

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Hela Schwarz GmbH**

**v.**

**People's Republic of China**

**(ICSID Case No. ARB/17/19)**

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**PROCEDURAL ORDER NO.3  
DECISION ON THE RESPONDENT'S REQUEST FOR BIFURCATION**

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***Members of the Tribunal***

Sir Daniel Bethlehem QC, President of the Tribunal  
Professor Campbell McLachlan QC, Arbitrator  
Mr. Roland Ziadé, Arbitrator

***Secretary of the Tribunal***

Ms. Lindsay Gastrell

***Assistant to the Tribunal***

Mr. Paolo Busco

17 December 2018

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## **I. INTRODUCTION**

1. On 2 May 2017, Hela Schwarz GmbH (“**Hela Schwarz**” or “**Claimant**”), filed a Request for Arbitration commencing these proceedings. The Tribunal was constituted on 8 January 2018. Procedural Order No.1, including a procedural timetable, was issued on 9 March 2018 (“**PO#1**”). The proceedings are conducted in accordance with the ICSID Convention and the ICSID Arbitration Rules in force as of 10 April 2006.
2. In accordance with the procedural timetable, the Claimant submitted its Memorial dated 29 June 2018 (“**Memorial**”). On 1 October 2018, the People’s Republic of China (“**PRC**” or “**Respondent**”) submitted a Memorial on Preliminary Objections and Request for Bifurcation (“**Bifurcation Request**”). Pursuant to §16.2 of PO#1, this included “a reasoned application for the [objections] to be addressed in a preliminary procedure”.
3. Pursuant to §16.3 of PO#1, the Tribunal is required to “determine the subsequent procedure after affording the Claimant an opportunity to present its views on the question of bifurcation.”
4. In accordance with the procedural schedule set out in Annex A of PO#1, the Claimant submitted Observations on the Respondent’s Request for Bifurcation dated 29 October 2018 (“**Observations**”), opposing the Respondent’s request for bifurcation. The Respondent thereafter submitted a Reply on Bifurcation dated 5 November 2018 (“**Reply**”) and the Claimant submitted a Rejoinder on Bifurcation dated 12 November 2018 (“**Rejoinder**”).
5. PO#1 makes it clear that the determination required of the Tribunal at this stage of the proceedings is a decision on the Respondent’s request for bifurcation, not a decision on the substance of the Respondent’s preliminary objections. This Procedural Order accordingly addresses only the issue of the request for bifurcation, without prejudice to any question going to the substance of the Respondent’s objections to jurisdiction and admissibility.
6. The Tribunal has given careful consideration to the Parties’ submissions on the Bifurcation Request, which are summarised in Section II below. For the reasons set out in Section III below, the Tribunal has concluded that the request for bifurcation must be denied, with the

consequence that the Respondent's objections to jurisdiction and admissibility will fall to be addressed by the Tribunal in due course alongside its consideration of the merits of the Claimant's case. The Tribunal's order is contained in Section IV below.

7. The Parties have set out their positions on substantive aspects of the Respondent's objections to jurisdiction and admissibility in their pleadings referred to in paragraphs 2 and 4 above. This said, the Parties' pleadings subsequent to the Bifurcation Request were directed to the question of bifurcation, rather than to the substance of the objections to jurisdiction and admissibility. For the avoidance of doubt, as is expressly contemplated in Alternative Schedule 2 of Annex A of PO#1, which will now be controlling of the procedural schedule going forward, the Parties are afforded an opportunity to further address the substantive issues engaged by the Respondent's objections to jurisdiction and admissibility in the remaining scheduled pleadings. Similarly, also for the avoidance of doubt, and as is made clear in §16.5 of PO#1, the Respondent is not precluded from raising other objections to jurisdiction and/or admissibility in its Counter-Memorial.
8. In the following parts of this Order, the Tribunal addresses the Respondent's preliminary objections and the Parties' arguments on those objections. This discussion is necessary to contextualise the Tribunal's analysis of the request for bifurcation. The Tribunal emphasises that it has made no determination on the substance of the Respondent's objections to jurisdiction and admissibility, and nothing in this Order preempts any later or different finding of fact or conclusion of law.

## **II. THE PARTIES' POSITIONS**

9. In this section, the Tribunal summarises briefly each Party's position on the Bifurcation Request, including their views on the applicable legal standard and whether bifurcation of the Respondent's objections to jurisdiction and admissibility is appropriate in this case.

### **A. The Respondent's Position**

10. The Respondent raises four objections relating to the Tribunal's jurisdiction and one objection relating to the admissibility of the claim. Its position is that this proceeding

should be bifurcated so that these objections can be decided in a preliminary phase. Specifically, the Respondent requests that the Tribunal:

(1) decide issues relating to the Tribunal's jurisdiction and the admissibility of the Claimant's claims in a preliminary phase of the proceeding in accordance with Article 41(2) of the ICSID Convention, Rule 41(4) of the ICSID Arbitration Rules, and Alternative Schedule 3 of Procedural Order No. 1 – Annex A; and

(2) suspend proceedings on the merits pending the hearing and decision on preliminary objections pursuant to Rule 41(3) of the ICSID Arbitration Rules.<sup>1</sup>

**(1) *Objections to Jurisdiction and Admissibility***

11. The Respondent's objections to jurisdiction and admissibility are, in brief summary, as follows.

*a. Objection 1: Investment*

12. The Respondent's first objection is that the Tribunal lacks jurisdiction *ratione materiae* over the Claimant's claims because they do not arise directly out of an investment, as required by the ICSID Convention and the Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments ("**BIT**").<sup>2</sup>

13. According to the Respondent, this dispute relates exclusively to the land use rights and other assets of the Claimant's subsidiary, Jinan Hela Schwarz Food Co. Ltd. ("**JHSF**").<sup>3</sup> The Respondent observes that JHSF is not a claimant in this arbitration, and that JHSF does not qualify as an investor under the BIT because it is incorporated in the PRC.<sup>4</sup>

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<sup>1</sup> Reply, ¶ 62; *see also* Request, ¶ 238(1).

<sup>2</sup> Request, ¶¶ 80 *et seq.*

<sup>3</sup> Request, ¶ 88.

<sup>4</sup> Request, ¶ 90.

14. Therefore, the Respondent's position is that the Claimant lacks standing to pursue claims relating to JHSF's assets.<sup>5</sup> The Respondent further argues that

[t]he Tribunal cannot go into the substance of a claim that does not concern the Claimant's legal interests, but instead those of a third party who is not part of these proceedings (i.e. JHSF). The Chinese company JHSF is not a protected investor under the BIT, and its rights and assets cannot be considered protected investments.<sup>6</sup>

15. In the Respondent's view, the Claimant has legal rights only with respect to its shares in JHSF, but it has failed to make out a plausible shareholder's claim.<sup>7</sup> In particular, the Claimant has not alleged any interference with its shares in JHSF, and has failed to put forward any evidence for its statement that the alleged measures caused the loss of "almost" all the value of those shares.<sup>8</sup> Similarly, the Claimant has offered no evidence of any payment for its shares in JHSF or any other financial contribution, and it has not shown that it assumed any risk in making this alleged investment.<sup>9</sup>

16. The Respondent proposes that this objection be heard in a preliminary phase because, first, it is serious and substantial, as demonstrated by the lack of evidence the Claimant has filed regarding any harm to its investment.<sup>10</sup> The Respondent further contends that the Parties agree that this objection is unrelated to the merits.<sup>11</sup> Finally, the Respondent considers that "Objection 1 can dispose of considerable portions of the case (e.g. the claim concerning the supposed diminution in value of shares held by the Claimant, or the claim concerning certain assets of JHSF), if not the entire arbitration".<sup>12</sup>

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<sup>5</sup> Request, ¶ 88.

<sup>6</sup> Request, ¶ 90.

<sup>7</sup> Request, ¶¶ 99-106.

<sup>8</sup> Request, ¶¶ 101-104, *quoting* Claimant's Memorial, ¶¶ 247, 530.

<sup>9</sup> Request, ¶¶ 107-108.

<sup>10</sup> Reply, ¶¶ 15-16; *see* Request, ¶¶ 218-219.

<sup>11</sup> Reply, ¶ 14, *citing* Response, ¶ 15. The Claimant rejects this characterization in its Rejoinder; *see* ¶ 5(a).

<sup>12</sup> Reply, ¶ 14.

*b. Objection 2: Article 9(1) and (2) of the BIT.*

17. The Respondent's second objection to jurisdiction is based on Article 9(1)-(2) of the BIT, which provide:

(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

18. According to the Respondent, these provisions contains three steps, which constitute mandatory conditions to the Respondent's consent: (a) the investor informs the Respondent of a dispute and identifies the BIT's substantive obligations as the legal basis for its contentions; (b) the investor attempts to settle the dispute amicably with the Respondent as far as possible through negotiations; and (c) six months elapse without resolution of the dispute.<sup>13</sup> The Respondent cites a "long line of cases" holding that where a State opts to condition its consent on such notice and negotiation requirements, they form a "compulsory legal obligation".<sup>14</sup>

19. The Respondent submits that the Claimant has failed to show that it properly notified the Respondent of the treaty claims raised in this arbitration or that it made a meaningful attempt to settle the dispute amicably. Rather, "the only matters made known to local officials at the time were purely domestic complaints regarding the supposed undervaluation of JHSF's land and the alleged misapplication of Chinese laws and procedures".<sup>15</sup>

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<sup>13</sup> Request, ¶¶ 110, 122.

<sup>14</sup> Request, ¶¶ 122, citing, *inter alia*, **RL-79**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶¶ 71-72; **RL-67**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶¶ 132 ("mandatory requirement"), 142, 148-149.

<sup>15</sup> Request, ¶ 143.

20. The Respondent concludes that, as a result of the Claimant's failure to comply with Article 9(1)-(2) of the BIT, "an integral part of the Respondent's consent to arbitrate was not respected", and the case must be dismissed.<sup>16</sup>
21. In the Respondent's view, the Tribunal should hear this objection in a preliminary phase for several reasons. *First*, the Respondent argues that the objection is well grounded, as made apparent by the Claimant's own misguided arguments on this issue in the Memorial and the Response.<sup>17</sup>
22. *Second*, the Respondent asserts that this objection, if accepted, would dispose of all, or at least a significant part of the Claimant's claims.<sup>18</sup> As an example, the Respondent states that "the shareholder claim regarding the supposed devastation of JHSF's business would not have to be addressed".<sup>19</sup>
23. *Third*, the objection is a discrete question independent from the merits of the dispute and will not require a fact-intensive inquiry.<sup>20</sup> According to the Respondent, the "Tribunal's main task for the purposes of ruling on Objection 2 will be to interpret Article 9 of the BIT" and the "focus of the objection is the Claimant's conduct, as opposed to the Respondent's, as would be the case for the merits".<sup>21</sup>

*c. Objection 3: Article 9(a) of the BIT Protocol*

24. The Respondent's third objection to jurisdiction invokes Article 9(a) of the BIT Protocol, which states that:

With respect to investments in the People's Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only:

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<sup>16</sup> Request, ¶147.

<sup>17</sup> Request, ¶ 220; Reply, ¶¶ 20-22.

<sup>18</sup> Request, ¶ 224; Reply, ¶ 23.

<sup>19</sup> Reply, ¶ 23.

<sup>20</sup> April Request for Bifurcation, ¶ 39.

<sup>21</sup> Reply, ¶ 25.

(a) the investor has referred the issue to an administrative review procedure according to Chinese law...

25. The Respondent argues that this provision requires a “domestic administrative review of the issues averred in the international legal proceedings”, and that this requirement is a “compulsory precondition qualifying the Respondent’s offer to arbitrate”.<sup>22</sup>
26. According to the Respondent, the Claimant did not even allege in the Memorial to have complied with the administrative review requirement, and in fact, the Claimant did not comply.<sup>23</sup> The Respondent observes that any administrative proceedings held in the PRC were initiated by JHSF, not by the Claimant, as required by the BIT Protocol. Furthermore, JHSF opted *not* to seek administrative review of the Compensation Decision issued by the Jinan Municipal People’s Government’s on 29 August 2016, which is central to the Claimant’s claims in this arbitration.<sup>24</sup>
27. In the Respondent’s view, the Claimant’s failure to comply with the administrative review requirement deprives the Tribunal of jurisdiction.<sup>25</sup>
28. The Respondent argues that all three relevant considerations weigh in favour of bifurcating Objection 3. In this regard, the Respondent asserts that the seriousness of the objection is evident from the Parties’ disagreement over the interpretation of Article 9(a) of the BIT Protocol and its application to the relevant facts.<sup>26</sup> In addition, the Respondent views the relevant facts as uncontested, such that any further briefing would be “mainly legal in nature”.<sup>27</sup>

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<sup>22</sup> Request, ¶ 151.

<sup>23</sup> Request, ¶ 155.

<sup>24</sup> Request, ¶ 161.

<sup>25</sup> Request, ¶ 163.

<sup>26</sup> Reply, ¶ 30.

<sup>27</sup> Reply, ¶ 31.

29. Further, if the objection prevails, it would “defeat the Tribunal’s jurisdiction in the entirety, or at least with respect to the issues other than those covered by the Expropriation Decision”.<sup>28</sup>

*d. Objection 4: Article 9(c) of the BIT Protocol*

30. The Respondent’s fourth objection to jurisdiction is based on Article 9(c) of the BIT Protocol, which provides:

With respect to investments in the People’s Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only:

[...]

(c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law.

31. The Respondent asserts that this provision constitutes an additional mandatory precondition to the State’s consent to arbitration.<sup>29</sup> According to the Respondent, the “Claimant must not have litigated the issues it now submits to investment arbitration to completion in the Chinese courts”.<sup>30</sup>

32. In this context, the Respondent highlights that JSHF challenged the expropriation of its land in Chinese courts, and that, because those proceedings have concluded, the matter cannot be withdrawn from the courts. Thus, the Respondent’s view is that the Claimant cannot now raise that issue before an international tribunal, in light of Article 9(c) of the BIT Protocol.<sup>31</sup>

33. The Respondent considers it appropriate to bifurcate this objection because it is well founded and goes directly to the State’s consent to arbitrate, which “is *sine qua non* for investment arbitration”.<sup>32</sup> It is also sufficiently discreet for early determination. In this

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<sup>28</sup> Reply, ¶ 32.

<sup>29</sup> Request, ¶ 168.

<sup>30</sup> Request, ¶ 169.

<sup>31</sup> Request, ¶¶ 170-175.

<sup>32</sup> Reply, ¶ 35.

regard, the Respondent rejects the Claimant's attempt to create an overlap between this objection and the merits, including its attempt to plead a denial of justice. In the Respondent's view, the key facts relating to the objection are uncontested and unrelated to the merits, which revolve around the question of whether there was a substantial deprivation of JHSF's share value.<sup>33</sup>

*e. Objection 5: Admissibility*

34. Separate from the preceding objections to jurisdiction, and further to them or alternatively, the Respondent submits that the bases of its jurisdictional objections also provide compelling reasons for the Tribunal to decline to hear the Claimant's claims "independently from the lack of jurisdictional title or the merits."<sup>34</sup> In particular, the Respondent's position is that even if the Tribunal were to find that Article 9(1)-(2) of the BIT and Article 9(a) and (c) are not preconditions to jurisdiction, but rather matters pertaining to admissibility, they would still be mandatory.<sup>35</sup> Thus, the case must be dismissed in any event.

**(2) Applicable Legal Standards**

35. The Respondent position is that all five of its objections should be heard in a preliminary phase in the interest of procedural efficiency and fairness.
36. The Respondent submits that, pursuant to Article 41(2) of the ICSID Convention and ICSID Arbitration Rule 41(3) and (4), ICSID tribunals have discretion to bifurcate the proceedings and hear objections to jurisdiction and admissibility in a preliminary phase.<sup>36</sup> Indeed, many tribunals in cases under the ICSID Convention have opted for such a bifurcated proceeding.<sup>37</sup> According to Professor Schreuer's Commentary on the ICSID

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<sup>33</sup> Reply, ¶ 37.

<sup>34</sup> Request, ¶ 176.

<sup>35</sup> Request, ¶ 180.

<sup>36</sup> Request, ¶ 190.

<sup>37</sup> Request, ¶ 198.

Convention, “treatment of jurisdictional issues as preliminary questions is standard procedure”.<sup>38</sup>

37. In the Respondent’s view, there are several benefits to this approach. It promotes efficiency and “clarifies the basis and ambit of proceedings”.<sup>39</sup> In addition, the Respondent states that bifurcation “ensures that a party is not needlessly subject to improper proceedings”.<sup>40</sup> For the Respondent, this point is especially important when a sovereign State is a party, in light of the “basic principle of international law ... that States need not give an account of themselves before an international court or tribunal on the substance of a dispute when jurisdiction has not yet been established”.<sup>41</sup>
38. The Respondent notes that “efficiency is not just a question of speed and time savings. What instead matters is reaching the right result without needless input”.<sup>42</sup> Thus, for the Respondent, bifurcation of preliminary objections may be warranted even if it might prolong the proceedings.<sup>43</sup>
39. Regarding the legal framework, the Respondent submits that there is no strict test to be applied. Rather, the Tribunal should refer to “the core notions of economy, efficiency and fairness”.<sup>44</sup> In this context, the Respondent identifies three non-exhaustive considerations drawn from past investment cases:

*First*, is the objection *prima facie* serious and substantial in that it is not frivolous or vexatious?

*Second*, could the objection, if successful, dispose of the entirety of the Claimant’s case? If not, could it dispose of an important or essential part of the dispute, reduce the complexity of the dispute and/or obtain clarity on the existence and scope of the Tribunal’s jurisdiction (before a full-fledged merits phase)?

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<sup>38</sup> Request, ¶ 199, quoting **RL-56**, C. Schreuer et al., *The ICSID Convention: A Commentary* (CUP 2009), pp. 534, 537.

<sup>39</sup> Request, ¶ 202.

<sup>40</sup> Request, ¶ 203.

<sup>41</sup> Request, ¶ 211, citing **RL-37**, Shabtai Rosenne, *The World Court: What It Is and How It Works*, (Brill 2003), p. 81.

<sup>42</sup> Request, ¶ 201; Reply, ¶ 53.

<sup>43</sup> Reply, ¶¶ 53-54.

<sup>44</sup> Request, ¶ 204.

*Third*, is the objection capable of being disposed of preliminarily without prejudicing issues of liability, namely, is the objection unduly intertwined with the merits of the dispute?<sup>45</sup>

40. The Respondent notes the Claimant's agreement that the Tribunal has discretion to bifurcate the proceeding, and that the three considerations above are relevant to the Tribunal's determination.<sup>46</sup>

**(3) Whether Bifurcation is Appropriate in this Case**

41. The Respondent submits that each of its five objections satisfies the test for bifurcation because it (a) is "substantial as a matter of fact and law", (b) will dispose of all or a significant portion of the Claimant's claims, and (c) can be decided without entering into the merits of the dispute.<sup>47</sup> In fact, the Tribunal can "dispose of the entire matter on the basis of facts that are already on the record and that do not require any additional taking of evidence".<sup>48</sup>
42. In response to the Claimant's submissions on the Bifurcation Request, the Respondent contends, *inter alia*, that:
- a. the Claimant's extensive submissions on the merits of the objections show that the objections are sufficiently serious to warrant bifurcation;<sup>49</sup>
  - b. the Claimant has underestimated the work remaining in the arbitration,<sup>50</sup> all of which could be avoided if the preliminary objections are decided in a preliminary phase.<sup>51</sup>
43. The Respondent also submits that the Claimant's allegation of dilatory tactics on the part of the Respondent are misplaced, in light of the Respondent's compliance with all

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<sup>45</sup> Request, ¶ 204.

<sup>46</sup> Reply, ¶ 6.

<sup>47</sup> Request, ¶¶ 214 *et seq.*

<sup>48</sup> Request, ¶ 217.

<sup>49</sup> Reply, ¶ 11.

<sup>50</sup> Reply, ¶¶ 44-49.

<sup>51</sup> Request, ¶¶ 225-228. Reply, ¶ 46.

deadlines set by the Tribunal and considering the Claimant's own failure to submit its quantum expert report with the Memorial.<sup>52</sup>

**B. The Claimant's Position**

44. The Claimant opposes bifurcation and requests relief as follows:

the Claimant respectfully requests that the Arbitral Tribunal issue a decision DISMISSING the Respondent's Request for Bifurcation and DIRECTING the Parties to proceed to the full merits phase in accordance with Alternative Schedule 2 of Procedural Order No. 1 (Annex A).

The Respondent should be ORDERED to pay all additional costs and expenses incurred by the Claimant in connection with the Respondent's Request for Bifurcation.<sup>53</sup>

**(1) Response to Objections to Jurisdiction and Admissibility**

45. In summary, the Claimant's response to the Respondent's objections to jurisdiction and admissibility are as follows.

**a. Objection 1: Investment**

46. With regard to the Respondent's objection to jurisdiction *ratione materiae*, the Claimant argues that bifurcation would be inappropriate because the Respondent's arguments are frivolous and can be easily dismissed.<sup>54</sup>

47. According to the Claimant, this dispute arises directly out of its investment in the PRC, which consists of its shares in JHSF, as well as the investments it made through JHSF, including the expropriated land and buildings.<sup>55</sup> The Claimant argues that these assets clearly fall within the BIT's definition of "investment", which expressly covers indirect

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<sup>52</sup> Reply, ¶ 58.

<sup>53</sup> Response, ¶¶ 90-91.

<sup>54</sup> Response, ¶¶ 13-21, 61-63.

<sup>55</sup> Rejoinder, ¶ 9, 28.

investments.<sup>56</sup> Indeed, the Claimant points out that Article 1(b) of the Protocol to the BIT defines “Invested indirectly” as follows:

“Invested indirectly” means invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party.

48. The Claimant contends that, in accordance with this provision, investments made by JHSF are to be treated as the Claimant’s investments.<sup>57</sup>
49. The Claimant rejects the Respondent’s assertion that the Claimant has failed to demonstrate any harm to its investment. According to the Claimant, this is an issue for the merits, which is irrelevant for preliminary objections.<sup>58</sup> In any event, the Claimant contends that the harm is evident based on the uncontested fact that “the premises of JHSF were confiscated and demolished by the Jinan authorities and that, as a result, all economic activities of the Claimant have ceased”.<sup>59</sup>
50. The Claimant also rejects the Respondent’s statement that the “parties agree that this objection is unrelated to the merits”.<sup>60</sup> To the contrary, the Claimant considers the “Respondent’s contention that the dispute is not related to the Claimant’s investment is so far-fetched that it does not deserve any further attention”.<sup>61</sup>

*b. Objection 2: Article 9(1) and (2) of the BIT*

51. Similarly, the Claimant considers the Respondent’s second objection to be “plainly untenable”.<sup>62</sup> In particular, the Claimant challenges the Respondent’s interpretation of Article 9(1)-(2) of the BIT. According to the Claimant, this “cooling-off clause” does not mandate negotiations. Rather, it contains a single requirement: that an investor “raise” the

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<sup>56</sup> Response, ¶¶ 17-19.

<sup>57</sup> Response, ¶ 19.

<sup>58</sup> Rejoinder, ¶ 11.

<sup>59</sup> Rejoinder, ¶ 12.

<sup>60</sup> Rejoinder, ¶ 5(a), *quoting* Reply, ¶ 14.

<sup>61</sup> Rejoinder, ¶ 5(a).

<sup>62</sup> Response, ¶22.

dispute at least six months prior to filing a request for arbitration.<sup>63</sup> The Claimant submits that it complied with this requirement by repeatedly attempting to negotiate with the competent Chinese officials since 2014 in order to settle the dispute concerning the expropriation, as documented in the record.<sup>64</sup>

52. In any event, the Claimant asserts that, in the light of the “informal and non-mandatory wording of Article 9(2) of the BIT”, the cooling off requirement “does not constitute a formal pre-condition to the jurisdiction of the Tribunal and/or the admissibility of the claim”.<sup>65</sup>

53. For these reasons, the Claimant’s position is that Objection 2 is not sufficiently serious to warrant bifurcation.<sup>66</sup> Further, according to the Claimant, the objection is intertwined with the merits, as it relates directly to the Claimant’s allegation that the PRC authorities failed to enter into good faith negotiations regarding the amount of compensation for JHSF’s expropriated assets, in violation of the BIT.<sup>67</sup>

*c. Objection 3: Article 9(a) of the Protocol of the BIT*

54. The Claimant submits that Objection 3 is founded on a flawed interpretation of the BIT and a misstatement of the facts.<sup>68</sup> *First*, the Respondent assumes that Article 9(a) of the Protocol of the BIT requires the exhaustion of local remedies. However, the Claimant sees nothing in the text to support that assumption. In the Claimant’s view, the only requirement contained in that provision is that the investor refer “the issue” to an administrative review procedure before commencing arbitration.<sup>69</sup>

55. *Second*, the Claimant submits that the objection fails in any event because the Claimant complied with the administrative review requirement. Specifically, JHSF initiated

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<sup>63</sup> Response, ¶¶ 22-25.

<sup>64</sup> Response, ¶¶ 28-32.

<sup>65</sup> Response, ¶¶ 36, 38.

<sup>66</sup> Response, ¶¶ 22-38, 61-63

<sup>67</sup> Response, ¶¶ 67-71.

<sup>68</sup> Response, ¶¶ 39-47.

<sup>69</sup> Response, ¶ 43.

administrative review proceedings in November 2014 to challenge “the legality of the direct expropriation of its land-use right, which is also ‘the issue’ at the heart of this arbitration”.<sup>70</sup> The Claimant points to the Respondent’s own statement confirming this: “JHSF applied unsuccessfully for administrative review of the Expropriation Decision”.<sup>71</sup>

56. *Third*, the Claimant rejects the Respondent’s argument that the Claimant (as opposed to JHSF) was required to initiate the administrative review. According to the Claimant, “a) JHSF is nothing but the alter ego of Hela-Schwarz and b) JHSF being the expropriated party, it was the only entity entitled to initiate administrative review of the expropriation decision under Chinese law”.<sup>72</sup>

57. Thus, the Claimant argues that Objection 3 is not serious enough to be bifurcated.<sup>73</sup> In addition, this objection is “directly linked” to the merits. In particular, a decision on the objection would require an analysis of the Claimant’s treatment by Chinese administrative bodies, and the facts relevant to such an analysis are the same as those underlying the Claimant’s claims.<sup>74</sup>

*d. Objection 4: Article 9(c) of the Protocol of the BIT*

58. The Claimant submits that the Respondent’s fourth objection is “in manifest and direct contradiction with the clear terms of the BIT”.<sup>75</sup> According to the Claimant, the text of Article 9(c) of the Protocol of the BIT makes clear that it is not a “fork-in-the-road” or “election of remedies” clause, as the Respondent suggests.<sup>76</sup> Further, the Claimant points to the final sentence of Article 4(2) of the BIT, which provides:

At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts, notwithstanding the provisions of Article 9.

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<sup>70</sup> Response, ¶ 41.

<sup>71</sup> Response, ¶ 41, *quoting* Request, ¶ 41.

<sup>72</sup> Rejoinder, ¶ 17.

<sup>73</sup> *See* Response, ¶¶ 61-63.

<sup>74</sup> Response, ¶¶ 74-77.

<sup>75</sup> Response, ¶ 49.

<sup>76</sup> Response, ¶ 53.

59. In the Claimant's view, this provision expressly permits an investor to first submit the dispute to domestic courts and, absent effective redress, to then submit it to arbitration.<sup>77</sup> The Claimant contends that this is exactly what it has done in the present case. It tried to litigate in the Chinese courts, but was not given the opportunity to fully present its case, and therefore turned to arbitration.<sup>78</sup> In any event, the Claimant considers Article 9(c) of the Protocol of the BIT irrelevant, given that that no domestic proceedings were pending at the time it filed the request for arbitration.<sup>79</sup>
60. For these reasons, the Claimant argues that this objection will be easily dismissed, making bifurcation counter-productive.<sup>80</sup> In addition, according to the Claimant, the objection "encompasses questions of whether domestic proceedings have taken place effectively, which is directly relevant to the Claimant's denial of justice claim".<sup>81</sup> Thus, in the case of a bifurcated proceeding, the Parties would have to make submissions and present evidence on the same facts and law twice.<sup>82</sup>

*e. Objection 5: Admissibility*

61. The Claimant does not specifically address the Respondent's objection to admissibility. However, its position is that bifurcation is unwarranted with respect to all of the Respondent's objections.

**(2) Applicable Legal Standards**

62. The Claimant asserts that the 2006 ICSID Rules do not contain a presumption in favour of bifurcation, as opposed to the 1968 ICSID Rules.<sup>83</sup> Rather, it is entirely up to the Tribunal whether to hear preliminary objections in a separate phase or together with the merits. For the Claimant, this approach can be explained by the fact that "objections to jurisdiction are

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<sup>77</sup> Response, ¶ 50.

<sup>78</sup> Rejoinder, ¶ 31.

<sup>79</sup> Response, ¶ 56.

<sup>80</sup> See Response, ¶¶ 61-63.

<sup>81</sup> Rejoinder, ¶ 35.

<sup>82</sup> Response, ¶ 65.

<sup>83</sup> Response, ¶ 58.

frequent but not always genuine, and often serve the respondent State's objective of delaying the proceedings".<sup>84</sup>

63. The Claimant refers to certain factors that it considers relevant to the Tribunal's decision on the Bifurcation Request, including the seriousness of the objections, procedural efficiency, fairness, and proportionality.
64. According to the Claimant, "the issue of efficiency is directly linked to the likely outcome of the decision on preliminary objections"; if a respondent's objections are ultimately rejected, bifurcation increases the overall time and costs of the proceedings.<sup>85</sup> In particular, the Claimant states that the "same factual issues would have to be pleaded and adjudicated twice. The same documentary evidence would be submitted and reviewed twice. The same fact witnesses would have to be heard twice".<sup>86</sup>
65. Therefore, in the Claimant's view, the first question for the Tribunal in considering whether to bifurcate this proceeding is: "Are the objections raised by the Respondent the result of a genuine concern that the State parties (here the PRC and Germany) may not have intended to submit a dispute like the present one to ICSID arbitration?"<sup>87</sup> Another question addressed by the Claimant is whether the objections are linked to the merits.<sup>88</sup>
66. Finally, the Claimant considers the Respondent's general statements about the benefits of bifurcation are unhelpful, because the critical question is whether bifurcation would promote efficiency and fairness *in the particular circumstances of this case*.<sup>89</sup> In any event, the Claimant points to a statistical analysis of ICSID cases which, in its view, shows that bifurcation does not in fact promote efficiency.<sup>90</sup>

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<sup>84</sup> Response, ¶ 59.

<sup>85</sup> Response, ¶ 84.

<sup>86</sup> Response, ¶ 84.

<sup>87</sup> Response, ¶ 60.

<sup>88</sup> Response, ¶¶ 64-77.

<sup>89</sup> Response, ¶ 79.

<sup>90</sup> Response, ¶ 81, citing **CL-0109**, Lucy Greenwood, "Does Bifurcation Really Promote Efficiency?", *Journal of International Arbitration* (Volume 28, Issue 2, 2011), p. 107 ("The limited empirical data does not support the view that bifurcating proceedings limits the duration of the dispute.").

**(3) Whether Bifurcation is Appropriate in this Case**

67. The Claimant's position is that bifurcation would be detrimental to the efficiency and fairness of this proceeding for the three main reasons:

*First*, the Respondent's preliminary objections are in manifest contradiction with the letter of the BIT and with the established facts of the case. *Second*, the objections raise factual issues that lie at the heart of the merits of this arbitration, and, hence, may not be prejudged before assessing the Claimant's substantive claims. *Third*, bifurcation in this case would impose an unreasonable financial burden on the Claimant and would result in excessively long proceedings considering the relative simplicity of the case.<sup>91</sup>

68. With reference to the Procedural Timetable in Procedural Order No. 1, the Claimant argues that bifurcation would result in an extended proceeding in which an award on the merits could not be expected before the middle of 2022, five years after the registration of this case.<sup>92</sup> More than a year would be dedicated to the Respondent's objections, which according to the Claimant, "do not deserve that degree of attention".<sup>93</sup>

69. The Claimant sees no exceptional circumstances in this case that would justify such a long proceeding. In fact, the Claimant considers this a relatively simple case in which "[t]he facts are straightforward and well-documented. None of the underlying facts entail any particularly technical issues or require special knowledge other than expertise in international law, with the exception of a few isolated issues of Chinese law".<sup>94</sup>

70. Furthermore, the Claimant asserts that the arbitration costs should be proportionate to the amount in dispute. Accordingly, "the Tribunal should also be mindful of the fact that the amount in dispute – approximately EUR 25,000,000.00 – is comparatively low".<sup>95</sup> For the Claimant, this is especially important in the present circumstances, as there is "a massive economic imbalance between the Parties", and the Claimant's economic troubles have been

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<sup>91</sup> Response, ¶ 4.

<sup>92</sup> Response, ¶ 89; Rejoinder, ¶ 39.

<sup>93</sup> Response, ¶ 63.

<sup>94</sup> Rejoinder, ¶ 38.

<sup>95</sup> Response, ¶ 92.

caused by the Respondent's actions.<sup>96</sup> In these circumstances, the Claimant argues that it would suffer an unreasonable burden as a result of bifurcation.

71. The Claimant rejects the Respondent's arguments concerning the supposed efficiency of bifurcation, on the basis that they do not address the specific circumstances of this case. In addition, the Claimant considers the Respondent's position at odds with its "dilatory and obstructive tactics".<sup>97</sup>

### III. THE TRIBUNAL'S ANALYSIS

72. The Tribunal has given careful consideration to the Parties' submissions. As noted in opening, the question the Tribunal is required to address at this stage of the proceedings is limited to whether bifurcation is warranted to enable the Respondent's objections to be addressed in a preliminary phase.

73. The Tribunal notes that unlike, for example, the International Court of Justice, in which proceedings on the merits are suspended upon receipt of preliminary objections,<sup>98</sup> the ICSID Convention and ICSID Arbitration Rules do not mandate such action. On the contrary, there is no presumption in favour of bifurcation in ICSID proceedings. Article 41(2) of the ICSID Convention provides simply that the Tribunal "shall determine whether to deal with [objections to jurisdiction or competence] as a preliminary question or to join [them] to the merits of the dispute." ICSID Arbitration Rule 41(3), under the heading "Preliminary Objections", provides, *inter alia*, that "Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceedings on the merits."<sup>99</sup> The question of whether to bifurcate the proceedings so as to address in a preliminary phase objections that are characterised as "preliminary" is thus a matter of discretion for the Tribunal based on its appreciation of what the Respondent has described

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<sup>96</sup> Response, ¶ 91; *see* Rejoinder, ¶ 40.

<sup>97</sup> Response, ¶ 87. The Claimant states that "[t]he most striking examples are (i) the time taken to fulfil its part in the constitution of the Arbitral Tribunal, (ii) its deliberate aggravation of the dispute following the Claimant's provisional measures request and, more recently, (iii) its unilateral decision to upload the supporting documentation to its Memorial on Preliminary Objections with a seven-day delay".

<sup>98</sup> International Court of Justice, Rules of Court, Article 79(5).

<sup>99</sup> Emphasis added.

as “the core notions of economy, efficiency and fairness”<sup>100</sup> and the Claimant has framed in terms of efficiency, fairness and proportionality.<sup>101</sup>

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. Amongst the issues to which it ought to have regard are (a) whether the Respondent’s objections appear closely linked to the merits of the claim such that the Tribunal may only be sufficiently informed of the issues in the course of the proceedings on the merits, (b) whether the objections appear capable of disposing of the entirety of the Claimant’s case, and (c) whether bifurcation would be procedurally efficient in the circumstances of the case, both in terms of time and cost, or, alternatively, whether bifurcation may prolong the proceedings and add to the Parties’ costs, whether for reason of dismissal of the objections or joinder of the objections to the merits of the proceedings.
75. The Tribunal is required to make its assessment on the basis of the Parties’ submissions to date, which in this case includes notably the Claimant’s Memorial, the Bifurcation Request and the Parties’ subsequent pleadings on the Bifurcation Request.
76. Having regard to these pleadings, the Tribunal is not in a position to conclude, and does not consider, that any of the objections advanced by the Respondent is either frivolous or otherwise self-evidently lacking in merit. An appreciation of whether such an evaluation is warranted, as is urged by the Claimant, will have to await a considered assessment in due course. Nothing in the Tribunal’s decision to reject the Respondent’s request for bifurcation should thus be taken as reflecting a view that any objection does not properly warrant careful scrutiny.
77. This said, having regard to the Parties’ submissions, the Tribunal considers that bifurcation is neither warranted nor appropriate in the circumstances of the case for three reasons. The first is that, on the basis of its appreciation from the Parties’ submissions to date, it appears to the Tribunal that it is only likely to be sufficiently informed of the issues, to enable it to

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<sup>100</sup> Bifurcation Request, ¶ 204.

<sup>101</sup> Observations, *inter alia*, at ¶¶ 4 and 57.

take a considered decision on the Respondent's objections, in the course of the proceedings on the merits of the case. For example, it appears to the Tribunal that a considered assessment would properly require the Tribunal to have a clear appreciation of the steps taken by the Claimant and its subsidiary in the PRC to challenge the measures of which the Claimant complains before the PRC authorities. This goes to both jurisdiction and merits, and may be expected to turn on questions of evidence.

78. This appreciation of linkage to the merits, even if to a different extent, for purposes of enabling the Tribunal to be sufficiently informed of the issues requiring decision, seems to arise in respect of each of the Respondent's objections to jurisdiction. And, as noted above, the objection to admissibility is contingent on the objections to jurisdiction, rather than being an elaborated and independent objection.
79. The second reason for the Tribunal's decision, related to the first, is that, having regard to the preceding appreciation, the Tribunal considers that bifurcation is unlikely to be procedurally efficient in terms of both time and cost. Particularly having regard to the likely requirement for evidence, a bifurcated procedure to address the substance of the Respondent's objections would likely require an extended procedure in circumstances in which the Tribunal is not now in a position to conclude that there is a preponderant likelihood that the outcome of such a preliminary procedure would be dismissal of the Claimant's case at that preliminary stage. In such circumstances, bifurcation would add to the Parties' commitment of time and cost, rather than reduce it. In contrast, the Tribunal considers that the procedural schedule that is already in place pursuant to PO#1, that will follow this decision on bifurcation, will enable the issues to be efficiently addressed.
80. The third reason for the Tribunal's decision is that any disadvantage or hardship to the Respondent in consequence of joining the Respondent's objections to the merits would be adequately and appropriately addressed by an award of costs were the Tribunal to conclude in due course that any of the Respondent's objections were well founded. In the circumstances of the case, the Tribunal considers that the balance of economy, efficiency and fairness favours joining the Respondent's preliminary objections to the merits, where they can be fully considered in light of all the evidence.

**IV. DECISION**

81. For the above reasons, the Tribunal decides as follows:

- (a) the Respondent's request for the proceedings to be bifurcated to enable its objections to jurisdiction and admissibility to be addressed at a preliminary phase is denied;
- (b) the Respondent's objections to jurisdiction and admissibility are joined to the proceedings on the merits;
- (c) Alternative Schedule 2 of Annex A of Procedural Order No.1 shall apply to the proceedings going forward; and
- (d) the issue of costs in connection with the request for bifurcation is deferred for consideration at a later stage.

On behalf of the Tribunal,

[signed]

Sir Daniel Bethlehem QC  
President of the Tribunal

Date: 17 December 2018