claimants’ Memorial on the Merits failed to include “*facts and the law arguing that this Tribunal has jurisdiction*” and that, on this basis alone, the Tribunal would have no jurisdiction.<sup>7</sup>
10. Furthermore, the Respondent’s objections are that neither Claimant is an investor within the meaning of Article 26 of the Energy Charter Treaty (“**ECT**”) and that, as a consequence, this Tribunal lacks jurisdiction *ratione personae* to decide on the Claimants’ claims (the “**Objection(s)**”). In particular, the Respondent submits that:<sup>8</sup>

*“1. RTI fails to qualify as an investor per ICSID Article 1(7)(a)(i) and applied in Articles 26 of the ECT, hence the Tribunal lacks jurisdiction rationae personae.*

*2. Rotalin Gaz fails to qualify as an investor per Article 26 (7) of the ECT, hence the Tribunal lacks jurisdiction rationae personae”.*

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<sup>4</sup> Request for Bifurcation, ¶ 27, citing *RWE AG RWE Eemshaven Holding II BV v. The Kingdom of the Netherlands, Claimants’ Application for Bifurcation and Expedition*, ICSID Case No. ARB/21/4, 28 January 2022, ¶ 21 (**Exhibit RL-001**).

<sup>5</sup> Request for Bifurcation, ¶ 27.

<sup>6</sup> Request for Bifurcation, ¶ 31.

<sup>7</sup> Request for Bifurcation, ¶¶ 12-13.

<sup>8</sup> Request for Bifurcation, ¶ 30.

11. **First**, regarding RTI Rotalin Gas Trading AG (“**RTI**”), the basis of the Respondent’s Objection is that RTI does not come within the definition of an investor in Article 1(7)(a)(ii) of the ECT, which defines an investor as a company organized in accordance with the laws applicable in a contracting party.<sup>9</sup>
12. The Respondent argues that RTI (i) is a holding company with no commercial activity in Liechtenstein; (ii) is not registered with the Liechtenstein Office for Economic Affairs; (iii) does not have a trading license; and (iv) has not appointed or declared a director with the Commercial Register.<sup>10</sup> The Respondent relies on a declaration by Mr. Arnold Hanes, dated 19 July 2023, an attorney in Liechtenstein who states that, by reason of the above, RTI is not an ‘active company’ according to the laws applicable in Liechtenstein and contravenes the laws of Liechtenstein.<sup>11</sup>
13. The Respondent further states that although an investor is required to have a direct or indirect investment, RTI had no ability to conduct any activity and was consequently unable to invest directly.<sup>12</sup>
14. Relying on these assertions, the Respondent then argues that RTI could not have had any substantial business activities in Liechtenstein, by reason of which Article 17(1) of the ECT is applicable. Article 17(1) of the ECT provides as follows:

*“Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised.”*

15. **Second**, regarding Rotalin Gaz Trading S.R.L. (“**Rotalin**”), the Respondent challenges the Claimants’ assertion that Rotalin is controlled by RTI.<sup>13</sup> Relying on an excerpt from the

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<sup>9</sup> The Tribunal notes that the Respondent actually refers to Article 1(7)(a)(i) of the ECT throughout its submission and refers to the definition set out in this provision. However, it appears to rely, in fact, on the requirements of Article 1(7)(a)(ii) of the ECT.

<sup>10</sup> Request for Bifurcation, ¶¶ 44, 49, 51, 53.

<sup>11</sup> Declaration of Mr. Arnold Hanes, ¶ 19 (**Exhibit R-001**).

<sup>12</sup> Request for Bifurcation, ¶¶ 59-61.

<sup>13</sup> Request for Bifurcation, ¶ 68, referring to Request for Arbitration, ¶¶ 84-86.

website ‘Open Money’, the Respondent asserts that after the Request for Arbitration was submitted, in July 2022, the beneficial owner of Rotalin became a certain [REDACTED], a citizen of the United States of America.<sup>14</sup>

16. On the bases that RTI is not a company capable of commercial activity in Liechtenstein, and that the United States of America is not a contracting party to the ECT, the Respondent argues that Rotalin is not an investor within the meaning of Article 26(7) of the ECT. Article 26(7) of the ECT provides as follows:

*“An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State”.*

17. The Respondent submits that objections to jurisdiction *ratione personae* are considered a matter of jurisdiction rather than merit. It also submits that the determination of its Objections as to jurisdiction *ratione personae* does not require this Tribunal to analyze any of the factual evidence in relation to the alleged breaches.<sup>15</sup>
18. Finally, regarding its Objections more generally, the Respondent submits that if the Tribunal were to uphold the Objections, they would eliminate the entirety of the Claimants’ case and in that instance, there would be no prejudice to the Claimants from having bifurcated proceeding to resolve the Objections on a preliminary basis. The Respondent thus argues that bifurcation would materially reduce both time and costs for the Parties and the Tribunal and is the fair, efficient and economical way to proceed in this matter.<sup>16</sup>

*B. Claimants’ Position*

19. The Claimants request the Tribunal to:

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<sup>14</sup> Request for Bifurcation, ¶¶ 67-80, citing Excerpt for Rotalin from Open Money (**Exhibit R-003**).

<sup>15</sup> Request for Bifurcation, ¶¶ 85-86.

<sup>16</sup> Request for Bifurcation, ¶¶ 87-94.

- a. Reject the Respondent’s Request for Bifurcation; and
  - b. Order the Respondent to pay the costs and expenses incurred in relation to the Request for Bifurcation including “fees and costs of its legal counsel, experts and consultants and those of Claimants’ employees” and interest on the relevant costs from the date on which those costs are incurred until the date of the payment.<sup>17</sup>
20. The Claimants do not dispute the Tribunal’s competence and authority to order bifurcation or disagree with the requirements for bifurcation as articulated by the Respondent.<sup>18</sup> However, the Claimants do state that there is no presumption in favor of bifurcation under the ICSID Rules or the ICSID Additional Facility Rules<sup>19</sup> and that the Request for Bifurcation fails to meet the requirements for bifurcation.
21. As a preliminary matter, the Claimants contend that the submissions contained in the Request for Arbitration dated 28 June 2022 are sufficient to ground jurisdiction in this case and that there is no requirement for the Memorial on the Merits to contain submissions on jurisdiction. In any event, according to the Claimants, the presence or absence of submissions on jurisdiction would not be a basis to justify a rejection of the Claimants’ claim, and so is irrelevant for the purpose of a decision on the Respondent’s Request for Bifurcation.<sup>20</sup>
22. Turning to the requirements for bifurcation, the Claimants argue primarily that the Respondent has not met the first requirement, *i.e.*, the Respondent’s Objections to the Tribunal’s jurisdiction are not substantial. The Claimants do not argue that these Objections, if found to be substantial, are so intertwined with the merits as to make bifurcation impractical, or if successful, would not materially reduce the time and costs of the proceeding.
23. The Claimants argue that the Respondent has failed to provide legal authority to support its Objections and submit that this failure indicates a lack of merit and should be sufficient

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<sup>17</sup> Reply to Request for Bifurcation, ¶ 54.

<sup>18</sup> Reply to Request for Bifurcation, ¶ 1.

<sup>19</sup> Reply to Request for Bifurcation, ¶ 1.

<sup>20</sup> Reply to Request for Bifurcation, ¶¶ 7-12.

for the Tribunal to dismiss the Request for Bifurcation. The Claimants submit that a decision to bifurcate the proceeding on the basis of an objection which is lacking in merit would only serve to delay the proceeding and add unnecessary time and costs.<sup>21</sup>

24. Turning to each of the Objections, the Claimants argue as follows.
25. **First**, regarding the Respondent's Objections in relation to RTI, the Claimants submit that the only requirement introduced by Article 1(7)(a)(ii) of the ECT is that the company in question is organized according to the law applicable in a contracting party.<sup>22</sup> In this instance, the Claimants submit that RTI is incorporated in the Liechtenstein Commercial Register as a shareholding company and functions as a holding company, in accordance with the laws of Liechtenstein.<sup>23</sup>
26. Therefore, according to the Claimants, it is irrelevant for the purposes of a determination of jurisdiction *ratione personae* whether RTI held a commercial license and whether the business activities to which the Respondent refers were those of Rotalin (not RTI) and were conducted in Moldova. The Claimants allege that there is no requirement that the investor organized according to the laws of a contracting party must directly engage in business in the host state, rather than through a subsidiary, as is the case here.<sup>24</sup>
27. The Claimants further argue that the Respondent's reliance on Article 17(1) of the ECT, the denial of benefits clause, in relation to RTI is misplaced. The Claimants submit that reliance on the denial of benefits clause is not a matter which pertains to the Tribunal's jurisdiction. The Claimants rely on *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.ár.l. v. Kingdom of Spain*<sup>25</sup> in support of the proposition that Article 17(1) concerns the protective standards of the ECT and not the Tribunal's jurisdiction.<sup>26</sup>

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<sup>21</sup> Reply to Request for Bifurcation, ¶¶ 3-6.

<sup>22</sup> Reply to Request for Bifurcation, ¶¶ 16-18.

<sup>23</sup> Reply to Request for Bifurcation, ¶ 18.

<sup>24</sup> Reply to Request for Bifurcation, ¶¶ 16-23.

<sup>25</sup> *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.ár.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3, 28 August 2020, ¶ 90 (**Exhibit CL-125**).

<sup>26</sup> Reply to Request for Bifurcation, ¶ 27.



28. The Claimants also argue that the Respondent has not exercised its right to deny any benefits to RTI pursuant to Article 17(1) and is no longer entitled to do so.<sup>27</sup> The Claimants rely on the decision in *Anatolie Stati and others v. Republic of Kazakhstan*,<sup>28</sup> among others, and argue that Article 17(1) will only apply if the Respondent invoked that provision before the dispute arose. In this instance, the Claimants state that the Respondent has not notified them of its right to deny their benefits under the ECT, and even after the Claimants notified them of the dispute, the Respondent proceeded to mediation under the Energy Community Secretariat’s Dispute Resolution and Negotiation Centre.<sup>29</sup> In the context of the mediation, the Claimants reserved the right to “*continue the arbitration process under the Energy Charter Treaty if a settlement agreement is not reached by 21 March 2022.*”<sup>30</sup>
29. Further, the Claimants submit that Article 17(1) does not apply to RTI, because the definition of what constitutes substantial business must depend on the nature of the company, and that a small number of activities may be sufficient to meet the threshold for ‘substantial business activity.’<sup>31</sup> The Claimants also rely on the decision in *Pac Rim Cayman LLC. v. Republic of El Salvador*,<sup>32</sup> in which the Tribunal found that a holding company could be engaged in substantial business activities if it has a board of directors, board minutes, a continuous physical presence and a bank account.<sup>33</sup>
30. The Claimants submit that RTI is engaged in substantial business activities as follows:

*“RTI has substantial business activities as a holding company in Liechtenstein. As demonstrated already by Respondent’s Exhibit R-001, RTI has a board of directors, which meets regularly. RTI also has a bank account with a Liechtenstein bank, pays taxes in Liechtenstein and maintains a continuous physical presence in the form of a physical address. RTI’s long-time head of the management board, [REDACTED], is a Liechtenstein citizen, who resides and works in Liechtenstein. [REDACTED] was the key person establishing RTI’s investment in Moldova and remains actively involved. In March 2008, the District of Hincesti awarded [REDACTED] the*

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<sup>27</sup> Reply to Request for Bifurcation, ¶ 29.

<sup>28</sup> *Anatolie Stati and others v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, ¶ 716 (**Exhibit CL-131**).

<sup>29</sup> Reply to Request for Bifurcation, ¶ 35.

<sup>30</sup> Reply to Request for Bifurcation, ¶ 35.

<sup>31</sup> Reply to Request for Bifurcation, ¶ 38.

<sup>32</sup> *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, ¶ 4.72 (**Exhibit CL-135**).

<sup>33</sup> Reply to Request for Bifurcation, ¶ 40.

*title 'Entrepreneur of the Year.' It was also ██████████ who met and communicated with Moldovan officials. Thus, RTI has substantial business activities in Liechtenstein pursuant to the predominant interpretation of Clause 17(1) ECT.”<sup>34</sup>*

31. The Claimants also argue that RTI is not effectively controlled by a national of a third state, and that the Respondent does not even allege that this could be the case.<sup>35</sup>
32. **Second**, regarding Rotalin, and the Respondent’s Objection that Rotalin is under the ultimate control and beneficial ownership of a national of a third state, the Claimants argue that the Objection is predicated on the wrong law. The Claimants submit that it is the laws of Liechtenstein, not Moldova, which determine the beneficial ownership of Rotalin. The Claimants argue that under Liechtenstein law, RTI is a Liechtenstein company and, since it controls Rotalin as the sole shareholder, Rotalin is considered a foreign national under Articles 26(7) of the ECT and 1(6) of the ICSID Additional Facility Rules.<sup>36</sup>
33. The Claimants also argue that, in any event, ██████████, who is the current head of the management board of RTI, is a dual national of the United Kingdom and United States of America, and that his UK nationality would grant Rotalin the same standing as the United Kingdom is also a contracting party to the ECT.<sup>37</sup>

### **III. TRIBUNAL’S ANALYSIS**

34. Having carefully considered the Parties’ respective submissions, the Tribunal addresses in turn: (A) the Tribunal’s power to order bifurcation and the standard it should apply; and (B) the application of the relevant standard in the present case.

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<sup>34</sup> Reply to Request for Bifurcation, ¶ 41.

<sup>35</sup> Reply to Request for Bifurcation, ¶¶ 42-45.

<sup>36</sup> Reply to Request for Bifurcation, ¶ 51.

<sup>37</sup> Reply to Request for Bifurcation, ¶¶ 47-53.

A. *Tribunal's Power to Order Bifurcation and Relevant Standard*

35. **First**, the Tribunal notes that both Parties to the dispute agree that this Tribunal holds the power to order bifurcation under Rule 45(4) of the ICSID Additional Facility Arbitration Rules.<sup>38</sup>
36. Rule 45(4) of the ICSID Additional Facility Arbitration Rules provides as follows:
- “(4) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection”.*
37. This power to bifurcate a proceeding and hear preliminary objections to jurisdiction in an initial phase has been accepted and applied by other ICSID tribunals.<sup>39</sup> The Tribunal is satisfied that it has the power to order bifurcation of some or all of the Objections under Rule 45(4).
38. **Second**, as regards the appropriate standard to be applied in order to determine whether bifurcation is warranted, the Additional Facility Arbitration Rules do not provide any guidance as to which test a tribunal should apply in assessing whether or not to order bifurcation. Nevertheless, this is a matter on which prior ICSID tribunals have achieved some level of consensus<sup>40</sup> and on which the Parties have not expressed any disagreement.<sup>41</sup>
39. In light of the above, the Tribunal will assess whether the Respondent's Objections (i) are *prima facie* serious and substantial; (ii) can be examined without prejudging, or delving into, the merits; and (iii) if upheld, would dispose of all or a significant portion of the Claimants' claims.

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<sup>38</sup> Request for Bifurcation, ¶ 26; Reply to Request for Bifurcation, ¶ 1.

<sup>39</sup> See e.g., *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 37 (**Exhibit RL-004**).

<sup>40</sup> See e.g., *RWE AG RWE Eemshaven Holding II BV v. The Kingdom of the Netherlands, Claimants' Application for Bifurcation and Expedition*, ICSID Case No. ARB/21/4, 28 January 2022, ¶ 44 (**Exhibit RL-001**); *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19, Procedural Order No. 3 Decision on the Respondent Request for Bifurcation, 17 December 2018, (“*Hela v. China*”) ¶ 74 (**Exhibit CL-116**).

<sup>41</sup> Request for Bifurcation, ¶ 27; Reply to Request for Bifurcation, ¶ 1.

40. These criteria are to be considered through the lens of whether bifurcation would enhance procedural efficiency and fairness.<sup>42</sup>

*B. Application of the Relevant Standard*

41. As noted above, the first criterion to consider in determining whether bifurcation is warranted is whether the Objections are *prima facie* serious.<sup>43</sup> The rationale behind this criterion is to ensure that bifurcation is not ordered to consider objections that have no reasonable chance of success or are otherwise frivolous, vexatious or clearly without merit; bifurcation in such circumstances would almost certainly result in a loss rather than a gain of procedural efficiency.

42. Importantly, the inquiry as to the seriousness of the Objections is on a *prima facie* basis. At this stage of the proceeding, the Tribunal is not in a position to determine the ultimate seriousness of the Objections, and nothing in this decision shall be read to constitute or imply such a determination.

43. In the present case, the Tribunal finds that the Objections as thus far articulated do not meet this first criterion. In its Request for Bifurcation, the Respondent has failed to particularize its Objections in a manner that would allow the Tribunal to find, on a *prima facie basis*, that these Objections are serious. In particular, the Respondent has failed to articulate:

a. regarding RTI, on what basis the Tribunal should take into account the additional factors referred to by the Respondent (*i.e.*, the fact that RTI is said to (i) be a holding company with no commercial activity in Liechtenstein; (ii) not be registered with the Liechtenstein Office for Economic Affairs; (iii) have no trading license; and (iv) have failed to appoint or declare a director with the Commercial Register) in assessing whether RTI falls under the definition of an investor in Article 1(7)(a)(ii) of the ECT;

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<sup>42</sup> Request for Bifurcation, ¶ 23; Reply to Request for Bifurcation, ¶ 1. *See also, Hela v. China*, ¶ 74 (“The Tribunal agrees that it should have regard to all relevant circumstances and be guided in its assessment by considerations of economy, efficiency and fairness”).

<sup>43</sup> *See above*, at ¶ 39.

b. also regarding RTI, what are the requirements for the denial of benefit clause in Article 17(1) of the ECT, and whether they are met in the case at hand; and

c. regarding Rotalin, on what basis it would fail to qualify as investor under Article 26(7) of the ECT taking into account any (alleged) control by [REDACTED]  
[REDACTED]

44. The Tribunal stresses that the above finding does not preclude the Respondent from further developing any jurisdictional objections it may have in its upcoming Counter-Memorial on the Merits and Memorial on Preliminary Objections.
45. Given that the Tribunal finds that the Objections do not meet this first criterion, the Tribunal does not find it necessary to address the other requirements for bifurcation set out above.<sup>44</sup>
46. In light of the above, the Tribunal is not satisfied that the bifurcation requested by the Respondent is likely to result in greater procedural efficiency or enhanced fairness. As such, it concludes that bifurcation is not warranted in the present case.
47. Finally, given the *prima facie* nature of the findings above, and considering the overall circumstances, the Tribunal finds that a decision on costs relating to the Request for Bifurcation is to be reserved.

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<sup>44</sup> See above, at ¶ 39.

*C. Decision*

48. In light of the above, the Tribunal decides as follows:
- a. The Respondent's Request for Bifurcation is dismissed; and
  - b. The Tribunal reserves its decision on costs relating to the Request for Bifurcation.

For and on behalf of the Tribunal,

Signed

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Prof. Maxi Scherer  
President of the Tribunal  
Date: 11 October 2023