

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER ARTICLE 8(2)(A) OF THE AGREEMENT
OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT
OF THE CZECH AND SLOVAK FEDERAL REPUBLIC FOR THE PROMOTION AND PROTECTION OF
INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (1976)**

A11Y LTD.

v.

CZECH REPUBLIC

(ICSID Case No. UNCT/15/1)

PROCEDURAL ORDER NO 2 – Decision on Bifurcation

Tribunal

Yves Fortier, PC, CC, OQ, QC, Presiding Arbitrator
Stanimir Alexandrov, Arbitrator
Anna Joubin-Bret, Arbitrator

Secretary to the Tribunal

Jara Mínguez Almeida

Assistant to the Tribunal

Annie Lespérance

October 5, 2015

I. PROCEDURAL HISTORY

1. In accordance with the procedural timetable set forth at Annex 1 of Procedural Order No. 1 (“**PO1**”), the Claimant filed its Memorial on the merits and quantum on 30 May 2015 (the “**Memorial**”).
2. The Respondent filed on 31 August 2015 its Counter-Memorial along with its Objections to Jurisdiction and a Request for Bifurcation of the proceeding (the “**Counter-Memorial**”).
3. On 15 September 2015, the Claimant filed a Response to the Respondent’s Request for Bifurcation (the “**Response**”).
4. The Respondent’s Counter-Memorial contains four objections to jurisdiction. The Claimant, in its Response, has addressed each one of these objections. The Tribunal will now summarize briefly each one of those objections and the Claimant’s comments thereon.

II. RESPONDENT’S JURISDICTIONAL OBJECTIONS

A) Scope of Application of Article 8(1) of the BIT (“Objection 1”)

1) *Respondent’s Position*

5. The Respondent submits that Article 8(1) of the BIT constitutes an offer of the Respondent to arbitrate:

*Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Article 2(3), 4, 5 and 6 of the Agreement [...]*¹

6. The Respondent argues that the ordinary meaning of the wording used in Article 8(1) is “*blatantly clear: Respondent offered to arbitrate disputes deriving from alleged violations of article 2(3) of the BIT (addressing obligations deriving from contracts concluded between investors and host states), article 4 of the BIT (compensation for losses from armed conflict, state of national emergency or civil disturbances), article 5 (expropriation) and article 6 (free transfer of investment and returns). Only such disputes shall be submitted to arbitration under*

¹ Counter-Memorial, para. 26. See BIT at CL-1.

*paragraph (2) [of Article 8] [...]”.*²

7. According to the Respondent, the Claimant alleges violations by the Respondent of (i) Article 2(2) of the BIT, including violations of the fair and equitable treatment (“FET”) standard, the prohibition of unreasonable and discriminatory measures, and (ii) the national treatment standard included in Article 3(1) of the BIT. The Claimant, says the Respondent, has not submitted any claims under Articles 2(3), 4, 5 or 6 of the BIT.³
8. The Respondent therefore submits that the Tribunal lacks jurisdiction over the Claimant’s claims since it has not consented to arbitrate those types of claims.⁴
9. In support of its argument, the Respondent quotes the decision in *Nagel v Czech Republic*⁵ involving the very same BIT under which the Claimant in the present proceeding is submitting its claims:

271. [...] Indeed, Article 8(1) only states that disputes under Articles 2(3), 4, 5, and 6 may be submitted to arbitration and there is nothing in the text to indicate that the arbitration may also include other questions arising under the Treaty. The Arbitral Tribunal therefore concludes that Mr Nagel’s claims under Articles 2(2), 3(1) and 3(2) are not admissible in the present arbitration and must be rejected.

2) *Claimant’s Position*

10. The Claimant accepts that, “*on its face, Article 8(1) contains reference only to Articles 2(3), 4, 5 and 6.*” However, submits the Claimant, “*the Respondent ignores the [...] fact that Article 2(3) serves as a “gate” towards all standards of protection contained in various articles of the BIT.*”⁶
11. The Claimant argues that this conclusion is reached by a perusal of Article 2(3) which provides, in relevant part, that “[*e*]ach Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of this Agreement” (Claimant’s emphasis). According to the Claimant, the FET

² Counter-Memorial, para. 27.

³ Counter-Memorial, paras. 31 and 32.

⁴ Counter-Memorial, para. 32.

⁵ Counter-Memorial, para. 29. *William Nagel v Czech Republic*, Final Award, 9 September 2003, RL-0010.

⁶ Response, para. 2.

standard contained in Article 2(2) is a “provision of this Agreement”.⁷

12. Therefore, submits the Claimant, the scope of Article 8(1) of the BIT includes a breach of the FET standard and the Tribunal therefore has jurisdiction over the Claimant’s claims in this respect.⁸
13. The Claimant submits that this conclusion is not affected by the *Nagel* award since nothing in the award implies that counsel for the claimant in that case made the same argument the Claimant is now making before this Tribunal. Moreover, according to the Claimant, this issue was not a crucial one since the Nagel tribunal proceeded to the merits and dismissed the claims on their merits.⁹
14. Alternatively, the Claimant invokes the most-favored-nation clause contained in Article 3(2) of the BIT to attract the more favorable dispute resolution provision found in the Netherlands-Czech BIT. Article 8 of that BIT provides that “all disputes” between an investor and the host state can be resolved through investment arbitration.¹⁰
15. As to the scope of applicability of MFN clauses, the Claimant refers the Tribunal to the 2007 award on jurisdiction in *RosInvest v. The Russian Federation*¹¹ wherein the tribunal reached the conclusion that the MFN clause can be applied to procedural protections. The Claimant submits that the MFN clause at issue in that case is in all significant aspects identical to the MFN clause in the UK-Czech BIT.¹²

B) Whether the Claimant made an Investment in the Czech Republic (“Objection 2”)

1) *Respondent’s Position*

16. The Respondent submits that the Claimant has never made an investment in the Czech Republic.
17. Article 1 (a) of the BIT provides:

⁷ Response, para. 3.

⁸ Response, para. 4.

⁹ Response, para. 5.

¹⁰ Response, para. 6.

¹¹ *RosInvest v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, RL-1, paras. 131-132.

¹² Response, para. 8.

The term “investment” means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity and in particular, though not exclusively, includes:

[...]

(iv) intellectual property rights, goodwill, know-how and technical processes;

[...]

18. According to the Respondent, in its Memorial, the Claimant alleges that its branch office in the Czech Republic “*possesses, inter alia, intellectual property rights, goodwill, know-how and technical processes.*”¹³ However, avers the Respondent, the Claimant has failed to establish the existence of such investments.¹⁴
19. In respect of alleged intellectual property rights, the Respondent argues that the Claimant never utilized any intellectual property rights in its alleged business. The Claimant does not have any registered patents in the Czech Republic nor does it allege that any intellectual property rights are involved in its description of the industry and its business model.¹⁵
20. In respect of technical processes, the Respondent avers that the Claimant in its Memorial does not allege that any technical processes are involved in its business.¹⁶
21. In respect of know-how, according to the Respondent, the Claimant alleges that its know-how consists of, in essence, the correct selection of hardware components for individual blind persons and the correct installation of the hard and software.
22. The Respondent avers that this alleged know-how does not meet the requirements of know-how under Czech law (applicable by virtue of Article 1(a) of the BIT) as (i) it is not secret knowledge since it is known to any of the Claimant’s competitors, and (ii) it is not substantial knowledge since it does not allow the Claimant to produce an aid that is in any way different to that of a competitor. The Respondent submits that the only know-how the Claimant has is

¹³ Memorial, para. 9.

¹⁴ Counter-Memorial, para. 39.

¹⁵ Counter-Memorial, para. 48. See Exhibit R-0001 – excerpt from the Czech Patent Registry.

¹⁶ Counter-Memorial, para. 49.

general in nature and that such knowledge is not a protected investment under Article 1 of the BIT.

2) *Claimant's Position*

23. In response, the Claimant argues that its know-how meets all the criteria identified by the Respondent, namely that it is secret, substantial and identifiable.
24. This know-how includes:
- (i) the documentation for the aids that A11Y was selling. This documentation contains both detailed technical description of each aid, as well as description of how the components work together. This documentation carries the copyright of the Claimant and its recipients were forbidden to share it.¹⁷
 - (ii) the Configuration handbook, in which the Claimant sets out some of its know-how into written form. This handbook was copyrighted and only used internally by A11Y.¹⁸
 - (iii) the textbook “Apple Computers for the Blind”, which was distributed to students with a copyright notice prohibiting its sharing.¹⁹
 - (iv) the Claimant’s method by which it offered a complete service to the customer in all matters related to the purchase and use of the aid.²⁰
25. According to the Claimant, these are clear examples of instances of know-how which were secret, substantial and identifiable.²¹
26. In any event, the Claimant submits that it does not base the existence of its investment solely on its know-how. According to the Claimant, the BIT defines an investment as “every kind of asset”. The Claimant asserts that it can easily prove that its Czech branch also possessed (i) technical equipment, (ii) a rental contract for its office, (iii) a car and (iv) contracts for phones,

¹⁷ Response, para. 17.

¹⁸ Response, para. 19. See excerpts of the Configuration handbook at C-49.

¹⁹ Response, para 20. See excerpts of the textbook at C-50.

²⁰ Response, para. 21.

²¹ Response, para. 22.

phone numbers and other assets.²²

27. The Claimant also asserts that it invested goodwill in the Czech Republic.²³
28. For the foregoing reasons, the Claimant submits that it has made an investment in the Czech Republic.

C) Whether the Claimant is a Foreign Investor (“Objection 3”)

1) *Respondent’s Position*

29. The Respondent submits that the Claimant is not a foreign investor.
30. Article 1(c)(ii)(bb) of the BIT defines the term “investor” in respect of the United Kingdom as “*corporations, firms, and associations incorporated or constituted under the law in force in any part of the United Kingdom.*”²⁴
31. The Respondent accepts that the Claimant is an entity incorporated under the law in force in the United Kingdom. However, the Respondent requests the Tribunal to look beyond this formalistic approach to ascertain whether the Claimant is a foreign investor.²⁵
32. In particular, the Respondent requests the Tribunal to pierce the corporate veil, as was done by several other tribunals, to ascertain who owns and controls the Claimant. According to the Respondent, such an exercise will reveal that the Claimant is controlled and owned in majority by Mr. Buchal, a Czech national.²⁶
33. In addition, the Respondent submits that the Claimant does not serve any commercial purpose in the UK. According to the Respondent, the Claimant is a shell corporation with no business activated in the United Kingdom whatsoever: “[b]y the Claimant’s own account, it conducts all its business in the Czech Republic [through its Czech subsidiary, A11Y Czech].”²⁷
34. Therefore, the Respondent argues that the dispute at hand is of a purely domestic nature: a Czech businessman is conducting business exclusively in the Czech Republic. As a

²² Response, para. 25.

²³ Response, para. 29.

²⁴ Counter-Memorial, para. 71. See BIT at CL-1.

²⁵ Counter-Memorial, para. 72.

²⁶ Counter-Memorial, paras. 65; 98-113.

²⁷ Counter-Memorial, para. 114.

consequence, avers the Respondent, the Claimant cannot be considered a foreign investor under the BIT as this would undermine the very purpose of the BIT by granting a national of a State access to international arbitration against its own home State.²⁸

35. For the foregoing reasons, the Respondent submits that the Claimant does not qualify as a foreign investor under the BIT and therefore the Tribunal lacks jurisdiction to hear its claims.²⁹

2) *Claimant's Position*

36. In response to the Respondent's argument that the Tribunal should go beyond a formalistic approach, the Claimant refers the Tribunal to the decision in *Yukos v. Russia* wherein the tribunal opined that: “[t]he Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. [...]”³⁰

37. According to the Claimant, there is abundant case law supporting the conclusion that the Claimant is a protected investor under the BIT as a result of the fact that it is registered in the United Kingdom.³¹

38. Finally, the Claimant recalls that the BIT does not provide for any requirement of control or “carrying business in the UK”.³²

39. For the foregoing reasons, the Claimant submits that it is a foreign investor.

D) Whether the BIT is superseded by EU Law (“Objection 4”)

1) *Respondent's Position*

40. The Respondent submits that EU law has superseded the BIT as of the date of accession of the Czech Republic to the European Union on 1 May 2004. In other words, submits the Respondent, the BIT is no longer in force between the Contracting States since 1 May 2004.

²⁸ Counter-Memorial, paras. 121-122.

²⁹ Counter-Memorial, para. 123.

³⁰ Response, para. 35. See *Yukos v. Russia*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility of November 30, 2009, CL-36.

³¹ Response, para. 36.

³² Response, paras. 37-38.

Hence, argues the Respondent, the Claimant is precluded from invoking the BIT's standards and its dispute resolution clause.³³

41. The Respondent quotes Article 59 of the VCLT in support of its argument: “[a treaty] shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the latter treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”³⁴
42. According to the Respondent, various provisions of EU law have the same scope as those of the BIT and hence EU law supersedes the BIT pursuant to Article 59 of the VCLT. Those provisions include Article 63 TFEU which grants the freedom of movement of capital and payments between EU member states and Article 18 TFEU which prohibits discrimination between nationals of member states based on their nationality.³⁵
43. Alternatively, if the Tribunal should conclude that the entire BIT was not terminated by the Respondent's accession to the EU by virtue of Article 59 VCLT, the Respondent submits that the BIT is still no longer in force as it is discriminatory pursuant to Article 18 of the TFEU: “[t]he BIT offers investors from the United Kingdom rights that it does not offer investors from other member states. This applies in particular to the possibility to raise claims before an arbitral tribunal under article 8 of the BIT.”³⁶
44. The Respondent therefore avers that EU law should take precedence over the BIT pursuant to Article 30 of the VLCT which provides that an earlier treaty between the same parties only apply “to the extent that its provisions are compatible with those of the later treaty.”³⁷

2) Claimant's Position

45. In response to the Respondent's argument that the BIT is superseded by EU law, the Claimant submits that “this jurisdictional defense is outdated”³⁸ and refers the Tribunal to the following

³³ Counter-Memorial, paras. 125 and 133.

³⁴ Counter-Memorial, para. 126.

³⁵ Counter-Memorial, paras. 127 and 129.

³⁶ Counter-Memorial, para. 128.

³⁷ Counter-Memorial, para. 129.

³⁸ Response, para. 40.

awards which dismissed identical objections raised by the Respondent: *Eastern Sugar v. The Czech Republic*³⁹ and *Binder v. The Czech Republic*.⁴⁰

III. RESPONDENT'S REQUEST FOR BIFURCATION

46. As was seen above, the Respondent has submitted four objections to the jurisdiction of the Tribunal which, it submits, should be bifurcated from the merits. The Claimant argues that no bifurcation should be ordered. The Tribunal, before proceeding to its analysis, will summarize the Parties' submissions in respect of bifurcation.

1) Respondent's Position

47. The Respondent requests that the Tribunal bifurcate its jurisdictional objections for the following reasons.

48. Firstly, the Respondent submits that its jurisdictional objections are not frivolous: "*they are serious and well-founded*".⁴¹

49. Secondly, the Respondent argues that, if the request were granted and the Respondent were successful, this would dispose of the entire case, and hence, lead to a substantial reduction of time and costs.⁴²

50. Thirdly, the Respondent avers that its objections can be resolved without assessing the merits of the dispute.⁴³ Specifically, the Respondent argues that:

(i) In respect of its first objection, a simple review of the claims raised by the Claimant is sufficient to determine which claims have been submitted by the Claimant. In addition, the interpretation of the dispute resolution clause does not touch upon the merits of the case.⁴⁴

(ii) In respect of its second objection, the Respondent concedes that the issue of the

³⁹ *Eastern Sugar v. The Czech Republic*, SCC Case No. 088/2004, Award of March 27, 2007, para 172, RL-44.

⁴⁰ *Binder v. The Czech Republic*, Award on Jurisdiction of June 6, 2007, p. 14, CL-39. See Response, para. 41.

⁴¹ Counter-Memorial, para. 140.

⁴² Counter-Memorial, para. 141.

⁴³ Counter-Memorial, para. 142.

⁴⁴ Counter-Memorial, para. 143.

“know-how” allegedly invested by the Claimant could also be considered during the merits of the case but argues that this is “*an isolated question which can be assessed without having to explore the merits of the case to a larger extent*”.⁴⁵

- (iii) In respect of its third objection, the Respondent submits that the question of whether the Claimant is a foreign investor mostly involves legal issues which are irrelevant to the merits of the case.⁴⁶
- (iv) In respect of its fourth objection, the Respondent submits that the question of the validity of the BIT after the Respondent’s accession to the EU mostly involves legal issues which are irrelevant to the merits of the case.⁴⁷

2) *Claimant’s Position*

- 51. The Claimant requests that the Tribunal dismiss the Respondent’s request for bifurcation for the following reasons.
- 52. Firstly, the Claimant argues that it has shown that all of the Respondent’s jurisdictional objections are of no merit and that the Tribunal can dismiss them without dedicating a separate phase of the proceedings to them. In particular, the Claimant avers that the Respondent’s fourth objection is frivolous as it was dismissed by at least two other tribunals in cases where the Respondent State was the Czech Republic.⁴⁸
- 53. Secondly, the Claimant avers that bifurcation of the proceedings would not lead to a reduction of time and costs. On the contrary, submits the Claimant, given the meritless nature of the Respondent’s objections, this would lead to a significant increase of the Claimant’s costs in arguing its claims.⁴⁹
- 54. Finally, according to the Claimant, the issues of jurisdiction and merits are sufficiently intertwined to justify the dismissal of the Respondent’s request for bifurcation. Specifically, the Claimant avers that this is particularly true in respect of the Respondent’s second objection, i.e. whether the Claimant made an investment. Requiring the Claimant to argue

⁴⁵ Counter-Memorial, para. 144.

⁴⁶ Counter-Memorial, para. 145.

⁴⁷ Counter-Memorial, para. 145.

⁴⁸ Response, para. 43.

⁴⁹ Response, para. 44.

issues pertaining to the merits in a preliminary jurisdictional phase would significantly increase the costs and logistical difficulties for it, argues the Claimant. Notably, the “*Claimant would be forced to bring a number of visually-impaired witnesses to two hearings instead of only one.*”⁵⁰

IV. TRIBUNAL’S ANALYSIS

55. The Parties do not dispute that the Tribunal has the procedural power to decide whether or not to bifurcate jurisdictional objections from the merits under Article 21(4) of the 1976 UNCITRAL Rules. It is well established that this power is to be exercised as a matter of an arbitral discretion by a tribunal in the circumstances of a particular case.

56. In exercising its discretion, the Respondent invites the Tribunal to consider the criteria set out in the *Glamis Gold v. United States*⁵¹ and *Emmis v. Hungary*⁵² decisions. The Respondent summarizes these criteria as follows:

(i) *Is the request substantial or frivolous?*

(ii) *Would the request, if granted, lead to a material reduction in the proceedings at the next stage?*

(iii) *Is the bifurcation impractical in the sense that the issues are too intertwined with the merits so that a reduction of time and costs cannot be expected?*⁵³

57. The Claimant, in its Response, refers to these criteria, and in particular, to the *Glamis Gold* decision, in support of its request that the Respondent’s request for bifurcation be denied.⁵⁴

58. The Tribunal accepts the Parties’ submissions in this respect and will be guided, in its analysis, by these three criteria.

59. In respect of the first criterion, the Tribunal considers that each of the Respondent’s four objections to jurisdiction is arguable and advanced in good faith. The Tribunal therefore finds

⁵⁰ Response, para. 45.

⁵¹ *Glamis Gold Ltd v. United States of America*, Award, 8 June 2009, para. 197, RL-0047.

⁵² *Emmis v. Hungary*, Decision on Respondent’s Application for Bifurcation, 13 June 2013, paras 13 et seq., RL-0048.

⁵³ Counter-Memorial, para. 136.

⁵⁴ Response, paras 43-45.

Procedural Order No. 2

that the Respondent's request for bifurcation is not frivolous.

60. In respect of the second criterion, the Tribunal is of the view that, should the request for bifurcation be granted in respect of these four objections and should the Respondent be successful in respect of anyone of these objections, this would lead to a material reduction of the proceedings since the whole case would then be disposed of.
61. In respect of the third criterion, the Tribunal is of the view that it would be impractical to bifurcate Objection 2 as it is clearly intertwined with the merits. The Tribunal notes that the Respondent accepts this in its Counter-Memorial: "*The question of whether an investment was made is mostly relevant only for jurisdictional questions. Merely the point (sic) which know-how should be involved in the case could also be considered during the merits of the case.*"⁵⁵ In respect of that objection, the Tribunal finds that, if it was bifurcated, it would not result in any reduction of time or costs.
62. Accordingly, the Tribunal finds that Objections 1, 3 and 4 should be bifurcated and that Objection 2 should be joined to the merits.

V. Conclusion

63. For the reasons stated above, the Tribunal unanimously decides:
 1. To bifurcate Objections 1, 3 and 4;
 2. To join Objection 2 to the merits; and
 3. The proceedings will be continued in respect of Objections 1, 3 and 4 in accordance with the bifurcated procedure ("Scenario 2") set out at Annex 1 of Procedural Order No. 1.

⁵⁵ Counter-Memorial, para. 144. Emphasis added by the Tribunal.

Paris, this 5th day of October 2015

Signed on behalf of the Arbitral Tribunal

[signed]

L. Yves Fortier, PC, CC, OQ, QC
President