INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

PROCEDURAL ORDER NO. 3
Decision on Bifurcation

DISSENTING OPINION OF MR. ANTOLÍN FERNÁNDEZ ANTUÑA

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7 June 2022

1. Absent compelling reasons, no respondent State should be imposed to go through full-fledged proceedings and plead the merits of the case in circumstances where the jurisdictional mandate is contested and not ascertained yet by the tribunal.

2. In the instant case, I have found no such reasons not to bifurcate. Thus, I respectfully dissent with the analysis and the decision of the majority that rejects the request for bifurcation and joins the preliminary objections to the merits, contained in Procedural Order No. 3 ("the Order"). An analysis grounded in the ICSID Convention and Arbitration Rules, the case law on bifurcation, and the facts and circumstances of the case currently in the record, leads to this dissenting opinion.

3. I hereby elaborate on the foregoing statements, starting with (i) some general considerations and the legal standard, followed by (ii) the application of that standard to the case at hand, to (iii) conclude that bifurcation should be ordered.

I. GENERAL CONSIDERATIONS & LEGAL STANDARD

4. The Respondent has requested bifurcation on the basis of three preliminary objections contesting the jurisdiction of this Tribunal, namely: the *ratione voluntatis* objection (intra-EU arbitration); the *ratione materiae* objection (lack of investment); and the *ratione personae* objection (only for the Fourth, Fifth, and Sixth Claimants).

5. In order to frame the analysis, it is important to bear in mind that there are different types of bifurcation. Indeed, any party may request that a question (preliminary or not – *e.g.*, *quantum*) be addressed in a separate phase of the arbitration and tribunals have general discretionary powers to rule in that regard under the umbrella of Article 44 of the ICSID Convention.[1]

6. However, when that question is precisely a preliminary objection,[2] specific provisions are dedicated by the ICSID Convention and by the ICSID Arbitration Rules to the issue,

[1] ICSID Convention, Art. 44: "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

[2] Defined as "[a]ny objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal" by ICSID Arbitration Rule 41(1).

considering the special nature of this kind of objections. Article 41 of the ICSID Convention (under Section 3, "Powers and Functions of the Tribunal") provides that the Tribunal shall determine whether to deal with the preliminary objection as a preliminary question or to join it to the merits:

> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.[3]

7. Furthermore, ICSID Arbitration Rule 41 (under the heading of "Preliminary Objections") adds, in relevant parts, (i) that the objection shall be made as early as possible and no later than the counter-memorial submission, and (ii) that the Tribunal may on its own initiative consider, at any stage, whether the dispute before it is within its own competence:

> (1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.
>
> (2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.[4]

8. From the reading of the above paragraphs of the applicable statutory rules, it is clear that preliminary objections are preferential in nature, and this characteristic requires their treatment as a preliminary question, as far as possible. This does not imply any presumption; there is no presumption of bifurcation or non-bifurcation. All relevant circumstances of the case must be considered in exercising this discretionary power of determining whether to bifurcate, always bearing in mind the overarching principles of

[3] ICSID Convention, Art. 41.

[4] ICSID Arbitration Rules, R. 41.

procedural fairness and economy. And one of the relevant circumstances is this specific preferential nature of jurisdictional objections.

9. Moreover, it can be noted that the 2022 Amendment of the ICSID Rules[5] maintains this specificity. Indeed, these regulate bifurcation under Chapter VI ("Special Procedures") of the Arbitration Rules and keep the unique character of preliminary objections, distinguishing and dedicating different rules to "bifurcation" in general, "preliminary objections", and "preliminary objections with a request for bifurcation".[6]

10. This distinction and preferential character of jurisdictional objections is naturally connected to a fundamental principle in international adjudication: the consensual basis of jurisdiction. As the Report of the Executive Directors on the Convention reminds, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre".[7]

11. The well-known case law related to bifurcation (*e.g.*, *Glamis Gold v. USA*, *Emmis v. Hungary*, *Philip Morris v. Australia*)[8] is cited by the Parties and lists some relevant factors included in the Order, but: the list of factors is non-exhaustive; and the case law differs somewhat in the nuances regarding some factors-nuances that could have an impact. For the sake of avoiding reiterations, I will refer only to the points relevant to this case and in addressing the application to the present arbitration.

12. Additionally, in connection with the nature of jurisdictional objections, the tribunal in *Sumrain v. Kuwait* highlighted "the particular sensitivities in exercising jurisdiction in circumstances where the jurisdictional mandate is challenged",[9] stating that:

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[5] Rules not applicable to the instant case. ICSID Member States approved the amended rules on 21 March 2022.

[6] 2022 ICSID Arbitration Rules, R. 42, R. 43, and R. 44, respectively.

[7] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 23.

[8] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2, 31 May 2005, **RL-0064**; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v. Hungary*, ICSID Case No. ARB/12/2, Decision on Bifurcation, 13 June 2013, **RL-0065**; *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014 ("*Philip Morris v. Australia*"), **RL-0069**.

[9] *Ayat Nizar Raja Sumrain and others v. State of Kuwait*, ICSID Case No. ARB/19/20, Procedural Order No. 2, 1 February 2021 (available at: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7953/DS15813_En.pdf), ¶ 45.

> [T]here are by definition more compelling reasons for a tribunal to establish if it has adjudicative authority at all before it exercises that authority over the dispute in its entirety. There is no doubt that a tribunal has the power, on the basis of competence-competence, to adjudicate upon objections to its jurisdiction. The question is rather at what stage of the proceedings the tribunal should exercise this power of competence-competence. If a tribunal reserves its decision on jurisdiction until after a full examination of the merits of the case, then the tribunal will be acting throughout the proceedings on the assumption that it does have jurisdiction—every step that the tribunal takes in the arbitration presupposes that is properly vested with adjudicative authority over the parties and their dispute on the basis of a valid reference to arbitration. The same issue does not arise in respect of questions relating to admissibility, liability or quantum.[10]

13. Therefore, in the absence of compelling reasons, no party should be required to argue the merits of the case in circumstances where the jurisdictional mandate is contested and has not yet been determined by the tribunal that has to exercise it. As distinguished scholars comment: "It does not make sense to go through lengthy and costly proceedings dealing with the merits of the case unless the tribunal's jurisdiction has been determined authoritatively".[11]

II. APPLICATION OF THE STANDARD TO THE INSTANT CASE

14. First of all, since all relevant circumstances must be considered, it is worth recapping the following background of this case: (i) the Respondent has put forward three preliminary objections; (ii) these objections contest the jurisdiction of this Tribunal from three different angles; (iii) the formal requirements have been met in a timely manner; (iv) there is currently a Procedural Timetable in place contained in Procedural Order No. 1 considering the scenario of bifurcating; (v) according to that Timetable, no counter-memorial on the merits has been submitted yet by the Respondent; (vi) two memorials on jurisdiction have already been filed, one by the Respondent and the other by the Claimants; and (vii) in case

[10] *Id.*, ¶ 15 [emphasis original].

[11] C. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2009) (excerpt) ("Schreuer"), **RL-0075**, p. 537.

of bifurcating, the total time dedicated by the Parties to the remaining submissions on jurisdiction would be, approximately, four months from the date.[12]

15. The above background is relevant to assess the preferential character of the objections (points (i) and (ii)), the conduct of the applicant (point (iii)), and time and cost considerations (points (iii) to (vii)). These are the current facts, and, for rigorous analysis, I do not find it helpful to speculate on hypothetical circumstances.

16. Second, addressing other factors contemplated, I agree with the Order in that it does not consider any of the jurisdictional objections to be frivolous. Further, I also agree with the analysis of the potential effect of bifurcation on dismissing or materially reducing the proceedings. It is clear that these two factors weigh in favour of the bifurcation of the arbitration.

17. However, I disagree with the Order over the considerations with regard to the factor related to potential intertwining issues between jurisdiction and the merits (first and second objections). On this subject, the quotation *ut supra* continues: "On the other hand, some jurisdictional questions are *so intimately linked* to the merits of the case that it is *impossible* to dispose of them in preliminary form".[13] Therefore, the legal test is not whether or not the preliminary issue is intertwined with the merits. Rather, the crux of the matter is whether it is "so intertwined that" bifurcation is *impossible* (*e.g.*, because it would imply prejudging the merits), and I find no reason why that should be the case here, not for the first objection nor for the second one. Naturally, that impracticability would have to be grounded on certain and verified elements and not on conjecture.

18. Regarding the first objection (*ratione voluntatis*), the Respondent submits that "Respondent's primary jurisdictional objection is a matter of principle and the correct understanding of EU law in an intra-EU dispute. Respondent's jurisdictional objection only raises matters of treaty interpretation. It is not intimately linked to the merits that deal with an alleged violation of Art. 10 ECT. […] The arguments at the jurisdictional phase focus

[12] Scenario 3 of Procedural Order No. 1's Procedural Timetable provides for a two-day Hearing on Jurisdiction on 4 and 5 October 2022.

[13] Schreuer, **RL-0075**, p. 537 [emphasis added].

on the fact whether or not the ECT is applicable in an intra-EU relationship. This discussion can be had and decided totally independently […]".[14] The Claimants, on the other hand, state that it "is so intertwined with the merits that it would not be efficient or fair to bifurcate"[15] and, to support this statement, argue that it "would be better resolved at the merits stage",[16] quote decisions stating that "it would benefit from a better understanding of the provisions at issue under the ECT […] and their relation to EU Law",[17] that "the general relationship […] is presently analysed and reviewed in different *fora*",[18] and refer to prior practice of other tribunals in other cases. However, any bifurcation request must be examined "in light of its own specific factual and legal circumstances".[19] Moreover, no specific reason has been articulated to justify that the discussion could not be bifurcated. Thus, no current material impediment to address this jurisdictional objection has been identified.

19. As to the second objection (*ratione materiae*, investment), the Respondent submits that this objection can be decided on the basis of the Claimants' arguments submitted in their Memorial on Jurisdiction alone, that it concerns questions which can be decided before the merits stage, and that it only requires a very basic examination of the facts already presented and a taking of evidence is not necessary.[20] The Claimants, again, state that it "is so intertwined with the merits that it would not be efficient or fair to bifurcate".[21] The Claimants argue that examination of experts and witnesses would be needed, and that the Respondent has made references to some paragraphs of the Claimants' expert reports and witness statements.[22] Nonetheless, even under the assumption that hypothetical efficiency could prevail over the preferential character of jurisdictional objections – *quod non*, on the

[14] Respondent's Memorial on Jurisdiction and Request for Bifurcation ("Resp. Mem."), ¶ 266.

[15] Claimants' Memorial on Jurisdiction and Response to the Request for Bifurcation ("Cl. Mem."), heading of Sec. V.D.1.

[16] *Id.*, ¶ 179.

[17] *Ibid.* (citing *Canepa Green Energy Opportunities I, S.á.r.l. and Canepa Green Energy Opportunities II, S.á.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3, 28 August 2020, **CL-0197**, ¶ 94).

[18] *Id.*, ¶ 180 (citing *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Procedural Order No. 3, 9 October 2019, **CL-0198**, ¶ 38).

[19] *Id.*, ¶ 148 (citing *Philip Morris v. Australia*, **RL-0069**, ¶ 103).

[20] Resp. Mem., ¶ 268.

[21] Cl. Mem., heading of Sec. V.D.2.

[22] *Id.*, ¶¶ 182-184.

basis of the record as it currently stands, the Claimants' statements are not persuasive in this regard. The very few referred paragraphs seem to be mentioned just as support (not to rebate them) by the referring Party and, without entering into undue speculation, the fact is that, having both the Respondent and the Claimants already submitted the first round of pleadings on jurisdiction: (i) the Respondent's Memorial on Jurisdiction *is not* accompanied by any expert reports or witness statements; and (ii) the Claimants' Memorial on Jurisdiction *is not* accompanied either by any additional expert reports or witness statements.

20. Finally, with regards to the third objection (*ratione personae*), obviously, being partial, it would not dispose of the case for the rest of the Claimants. Nevertheless, considering it in conjunction with the previous two objections that ought to be bifurcated, this third objection should be bifurcated as well.

III. CONCLUSION

21. For the foregoing reasons, I respectfully dissent with the majority and, as a matter of principle, I do not add my vote to those of my colleagues. I opine that the jurisdictional objections should not be joined to the merits and that the proceedings should be bifurcated. All the above is in the pursuit of procedural fairness and economy, and according to the ICSID Convention and Arbitration Rules in place.

[signed]

Mr. Antolín Fernández Antuña
Arbitrator
Date: 7 June 2022