(1) GRUPO UNIDOS POR EL CANAL, S.A., (2) SACYR, S.A., (3) WEBUILD, S.P.A. (FORMERLY SALINI-IMPREGILO S.P.A.), (4) JAN DE NUL, N.V. V. AUTORIDAD DEL CANAL DE PANAMÁ (II)

PROCEDURAL ORDER NO. 4

03 October 2017

Tribunal:
Robert Gaitskell (Appointed by the respondent)
Claus von Wobeser (Appointed by the claimant)
Pierre-Yves Gunter (President)
II. Procedural History

1. By letter dated 19 July 2017, the Claimants submitted an “application to add a tranche covering additional aspects of claims currently in this arbitration.” More specifically, the Claimants requested that the “concrete disruption” element of Contractor’s Claim 78, which is separately the subject of ICC Arbitration Case No. 22466/ASM/JPA, be added to the present arbitration. The Claimants also requested that a Case Management Conference (hereinafter “CMC”) be held for the purpose of incorporating the “concrete disruption” element of Claim 78 into the Procedural Timetable as well as to “allow the Tribunal and the Parties to consider whether it would be efficient to include further claims that are closely related to the issues currently before the Tribunal in this Arbitration.”

2. On the same day, the Arbitral Tribunal granted the Respondent until 24 July 2017 to respond to the Claimants’ letter of 19 July 2017.

3. On 20 July 2017, the Respondent requested that the time limit for its response be extended to 28 July 2017 at the earliest, in light of the Claimants’ “voluminous and extensive” request. By separate email of the same day, the Claimants indicated that they did not object to the Respondent’s request for an extension of the time limit.

4. On the same day, the Arbitral Tribunal granted the Respondent’s requested extension of the time limit to respond. The President of the Arbitral Tribunal also indicated his availabilities for a potential CMC and stated that, without prejudice to the Respondent’s position and the Arbitral Tribunal’s ultimate decision on the Claimants’ requested CMC, that such CMC would likely have to be held by telephone.

5. On 28 July 2017, the Respondent submitted its response to the Claimants’ letter of 19 July 2017. The Respondent objected to the Claimants’ request to “introduce an additional tranche into this arbitration” and took the position that a CMC was not necessary, but indicated that if the Arbitral Tribunal considered a CMC necessary the Respondent would be available for a CMC by telephone on 13-14 September 2017.

6. By email dated 1 August 2017, the Claimants indicated that they considered that the Respondent’s letter of 28 July 2017 contained “numerous errors, misrepresentations and unsupported allegations” and that they therefore wished to have an opportunity to respond in full to said letter. The Claimants also confirmed their availability for a CMC on the dates proposed by the
Respondent (13-14 September 2017).

7. Also on 1 August 2017, the Arbitral Tribunal invited the Parties to clarify by 2 August 2017 whether, in the event a CMC would be organized, such CMC would be held by phone or in person.

8. Later on the same date, the Respondent wrote to the Arbitral Tribunal and indicated that the Claimants had taken measures that the Respondent only became aware of after having finalized its letter of 28 July 2017, namely that the Claimants had submitted a new request for arbitration on 19 July 2017 (ICC Case. No. 22967/JPA) that included the same matters that the Claimants were requesting to have added to the present arbitration. The Respondent stated that the Claimants' actions "further highlight the fact that the consideration of these issues will necessitate a close scrutiny of [the Claimants'] procedural failings, which will inevitably impact and disrupt the timetable of this arbitration."

9. By email of the same date, the Arbitral Tribunal granted the Claimants a time limit until 4 August 2017 to take position on the Respondent's 1 August 2017 letter.

10. On 2 August 2017, the Claimants indicated that they considered an in-person CMC would be the most efficient option and proposed that such meeting take place in London.

11. On the same day, the Respondent indicated that its primary position was that a CMC was unnecessary, but that in the event the Arbitral Tribunal considered that further discussions were needed, then a CMC by telephone would be preferable, especially considering the difficulty that the Respondent's representatives in Panama would face in travelling to attend a CMC in person.

12. On 3 August 2017, the Arbitral Tribunal informed the Parties that a CMC by telephone would be held on 15 September 2017 at 10:00 (EST)/16:00 (CET). The Arbitral Tribunal invited the Parties, in the event they considered it necessary to make any additional filings and/or to file written presentations, to make proposals by 4 August 2017 regarding the sequence and timing of such submissions. The Arbitral Tribunal instructed the Parties to, in the meantime, refrain from making any further submissions, and requested that the Parties submit by 8 September 2017 their (i) lists of attendees and (ii) proposals for the structure and agenda of the CMC.

13. By email of the same day, the Claimants informed the Arbitral Tribunal that the Parties were still in discussions regarding a joint proposal for further briefing steps and requested that the Parties have until 11 August 2017 to provide their joint, if possible, proposal to the Tribunal. The Arbitral Tribunal granted the Parties' requested extension.

14. On 11 August 2017, the Claimants informed the Arbitral Tribunal that the Parties had agreed to
have two rounds of further written submissions on the Claimant's application and that such submissions could be accompanied by new factual exhibits but no new witness statements or expert reports. The Parties also agreed that slides could be used in support of their oral arguments during the CMC and that such slides would be limited to the content already in the written submissions, would not exceed 25 slides, and would be exchanged on 15 September 2017 at least four hours prior to the CMC.

15. On **16 August 2017**, the Claimants submitted the "Claimants' Application to Add a Tranche to the Arbitration" (hereinafter "Application"). Their position as set out therein is summarized in Section II, below.

16. On **1 September 2017**, the Respondent submitted the "ACP's Response to GUPC's Application to Add New Claims to the Arbitration" (hereinafter "Response"). The Respondent's position as set out therein is summarized in Section II, below.

17. On **7 September 2017**, the Claimants submitted the "Claimants' Rejoinder in Respect of their Application to Add a Tranche to the Arbitration" (hereinafter "Claimants' Rejoinder"). Their position as set out therein is summarized in Section II, below.

18. On **12 September 2017**, the Respondent submitted the "ACP's Sur-Rejoinder to GUPC's Application to Add New Claims to the Arbitration" (hereinafter "Respondent's Sur-Rejoinder"). The Respondent's position as set out therein is summarized in Section II, below.

19. On **15 September 2017**, a CMC was held via telephone conference. Prior to the CMC, PowerPoint presentations were provided to the Arbitral Tribunal by the Claimants and the Respondent, respectively. At the CMC, Mr Phillip Capper presented oral arguments on behalf of the Claimants and Mr Manus McMullan presented oral arguments on behalf of the Respondent. Oral arguments were followed by questions from the Arbitral Tribunal.

20. A transcript of the CMC was circulated shortly after the close of the conference on 15 September 2017.

21. On **22 September 2017**, an amended version of the CMC transcript was provided to the Arbitral Tribunal. References to the transcript made herein are references to the amended version.

### III. Summary of the Parties' Positions

22.
In this section, the Arbitral Tribunal shall briefly summarize the Parties’ positions as set out in their written submissions and oral arguments concerning the Claimants’ Application. This section is not intended as a full reiteration of each and every argument put forth by the Parties. The Arbitral Tribunal has nevertheless considered all of the Parties’ arguments contained both in their correspondence, written submissions, and oral arguments in making its determination.

A. Claimants’ Position

23. In their letter dated 19 July 2017, the Claimants put forth a request to "introduce an additional tranche in this arbitration (while keeping the existing Procedural Timetable for the matters currently in this arbitration) covering further impacts of claims already before this Tribunal."

24. In particular, the Claimants seek to have the "concrete disruption" element of Claim 78 added to this arbitration.²

25. In their Application, the Claimants state that the claim submitted to the Employer as Volume III of Claim 78 (hereinafter the "Concrete Disruption Claim") relates primarily to the additional impacts of the claims that are currently at issue in the present arbitration, namely: the Employer’s rejection of the concrete mix design for Structural Marine Concrete, problems with the production of concrete aggregates, and problems of faulting and over-excavation in the basalt reach of the Pacific Locks Excavation.³

26. The Claimants further state that, in order to limit the issues in dispute, the scope of the "additional tranche" (or "Tranche 2") to be added into the present arbitration could be limited to those impacts that occurred up to the end of September 2013.⁴ This would include the costs incurred by the Claimants in accelerating the works, the additional equipment and work that was required to comply with ACP’s instructions, the further delays caused in the completion of the works, the problems encountered with the unforeseeable faults in the Pacific Locks Upper Chamber, and the problems with the basalt from the Pacific Locks Excavation.⁵

27. The Claimants contend that these impacts, amongst others, caused significant disruption to the concrete works, which resulted in further delays.⁶ The Claimants also contend that the full impact of the claims currently in dispute in this arbitration cannot be determined without due consideration of these elements, which - had the Parties not agreed to exclude them from.

² Claimants’ letter to the Arbitral Tribunal dated 19 July 2017, pp. 3-5.
³ Claimants’ Application, paras 1-3.
⁴ Claimants’ Application, para. 4.
⁵ Claimants’ Application, para. 6.
⁶ Claimants’ Application, para. 6.
Referral 11 - would already be part of the present arbitration.\(^7\)

28.

The Claimants state that there are also other elements that impacted the concrete works and that the disruption to the concrete works continued beyond the period up to the end of September 2013, but that the Claimants are not currently seeking to include these elements in the "additional tranche" that they wish to add to the arbitration. The Claimants nevertheless reserve the right to "make an appropriate application to the Tribunal in due course to introduce a ‘Tranche 3’" that would relate to the period from October 2013 onward.\(^8\)

29.

The Claimants submit that the inclusion of "Tranche 2" in the present arbitration would not impact the current procedural timetable since "Tranche 2" would require its own briefing schedule. The Claimants propose an overlapping briefing schedule for "Tranche 2" that they contend would be the most efficient course of action and would not overly burden the Parties or prejudice the Respondent.\(^9\)

30.

The Claimants submit that, contrary to the allegations made by the Respondent in its letter dated 28 July 2017, the Claimants have consistently attempted to reach an agreement with the Respondent as to the most sensible procedure for dealing with the Parties’ numerous disputes related to the Project.\(^10\) The Claimants also contest the Respondent’s allegation that it would have been the Claimants that decided unilaterally to not include the concrete disruption elements in Referral 11. The Claimants contend that this was the result of an agreement between the Parties and that this is clear from the transcripts of the DAB hearing on Referral 11.\(^11\)

31.

According to the Claimants, it was following this agreement between the Parties not to include the concrete disruption elements in Referral 11 that the Claimants developed an overall disruption claim, which became Claim 78. Claim 78 was submitted to the Employer’s Representative in July 2015 and rejected by the Employer’s Representative on 31 March 2016.\(^12\) While the Claimants agree with the Respondent that the reasons for the exclusion of the concrete disruption elements from Referral 11 are of "limited (if any) relevance to the question of whether Tranche 2 should be admitted to this Arbitration", they nevertheless contest the Respondent’s version of the facts and maintain that there was an agreement between counsel in July 2013 regarding the exclusion of the concrete disruption elements from Referral 11.\(^13\)

32.

The Claimants further contend that in subsequent discussions between counsel (not all of which were conducted on a without prejudice basis), the Respondent made "vague and unsubstantiated..."
observations" regarding possible limitation defenses that the Respondent would not waive. It was thus in order to protect their rights in respect to any time bar or statute of limitations defenses that the Claimants initiated ICC Arbitration Cases Nos. 22465 and 22466 in December 2016.\textsuperscript{14}

33. The Claimants state that the Respondent in fact raised jurisdictional and admissibility objections in response to those arbitrations filed in December 2016, alleging that the Claimants had not properly gone through the DAB process. The Claimants contend that this was a delay tactic on the part of the Respondent and that in order to protect against further "unnecessary procedural debates", the Claimants referred all of their outstanding claims to the DAB in February 2017 through Referral 16.\textsuperscript{15} Once the 84-day period mandated by Sub-Clause 20.4 of the Contract for a decision by the DAB on Referral 16 had expired, the Claimants issued a Notice of Dissatisfaction pursuant to Sub-Clause 20.4, fifth paragraph.\textsuperscript{16} The Claimants contend that they have since attempted to reach an amicable resolution with the Respondent but that the Respondent rejected their offers to meet and discuss Referral 16 and have instead indicated that it considers that Referral 16 was "withdrawn" (which the Claimants deny).\textsuperscript{17} Since the 56-day period for amicable discussions, provided for in Sub-Clause 20.5 of the Contract, expired on 18 July 2017, the Claimants submit that the disputes underlying Referral 16 are now arbitrable.\textsuperscript{18} The Claimants state that they initiated new arbitrations on 19 July 2017 (ICC Arbitration Cases Nos. 22966 and 22967) in case the Respondent takes the position that the previous arbitrations commenced in December 2016 were not cured by the subsequent DAB Referral and in order to protect themselves in light of the "rigid procedural positions" taken by the Respondent.\textsuperscript{19}

34. As to the admissibility of their request, the Claimants contend that their Application is properly made under the ICC Rules and that "Tranche 2" can be added to this arbitration through the exercise of the Arbitral Tribunal’s case management powers. Indeed, the Claimants argue that "Tranche 2" only concerns the "additional impacts" of the claims already at issue in this arbitration and as such does not constitute a new claim. Therefore, the Claimants contend that "Tranche 2" can be added to the arbitration in accordance with the power granted to the Arbitral Tribunal under Article 24(3) of the ICC Rules to "adopt further procedural measures or modify the procedural timetable."\textsuperscript{20} The Claimants state that it would be inefficient for a different arbitral tribunal to hear the dispute concerning the additional impacts and that since there has been no agreement from the Respondent to appoint the Chairman of this arbitration to the same position in ICC Case No. 22466, the Claimant makes the current Application in order to seek a common sense solution.\textsuperscript{21}

35. The Claimants argue that since "Tranche 2" would only include the impacts of the current claims before this Arbitral Tribunal on the concrete works up until the end of September 2013, "

\textsuperscript{14} Claimants’ Application, paras 24-25.
\textsuperscript{15} Claimants’ Application, paras 26-27.
\textsuperscript{16} Claimants’ Application, paras 27-28.
\textsuperscript{17} Claimants’ Application, para. 29.
\textsuperscript{18} Claimants’ Application, para. 30.
\textsuperscript{19} Claimants’ Application, paras 31-32.
\textsuperscript{20} Claimants’ Application, paras 33-34.
\textsuperscript{21} Claimants’ Application, paras 35-36.
"Tranche 2" does not involve any new claims. Accordingly, the Claimants contest that Article 23(4) of the ICC Rules would apply to their request, although they contend that the requirements for Article 23(4) are in any case met.22

36. Indeed, the Claimants contend that for the admission of new claims under Article 23(4) of the ICC Rules, the Arbitral Tribunal must balance the disruption that could be caused by admitting new claims against the inefficiency of having those claims heard by a different tribunal. In the present case, the Claimants contend that the addition of "Tranche 2" would not disrupt the Procedural Timetable, would save time and costs, and would cause no prejudice to the Respondent who will have a full opportunity to present its case. In light of the inefficiency and potential for inconsistent decisions that would result from "Tranche 2" being heard in a separate arbitration, the Claimants submit that the balance weighs in favor of having "Tranche 2" heard by this Arbitral Tribunal.23

37. The Claimants further state that they are not seeking to consolidate arbitrations and that they will withdraw any overlapping claims from ICC Cases Nos. 22466 and 22967 promptly upon the admission of "Tranche 2" into this arbitration.24 The Claimants further state that, contrary to the Respondent’s allegations, the findings of the tribunal in ICC Case No. 19962/ASM/JPA (the "Cofferdam Arbitration") are not relevant to the Concrete Disruption Claim or to the current Application.25

38. As to the Respondent’s remarks on the lack of justification for the Claimants making their request at this stage, the Claimants contend that until June 2017, it seemed that the Parties were working toward an overall procedural agreement on how to deal with their many ongoing disputes, but that it now appears that these discussions have failed.26 The Claimants state that, in light of the Respondent’s failure to respond to the co-arbitrators’ proposal of Mr Pierre-Yves Gunter as President in ICC Case No. 22466, they were forced to make this Application in order to have the additional impacts of the claims considered by the same Tribunal.27

39. The Claimants contest the Respondent’s position that "procedural chaos" would result from the addition of "Tranche 2" to this arbitration and submit that the Respondent will in fact suffer no prejudice since the Arbitral Tribunal can proceed on "Tranche 1" (i.e. the claims already being heard by this Arbitral Tribunal) and even issue a partial award on "Tranche 1" as soon if not sooner than was previously planned.28 The Claimants argue that this would permit the Parties to tailor their submissions on "Tranche 2" and narrow the issues in dispute in light of the Tribunal’s findings on "Tranche 1", resulting in better efficiency.29 Furthermore, the Claimants do not accept

22 Claimants’ Rejoinder, para. 3 and fn. 3.
23 Claimants’ Application, paras 37-46.
24 Claimants’ Application, paras. 47-49.
25 Claimants’ Application, paras. 50-51.
26 Claimants’ Rejoinder, para. 6.
27 Claimants’ Rejoinder, paras 7-8.
28 Claimants’ Rejoinder, paras 9-11.

Voir le document sur jusmundi.com
that the Respondent would be unable to handle the workload of the proposed procedural timetable for "Tranche 2", considering the fact that the Respondent is represented by two of the largest law firms in the world, as well as the fact that there are already multiple overlapping procedures relating to the Parties' various disputes.\(^{30}\)

40.

The Claimants contend that further inefficiencies will result if "Tranche 2" is not added to this arbitration, for example disputes over the appointment of a presiding arbitrator in ICC Case No. 22466, discussions over procedural timelines for the separate arbitration, and even possibly the full briefing of the arbitral tribunal in the separate arbitration on the issues already briefed in this arbitration since the "Tranche 2" issues relate to the impact of the breaches underlying the "Tranche 1" aims.\(^{31}\)

41.

Finally, the Claimants submit that, contrary to the Respondent's claims, there will be no difficulty in splitting "Tranche 2" from the rest of the Concrete Disruption Claim since this represents the majority of the Concrete Dispute Claim\(^{22}\) and since September 2013 represents the "point in time when ACP's failure to fund the Project properly began to supplant the lack of sand (caused by the issues with the Pacific Site basalt) as the key issue driving delay of the Project".\(^{33}\) The Claimants also indicate however that they would be willing to include the other remaining impacts (post-September 2013) into this arbitration as well, and that the Respondent is in any case free to raise any defenses that it wishes relating to pre-September 2013 cash-flow problems.\(^{34}\)

B. Respondent's Position

42.

In its Response to the Claimants' Application, the Respondent submits that the Application is improperly made and is not in accordance with the ICC Rules; and is solely motivated by the Claimants' desire to interfere with and delay the Respondent's claims in this arbitration, and accordingly should be rejected.\(^{35}\)

43.

The Respondent contends that in deciding upon the Claimants' Application, the Arbitral Tribunal is bound by the ICC Rules and should find guidance as well in the Terms of Reference.\(^{36}\) While the Claimants argue that the Arbitral Tribunal may grant their Application on the basis of its powers under Article 24(3) of the ICC Rules, the Respondent submits that this position is incorrect.\(^{37}\) To the contrary, the Respondent submits that after the signing of the Terms of Reference, the only

\(^{29}\) Claimants' Rejoinder, paras 11-12.
\(^{30}\) Claimants' Rejoinder, para. 13.
\(^{31}\) Claimants' Rejoinder, paras 15-17.
\(^{32}\) Claimants' Rejoinder, paras 19-22.
\(^{33}\) Claimants' Rejoinder, para. 23.
\(^{34}\) Claimants' Rejoinder, paras 22 and 24.
\(^{35}\) Respondent's Response, para. 1.2.
\(^{36}\) Respondent's Response, para. 1.2.
\(^{37}\) Respondent's Response, para. 2.1.
two means by which new claims can be added to the arbitration are either by way of consolidation by the ICC Court under Article 10 of the ICC Rules or by an amendment to the Terms of Reference pursuant to Article 23(4) of the ICC Rules.\textsuperscript{38}

44. The Respondent contends that Article 24(3) of the ICC Rules, relied upon by the Claimants, does not allow for the addition of new claims as it only concerns "\textit{case management of the case before the arbitral Tribunal}".\textsuperscript{39} The Respondent states that moreover, even if this provision did apply, the requirement of ensuring "\textit{continued effective case management}" is not fulfilled in the present case.\textsuperscript{40}

45. The Respondent contends that the Claimants' reliance on Article 24(3) of the ICC Rules is based on a distortion of the nature of "\textit{Tranche 2}" which, according to the Respondent, does not merely concern additional impacts of the claims already before this Arbitral Tribunal but in fact concerns entirely separate claims, as is demonstrated by the Claimants' own treatment of "\textit{Tranche 2}" (referred to as a "\textit{separate claim}") in their Statement of Claim filed on 19 June 2017.\textsuperscript{41}

46. As such, the Respondent submits that the Claimants' reliance on Article 24(3) of the ICC Rules is "totally misplaced" and the only relevant provisions would be Articles 10 and 23(4) of the ICC Rules, the requirements for which are not met by the Claimants' Application.\textsuperscript{42}

47. In light of the separate arbitrations that have been initiated by the Claimants in regard to "\textit{Tranche 2}", the Respondent contends that the proper mechanism for adding those claims to this arbitration would be a request for consolidation under Article 10 of the ICC Rules, which only the ICC Court and not the Arbitral Tribunal would be competent to order.\textsuperscript{43}

48. As to Article 23(4) of the ICC Rules, under which the Arbitral Tribunal can add new claims to the arbitration, the Respondent submits that the "\textit{starting point}" under the ICC Rules is that no new claims may be added after the signing of the Terms of Reference.\textsuperscript{44} According to The Secretariat's Guide to ICC Arbitration (hereinafter "Secretariat's Guide"), the standard for what is considered "\textit{new claims}" varies greatly from one legal system to another, and in that respect, the Respondent states that since "\textit{Tranche 2}" involves both new arguments and new claims for relief, it inarguably constitutes new claims.\textsuperscript{45}

49.

\textsuperscript{38} Respondent's Response, para. 2.1.
\textsuperscript{39} Respondent's Response, para. 2.3 (emphasis in original).
\textsuperscript{40} Respondent's Response, para. 2.4.
\textsuperscript{41} Respondent's Response, paras 2.5-2.6.
\textsuperscript{42} Respondent's Response, para. 2.7.
\textsuperscript{43} Respondent's Response, paras 2.8-2.9.
\textsuperscript{44} Respondent's Response, paras 2.10-2.11.
\textsuperscript{45} Respondent's Response, para. 2.12.
Again citing to the Secretariat's Guide, the Respondent further submits that in deciding whether to add such new claims under Article 23(4), the Arbitral Tribunal must consider to what extent the addition of the new claims will disrupt the proceedings. In light of, inter alia, the significant work that has already been undertaken in the present arbitration and the delays and complications that would result from the Claimants' proposed timetable for "Tranche 2", the Respondent contends that the addition of "Tranche 2" to this arbitration would cause a major disruption. The Respondent states that, moreover, it was the Claimants that chose to deal with "Tranche 2" separately up to now and that they have not provided any explanation for why they cannot continue to pursue these claims separately, nor why these claims would now need to be heard together with the claims in this arbitration.

As to the Claimants' proposal to only add that portion of its Concrete Disruption Claim that relates to the period up to September 2013, the Respondent contends that it would be impractical and arbitrary to separate out a portion of the Concrete Disruption Claim in such a way. First, the Respondent states that the Concrete Disruption Claim, as it was presented by GUPC to the ACP in July 2015, concerns the "cumulative disruptive impact of a multitude of alleged breaches" and that it therefore does not make sense to "slice" the claim at some date unilaterally chosen by the Claimants. The Respondent points out that the ACP's Determination on the claim, which was issued on 31 March 2016, addresses a multitude of issues, including threshold issues, that would need to be considered by this Arbitral Tribunal before deciding to admit new claims in this arbitration and the Respondent reserves its position in this regard. The Respondent further submits that artificially cutting off the impacts of the new claims at September 2013 would make them even more "procedurally unmanageable", whereas the claims presently at issue in this arbitration have a clear cut-off date that corresponds to the (undisputed) date when the structural marine concrete was first poured.

Moreover, the Respondent contends that the Claimants previously represented that it was not possible to separate out the individual impacts of the various acts underlying their Concrete Disruption Claim and that, as such, there are a number of issues that the Arbitral Tribunal would in any case have to consider, including (i) the alleged disruption caused by the Pacific cofferdam; (ii) the strikes and works stoppages that occurred from July 2010 to April 2014; (iii) the alleged lack of funding from the ACP; and (iv) the ACP's alleged failure to recognize an Extension of Time. According to the Respondent, it is not clear from the Claimants' submissions whether some of these elements, many of which have nothing to do with the claims at issue in this arbitration, would be included in their "Tranche 2" and in any case it is not for the Claimants to "pick and choose" what elements are in and what elements are out. Instead, the Respondent argues that the "new claims should be left intact in their existing arbitrations, otherwise procedural chaos will ensue".
52. As to the Claimants’ proposed timetable for "Tranche 2", the Respondent submits that the proposed dates are unworkable and that the Claimants' true plan is to derail the present arbitration and delay the determination of "Tranche 1". In particular, the Respondent submits that the proposal that the Statement of Defence on "Tranche 2" would be due from the Respondent just five weeks prior to the hearing on "Tranche 1" is impossible and would surely lead to the postponement of the hearing on "Tranche 1". Moreover, the Respondent contends that the Claimants' have not demonstrated how any of the proposed overlap of "Tranche 1" and "Tranche 2" would be efficient.53

53. Despite the Claimants’ arguments set forth in their Rejoinder, the Respondent maintains that it would be prejudiced by the procedural timetable suggested by the Claimants, which it considers to be an attempt to "derail" the arbitral proceedings related to "Tranche 1" by any means possible. The Respondent also takes issue with the Claimants' suggestion that first having a Partial Award on "Tranche 1" would allow the Parties to narrow the issues in dispute on "Tranche 2" since it is clear that with the current procedural timetable, a decision on "Tranche 1" would likely be issued in late 2019 at the earliest, which would be after the Claimants' submission of its Reply on "Tranche 2". Thus, the Respondent contends that the Claimants have not shown that any efficient overlap would be achieved. Moreover, the Respondent believes that the Claimants would resist any payments ordered in a Partial Award.56

54. The Respondent stresses that it is in fact the true claimant in the present proceedings, whose claims total in excess of US$320 million, and that it is for this reason that the Claimants continually attempt to delay the progress of this arbitration and the issuance of a final award in the Respondent's favor.58

55. The Respondent contests the Claimants' version of the Parties' previous procedural discussions and of there being an alleged "agreement" between the Parties regarding the scope of Referral 11. The Respondent states that despite any alleged agreement (which is denied), nothing prevented the Contractor from including its disruption claims in the present arbitration from the outset. The Respondent further submits that in any case, any such alleged agreement is irrelevant to the Tribunal's decision on the present Application.60 In its Sur-Rejoinder, the Respondent notes that the Claimants have changed their position on this alleged agreement throughout the course of their submissions and that they now agree that it is irrelevant, although the Respondent nevertheless maintains that there was never any such agreement and that the evidence submitted by the Claimants in fact shows that it was indeed the Claimants' own choice to separate the Concrete Disruption Claim from Referral 11.60

53 Respondent’s Response, paras 2.29-2.32.
54 Respondent’s Sur-Rejoinder, para. 1.12.
55 Respondent’s Sur-Rejoinder, para. 1.13.
56 Respondent’s Sur-Rejoinder, para. 1.14
57 Respondent’s Sur-Rejoinder, para. 1.15.
58 Respondent’s Response, paras 3.1-3.4.
60 Respondent’s Sur-Rejoinder, para. 2.1.
The Respondent also contests the history of Claim 78 as presented by the Claimants and refers the Tribunal to its letter dated 28 July 2017, which it considers to contain a more accurate account.\(^{61}\) In particular, in its 28 July 2017 letter, the Respondent sets out a chronology of the procedural steps that have been undertaken since July 2012 in relation to the Claimants’ Concrete Disruption Claim including, inter alia.\(^{62}\)

- The submission of the Contractor’s original claim for “Delay and Disruption to Concrete Aggregate Production and Concrete Mix Designs” in July 2012, with very little particulars and only an estimated cost amount put forth for its disruption claim;

- The initiation of the Referral 11 DAB proceedings by the Contractor in September 2013, in which the Contractor did not include details of its claim for disruption but instead stated that these would be made in “separate submissions” (which were never in fact made in the Referral 11 proceedings) and in which the Contractor claimed a delay of 265 days ending on 18 August 2011;

- The subsequent submissions made by the Contractor in respect of its claims for disruption of the Works in December 2013, March 2014 and August 2014 (none of which were complete, according to the Respondent);

- The hearings and DAB Decision on Referral 11 in late 2014, followed by both Parties’ filing of Notices of Dissatisfaction and Requests for Arbitration in relation to Referral 11;

- The initiation of DAB Referral 12 proceedings by the Respondent in March 2015, in which the Respondent sought further substantiation of the Contractor’s disruption claims that had been made in its previous correspondence, and which the Contractor argued were premature due to the fact that its Disruption Claim 78 was not yet finalized;

- The submission of the Contractor’s Claim 78 (for delay, disruption and acceleration of the Works) in July 2015 and the subsequent Determination on Claim 78 made by the Employer’s Representative in March 2016;

- The initiation of arbitration proceedings by the Claimants in relation to Claim 78 in December 2016, despite this claim not yet having been referred to the DAB.

In regard to the arbitrations commenced by the Claimants in December 2016, the Respondent contends that (a) it is undisputed that the Contractor had not complied with the pre-arbitration conditions when those arbitrations were initiated and (b) that those arbitrations were commenced at that time as part of the Claimants’ strategy related to its request for emergency relief (so that they could argue to the Tribunal that they were not delaying in bringing their claims).\(^{63}\) The Respondent contends that it has justifiably raised jurisdictional and admissibility objections to those arbitrations, and also intends to do so in ICC Case Nos. 22966/JPA and 22967/JPA, which were commenced after the DAB proceedings for Referral 16 were “aborted” by the Contractor.\(^{64}\) The Respondent does not accept that the disputes within the scope of DAB Referral 16...
16 are now arbitrable and reserves all of its rights in that respect.\textsuperscript{65}

58.

As to the Claimants’ explanations regarding the timing of the Application, and in particular the Claimants’ purported desire to have "Tranche 2" heard by the same arbitral tribunal as the claims in this arbitration, the Respondent submits that (i) if that were the case, then the Claimants should have pursued these claims together from the outset and referred them to arbitration together, which the Claimants chose not to do; and (ii) this is not, in the Respondent’s view, the real reason that the Claimants make their Application, nor is it a good reason, in light of the prejudice that will be suffered by the Respondent and the inefficiency that will result.\textsuperscript{66}

59.

The Respondent also submits that in recent correspondence to the ICC Court, the Claimants have requested more time in order to respond to the disclosure made by Robert Gaitskell QC in ICC Case No. 22967/ASM, which indicates that the Claimants might object to his appointment, and the members of the tribunal in that case might in fact end up being different from the present Arbitral Tribunal.\textsuperscript{67} The Respondent also points out that in the other arbitrations commenced by the Claimants in December 2016 and July 2017 (ICC Case Nos 22465/ASM and 22966/JPA), no chairman has yet been agreed, and also that the Claimants have started new arbitration proceedings for the issues that were dealt with in the Claimants’ Emergency Application, arguing that they do not want to “overburden” the tribunals in the pending arbitrations. As such, the Respondent contends that the Claimants’ are not in fact interested in efficiency but are instead attempting to avoid tribunal members that did not decide favorably toward them on certain issues.\textsuperscript{68}

60.

The Respondent also disputes the alleged inefficiencies cited by the Claimants in having "Tranche 2 heard by a separate tribunal. The Respondent argues that the Claimants knew the procedures that would apply when they commenced multiple separate arbitrations and that the Respondent is completely within its rights to carefully consider and agree (or not) to the appointment of members of the tribunal.\textsuperscript{69} Also, the Respondent does not agree that it would be inefficient to have the "Tranche 2" issues heard by a different tribunal since the tribunals would be highly qualified to deal with the complex issues at stake and, moreover, there would be no risk of inconsistent decisions since the decision in the present arbitration would clearly be issued before that in either of the subsequent arbitration proceedings.\textsuperscript{70}

61.

Finally, the Respondent contends that the Claimants have not actually explained in their Rejoinder how "Tranche 2 could be separated from the rest of Claim 78. In particular, the Claimants have not addressed the fact that Claim 78 is a "cumulative impact disruption claim for

\textsuperscript{64} Respondent’s Response, paras 3.16-3.17.
\textsuperscript{65} Respondent’s Response, para. 3.18.
\textsuperscript{66} Respondent’s Sur-Rejoinder, paras 1.7-1.8.
\textsuperscript{67} Respondent’s Sur-Rejoinder, para. 1.9.
\textsuperscript{68} Respondent’s Sur-Rejoinder, paras 1.10-1.11.
\textsuperscript{69} Respondent’s Sur-Rejoinder, paras 1.16-1.18.
\textsuperscript{70} Respondent’s Sur-Rejoinder, para. 1.19.
which the exact entitlements (both the quantum and the delay) claimed for individual issues is not specified”, which the Claimants previously argued needed to be considered as a whole. The Respondent submits that individual issues indeed cannot be arbitrarily separated out of Claim 78 and thus that the inevitable result of granting the Application would be the subsequent widening of the issues and further procedural chaos.

IV. Arbitral tribunal's Determination

The present arbitral proceedings are governed by the ICC Rules of International Arbitration (2012) (the "ICC Rules"). The Arbitral Tribunal must therefore decide whether, under the ICC Rules, the Claimants' request to include the additional “Tranche 2” in this arbitration should be granted.

As detailed above, the Claimants' primary position is that the Arbitral Tribunal has the power to grant their Application as part of their "case management powers" under Article 24(3) of the ICC Rules. The Respondent does not agree that such provision would be applicable to the Claimants' request.

Article 24(3) of the ICC Rules provides as follows:
"To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable."

In support of their position that the Arbitral Tribunal would have the power under this provision to grant the Claimants' request and admit "Tranche 2" in these proceedings, the Claimants make reference in their written submissions to the commentary on Article 24(3) of the ICC Rules in the Secretariat's Guide. When questioned by the Arbitral Tribunal whether there would be any other legal authority providing precedent for the Claimants' position during the CMC, Claimants' Counsel confirmed that the Claimants rely exclusively on the Secretariat's Guide and not any other legal precedents for their position that the Arbitral Tribunal's powers under Article 24(3) of the ICC Rules would be wide enough to allow for the Claimants' request.

However, the Arbitral Tribunal is not convinced that the commentary on Article 24(3) in the Secretariat's Guide supports the Claimants' position. The Secretariat's Guide makes no mention of this provision having been applied in circumstances similar to the present request to admit an "additional tranche" to the arbitration. Instead, it is clear from this commentary that Article 24(3)

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71 Respondent's Sur-Rejoinder, para. 1.20.
72 Respondent's Sur-Rejoinder, para. 1.21.
73 Claimants' Application, para. 34; Transcript of Case Management Conference held on 15 September 2017 ("Transcript"), p. 54, lines 5-7.
74 See Transcript, p. 53, line 17 to p. 55, line 8.
is aimed at issues of procedural conduct such as case management conferences and procedural timetables.\textsuperscript{75}

Moreover, even though Article 24(3) refers to "ensuring effective case management", this is a general power of the Arbitral Tribunal to conduct the proceedings efficiently, but does not extend to issues such as new claims (which are specifically regulated by Article 23(4) of the ICC Rules) or to issues of extending the scope of an arbitration through the inclusion of additional elements.

As such, the Arbitral Tribunal agrees with the Respondent that Article 24(3) of the ICC Rules is not applicable in the present circumstances and does not give the Arbitral Tribunal the power to extend the scope of the arbitration to include additional "impacts", "tranches", or claims. As the Respondent has rightly pointed out, such circumstances must be considered in the context of either the admission of new claims under Article 23(4) of the ICC Rules or, where such claims are the subject of separate ICC proceedings, perhaps under the rules for the consolidation of ongoing cases under Article 10 of the ICC Rules.

Indeed, in regard to Article 10 of the ICC Rules, the Arbitral Tribunal notes that the Respondent in fact takes the primary position that the Application should have been a request for consolidation under this rule, as it concerns the introduction into this arbitration of claims that are currently the subject of separate ICC arbitration proceedings. However, the Claimants have made clear that they do not base their Application on Article 10 of the ICC Rules.\textsuperscript{76} The Arbitral Tribunal therefore does not make any finding as to the possibility for consolidation, which is in any case a matter conferred to the ICC Court, and not to the arbitral tribunal, under Article 10 of the ICC Rules.

The Arbitral Tribunal shall therefore turn to Article 23(4) of the ICC Rules and the question of whether the Claimants' Application should be granted pursuant to that provision.

Article 23(4) of the ICC Rules provides: "After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."

In order to determine whether this provision is applicable, the Arbitral Tribunal must first define the nature of the Claimants' request and whether it is in fact a request to admit new claims. Indeed, the application of Article 23(4) of the ICC Rules "is triggered where (i) a new element introduced into a case is either presented as a new claim by a party or identified as such by the arbitral tribunal, and (ii) that claim falls outside the limits of the Terms of Reference."\textsuperscript{77}

\textsuperscript{75} Exhibit C-1049, Fry/Greenberg/Mazza, \textit{The Secretariat's Guide to ICC Arbitration} ("Secretariat's Guide"), para. 3-931.
\textsuperscript{76} Claimants' Application, paras 47-49.
The Arbitral Tribunal must therefore first examine whether "Tranche 2" would constitute a new claim falling outside of the Terms of Reference that have been established for this arbitration.

On this point, the Claimants argue that "Tranche 2" would not constitute new claims and in doing so rely heavily on the fact that the "impacts addressed in Tranche 2 are "intimately connected" to the claims that are already part of this arbitration. Indeed, in limiting their request to "Tranche 2" (to the exclusion of other disputed issues included in Claim 78), the Claimants argue that their request solely concerns the "additional impacts" of the claims already before this Arbitral Tribunal and that "there is nothing unusual about adding a tranche, or indeed more than one tranche at different stages to an arbitration of this kind."78

While the Respondent does not deny that there is a connection between the issues currently before this Arbitral Tribunal and the issues underlying "Tranche 2", the Respondent argues that "Tranche 2" would nevertheless constitute new claims in the present arbitration because it "involves new arguments and new claims for relief".79

As noted in the Secretariat's Guide, varying definitions exist as to what constitutes a claim.80 In ICC arbitrations, it is generally accepted that a change in argument or an adjustment to the quantum of a claim will not be considered to be a new claim, whereas on the other hand new requests for relief generally will be regarded as new claims.81 Arbitral tribunals will often consider whether the new element "departs substantially from what was envisaged in the Terms of Reference" in determining whether the new element should be considered a new claim.82

Indeed, the Terms of Reference serves to define the scope of the issues in dispute in this arbitration and is of paramount importance when determining whether new elements, even if they arise out of the same contracts and have some connection to the current arbitration claims, constitute new claims.

In this respect, the Arbitral Tribunal notes that in the summary of the Claimants' claims and requested relief set out in the Terms of Reference, explicit reference is made to DAB Referral 11 (Claims 43 and 52) and DAB Referrals 1 and 10 (Claim 19).83 While the Claimants also included a reference to a potential claim relating to DAB Referral 14B,84 no such reference is made to DAB Referral 16 (which had not yet been initiated at that time) or to the concrete disruption claims

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77 Exhibit C-1049, Secretariat's Guide, para 3-896.
78 Transcript, p. 3, lines10-13.
79 Respondent’s Response, para 2.12.
80 Exhibit C-1049, Secretariat's Guide, para. 3-897.
81 Exhibit C-1049, Secretariat's Guide, paras 3-897 and 3-898.
82 Exhibit C-1049, Secretariat's Guide, para. 3-900.
84 Terms of Reference, p. 21.
which form part of the Contractor's Claim 78 (despite the fact that the Employer had already issued its Determination on Claim 78 by the time the Terms of Reference were signed in July 2016 and thus the Claimants could have also mentioned Claim 78 therein).

Thus, it is clear that there is no specific mention of the concrete disruption claims that are part of Contractor's Claim 78, including "Tranche 2", in the Terms of Reference that were agreed between the Parties for the present arbitration.

The Arbitral Tribunal notes that in the Terms of Reference, the Claimants also made a reservation of rights concerning "Additional Claims", wherein the Claimants stated that "in accordance with Articles 10 and 23.4 of the ICC Rules concerning consolidation of claims, GUPC reserves the right to refer to this Arbitral Tribunal any additional claims that GUPC may deem arbitrable under Sub-Clause 20.6 of the Conditions of Contract...". However, such reservation of rights cannot be considered as expanding the scope of the arbitration to any other future claims that the Claimants wish to introduce. As stated by the Claimants themselves in making such reservation of rights, the introduction of additional claims would need to be made in accordance with Articles 10 and 23(4) of the ICC Rules.

As such, the Arbitral Tribunal finds that the matters underlying Claim 78, including "Tranche 2", do not fall within the scope of the claims contemplated by the agreed Terms of Reference.

Moreover, the Claimants admit that the "impacts" which they wish to include "give rise to new entitlements requiring further factual evidence". Thus, the Claimants themselves recognize that they are not merely requesting to introduce new arguments or modify the quantum of their claim, but in fact seek to include additional requests for relief ("new entitlements") that are based on an additional set of facts.

For these reasons, the Arbitral Tribunal finds that "Tranche 2 does constitute new claims in the context of the present arbitration and, therefore, the admissibility of "Tranche 2" must be determined pursuant to Article 23(4) of the ICC Rules.

When determining whether authorization to admit new claims should be granted under Article 23(4) of the ICC Rules, arbitral tribunals "will need to balance any disruption that would result in the arbitration against any inefficiency caused if the claims needs to be brought in other proceedings." Article 23(4) makes specific reference to the stage of the proceedings and the nature of the new claim(s) as important considerations in this regard. Additional elements that should be considered include "whether there are good reasons why the claim was not made earlier and whether the attempt to make a new claim is abusive, designed merely to delay the

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85 Terms of Reference, p. 23.
86 Transcript, p. 57, lines 11-12.
87 Exhibit C-1049, Secretariat's Guide, para. 3-905.
arbitration or to surprise the other side.\textsuperscript{88}

85. The Claimants argue, inter alia, that their request would meet the requirements of Article 23(4) of the ICC Rules since it would be inefficient to have “Tranche 2” heard by a different tribunal, considering its interconnectedness with the issues already before this Tribunal, and that “Tranche 2” can be introduced into this arbitration with its own, parallel procedural timetable that will not cause any disruption to the present proceedings.

86. The Respondent, on the other hand, argues that the Claimants have not shown how adding “Tranche 2” to these proceedings would increase efficiency and that it would in fact result in procedural chaos to have “Tranche 2” admitted to the present arbitration. In particular, the Respondent considers that the parallel procedural timetable proposed by the Claimants would be unworkable and that admitting “Tranche 2” would open the door to further requests by the Claimants to add additional elements and would inevitably result in delays in the resolution of the claims currently under consideration.

87. Having considered all of the Parties’ points concerning the potential disruptions that would be caused by admitting “Tranche 2” and also the potential inefficiencies that could result from not admitting “Tranche 2”, the Arbitral Tribunal makes the following observations.

88. First, concerning the stage of the present proceedings, the Arbitral Tribunal notes that the Parties have agreed to a fairly long procedural timeline leading up to hearings on the merits beginning in January 2019. Thus, even if the Claimants’ Statement of Claim was filed almost a year after the signing of the Terms of Reference, this arbitration is still in a relatively early stage of the procedure in relation to the hearings that will be held in 2019. This arbitration is not yet in such an advanced stage that it would be inconceivable that new claims be admitted. Indeed, this is not a situation where new claims have been presented at a late stage, such as in the Rejoinder or at the hearings.

89. Moreover, it should be stressed that whether or not “Tranche 2” is added to this arbitration or dealt with in separate arbitrations, the workload of the Parties’ legal teams will not be affected and therefore the Arbitral Tribunal does not accept the Respondent’s argument to the effect that the proposed timeline for “Tranche 2” would be unworkable. The work will have to be done in any case and the same amount of pressure will be placed on the legal teams.

90. This being said, the Arbitral Tribunal needs to take into account all of the relevant circumstances, including the nature of the new claim(s) and whether, in the circumstances, it would be appropriate to admit them.

\textsuperscript{88} Exhibit C-1049, Secretariat’s Guide, para. 3-906.
In this regard, the Arbitral Tribunal considers that, in order to admit new claims, such claims would need to be sufficiently identified in order to properly assess their connection to the claims presently in the arbitration and the scope of the issues being added. However, the Claimants have not clearly set out in any of their submissions, or in the oral arguments or presentations made during the CMC, what their additional prayers for relief would be in relation to “Tranche 2”. This creates uncertainty concerning which elements would be included and which elements would not be included if the Tribunal were to grant the Claimants’ Application.

Indeed, while the Claimants submit that they would limit the additional “Tranche 2” to a time period up to September 2013, they have also mentioned the possibility of there being a further “Tranche 3” and do not exclude the possibility that issues covering a later period would need to also be included. Moreover, there already seems to be disagreement between the Parties as to which issues would be included in “Tranche 2” and “Tranche 3” and whether all of those issues would be relevant to the claims in this arbitration or, for example, to the claims in the Cofferdam Arbitration. Even the proposed cut-off date of September 2013 does not appear to be accepted between the Parties as an appropriate limit to “Tranche 2” and therefore adds to the uncertainty surrounding the scope of the claims to be added.

As such, the Arbitral Tribunal finds that the Respondent’s fears of opening the door to even more additional claims (which has not been contested, and even reserved as a possibility, by the Claimants) and of derailing the current arbitral process are not unfounded. As Counsel for the Respondent stated at the CMC, if the Arbitral Tribunal were to grant the request, it would “not know the door that [it is] opening because [it has] no clarity on precisely what GUPC want to add in”.  

The Arbitral Tribunal tends to agree. In the present circumstances, the Arbitral Tribunal is not faced with a request to admit just one, clear-cut additional claim that would be clearly linked to the claims already in this arbitration. Instead, it is faced with a request to admit some (not entirely clear) portion of a larger set of claims and the very real potential that the nature of these claims would lead to further requests being made later on in the proceedings. The potential for disruption to the procedural timetable set for this arbitration and the agreed date for hearings on the merits in 2019 is therefore, in the Arbitral Tribunal’s view, extremely high.

Moreover, the Arbitral Tribunal notes that even in the Claimants’ own proposed timetable, there would be no hearing on “Tranche 2” until 2020.

Indeed, the Claimants do not attempt to argue that “Tranche 2” could be admitted into these proceedings in conjunction with the claims they have already presented, but instead propose a parallel and disjointed procedural timetable for “Tranche 2”. As such, the Arbitral Tribunal sees little in terms of increased efficiency that would result from the granting of the Claimants’

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89 Transcript, p. 31, lines 19-21.
90 Claimants’ Application, pp. 2-3.
request. According to the Claimants’ proposal, the procedure for "Tranche 2" would carry on independently from the procedures already underway in this arbitration much to the same extent that it would in the separate arbitration(s) that have already been initiated.

97. Finally, the Arbitral Tribunal observes that, while it does not have reason to believe that the Claimants’ Application is aimed merely at delaying this arbitration (despite the Respondent’s allegations to that effect), it does have some difficulty understanding why the Claimants’ Application was not made at an earlier stage of the proceedings. The Arbitral Tribunal notes that the Employer’s Determination on Claim 78 was issued on 31 March 2016

91 but that the Contractor’s Claim 78 was not referred to the DAB until March 2017 (DAB Referral 16). If the Contractor had referred Claim 78 to the DAB in 2016, the Claimants would have been in a position to refer to the ongoing dispute over Claim 78 in the Terms of Reference.

98. The Arbitral Tribunal further notes that the Claimants made no mention of the possibility of adding Claim 78 (or any portion thereof) to this arbitration in their Statement of Claim, whereas at that point the Contractor had already issued its Notice of Dissatisfaction in relation to DAB Referral 16 (including Claim 78)

92 and had received indications from the Respondent that it considered any discussions around the "amicable settlement" of Claim 78 (pursuant to Sub-Clause 20.5) to be premature.

93 As such, the Arbitral Tribunal considers that nothing would have prevented the Claimants from referring to such claims in their Statement of Claim and inviting the Arbitral Tribunal to admit them as new claims in the event that discussions with the Respondent were ultimately unsuccessful (especially considering the fact that the Claimants had already referred the claims to arbitration in December 2016). Indeed, if the Claimants had fully detailed their additional claims with specific prayers of relief and supporting evidence in their Statement of Claim, the Arbitral Tribunal would have at least been in a better position to assess the scope of the claims that the Claimants wished to add and their potential impact on the present proceedings.

99. While the fact that the Application was not made earlier is in no way conclusive, the Claimants do have to bear the consequences of their decision not to take earlier action in relation to Claim 78, which ultimately results in a higher risk that the Respondent would suffer prejudice if the Claimants’ Application were to be granted at this stage.

100. For all of these reasons, and in particular in light of the potential disruption of the arbitral process and prejudice to the Respondent that could result from the introduction of "Tranche 2" in this arbitration, the Arbitral Tribunal finds that the Claimants’ request to admit the "Tranche 2" claims does not meet the requirements of Article 23(4) of the ICC Rules and must be dismissed.

101. As a final point, it should be noted that the Respondent has also taken the position that the

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91 See Exhibit R-64, Determination of the Employer’s Representative dated 31 March 2016.
93 See Exhibit C-1045, Letter from ACP to GUPC dated 13 June 2017.
Arbitral Tribunal would in fact be barred from admitting new claims under Article 23(4) of the ICC Rules where such claims are already the subject of separate arbitration proceedings, since in such a case only Article 10 of the ICC Rules (concerning consolidation) would apply. It is true that the Claimants' Application does not simply concern the admission of new claims into this arbitration but also presents the unusual situation of such claims already having been submitted to separate arbitrations. As the Claimants undertook to withdraw their claims from those other arbitrations were their Application granted, the Arbitral Tribunal does not see that there would be a risk of multiple arbitral tribunals dealing with the same claims. However, the question remains - since those claims are still for the moment pending before other arbitral tribunals -whether the Arbitral Tribunal in this case would be barred from admitting them.

The Arbitral Tribunal has examined the submissions and oral arguments, and in particular the legal authorities, provided by the Respondent and does not consider that it would have sufficient elements to reach such a conclusion. It is not, however, necessary for the Arbitral Tribunal to decide this matter since it finds, for the other reasons cited above, that the Claimants' Application does not satisfy the requirements of Article 23(4) of the ICC Rules. As interesting as it may be, this is a question that can therefore remain open.

V. Order

For the above reasons, the Arbitral Tribunal hereby:
(i) dismisses the Claimants' Application to admit "Tranche 2" into this arbitration;

(ii) declares that the costs related to this Procedural Order will be dealt with at a later stage, together with its overall decision on costs.

The decision contained in this Order is the decision of the Arbitral Tribunal although the Order is executed by the President (Section 51 of the Specific Procedural Rules).

94 See Respondent's Response, paras 2.8-2.9; see also Transcript, p. 69, lines 7-11.