INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Scholz Holding GmbH v. Kingdom of Morocco

v.

Kingdom of Morocco

(ICSID Case No. ARB/19/2)

PROCEDURAL ORDER NO. 2
Decision on Bifurcation

Members of the Tribunal
Mr. Alexis Mourre, President of the Tribunal
Professor Zachary Douglas QC, Arbitrator
Professor Nassib G. Ziadé, Arbitrator

Secretary of the Tribunal
Mr. Francisco Abriani

Assistant to the Tribunal
Ms. Marina Matousekova

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14 February 2020

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I. THE PARTIES

1. The Claimant is Scholz Holding GmbH ("**Scholz Holding**" or "**Claimant**"), a company organized under the laws of Germany. The Claimant is represented by Withers LLP, in London, United Kingdom.

2. The Respondent is the Kingdom of Morocco ("**Morocco**" or "**Respondent**"). The Respondent is represented by Mayer Brown, in Paris, France and Afrique Advisors, in Casablanca, Kingdom of Morocco.

3. The Claimant and the Respondent shall be referred to together as the "**Parties**".

II. PROCEDURAL BACKGROUND

4. On 21 December 2018, the Claimant submitted its Request for Arbitration ("**RFA**") to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965 ("**ICSID Convention**") and the Bilateral Investment Treaty between the Federal Republic of Germany and the Kingdom of Morocco on the mutual promotion and protection of investments signed on 6 August 2001, and which entered into force on 12 April 2008 ("**BIT**" or "**Treaty**").

5. On 3 January 2019, the Secretary-General of ICSID registered the RFA in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.

6. On 2 April 2019, the Parties agreed on the method of constitution of the tribunal. Professor Ziadé and Professor Douglas accepted their appointments as arbitrators on 14 and 16 April 2019, respectively.

7. On 29 July 2019, following the appointment of Mr. Alexis Mourre by the Chairman of the Administrative Council, a national of France, as President of the Tribunal, a Tribunal composed of Mr. Alexis Mourre (President, appointed by the Chairman of the Administrative Council), Professor Nassib G. Ziadé (Arbitrator, appointed by the Claimant), and Professor

Zachary Douglas QC (Arbitrator, appointed by the Respondent) was constituted. Mr. Francisco Abriani, Legal Counsel, ICSID, was designated to serve as Secretary of the Tribunal.

8. On 23 August 2019, the Tribunal held a first session by telephone conference. On 11 September 2019, the Tribunal issued Procedural Order No. 1, setting out the agreed terms for the conduct of the proceeding, with the Procedural Calendar attached as Annex B.

9. On 15 November 2019, the Claimant submitted a Memorial on the Merits, together with the accompanying documents ("**Memorial**").

10. On 6 December 2019, the Respondent filed a Request for Bifurcation ("**Request**").

11. On 27 December 2019, the Claimant submitted a Reply to the Respondent's Application for Bifurcation ("**Reply**").

12. On 14 January 2020, the Respondent submitted Comments to the Reply to the Application for Bifurcation ("**Comments to Claimant's Reply**").

13. On 27 January 2020, the Claimant submitted a Further Reply to the Application for Bifurcation ("**Rejoinder**").

14. By email of the same date, the Respondent alleged that the Claimant made "numerous distortions" of the Respondent's position in its submission and informed the Tribunal that it stood ready to elaborate on the issue, if necessary.

15. On 28 January 2020, the Claimant stated that the Respondent took a quotation out of context and proceeded to correct the record.

16. On the same date, the Tribunal informed the Parties that it would start deliberating and asked that they abstain from any further unsolicited submissions.

17. On 4 February 2020, the Tribunal notified the Parties of its decision to address the bifurcated question in a separate phase and that the reasoning for its decision to bifurcate will be provided as soon as possible. The Tribunal also informed the Parties that the timetable established in

case of no bifurcation in Annex B of Procedural Order No. 1 was vacated and provided a bifurcated timetable to the Parties, for their approval.

18. The Tribunal provides the reasons for its decision of 4 February 2020 in this Procedural Order No. 2.

III. THE PARTIES' POSITIONS

A. THE RESPONDENT

19. The Respondent submits that it has various jurisdictional objections and reserves its right to raise them in due course. The Respondent however requests bifurcation of a single question, namely whether the Claimant meets the requirement provided by Article 1(3)(b) of the BIT concerning the localization of its siège/sitz/مقر (the "bifurcated question").[1]

20. The Respondent refers in this respect to the Tribunal's power, under Article 41(2) of the ICSID Convention, to stay the proceedings to rule as a preliminary matter on objections to jurisdiction.[2] It argues that arbitral tribunals often use their discretionary power to bifurcate jurisdiction and merits' issues[3] and refers to *Glamis Gold v. United States* citing that "*bifurcation shall be the rule and not the exception*."[4] The Respondent further argues that it is common for arbitral tribunals faced with many objections to jurisdiction to grant bifurcation only with respect to those objections which meet all the requirements for bifurcation.[5]

21. Referring to a number of arbitral decisions on bifurcation, such as *Philip Morris v. Australia*, *Glencore v. Bolivia*, *Eco Oro Minerals v. Colombia*, and *Global Telecom Holding v. Canada*, the Respondent argues that the three following criteria shall guide the Tribunal in deciding whether bifurcation is appropriate: (1) whether the jurisdictional objection is *prima facie* serious and has a chance to be upheld; (2) whether the objection may be dealt with without examining the merits of the case; and (3) whether the objection raised, if upheld, would be

[1] Request, paras. 3, 14-22; Comments to Claimant's Reply, paras. 11-22.
[2] Request, para 6.
[3] *Ibid*. para. 7.
[4] *Ibid*. para. 8; *Glamis Gold v. The United States of America*, Procedural Order n°2, 31 May 2005, para. 11, **Exhibit RL-007**.
[5] Comments to Claimant's Reply, paras. 2-7.

dispositive of the case.[6] The Respondent argues that all three criteria are met in the present case.

22. *First*, the Respondent submits that the objection to jurisdiction is *prima facie* serious. It avers that such test does not require establishing that the objection is grounded but only whether it *prima facie* has a chance to be upheld on the basis of a mere reading of the text of the BIT.[7] The Respondent produces various exhibits purportedly showing that Scholz Holding has transferred its seat (intended as its "*centre of main interest*" or "*headquarters*") from Essingen, Germany, to London, England, on 14 January 2016 before the filing of the Request for Arbitration on 14 December 2018.[8] The Respondent concludes that the Claimant does not satisfy the first condition of Article 1(3)b of the BIT to qualify as a protected investor, which consists for a legal person in "*having its seat on the territory of the Federal Republic of Germany*."[9] The Respondent submits that such condition must be assessed at the time of the consent to arbitration, i.e, in this case at the moment of the filing of the Request for arbitration.[10] The Respondent further challenges the Claimant's position that the term seat shall be defined in accordance with German law. It argues that the BIT refers to the national law of the investor only with respect to the second criteria of Article 1(3)(b) pertaining to the constitution of the company.[11] In any case, the Respondent notes that German law retains two concepts to designate the seat of a company: the administrative seat ("*verwaltungsitz*") or the statutory seat ("*satzungssitz*") and it commits to demonstrate in due course that the drafters of the BIT intended to refer, in Article 1(3)(b), to the administrative seat and not to the statutory seat.[12]

6 Request, para. 12; *Philip Morris Asia Limited v. The Commonwealth of Australia*, CPA Case No. 2012-12, Procedural Order No. 2, Decision on Bifurcation, 14 April 2014, para. 109, **Exhibit RL-008**; *Eco Oro Minerals Corp. v. Republic of Columbia*, ICSID Case No. ARB. 16/41, Procedural Order No. 2, 28 June 2018, para 49, **Exhibit RL-009**; *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No 2, Decision on bifurcation, 31 January 2018, para. 39, **Exhibit RL-010**; *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No 2, Decision on Respondent's Request for bifurcation, 14 December 2017, para. 100, **Exhibit RL-011**

7 Comments to Claimant's Reply, paras. 11-14.

8 Request, para. 18; **Exhibits R-001** to **R-005** and **Exhibit C-13**.

9 **Exhibit CL-001**, Article 1(3)(b).

10 Request, para. 18 and footnote 5; Comments to Claimant's Reply, para. 15.

11 Comments to Claimant's Reply, paras. 18-19.

12 *Ibid*., paras. 20-21.

23. *Second*, the Respondent contends that the proposed bifurcated issue is narrow, and that it is fully independent from the merits of the case because its assessment relies on the interpretation of the provisions of the BIT and of public factual information regarding the seat of the Claimant.[13]

24. *Third,* the Respondent argues that, if upheld, the objection on jurisdiction would put an end to the arbitration.

25. *Finally*, the Respondent argues that bifurcation would not harm the Claimant and would promote fairness and efficiency in this case. It notes that bifurcation was foreseen in the first provisional timetable and it argues that it would not therefore disrupt the proceedings. It further contends that the objection may be addressed within a short time and will not significantly increase the cost of the proceedings. The Respondent argues that, if upheld, bifurcation would end the arbitration with a considerable saving of time and costs for both Parties, while, if denied, the Parties would no longer have to bear the costs linked to the objection dealt with in the preliminary phase of the proceedings.[14]

26. As a consequence, the Respondent requests the following relief:

> *Pour toutes les raisons exposées ci-dessus, la Défenderesse demande respectueusement au Tribunal arbitral de procéder à la bifurcation de la procédure en suspendant la procédure au fond et en tenant une phase préliminaire pour statuer sur l'objection à la compétence décrite ci-dessus.* [15]

B. THE CLAIMANT

27. The Claimant asks the Tribunal to reject the Request for bifurcation for two reasons.

28. *First*, the Claimant submits that bifurcation would not be fair or procedurally efficient. The Claimant refers to *Cairn Energy v. India*, *Glencore v. Bolivia* (which, in its opinion, the Respondent misinterprets) and to *Global Telecom v. Canada* to conclude that the overarching

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[13] Request, paras. 23-25.
[14] *Ibid*., paras. 31-38.
[15] *Ibid*., para. 39; Comments to Claimant's Reply, para. 28.

principle in determining whether or not to bifurcate is fairness and efficiency.[16] The Claimant disagrees with the Respondent's representation that the appropriate test is whether the objection is *prima facie* serious.[17] It contends that considerations of procedural economy are paramount even in circumstances where a jurisdictional objection is both serious and substantial.[18] The Claimant outlines that modern and best practice in international arbitration has moved away from bifurcating as a default rule as it often increases delays and costs.[19] In this respect, it notes that *Glamis Gold v. United States* was grounded on the former text of article 21(4) of the 1976 UNCITRAL Rules (providing that "*the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question*") that was deleted in article 23(3) of the 2010 UNCITRAL Rules (providing that "[the] *arbitral tribunal may rule on a plea* [of lack of jurisdiction] *either as a preliminary question or in an award on the merits*"). The Claimant argues that such change of the UNCITRAL Rules reflected a similar change in the 2006 ICSID Arbitration Rules: while under the 2003 version of Article 41 of the ICSID Rules, proceedings on the merits were automatically suspended when a party submitted jurisdictional objections, Article 41 of the new Rules provides for the Tribunal's discretion whether or not to suspend the proceedings on the merits.[20] The Claimant argues that the Respondent's behaviour amounts to delaying tactics because (i) it has raised its objection in an untimely manner, after the Claimant's Memorial on the merits (while it could have done so at an earlier date after the 15 February 2018 Notice of Dispute or after the 14 December 2018 Request for Arbitration), and (ii) it raises its objections in a sequenced manner instead of

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16 Reply, paras. 7, 11-12; *Cairn Energy PLC and Cairn UK Holdings Limited (CHUL) v. Republic of India,* PCA Case No 2016-7, Procedural Order No 4, Decision on Respondent's Application for bifurcation, 19 April 2017, para. 78, **Exhibit CL-118**; *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No 2, Decision on bifurcation, 31 January 2018, para. 56, **Exhibit RL-010**; *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No 2, Decision on Respondent's Request for bifurcation, 14 December 2017, paras. 102-106, **Exhibit RL-011**.

17 Rejoinder, paras. 2-3 and 9-10.

18 *Ibid*., para 2; *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No 2, Decision on Respondent's Request for bifurcation, 14 December 2017, paras. 102-103, **Exhibit RL-011**.

19 Reply, paras. 8-9, 13-20.

20 *Ibid*., para. 17.

presenting them all at once.[21] The Claimant submits that bifurcation would be inefficient in this case.[22]

29. *Second*, the Claimant contends that the Respondent's jurisdictional objection is flawed. The Claimant argues that the nationality of a legal entity must be assessed by reference to its national law. In this case, the Claimant argues that the legal meaning of the term "*sitz*" under German law is set out in section 4(a) of the German Limited Liability Companies Act, which refers to the registered office rather than the headquarters or any other test.[23] The Claimant argues that the Respondent refers to the test of the "sitz" as it existed in Germany in 2001, so that the Respondent's thesis suggests that the BIT would have intended to freeze German law on corporate nationality. The Claimant submits that such retroactive theory of treaty interpretation is contrary to international law, which supports an evolutionary interpretation of treaties.[24] The Claimant states that Scholtz's "sitz" has always been and continues to be in Germany as it results from the German corporate registry.[25] It contends that German companies can transfer administrative and management functions to other jurisdictions without being dissolved and this does not affect their "sitz" in Germany.[26] It adds that the Claimant is registered by the UK Companies House only as an "overseas company" and that it nonetheless remains a "Gesellschaft Mit Beschranker Haftung (GmbH)", i.e. a German limited liability company.[27] The Claimant therefore concludes that there is no cogent objection to the fact that Scholtz is a German company meeting all requirements of Article 1(3)b of the BIT.

30. As a result, the Claimant requests the following relief:

> *For the foregoing reasons, the Respondent has failed to satisfy its burden that the bifurcation of these proceedings should be granted and its Request for Bifurcation should be rejected.*[28]

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21 *Ibid*., paras. 2 and 10; Rejoinder, para. 3.
22 Reply, paras. 21-23.
23 *Ibid.*, para. 32.
24 Rejoinder, paras. 28-50.
25 Reply, para. 34.
26 *Ibid*., para. 35.
27 *Ibid*., para. 37.
28 *Ibid*., para. 39.

IV. ANALYSIS OF THE TRIBUNAL

A. APPLICABLE STANDARD

31. The purpose of this Order is to decide whether the proposed bifurcated jurisdictional objection should be decided as a preliminary question in a separate phase.

32. As an initial matter, the Tribunal has the power to order the proposed bifurcation in accordance with Article 41 of the ICSID Convention and with the ICSID Arbitration Rules. Article 41(2) of the ICSID Convention provides that:

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

33. Article 41(4) of the ICSID Arbitration Rules also provides that:

> [*The Tribunal*] *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.*

34. The ICSID Convention and the ICSID Arbitration Rules do not provide for the legal standard to be applied by arbitral tribunals when ruling on the admissibility of a bifurcation request. There is no presumption for or against bifurcation. As a consequence, the Tribunal has a discretionary power to decide whether to bifurcate jurisdictional/admissibility objections or join them to the merits.

35. With regard to the criteria that shall guide arbitral tribunals when deciding upon a bifurcation, both Parties refer to *Glencore v. Bolivia*[29] (which in turn refers to *Philip Morris v. Australia*[30]

[29] *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No 2, Decision on bifurcation, 31 January 2018, para. 39, **Exhibit RL-010**.

[30] *Philip Morris Asia Limited v. The Commonwealth of Australia*, CPA Case No. 2012-12, Procedural Order No. 2, Decision on Bifurcation, 14 April 2014, para. 109, **Exhibit RL-008**.

and *Glamis Gold v. United States*[31]), as well as to *Global Telecom v. Canada*.[32] These decisions all refer to the three following criteria:

> i. *whether the objection is prima facie serious (or not frivolous) and substantial;*
>
> ii. *whether the objection can be examined without prejudging or entering the merits; and*
>
> iii. *whether the objection, if successful, could dispose of all or an essential part of the claims before the Tribunal.*

36. The Tribunal agrees with these criteria and will adopt them in this decision. Each of them shall be assessed individually with the purpose of implementing the general principle of procedural efficiency in matters of bifurcation. In considering and weighing each of them, the tribunal will be guided by the "*overarching principle of fairness and efficiency*."[33]

B. APPROPRIATENESS OF THE PROPOSED BIFURCATION

37. As an initial matter, the Tribunal considers that the fact that the Respondent reserved its right to present jurisdictional objections other than the one which bifurcation is proposed is irrelevant to the Tribunal's decision. As a matter of principle, it is perfectly possible to bifurcate only part of a respondent's jurisdictional objections. Whether that is desirable or not is a question that depends on the specificities of each case. In the present situation, the fact that the Respondent may raise other jurisdictional objections in a possible phase 2 does not, in the Tribunal's view, weigh against the proposed bifurcation.

38. Having reviewed the Parties' positions, the Tribunal decides that the proposed bifurcation should be ordered.

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[31] *Glamis Gold v. The United States of America*, Procedural Order n°2, 31 May 2005, para. 12(c), **Exhibit RL-007**.

[32] *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No 2, Decision on Respondent's Request for bifurcation, 14 December 2017, para. 100, **Exhibit RL-011**.

[33] *Glamis Gold v. The United States of America*, Procedural Order n°2, 31 May 2005, para. 12(c), **Exhibit RL-007**: "*The tribunal may decline to* [hear an objection as a preliminary matter] *when doing so is unlikely to bring about increased efficiency in the proceedings*".

1. Timeliness

39. The Tribunal does not, first of all, consider Morocco's request for bifurcation to be untimely. As a matter of fact, the timing of such a request was indeed discussed and agreed in Annex B of Procedural Order No. 1 and the Respondent has filed its request in accordance with that Annex B.

2. The Respondent's objection is not *prima facie* frivolous

40. The Arbitral Tribunal does not, in deciding on the proposed bifurcation, have to assess, even on a *prima facie* basis, whether the jurisdictional objection is well grounded. It only has to assess whether it is not *prima facie* frivolous. The Tribunal does not see any basis to conclude that the proposed bifurcated question would be frivolous. The Parties disagree, in particular, on the meaning of the concept of seat, on whether or not it must be interpreted in accordance with German law, and the point in time at which the localization of the seat must be made. Each party has supported its position with arguments that deserve serious consideration, and it is impossible to conclude on a *prima facie* basis that the objection should be upheld or rejected. As a consequence, the objection is not *prima facie* frivolous, so that it may be bifurcated.

3. The Respondent's objection is independent from the merits

41. The Tribunal notes that the bifurcated question is very narrow and considers that it does not require, in order to be decided, that the Tribunal engage into an assessment of the merits of the dispute. The objection implies interpreting Article 1(3)(b) of the BIT and, as the case may be, other applicable norms governing the question of the seat as well as documents relating to the Claimant's corporate structure. Such assessment should not require the taking of significant fact evidence, and is not likely to overlap with the merits of the case. There is therefore no risk that the proposed bifurcation will entail a duplication of arguments or procedural steps.

4. Fairness and efficiency

42. First, the bifurcated objection would, in case the Respondent succeeds, be dispositive of the case by leading to a decision that the Tribunal lacks jurisdiction over the Claimant. As a

consequence, in the scenario in which the Respondent would prevail in its jurisdictional objection, it is clearly more efficient to bifurcate rather than to have the parties brief the entirety of their arguments, on jurisdiction and merits. The Tribunal also accepts that, in the contrary scenario, in which the Respondent fails in its jurisdictional objection, bifurcation would result to a certain extent in added delays, due to the fact that the initially contemplated timetable would not be maintained and that the Tribunal will need some time to deliberate and draft its decision on the bifurcated objection. The question is therefore whether the advantages of bifurcation in the first scenario outweigh the disadvantages suffered by the parties in the second.

43. In assessing whether that is the case, it is necessary to assess whether the bifurcated objection can be disposed of in a reasonable time. Because the question is narrow and essentially legal, that is indeed the case. The Tribunal considers that the bifurcated question can be decided expeditiously with a short hearing essentially limited to expert legal evidence and short oral arguments. Indeed, the Parties have already agreed to a one-day hearing in Paris on 21 April, meaning that a decision on jurisdiction is likely to be ready before the end of spring 2020. In case the jurisdictional objection is found to be ill-grounded, the delay to the resolution of the case would therefore be limited.

44. To the contrary, in the scenario in which the jurisdiction objection is found to be well grounded, in the absence of bifurcation, the Parties would have to incur significant expense to brief their full case, including on liability and damages. In these circumstances, the Tribunal holds that the advantages of bifurcation outweigh its disadvantages, and that it should therefore be ordered.

45. Finally, the Tribunal does not see any unfairness in the proposed bifurcation. As a matter of fact, the case has not been made that it would impair in any way the Claimant's ability to present its case, or that it would have any detrimental effect on the Claimant, other that entailing a limited and reasonable delay in the resolution of the case in the scenario in which the objection would be rejected. However, as said above, such detrimental effect is outweighed by the detrimental effect that no bifurcation would have in the contrary scenario.

V. ORDER

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

    a. The Respondent's request for bifurcation is granted.

    b. The preliminary phase of the arbitration shall proceed in accordance with the procedural timetable, which is contained in Annex A of this Procedural Order No. 2.

On behalf of the Tribunal

[signed]

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Mr. Alexis Mourre
President of the Tribunal
Date: 14 February 2020

ANNEX A

PROCEDURAL CALENDAR NO. 2

Step	Date
Memorial	15 November 2019
Request for bifurcation	6 December 2019
Reply to the Request for bifurcation	27 December 2019
Comments to the Claimant’s Reply on bifurcation	14 January 2020
Rejoinder on bifurcation	27 January 2020
Respondent's Statement of Claim on the bifurcated question	25 February 2020
Claimant's Statement of Defence on the bifurcated question	17 March 2020
Respondent's Statement of Reply on the bifurcated question	27 March 2020
Claimant's Statement of Rejoinder on the bifurcated question	6 April 2020
Hearing on bifurcation	21 April 2020