INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LSG Building Solutions GmbH and others

v.

Romania

(ICSID Case No. ARB/18/19)

Procedural Order No. 3
Decision on Bifurcation

Members of the Tribunal
Juan Fernández-Armesto, President of the Tribunal
Pierre-Marie Dupuy, Arbitrator
O. Thomas Johnson, Jr., Arbitrator

Secretary of the Tribunal
Aïssatou Diop

Assistant to the Tribunal
Bianca McDonnell

October 9, 2019

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WHEREAS

1. This arbitration arises between Claimants, LSG Building Solutions GmbH, Green Source Consulting GmbH, Solluce Romania 1 B.V., Risen Energy Solar Project GmbH, Core Value Investments GmbH & Co KG Gamma, Core Value Capital GmbH, SC LJG Green Source Energy Beta SRL, Anina Pro Invest Ltd, Giust Ltd, and Pressburg UK GmbH and Respondent, Romania [collectively, the "**Parties**"].

2. On February 6, 2019 the Arbitral Tribunal received the European Commission's Application for Leave to Intervene as Non-Disputing Party [the "**Commission's Application**"].

3. On March 28, 2019 the Arbitral Tribunal issued Procedural Order No. 1 ["**PO No. 1**"] and the Procedural Timetable attached as Annex B.

4. On May 13, 2019 the Arbitral Tribunal issued its Decision on the European Commission's Application to Intervene as a Non-Disputing Party as Procedural Order No. 2, granting the European Commission's request to file a written submission as a non-disputing party on the European Union ["**EU**"] law issue.

5. On August 14, 2019 Romania submitted its Request for Bifurcation.

6. On September 11, 2019 Claimants submitted their Response to Romania's Request for Bifurcation.

7. On September 16, 2019 the Tribunal decided that a hearing on bifurcation would not be necessary.

8. After carefully considering the Parties' respective positions, the Arbitral Tribunal issues the following Decision on Bifurcation.

Decision on Bifurcation

9. This Decision summarises the Respondent's and the Claimants' respective positions (**1.** – **2.**) and then the Tribunal renders its ruling (**3.**).

1. THE RESPONDENT'S POSITION

10. Romania asserts that the Tribunal lacks jurisdiction on the basis of three grounds [the "**Jurisdictional Objections**"]:

- Art. 26 of the Energy Charter Treaty ["**ECT**"] does not apply to intra-EU disputes [the "**EU Law Objection**"] (**1.1.**);

- Romania has not consented to the collective adjudication of Claimants' claims in one arbitration [the "**Multi-Party Objection**"] (**1.2.**);

- Claimants Anina Pro Invest Ltd and Guist Ltd ["**Anina**" and "**Guist**"] are owned and controlled by a Romanian national [the "**Nationality Objection**"] (**1.3.**).

11. On these bases, Romania alleges that the proceeding should be bifurcated into two phases: jurisdiction and merits.

1.1 CRITERIA FOR BIFURCATION

12. Respondent alleges that the Tribunal should apply the following criteria when deciding whether to bifurcate[1]:

- Whether the issue to be bifurcated is sufficiently substantial (not frivolous or vexatious);

- Whether the issue to be bifurcated, if upheld, may result in a material reduction of the proceedings or clarification of the issues in dispute, leading to a saving of time and costs; and

- Whether the issue to be bifurcated is not too intertwined with the merits of the case that it renders bifurcation impractical and requires a prejudging of the merits of the case.

13. Respondent states that the overall consideration should be of procedural economy and efficiency[2].

[1] Request for Bifurcation, paras. 17; 15-34. Respondent avers that each Objection meets the requirements for bifurcation.
[2] Request for Bifurcation, para. 14.

1.2 THE EU LAW OBJECTION

14. Romania alleges that the Tribunal lacks jurisdiction over the dispute as the arbitral clause in Art. 26 ECT is inapplicable to intra-EU disputes such as the case at hand, as confirmed by[3]:

    - The Decision rendered by the Court of Justice of the European Union ["**CJEU**"] on 6 March 2018 in *Slovak Republic v. Achmea BV* [the "***Achmea* Judgment**"];

    - The European Commission's Communication of July 19, 2019;

    - The political declaration signed by 22 EU Member States on January 15, 2019, addressing what they called the legal consequences of the CJEU's *Achmea* Judgment in relation to intra-EU BITs.

15. Respondent states that bifurcation is warranted because the EU Law Objection:

    - Is neither vexatious nor frivolous[4];

    - If upheld, would result in a finding that there is no valid arbitration agreement between the Parties, resulting in the dismissal of Claimants' complex claims in their entirety[5]; and

    - Can be decided without examining the merits of the dispute[6].

1.3 THE MULTI-PARTY OBJECTION

16. According to Romania, the Tribunal lacks jurisdiction over the dispute because Romania has not consented to the collective adjudication of Claimants' claims in this arbitration. Claimants, comprised of ten different companies incorporated in five different European countries, are attempting to jointly adjudicate separate and distinct claims in relation to five different solar photovoltaic projects in Romania[7].

17. However, Respondent argues that neither the ECT nor the ICSID Convention provides for the collective adjudication of claims, and Respondent has not consented to such collective adjudication[8].

18. Further, Respondent says that the collective adjudication of such claims raises antitrust concerns under EU and Romanian law, as it could lead to the exchange of

[3] Request for Bifurcation, paras. 36 and 40.
[4] Request for Bifurcation, para. 42.
[5] Request for Bifurcation, paras. 49-50 and 65.
[6] Request for Bifurcation, paras. 67-70.
[7] Request for Bifurcation, para. 73.
[8] Request for Bifurcation, para. 73.

competitively sensitive information between the Claimants, which are competitors in the EU market[9].

19. Respondent avers that the Multi-Party Objection meets the requirements for bifurcation as articulated in paragraph 12[10].

1.4 THE NATIONALITY OBJECTION

20. Romania's final objection is based upon the Tribunal's alleged lack of jurisdiction over the two Claimants, Anina and Giust, as they are 100% controlled and owned by a Romanian national Gheorge Catalin Liviu[11]. Arbitrations may not be brought against an investor's state under Arts. 17 and 25 of the ECT and Art. 25 of the ICSID Convention.

21. Respondent states that the Nationality Objection meets the criteria for bifurcation[12], and if accepted, would dispose of the claims brought by these two Claimants, and decrease the overall time and costs required to defend the claims[13].

2. THE CLAIMANTS' POSITION

22. Claimants request the Tribunal to reject Romania's request to bifurcate the proceedings. Claimants argue that Romania is relying upon a lower standard for bifurcation (**2.1**.), and in any case, all three Objections lack legal merit and fail to fulfil the criteria necessary for bifurcation and should be dismissed (**2.2.-2.5**.).

2.1 CRITERIA FOR BIFURCATION

23. Claimants aver that, contrary to Respondent's contention, bifurcation is the exception and should only be considered when the following cumulative criteria are met[14]:

- When the state's objections to jurisdiction have a strong likelihood of success;
- When bifurcation would materially reduce the time and cost of the proceeding, rather than result in an additional burden by creating another, separate phase; and
- When issues of jurisdiction and merits are so distinct that consideration of the former will not require briefing or evidence related to the latter.

[9] Request for Bifurcation, para. 75.
[10] Request for Bifurcation, paras. 76-81.
[11] Request for Bifurcation, para. 82.
[12] Request for Bifurcation, para. 88.
[13] Request for Bifurcation, paras. 85-86.
[14] Claimant's Response to Bifurcation, para. 5, citing CL-141, para. 49.

24. Claimants state that tribunals typically apply this test against an overarching concern for procedural efficiency and the reduction of costs[15].

2.2 THE EU LAW OBJECTION

25. According to Claimants, the EU Law Objection fails to satisfy the first element in the test for bifurcation as it is not substantial and does not have a strong likelihood of success; the same objection has been unanimously rejected by all tribunals, including at least 25 ECT tribunals that have issued decisions on the objection in recent years (including 15 ECT tribunals post-*Achmea*)[16].

26. Claimants aver that all substantive arguments made by Respondent to support its EU Law Objection, have been considered and rejected by prominent arbitrators[17]. The EU Law Objection is therefore very unlikely to succeed and, thus, bifurcation would only result in delay and additional costs[18].

2.3 THE MULTI-PARTY OBJECTION

27. Claimants state that the proceedings should not be bifurcated on the basis of the Multi-Party Objection, as it is not likely to succeed and result in the termination of the arbitration at the jurisdictional phase[19].

28. Claimants argue that additional consent to arbitration with multiple parties is not required under the ECT or the ICSID Convention and Arbitration Rules[20]. ICSID case law[21] supports the proposition that the different Claimants must only meet the express jurisdictional requirements of the ICSID Convention and the ECT for the Tribunal's jurisdiction to be established[22].

29. Claimants additionally argue that acceptance of the Objection would lead to redundancy, as it would force Claimants to divide their claims into ten separate arbitrations[23]. Due to the significant overlap among the Claimants, no procedural efficiency would be gained by accepting Romania's position and requiring the arbitration to be divided[24].

2.4 THE NATIONALITY OBJECTION

30. Finally, Claimants request that the Tribunal dismiss Respondent's Nationality Objection.

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[15] Claimant's Response to Bifurcation, para. 14, citing CL-131 and CL-132.
[16] Claimant's Response to Bifurcation, paras. 23-25 and cases cited therein.
[17] Claimant's Response to Bifurcation, paras. 27-50.
[18] Claimant's Response to Bifurcation, paras. 51-52.
[19] Claimant's Response to Bifurcation, para. 53.
[20] Claimant's Response to Bifurcation, para. 55.
[21] Claimant's Response to Bifurcation, paras. 58-61, citing CL-154, CL-155 and CL-156.
[22] Claimant's Response to Bifurcation, para. 55.
[23] Claimant's Response to Bifurcation, para. 55.
[24] Claimant's Response to Bifurcation, para. 65.

31. Claimants say that both Anina and Giust are Cypriot nationals and are incorporated in Cyprus, fulfilling the relevant test for nationality. Neither the ECT nor the ICSID Convention permit the Tribunal to disregard the nationality of the Claimants and consider the nationality of their shareholder, who is Romanian[25].

32. Claimants state that the same objection has been consistently rejected by arbitral tribunals[26], and the legal authority on which Romania relies to further this position is not applicable in the present case[27].

33. Claimants outline that the Nationality Objection fails the second element of the bifurcation standard because even if it was accepted by the Tribunal, it would not lead to the dismissal of the entire case or result in the narrowing of the size or scope of the arbitration. This is because Anina owns 50% of one of the two Frăsinet plants, while Giust owns 50% of the other Frăsinet plant; the remaining 50% in each case is owned by Claimant Pressburg, who would remain in the arbitration regardless. There would, therefore, be no reduction in the number of investments or the evidence and legal arguments related to those projects[28].

34. The Tribunal should therefore reject Romania's final Objection[29].

3. THE TRIBUNAL'S DECISION

35. Romania requests the Tribunal to bifurcate the proceedings on the basis of three objections:

- The EU Law Objection;
- The Multi-Party Objection; and
- The Nationality Objection.

36. The case law cited by the Parties shows that arbitral tribunals generally consider the following three-factor test when deciding whether to grant bifurcation[30]:

- Whether the jurisdictional objections raised are *prima facie* substantial;
- Whether the objection to jurisdiction, if granted, will result in a material reduction of the proceedings at the next phase, or would dispose of all or substantially all of the claims; and;

[25] Claimant's Response to Bifurcation, para. 72.
[26] Claimant's Response to Bifurcation, paras. 73-83 and references cited therein.
[27] Claimant's Response to Bifurcation, para. 85.
[28] Claimant's Response to Bifurcation, para. 86.
[29] Claimant's Response to Bifurcation, para. 86.
[30] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, CL-141, para. 49; *Glamis Gold Ltd. v. The United Sates of America*, UNCITRAL Case, Procedural Order No. 2 (revised) dated May 31, 2005, para. 12(c).

- Whether bifurcation is impractical, in that the jurisdictional issue is too intertwined with the merits, making it very unlikely that there will be any savings in time or cost.

37. After carefully analysing Romania's Objections to jurisdiction in light of the above criteria, and in the interests of procedural economy and efficiency, the Tribunal decides not to bifurcate the proceedings for the reasons outlined below.

The EU Law Objection

38. Bearing in mind that the general relationship between EU law, the ECT and investment arbitration is presently being analysed and reviewed in different *fora*, the Tribunal is not convinced that bifurcation would lead to a material reduction of the proceedings and a substantial saving in time and costs.

The Nationality Objection

39. The Nationality Objection is only brought against two out of the ten Claimants: Anina and Giust. Both Anina and Giust are 50% owners of two different Frăsinet plants, with the remaining 50% of each plants owned by a different Claimant, Pressburg[31].

40. Consequently, even if the Objection is eventually accepted by the Tribunal, it would not lead to a reduction in the number of investments or the evidence and legal arguments related to those projects; nor would it result in the dismissal of the entire case, dispose of substantially all of the claims, or materially reduce the proceedings at the merits phase.

The Multi-Party Objection

41. In regard to the Multi-Party Objection, Respondent avers that the same objection has been regularly advanced as a ground for bifurcation and upheld by arbitral tribunals[32]. To support its proposition Respondent refers to four cases, *Abaclat and Others v. The Argentine Republic*, *Ambiente Ufficio S.P.A. and Others v. The Argentine Republic*, *Giovanni Alemanni and Others v. The Argentine Republic* and *Erhas and Others v. Turkmenistan*.

Abaclat and Others v. The Argentine Republic

42. In *Abaclat* the tribunal had to determine whether the respondent state had consented to arbitration brought by 60,000 bondholders[33]. The tribunal affirmed the principle of multi-party arbitration, stating that "it is difficult to conceive why and how the

[31] Claimants' Memorial on the Merits, paras. 37-40.
[32] Request for Bifurcation, para. 78.
[33] RL-28, para. 216.

Tribunal could lose its jurisdiction where the number of Claimants outgrows a certain threshold"[34].

43. The tribunal concluded that[35]:

> "It would be contrary to the purpose of the treaty and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration".

44. The tribunal therefore dismissed the objection.

Ambiente Ufficio S.P.A. and Others v. The Argentine Republic

45. In *Ambiente Ufficio* the tribunal additionally affirmed the permissibility of multi-party arbitration under the ICSID convention. The tribunal found multi-party arbitrations to be "perfectly compatible"[36] with the ICSID Convention and Rules, reasoning that while Art. 25(1) of the ICSID Convention refers to

> "'a national of [a] Contracting State' in the singular, nothing would force the Tribunal to conclude that this wording could not also encompass a plurality of individuals"[37].

46. The tribunal therefore dismissed the jurisdictional objection and concluded that[38]:

> "multi-party arbitration is a generally accepted practice in ICSID arbitration… [that] does not require any consent on the part of the respondent Government beyond the general requirement of consent to arbitration".

Giovanni Alemanni and Others v. The Argentine Republic

47. In *Giovanni Alemanni and Others v. The Argentine Republic* the tribunal's Decision on Jurisdiction and Admissibility firstly confirmed that the ICSID Convention does not limit multiple claimants from bringing a single proceeding[39]:

> "The Tribunal can see no reasonable basis for implying into the text as it stands of Article 25(1) the additional words 'but only one'".

48. The Tribunal then analyzed whether Respondent had consented to multi-party arbitration[40]. The Tribunal decided that the key to link the respective investors is the existence of a single dispute[41]:

> "In searching, therefore, for an element that more satisfactorily defines the link that must exist between a group of claimants and between their claims, in

[34] RL-28, para. 490.
[35] RL-28, para. 490.
[36] RL-29, para. 146.
[37] RL-29, para. 130.
[38] RL-29, para. 141.
[39] RL-30, para. 271.
[40] RL-30, para. 280.
[41] RL-30, para. 292.

> the absence of consent by the respondent to the hearing of their claims together, the Tribunal has come to the conclusion that the answer lies in the notion of a 'dispute'. To go back to basics, the jurisdiction created by Article 25(1) of the ICSID Convention 'extends to' (which in context means, is confined to) 'any legal dispute arising directly out of an investment'".

49. The tribunal reasoned that for a 'single dispute' to exist, it is necessary for the interests of both claimants' and respondent's "to be in all essential respects identical for all of those involved on that side of the dispute"[42].

50. The tribunal considered, however, that such an assessment could only be made at the merits stage, since only then would it be in a position to consider whether the actual rights of the claimants and the effects of Argentina's conduct were sufficiently similar to constitute a 'single dispute'[43].

51. Therefore, the tribunal decided that the substance of the jurisdictional issue was so closely entwined with the substantive disagreement between the Parties, that it had to be joined to the merits[44].

52. (The case was eventually discontinued due to a lack of payment, prior to the award on the merits was issued.)

Erhas and Others v. Turkmenistan

53. Respondent also refers to *Erhas and Others v. Turkmenistan*, in which an UNCITRAL tribunal declined jurisdiction on the basis of the Respondent's lack of consent to arbitrate with multiple claimants[45]. The tribunal declined jurisdiction over 22 Turkish investors which claimed to have invested in 31 different projects over a period of 20 years, and ranging across a variety of industries, including a water bottling business, various factories and construction projects[46] - a factual situation quite different from that submitted by Claimants in the present arbitration.

54. The arbitrators acknowledged the claimants' argument that tribunals have asserted jurisdiction over investment treaty claims brought by groups of claimants where there are certain common linkages between the various claims. However, the tribunal saw no prior case where a tribunal had asserted jurisdiction in circumstances where the claims, claimants and investments were unrelated[47]:

> "consent to arbitration in a treaty based context does not imply the acceptance to the joint adjudication of entirely unrelated claims made by unrelated claimants in the context of different and unrelated investments".

[42] RL-30, para. 292.
[43] RL-30, para. 293.
[44] RL-30, para. 293.
[45] RL-31.
[46] RL-31, para. 1.
[47] RL-31, p. 5.

55. Moreover, there was no indication that Turkmenistan had consented to have such disparate claims arbitrated in a single proceeding[48].

* * *

Analysis

56. The Tribunal finds, *prima facie*, the reasoning of *Giovanni Alemanni and Others v. The Argentine Republic* to be relevant. As the tribunal in that case reasoned, multiple claimants may be permitted to bring a single arbitration against a respondent state, provided that such claimants are capable of proving that their respective claims form a single dispute.

57. The Tribunal additionally agrees with the *Alemanni* tribunal that the determination of the existence of a single dispute requires an in-depth analysis of the claims being advanced by Claimants, an exercise which is closely intertwined with the adjudication of the merits. It would therefore be inappropriate to bifurcate the Multi-Party Objection into a separate jurisdictional phase.

58. Accordingly, the procedure established in Scenario A of the Procedural Timetable will be followed, and the Tribunal will address the jurisdictional objections raised by Respondent together with the merits. The Tribunal hereby reissues the Procedural Timetable, attached as Annex B to PO No. 1.

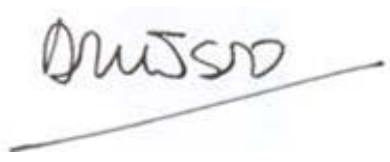
* * *

59. In summary, the Tribunal decides to:

(i) Reject Respondent's request for bifurcation;

(ii) Join the EU Law Objection, Multi-Party Objection and Nationality Objection to the merits; and

(iii) Direct the Parties to follow the Procedural Timetable set out in Scenario A of Annex B to PO No. 1.



Juan Fernández-Armesto
President of the Arbitral Tribunal
Date: October 9, 2019

[48] RL-31, p. 3.