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

Members of the Tribunal
Ms. Wendy Miles QC, President of the Tribunal
Mr. Antolín Fernández Antuña, Arbitrator
Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

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7 June 2022

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I. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY

1. This case concerns claims brought by (i) Mainstream Renewable Power Ltd, (ii) International Mainstream Renewable Power Limited, and (iii) Mainstream Renewable Power Group Finance Ltd, three private companies limited by shares incorporated in Ireland, and (iv) Horizont I Development GmbH, (v) Horizont II Renewable GmbH, and (vi) Horizont III Power GmbH, three limited liability companies incorporated in Germany (together, the "**Claimants**"), against the Federal Republic of Germany ("**Germany**" or the "**Respondent**"). The dispute was submitted by the Claimants to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty ("**ECT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**"). The proceedings are administered under the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"). The Claimants and the Respondent are collectively referred to as the "**Parties**".

2. The dispute arises out of measures taken by the Respondent regarding its regulatory regime for wind energy, which allegedly affected the Claimants' wind energy projects, resulting in a loss to their investments.

3. This Procedural Order concerns the Respondent's Memorial on Jurisdiction and Request for Bifurcation dated 25 March 2022 (the "**Request**").

4. On 12 October 2021, the Respondent filed an Application Pursuant to ICSID Arbitration Rule 41(5), arguing that the Claimants' claim is manifestly without legal merit and should be dismissed (the "**Rule 41(5) Application**"). Following the establishment of a briefing schedule, the Parties subsequently made submissions on the Rule 41(5) Application.

5. The first session was held on 26 October 2021. On 22 November 2021, the Tribunal issued Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties and the Tribunal's determinations on procedural matters. PO1 was subsequently amended on 26 January 2022. Annex C to PO1 set forth the procedural calendar if the Tribunal dismissed the

Rule 41(5) Application, with a scenario involving a request for bifurcation of the proceeding.

6. On 18 January 2022, the Tribunal decided on the Rule 41(5) Application (the "**Rule 41(5) Decision**"), wherein it concluded:

> *In view of the above, the Tribunal determines as follows:*
>
> *a. the Respondent's Application under ICSID Arbitration Rule 41(5) is denied;*
>
> *b. both Parties' requests that the Tribunal rule on jurisdiction are denied in the context of this Application; and*
>
> *c. any decision as to costs is reserved.*[1]

7. Pursuant to the procedural calendar, on 25 March 2022, the Respondent filed the Request, together with Legal Authorities RL-0014 through RL-0076.

8. On 6 May 2022, the Claimants filed their Memorial on Jurisdiction and Response to the Request for Bifurcation (the "**Response**"), together with Exhibits C-0164 through C-0177 and Legal Authorities CL-0137 through CL-0213.

9. On 23 May 2022, the Respondent requested that the Tribunal take into account its recent appeal concerning the decision of the Higher Regional Court of Berlin (the *Kammergericht*, or "**Berlin Court**") dated 28 April 2022, which had rejected the Respondent's application under Sec. 1032(2) of the German Code of Civil Procedure to rule on the admissibility of the arbitral proceedings("**Berlin Court Application**"). The Berlin Court rejected the application on the grounds that the invalidity of an arbitration agreement in favour of ICSID arbitration could not be raised in proceedings pursuant to Sec. 1032(2) of the German Code of Civil Procedure (*Zivilprozessordnung*).

[1] Rule 41(5) Decision, para. 126.

10. The Respondent submitted that the Court's reasoning was wrong and under appeal. It requested that "[*c*]*onsidering that the Arbitral Tribunal is bound by EU law, that the arbitration agreement is invalid under EU law and that German courts have jurisdiction to examine the admissibility of the proceedings*", the Tribunal stay the proceeding pending the outcome of the appeal.

11. On 25 May 2022, the Claimants submitted in response that the Tribunal should reject the application to stay as "*untimely and unfounded*", as well as being "*contrary to the exclusive jurisdiction of the Tribunal under Article 41 of the ICSID Convention to determine its own competence*", and sought legal fees.

12. On 30 May 2022, the Respondent wrote further to notify the Tribunal that it "*does not consider it necessary or appropriate for the Tribunal to make a decision on costs at this stage of the proceedings*" because they are "*still in their early stages*". The Respondent however upholds its request for stay pending the outcome of the appeal in the Berlin Court Application. Also on 30 May 2022, the Claimants clarified the date of the appeal in the Berlin Court Application, being 20 May 2022, and copied the appeal document to the Tribunal.

13. On 1 June 2022, in Procedural Order No. 2, the Tribunal denied the Respondent's Application to Stay the arbitration pending the outcome of the appeal in the Berlin Court Application.

II. THE PARTIES' POSITIONS

14. This section provides a brief summary of the Parties' positions on the bifurcation of objections to jurisdiction, including their respective views on the applicable legal standard and on how that standard should be applied to the facts of this case.

A. THE RESPONDENT'S REQUEST

15. The Respondent raises three separate jurisdictional objections: (i) lack of consent to arbitrate pursuant to ECT Article 26 and ICSID Convention Article 25(1) (the "***intra-EU***

objection"); (ii) lack of subject matter jurisdiction based on the Claimants' activity not constituting an investment; and (iii) no personal jurisdiction in respect of the three German Claimants.

16. The basis for the Respondent's application to bifurcate is set out at paragraphs 249 to 288 of its Request. It argues that the applicable criteria for ICSID Convention Articles 41(1) and (2) are met. In particular, it submits that: (i) the jurisdictional objections are substantial;[2] (ii) if bifurcation were granted it would result in material reduction in the proceeding;[3] (iii) the preliminary issue is not intertwined with the merits;[4] and (iv) bifurcation would promote procedural efficiency and fairness.[5]

17. As to the substantial nature of its objections, the Respondent submits that bifurcation should be denied if the objections are frivolous,[6] and here the objections "*cannot be dismissed as frivolous, but must be qualified as substantial and serious*".[7]

18. As to the material reduction of the proceeding, the Respondent submits that if bifurcation were permitted then "[*a*]*n in depth analysis of the merits will not be necessary, but the Tribunal is invited to focus its efforts on the jurisdictional questions*".[8] The Respondent further submits that its "*intra-EU objection*" would be dispositive.[9]

19. As to the preliminary issue not being intertwined with the merits, in relation to the "*intra-EU objection*", the Respondent submits that "*there is no close relationship between Respondent's primary jurisdictional objection* ratione voluntatis *and the merits of the case*".[10] It submits that the "*arguments at the jurisdictional phase focus on the fact whether or not the ECT is applicable in an intra-EU relationship*", which "*can be had and decided*

[2] Request, paras. 256-262.
[3] Request, paras. 263-264.
[4] Request, paras. 265-268.
[5] Request, paras. 269-282.
[6] Request, para. 257.
[7] Request, para. 262.
[8] Request, para. 263.
[9] Request, para. 264.
[10] Request, para 266.

totally independently of what Claimants wrongly allege as violation of the ECT in the matter".[11] In relation to the subject matter jurisdiction, the Respondent submits that this can be "*decided on the basis of Claimants' arguments submitted in their Memorial alone*", on the grounds that "*since the activities never left the preparatory stages and there was nothing that would or could have contributed to the economic development of the Federal Republic of Germany in any way*".[12]

20. As to procedural efficiency, the Respondent refers the Tribunal to *Apotex v. USA* to support its position that the Tribunal should consider the circumstances of the case including as to risks of delay, wasted expense and prejudice.[13]

21. It submits that "[*e*]*specially in view of the complexity of the merits of this case*", bifurcation "*would save considerable time, costs and human resources*".[14] It further submits that "*the principle of procedural efficiency requires that Respondent's objections to this Tribunal's jurisdiction be determined as a preliminary matter*",[15] including because it would save costs "*as less submissions will be necessary*",[16] and the Tribunal "*should give considerable weight to the potential for cost savings in the expenditure of public funds*".[17]

22. It further submits that there would be significant delay if bifurcation were not granted.[18] Even if the jurisdictional challenges were unsuccessful, it submits that given that "*the facts leading up to this case happened more than a decade ago, a decision at the beginning of 2024 does not present any further lengthy delay in the resolution of this dispute*".[19]

[11] Request, para. 266.

[12] Request, para. 268.

[13] Request, para. 269, citing to *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1, Procedural Order deciding Bifurcation and Non-Bifurcation, 25 January 2013 ("***Apotex v. USA***"), **RL-0073**, para. 10.

[14] Request, para. 270.

[15] Request, para. 271.

[16] Request, para. 272.

[17] Request, para. 274.

[18] Request, paras. 276-278.

[19] Request, para. 279.

23. As to fairness, the Respondent submits that it should not be required to participate in a full hearing "*before the Tribunal has determined whether the claims are brought in the right forum*" and that "*no irreparable harm will be suffered by Claimants if these proceedings are bifurcated*".[20] As the Claimants seek monetary loss, "*any possible prejudice that they would suffer can be compensated by an award from the Tribunal*".[21]

24. Finally, the Respondent submits that "*ICSID arbitration practice supports suspending the proceedings on the merits while objections to jurisdiction are addressed as preliminary questions*".[22]

B. THE CLAIMANTS' OBSERVATIONS

25. The Claimants deny the challenges to jurisdiction and object to the Request for Bifurcation.

26. The basis for the Claimants' objection is set out at paragraphs 146 to 188 of the Response. It submits that the Parties are "*in agreement that the Tribunal has the power to bifurcate*",[23] and that whether it should exercise that power "*is a practical question*" and the main considerations are "*procedural economy, efficiency and fairness*".[24]

27. The Claimants submit that the three criteria asserted by the Respondent (*i.e.*, the criteria of (i) serious and substantial objection, (ii) which is dispositive of the case, and (iii) not intertwined with the merits) "*represent non-exhaustive examples of procedural efficiency and hark back to a past trend in favour of a presumption of bifurcation which no longer exists*".[25] Instead, the Claimants submit that "*any bifurcation request must be examined 'in light of its own specific factual and legal circumstances'*".[26] According to the

[20] Request, para. 281.

[21] Request, para. 280.

[22] Request, para. 284, citing to C. Schreuer, *The ICSID Convention: A Commentary* (2009) (excerpt) ("**Schreuer**"), **RL-0075**, p. 534.

[23] Response, para. 146.

[24] Response, para. 147.

[25] Response, para. 148.

[26] Response, para. 148, citing to *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014, **RL-0069**, para. 103; *Rand Investment Ltd. and others v. Republic*

Claimants, in the current case "*viewed in the whole, bifurcation would not limit the duration and cost of proceedings in a procedurally efficient manner*".[27]

28. As to time and cost, the Claimants suggest that bifurcation would lead to increased cost and time, based on survey data and earlier decisions,[28] and that bifurcation in the current case could lead to delay "*in the range of 16 to 18 months as per the studies mentioned, meaning that the main evidentiary hearing would not take place in September 2023 but possibly only in March 2025 (or even later, depending on the Tribunal's and the Parties' availability)*".[29] Among other things, the Claimants note that the Respondent's Memorial references to its witness and expert evidence would require examination of certain witnesses and experts at the jurisdictional hearing.[30]

29. The Claimants further submit that even if bifurcation were to save time, it is still necessary to weigh the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice for both sides.[31]

30. As to the substantial nature of the objections, the Claimants submit that the Respondent's jurisdictional objections are not "*serious and substantial*".[32]

31. As to the dispositive nature of the objections, the Claimants point out that the Respondent's objections *ratione personae* would not dispose of all or an essential part of the claims raised.[33]

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of Serbia, ICSID Case No. ARB/18/8, Procedural Order No. 3, 24 June 2019, **CL-0183**, para. 16; and *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, **CL-0184**, para. 66.

[27] Response, para. 149.

[28] Response, para. 154, citing to, *inter alia*, L. Greenwood, "Revisiting Bifurcation and Efficiency in International Arbitration Proceedings", in 36 *Journal of International Arbitration* No. 4 (2019), **CL-0189**, p. 425.

[29] Response, para. 155(ii).

[30] Response, para. 151.

[31] Response, para. 158, citing to *Apotex v. USA*, **RL-0073**, para 10.

[32] Response, paras. 165-172.

[33] Response, paras. 173-175.

32. Finally, as to the intertwining of the jurisdictional objections and the merits, the Claimants submit that there are "*closely linked*" facts sufficient to justify a refusal to bifurcate.[34] In particular the Claimants submit that the "*intra-EU objection*" is intertwined with the merits and has been found similarly to have been so other proceedings.[35]

33. As to the subject matter jurisdiction, the Claimants submit that the Respondent relies on two Claimant expert reports and one Claimant fact witness statement, giving rise to the potential need for further oral testimony at any jurisdictional hearing.[36] According to the Claimants, duplicative oral testimony could lead to procedural inefficiency and unfairness.[37] In particular, the Tribunal would be prevented from effectively ruling on the objection unless it were able to "*carry out a detailed review of facts and evidence (both documentary and testimonial) spanning numerous years*".[38]

III. THE TRIBUNAL'S ANALYSIS

34. The Tribunal has carefully considered the Parties' respective written submissions. At this stage it has focused on the Request for Bifurcation applicable standard and the application of that standard in the circumstances of the current case, as opposed to the substance of the objections to jurisdiction.

A. THE APPLICABLE STANDARD

35. The Tribunal is governed by Article 41(2) of the ICSID Convention, which provides:

> *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*

[34] Response, paras. 176-188.

[35] Response, paras. 179-181, citing to *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**, para. 94; *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Procedural Order No. 3, 9 October 2019, **CL-0198**, para. 38; and Annex 1 (listing 42 other cases).

[36] Response, paras. 182-183.

[37] Response, para. 184.

[38] Response, para. 184.

> *which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.*

36. The Tribunal is further governed by Arbitration Rule 41, which provides in relevant parts:

> *(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.*
>
> *(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.*

37. The Parties agree that the Tribunal has the power to bifurcate the Respondent's three jurisdictional objections pursuant to the exercise of its jurisdiction under Article 41(1) ICSID Convention. However, the Parties differ as to whether or not and in what circumstances the Tribunal ought to exercise its power.

38. The ICSID Convention Article 41(2) relates exclusively to "*[a]ny 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*", i.e., a jurisdictional objection. Article 41(2) does not create a presumption that a tribunal must deal with such objection by way of "*preliminary issue*". Instead, and as both sides appear to accept, Article 41(2) leaves it to tribunal discretion to determine "*whether to deal with [the objection] as a preliminary question or to join it to the merits of the dispute*".

39. As stated by Schreuer,[39]

> *The choice between a preliminary decision and a joinder to the merits is a matter of procedural economy. It does not make sense to go through lengthy*

[39] Schreuer, **RL-0075**, p. 537.

> *and costly proceedings dealing with the merits of the case unless the tribunal's jurisdiction has been determined authoritatively. 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.*

40. As further noted by Schreuer, the proposal in the Working Paper and Preliminary Draft to the ICSID Convention that tribunals were mandated to decide jurisdictional objections as preliminary questions was expressly rejected in the final draft.[40] The key factor is procedural economy in the particular case and that remains a matter for the Tribunal to determine solely in its discretion without any presumption in favour of a preliminary decision. Therefore, it is not for the Claimants to prove compelling reasons to rebut a presumption of bifurcation.

41. The Tribunal is not persuaded by the Respondent's reliance on commentary that "*ICSID tribunals have routinely suspended proceedings on the merits upon receipt of an objection to jurisdiction*".[41] This relates solely to the period of time between the raising of an objection to jurisdiction to the Tribunal decision on bifurcation. Moreover, the commentary reflects the position prior to the change to Rule 41(3) in April 2006. Prior to that time, Rule 41(3) required mandatory suspension of proceedings. Since April 2006, Rule 41(3) has left the matter of suspension also entirely to the Tribunal's discretion, as remained the case for bifurcation.

42. If the practice of other tribunals were a factor in the Tribunal's consideration, the majority of the Tribunal notes the Claimants' observation that almost every one of the 42 tribunals that has considered the "*intra-EU objection*" has decided in its discretion not to bifurcate the objection to jurisdiction and not to suspend the merits pending resolution of the jurisdictional objection. Almost every one has in its discretion determined instead to join the preliminary question regarding the "*intra-EU objection*" to the merits.

[40] Schreuer, **RL-0075**, p. 537.

[41] Request, para. 284, fn. 151, citing to Schreuer, **RL-0075**, p. 534.

43. The majority of the Tribunal in the current arbitration is persuaded primarily by its consideration of the relevant factors before it in this particular case. Insofar as it were to be guided by decisions of prior tribunals, it would make most sense to be guided by those dealing with the same or substantially similar objection as in the current case.

44. As to the relevant factors that the majority of the Tribunal considers to be pertinent in this case, the Parties have broadly agreed that these include:

a. the nature of the jurisdictional objections;

b. whether or not bifurcation would result in dismissal or a material reduction of the questions to be addressed in the proceedings;

c. whether or not the preliminary issue is intertwined with the merits;

d. whether or not bifurcation would promote procedural, time and cost efficiency; and

e. general principles of fairness to both sides.

45. The Tribunal recognises that the Claimants consider the factors identified by the Respondent based on the *Glamis Gold v. USA* case to be non-exhaustive examples of procedural efficiency that pre-date the amendment to the Rules.[42] However, the Tribunal considers that the factors outlined in paragraph 44 above, which include but are not limited to the *Glamis Gold* factors, are appropriate for it to consider in exercising its discretion.

46. The majority of the Tribunal further notes that it does not accept the additional standard proposed by the Claimants that "*[i]f the Tribunal considers that <u>any</u> of the Respondent's objections do not merit bifurcation, procedural efficiency dictates that <u>all</u> of the objections should be so joined*".[43] Rather, the majority of the Tribunal considers it appropriate to consider the case and the jurisdictional objections in the whole and determine whether or

[42] *See* Response, paras. 147-148, referring to Request, para. 252, fn. 143 (citing to, *inter alia, Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2, 31 May 2005, **RL-0064**, para. 12).

[43] Response, para. 150 [emphasis original].

not they collectively render it appropriate to bifurcate. That approach would be most consistent with the objective of achieving procedural economy.

B. THE APPLICATION OF THE STANDARD

47. First, as to the nature of the objections, it is appropriate at this stage in the proceeding for the Tribunal to take a *prima facie* view as to whether or not these are frivolous. The Tribunal has not taken a decision on the substantive arguments, legal basis or evidence regarding the jurisdictional objections, and nor will it be in a position to do so fairly and reasonably, until each side has had a full opportunity to present its case. The purpose of this decision is simply to consider whether or not those objections are frivolous.

48. The Tribunal considers the frivolous threshold, based on the plain meaning of the term, to be one that would require the objections to have little or no weight or not deserve any serious attention. This is a relatively low threshold. It does not mean that the objections are likely to prevail or even are necessarily compelling. It simply means that on their face they appear to warrant serious attention and consideration by the Tribunal. No further weighing of the merits of those decisions can or will be made until they are considered having given both sides a full opportunity to be heard in a procedurally economic manner.

49. Having considered the scope and nature of the three jurisdictional objections and the bases as set out in the Respondent's Request, the Tribunal does not consider any one of these to be frivolous on the basis set out above.

50. As to the effect of this *prima facie* finding, the Respondent suggests that having determined the objections not to be frivolous, the Tribunal should automatically proceed to bifurcate the proceedings to deal with them as a preliminary issue. The Tribunal does not agree that this is the natural conclusion as procedural economy requires a weighing up of all of the relevant factors. Therefore, it proceeds instead to consider each of the remaining four.

51. Secondly, the Tribunal has considered each side's position as to the effect of bifurcation on dismissing or materially reducing the proceeding. In this respect, the Tribunal assumes that the jurisdictional objectives were to succeed (broader procedural economy taking into

account bifurcation and failure of the jurisdictional objections is dealt with separately below). It is plain that if the Respondent were to succeed in respect of its first or second jurisdictional objection, that would result in a termination of the proceeding. If, on the other hand, it were only to succeed in its third objection as to the personal jurisdiction in respect of the three German Claimants, the proceeding would not be materially reduced, and the Respondent has not suggested otherwise.

52. Accordingly, the Tribunal is persuaded that the early consideration of the first and second jurisdictional objections, but not the third, could result in early termination of the proceeding.

53. Thirdly, the Tribunal has considered the extent to which the factors and arguments regarding the jurisdictional objections are intertwined with the merits. This is the factor that Schreuer describes as "*jurisdictional questions [] so intimately linked to the merits of the case that it is impossible to dispose of them in preliminary form*".[44] In this regard, the majority of the Tribunal is less troubled by the third jurisdictional objection dealing with the three German Claimants. It is concerned however that the first and/or second objections are likely linked to the merits of the case. Whilst it may not be 'impossible' to dispose of these objections separately, there is a risk that doing so may lead to a decision that prejudges factual and/or legal issues that require proper consideration of the evidence and arguments on the merits as well as the arguments on the jurisdictional objections.

54. Therefore, given potential intertwining of issues (as described below) it is impossible for the majority of the Tribunal at this juncture to determine that it is able to dispose of the first and second jurisdictional objections without risking injustice to one or more of the Parties.

55. As to the first objection, the Respondent invokes the Court of Justice of the European Union ("**CJEU**") cases of *Achmea*, *Komstroy* and *European Food* in support. It cites to *Komstroy* in that "*an arbitral tribunal such as that referred to in Article 26(6) ECT is required to*

[44] Schreuer, **RL-0075**, p. 537.

interpret, and even apply, EU law".[45] That reference follows from the CJEU's discussion at paragraph 48 of the judgment that "*in the first place, it should be noted that, in accordance with Article 26(6) ECT, the arbitral tribunal provided for in paragraph 4 of that article is to rule on the issues in dispute in accordance with the ECT and with the applicable rules and principles of international law*".[46]

56. The reference does not expressly limit any requirement to interpret and apply EU law to the question of jurisdiction independent of any underlying interpretation or application of EU law to the merits of the dispute. The three primary CJEU decisions relied upon by the Respondent as forming the basis of its "*intra-EU objection*" each involved an underlying arbitration in which the Respondent EU Member State argued that the investment protection and relief sought would constitute State aid in breach of EU law. The underlying tribunals' role in interpreting or applying that EU law was a predicate to the CJEU decisions.

57. The Respondent currently describes its "*intra-EU objection*" as being based on the argument that arbitration clauses in intra-EU BITs in themselves give rise to a ***risk*** that a tribunal established pursuant to such arbitration clause ***may*** have to apply EU law, sufficient to exclude the Tribunal's jurisdiction.[47] However, in each of the CJEU decisions that it relies on as central to its "*intra-EU objection*", the respondent EU Member State had raised EU State aid law in the context of the underlying merits case. Therefore, although the Respondent does not currently put its "*intra-EU objection*" on the basis that this Tribunal needs to apply EU law to the merits of this dispute, the CJEU decisions each appears to have included that additional element. These cases therefore did not involve a factual matrix of hypothetical risk of a tribunal possibly needing to apply EU law but, on the respondent EU Member State's case, the relevant tribunal in fact being required to interpret or apply EU law.

[45] Request, para. 46, citing to *Republic of Moldova v. Komstroy LLC*, CJEU Case C-741/19, Judgment, 2 September 2021 ("***Komstroy***"), **RL-0007**, para. 50.

[46] *Komstroy*, para. 48.

[47] Memorial on Jurisdiction, paras. 43-47.

58. In the current case, the Respondent has not yet pleaded its defence on the merits. It is not yet clear whether or not it intends to argue the application of EU law to the merits, as well as to jurisdiction. Assuming that, in line with the authorities that the Respondent has invoked in support of its "*intra-EU objection*", the Respondent were to raise the issue to the application of EU law to the merits, then the jurisdictional questions would be very much intertwined with the merits in this proceeding. In the circumstances, the application of EU law in relation to jurisdiction may not be as discrete as the Respondent has suggested.

59. The majority of the Tribunal is concerned that this raises a risk that it will not be able to deal with the Respondent's arguments as to the application of EU law in a fair or full manner that properly affords a full right to be heard by both sides.

60. As to the second objection, the Claimants have set out in some detail the extent to which the nature of the activity is intertwined with the facts and expert and factual evidence. They note in particular that the Respondent has sought to rely upon that evidence and expert testimony, which goes to the Claimants' case on the merits, in support of the second jurisdictional objection.[48] This indicates that this jurisdictional objection raises issues that are in fact intertwined, not simply theoretically, with the facts and expert issues regarding the merits.

61. Whilst the Respondent has indicated that "*the question whether or not Claimants have made an investment can be decided on the basis of the Claimants' arguments submitted in their Memorial alone*" and that "*[a] taking of evidence is not necessary*", they nevertheless repeatedly rely on evidence as indicated above. The Respondent's interpretation and reliance on this evidence may well give rise to additional evidential questions for the Claimants and indeed the Tribunal. Therefore, based on the manner in which the Respondent has pleaded its case on subject matter jurisdiction, it has raised and relied on matters of evidence that are intertwined with the merits.

[48] Response, paras. 182-184, citing to Request, paras. 170, 182, 188-191, 198, 232, 237.

62. Fourthly, as to procedural, time and cost efficiency, the Tribunal has considered each of the factors raised by the Claimants and the Respondent. It is mindful that it must weigh these factors as they affect both sides and not only the party requesting bifurcation. Moreover, it must consider procedural economy also in the event that a preliminary question were unsuccessful.

63. In the event of bifurcation, if either the first or second jurisdictional objection were successful, this case would be concluded by the end of 2022 or early 2023. In that scenario, the Parties would have saved the time and cost of proceeding with the arbitration for an additional nine or so months, conceivably to reach the same result at the conclusion of a single hearing on both jurisdiction and merits.

64. However, the Tribunal is not able to predetermine that outcome. It is just as possible that in the event of bifurcation the first or second jurisdictional objections would not succeed and the case would need to proceed to a second stage on merits. In that case, not only will there be a second hearing and decision phase, but there is likely to be duplicative fact and expert evidence and cross-examination, at least in relation to the third objection. This would create unnecessary additional cost and time, both to the hearing schedule but also to the Parties' respective preparation time.

65. The question of time and cost is in the balance in this case because the hearing schedule does raise the possibility of a merits hearing just four months later than the currently scheduled full hearing on jurisdiction and merits in September 2023. However, that scheduling assumes that the Tribunal members and the Parties will be able to find a convenient date in the first few months of 2024 and that there is no further slippage in the timetable. It is optimistic to assume that the delay would be limited to four months.

66. Any delay increases the costs to the Parties and this is compounded by additional steps in the proceeding, additional hearings and duplication of witness and expert testimony. The Tribunal is keen to avoid unnecessary delay and cost where possible in the interests of procedural economy.

67. The Tribunal further notes that the pleadings to date have been relatively succinct and to the point. Fact and expert evidence is largely focused and relatively narrow. This approach has factored in the majority of the Tribunal's consideration as to time and cost. The case that the Respondent would be required to answer in a non-bifurcated proceeding is not one that is obviously overly or unnecessarily burdensome.

68. Finally, as to overall fairness to the Parties, the majority of the Tribunal has some concerns about bifurcating the three jurisdictional objections identified in this particular case. As indicated above, although it is also concerned about possible intertwining issues in respect of the "*intra-EU objection*", the majority of the Tribunal is persuaded that there are almost certainly intertwining issues in respect of the second objection. These alone would suffice, in the Tribunal majority's view, to render this case appropriate to be heard in a single proceeding dealing with jurisdiction and merits.

69. The majority of the Tribunal is particularly concerned that it will not be in a position properly to hear and consider any intertwining issues in their entirety at a preliminary stage.

70. These risks, even if minimal, can be prevented in their entirety by not bifurcating the proceeding.

71. Additionally, the Respondent's recent correspondence of 23 May 2022 seeking a stay of the arbitration pending the outcome of its recently filed appeal in the Berlin Court Application further reinforces the majority of the Tribunal's view against bifurcation. Whilst acknowledging the Claimants' position that the Berlin Court does not determine this Tribunal's jurisdiction as it is a matter for the competence of this Tribunal pursuant to the ICSID Convention and Rules, the existence of the appeal has been raised in the context of the jurisdiction objections. In support of its stay application, the Respondent has asserted that the appeal in the Berlin Court Application is relevant. As the appeal was filed on 20 May 2022, it is unlikely that a decision will be available prior to the due date for final submissions on jurisdiction in the event of bifurcation (i.e., June/July 2022). Whilst not determinative, this is an additional factor in the Tribunal majority's decision in this particular proceeding.

72. The Tribunal accepts that its decision not to bifurcate the jurisdictional objections may give rise to additional cost but, as noted by the Respondent, this may be addressed in a cost order at the conclusion of the proceeding.

IV. DECISION

73. Based on the foregoing, the Tribunal, by majority, decides to:

a. reject the Respondent's request for bifurcation;

b. join the "*intra-EU objection*", lack of subject matter and personal jurisdiction objections to the merits; and

c. direct the Parties to follow the Procedural Timetable set out in Scenario 2 of Annex C to PO1.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles QC
President of the Tribunal
Date: 7 June 2022