INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Vasilisa Ershova and Jegor Jeršov

v.

Republic of Bulgaria

(ICSID Case No. ARB/22/29)

PROCEDURAL ORDER NO. 1
(applicable ICSID Arbitration Rules)

Members of the Tribunal
Juan Fernández-Armesto, President of the Tribunal
Jan Paulsson, Arbitrator
Toby Landau KC, Arbitrator

Secretary of the Tribunal
Anna Holloway

Assistant to the Tribunal
Francisca Seara Cardoso

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18 July 2023

I. INTRODUCTION AND BACKGROUND

1. On 2 November 2022, the ICSID Secretariat received a request for arbitration from Ms. Vasilisa Ershova and Mr. Jegor Jeršov ["**Claimants**"], requesting to institute an ICSID arbitration proceeding against the Republic of Bulgaria ["**Respondent**" or "**Bulgaria**"], pursuant to Articles 25 and 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [the "**ICSID Convention**"], Rule 1 and 2 of the ICSID Institution Rules [the "**Institution Rules**"], and Article 26 of the Energy Charter Treaty ["**ECT**"][1].

2. Following an exchange of correspondence between the ICSID Secretariat and Claimants, the request for arbitration, as supplemented by Claimants' correspondence of 7 and 8 November 2022 [the "**Request for Arbitration**"], was registered on 11 November 2022.

3. In the Request for Arbitration, Claimants asserted that their written consent to submit the dispute to arbitration had occurred on 27 April 2021[2]. Therefore, ICSID registered the proceeding pursuant to the arbitration rules that were in force on 27 April 2021, namely the ICSID Arbitration Rules, as amended and effective on 10 April 2006 [the "**2006 Arbitration Rules**"].

4. Following the constitution of the Tribunal on 4 May 2023, the Tribunal set a date for the first session and, on 30 May 2023, circulated a draft order addressing the procedure for the Parties' discussion and comments. That draft procedural order was premised on the applicability of the 2006 Arbitration Rules, in line with the registration of the proceeding.

5. Later that same day, Respondent filed an objection under the 2006 Arbitration Rule 41(5)[3]. In footnote 1 of that submission, Respondent indicated that it was presenting its objection

[1] Request for Arbitration, para. 1.

[2] Request for Arbitration, paras. 99 and 109.

[3] 2006 Arbitration Rule 41(5) provides that: "Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present

under the 2006 Arbitration Rules because those were the rules under which the proceeding had been registered, but that it reserved its right to contest the application of the 2006 Arbitration Rules in lieu of the ICSID Arbitration Rules in force as of 1 July 2022 [the "**2022 Arbitration Rules**"].

6. On 21 June 2023, Respondent submitted, on behalf of the Parties, the Parties' joint comments to the first draft procedural order. That same day, Respondent filed a letter addressing the application of the 2022 Arbitration Rules to this proceeding ["**Respondent's Application**"].

7. On the evening of 22 June 2023, Claimants sent an email, *inter alia*, objecting to the timing and mode by which Respondent had made submissions regarding which set of Arbitration Rules should apply. The email briefly responded to the substance of Respondent's arguments in this regard. Later that evening, Respondent sent a brief response to Claimants' objections.

8. On the following day, 23 June 2023, the Tribunal held the first session with the Parties ["**First Session**"], the details of which will be summarized in a subsequent procedural order. At the First Session, the Tribunal invited Claimants to submit their observations regarding the applicable Arbitration Rules by 30 June 2023[4]. These directions were recorded in the Tribunal's email to the parties of 26 June 2023.

9. On 30 June 2023, in accordance with the Tribunal's directions, Claimants submitted their observations on Respondent's Application ["**Claimants' Response**"].

10. The Tribunal will summarize (**II.**) and analyse (**III.**) the Parties' positions regarding the applicable Arbitration Rules, and then make its decision (**IV.**).

their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit".

[4] These directions were further summarized in the Tribunal's email communication of 26 June 2023.

II. POSITIONS OF THE PARTIES

11. Both Parties agree that, by operation of Article 44 of the ICSID Convention, absent party agreement, any arbitration proceeding shall be conducted in accordance with the Arbitration Rules in effect on the date on which the Parties consented to arbitration[5].

12. Claimants' position is that the Parties' consent was locked in before the 2022 Arbitration Rules entered into force[6]. Indeed, Claimants aver that they accepted Bulgaria's standing offer to arbitrate contained in the ECT when they served the Notice of Intent to Commence Arbitration, dated 27 April 2021 [the "**Notice of Intent**"][7]. In Claimants' words, the Notice of Intent[8]:

> *"[…] includes Claimants' express and written consent to submit their disputes with Bulgaria to the jurisdiction of the Center under Article 26(4) of the ECT."*

13. Claimants argue that since they consented to submit the dispute to ICSID arbitration on 27 April 2021 – *i.e.*, before the 2022 Arbitration Rules entered into force – the present arbitration must be governed by the 2006 Arbitration Rules[9].

14. Bulgaria, on the contrary, submits that Claimants' Notice of Intent could not constitute the requisite consent to ICSID Arbitration. In fact, Bulgaria avers that Claimants did not consent to ICSID arbitration until they filed the Request for Arbitration dated 2 November 2022, with the consequence that the 2022 Arbitration Rules should apply[10].

A. RESPONDENT'S APPLICATION

15. Respondent argues that under the applicable provisions of the ECT, an investor must first request to resolve the dispute amicably, and if the dispute is not resolved within three

[5] Respondent's Application, para. 1; Claimants' Response, p. 1.
[6] Claimants' Response, p. 6.
[7] Claimants' Response, p. 6. *See also* Request for Arbitration, para. 99.
[8] Request for Arbitration, para. 99. *See also* para. 109.
[9] Claimants' Response, para. 6.
[10] Respondent's Application, para. 3.

months, the investor may *then* elect a dispute resolution method under Article 26(2)(c) of the ECT. Article 26(4) of the ECT provides that the investor must provide its "further" consent to ICSID arbitration at this time[11].

16. On Respondent's case, the Notice of Intent was when Claimants first requested amicable settlement. The effect of this document was merely to trigger the three-month period for potential amicable resolution, and only thereafter could Claimants choose to submit the dispute to ICSID arbitration by providing further consent under Article 26(4) of the ECT[12].

17. Respondent relies, in support of its arguments, on the recent ICSID Case No. ARB/22/23, *Benabderrahmane v. Qatar*, in which the tribunal determined that the claimant's notice letter did not constitute consent to ICSID arbitration, and that the claimant had consented through his request for arbitration, such that the 2022 Arbitration Rules applied[13].

18. Bulgaria avers that, in any event, assuming that the Tribunal were to decide that the 2006 Arbitration Rules apply, the 2022 Arbitration Rules reflect best practices in ICSID arbitration that the Tribunal may consider to the extent that they do not directly conflict with any provision of the 2006 Arbitration Rules[14].

B. Claimants' Response

19. Claimants submit that Respondent's reading of Article 26 of the ECT is misguided in light of the well-established ICSID arbitration practice, where no issue has been taken with various claimants giving consent to arbitrate when submitting their notices of dispute[15].

20. Claimants argue that the ICSID case on which Respondent relies to support its Application (*Benabderrahmane v. Qatar*):

[11] Respondent's Application, paras. 4-11.

[12] Respondent's Application, para. 14.

[13] Respondent's Application, para. 17, citing to *Tayeb Benabderrahmane v. The State of Qatar*, ICSID Case No. ARB/22/23, Procedural Order No. 1 dated 13 March 2023, "Enclosure A".

[14] Respondent's Application, pp. 3-4.

[15] Claimants' Response, p. 2.

- Was not an ECT case and did not discuss Article 26 of the ECT[16];

- Was not analogous in that the claimant in that case had not given its express consent in the notice of dispute and was seeking to have consent inferred from the fact that the notice was a mandatory part of the applicable BIT procedure; and

- Was a case in which the tribunal expressly acknowledged that consent can be given prior to the request for arbitration, and cited to multiple ICSID awards that have upheld this basic rule[17].

21. Claimants note that, contrary to the *Benabderrahmane v. Qatar* case, Claimants provided their express and unequivocal consent to ICSID Arbitration in para. 105 of their Notice of Intent[18].

22. Furthermore, Claimants argue that Article 26 of the ECT contains no language that could be read as if the ECT precluded the provision of consent by investors before the expiry of the three-month cool-down period[19]. The requirement in Article 26(4) for the investor to "further provide its consent in writing for the dispute to be submitted to [ICSID arbitration]" is not a requirement to provide a supplementary consent, in addition to that provided in the notice of dispute[20]. The word "further" simply indicates that the investor's mere choice or preference to submit its dispute to ICSID arbitration does not in and of itself satisfy the jurisdictional condition under the ECT and the ICSID Convention; the investor is "further" required to provide its consent *in writing* prior to submitting its dispute to ICSID arbitration[21].

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[16] Claimants' email of 22 June 2023; Claimants' Response, pp. 2-3.

[17] Claimants' Response, p. 3, citing to *Tayeb Benabderrahmane v. The State of Qatar*, ICSID Case No. ARB/22/23, Procedural Order No. 1 dated 13 March 2023, "Enclosure A", para. 17.

[18] Claimants' Response, p. 3.

[19] Claimants' Response, p. 4.

[20] Claimants' Response, p. 5.

[21] Claimants' Response, p. 6.

III. TRIBUNAL'S ANALYSIS

23. The set of Arbitration Rules which applies to a particular proceeding is determined in accordance with Article 44 of the ICSID Convention:

> *"Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question" [Emphasis added].*

24. Bulgaria gave its unconditional consent to ICSID arbitration, when it signed and ratified the ECT, which in its Article 26(3)(a) provides that[22]:

> *"(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article".*

25. The Tribunal is called upon to determine when *Claimants* gave their consent to ICSID arbitration, given that the date on which consent was perfected is the date relevant to determine the applicable Arbitration Rules.

26. Article 26 of the ECT, on the settlement of disputes between an Investor and a Contracting Party to the ECT, provides in its relevant part that[23]:

> *"(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
>
> *(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
>
> > *(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;*

[22] ECT, Exhibit CLA-1, Article 26(3).
[23] ECT, Exhibit CLA-1, Article 26.

> *(b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
>
> *(c) in accordance with the following paragraphs of this Article.*
>
> *(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.*
>
> *[…]*
>
> *(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:*
>
> *(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or*
>
> *[…]*
>
> *(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:*
>
> *(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention […]; […]." [Emphasis added]*

27. It follows from the above provisions that, if possible, a dispute between an investor and a Contracting State to the ECT should be settled amicably. If within three months the dispute cannot be amicably solved, the investor may choose to submit the dispute to ICSID arbitration – in which case, the investor must "provide its consent in writing".

28. Claimants argue that their consent in writing to ICSID arbitration is contained in the Notice of Intent. The Notice of Intent, attached to the Request for Arbitration as Exhibit C-5, states that[24]:

> *"Pursuant to Article 26(4) [of the ECT] Claimants accept Bulgaria's offer to arbitrate and hereby consent for the dispute to be submitted to the International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), to which both Lithuania and Bulgaria are parties" [Emphasis added].*

29. The wording of the Notice of Intent is unequivocal: Claimants clearly gave their "consent in writing" to ICSID arbitration in accordance with Article 26(4) of the ECT when they filed such document on 27 April 2021.

30. The necessary consequence is that the Parties' consent was locked in as of that date[25].

Respondent's counterarguments

31. Bulgaria proposes a different reading of Article 26 of the ECT. It argues that, when Claimants filed the Notice of Intent, they merely triggered the three-month period for amicable resolution of the dispute, and *only thereafter* could they choose to submit the dispute under Article 26(4) of the ECT by providing "further consent".

32. The Tribunal finds that Bulgaria's argument is based on an incorrect reading of Article 26. Nothing in Article 26 precludes the investor from providing its consent to arbitration at a stage prior to the request for arbitration. In fact, nothing precludes the investor from providing its consent at the same time as it offers to amicably solve the dispute – which is precisely what happened in the present case.

[24] Notice of Intent, Exhibit C-5, para. 105.

[25] Without prejudice to the Tribunal's decision on Respondent's Objection that Claimants are not "Investors" under the ECT and thus are not eligible to consent to arbitrate any alleged ECT dispute (*see* Respondent's Objection under ICSID Arbitration Rule 41 dated 30 May 2023; Respondent's Application, paras. 12-13).

33. Indeed, with their Notice of Intent, Claimants gave notice to Bulgaria of their intention to submit their dispute to international arbitration and accepted Bulgaria's standing offer pursuant to Article 26(4) of the ECT[26]. At the same time, Claimants clarified that they remained ready to find an amicable solution[27]:

> *"Claimants send this notice reluctantly. [Claimants] would have preferred to get justice through Bulgaria's courts, but that has proven impossible. Nevertheless, Claimants are prepared to meet with the Government representatives to explore solutions.*
>
> *However, should the Parties prove unable to find an amicable, mutually acceptable solution to the dispute during the Treaty waiting period, Claimants intends to initiate arbitration under the ECT against the Republic of Bulgaria, alleging breaches of Article 10 and Article 13 of the Treaty." [Emphasis added]*

34. The wording "further consent" in Article 26(4) must be interpreted as a consent "further" to that of the State, which is mentioned in Article 26(3) – not temporarily as an additional stage of consent.

Benabderrahmane v. Qatar

35. Respondent relies on the recent ICSID case, *Benabderrahmane v. Qatar*, in which the tribunal found that the proceedings should be governed by the 2022 Arbitration Rules. The Tribunal finds, however, that the *Benabderrahmane v. Qatar* decision is of no avail to Bulgaria's case, for three reasons:

36. First, the case concerns a treaty between the French Republic and the State of Qatar – it does not involve the ECT. The instrument of consent being different, the requirements for consent may not necessarily be the same as in the present case.

[26] Notice of Intent, Exhibit C-5, paras. 104-105.
[27] Notice of Intent, Exhibit C-5, paras. 110-111.

37. Second, the tribunal and the parties in that case agreed that, both under the 2006 or the 2022 Arbitration Rules, the date of consent by the investor could not be *later* – but consent could always take place *earlier* – than the filing of the request for arbitration[28]:

> *"The Parties agree that under either the 2006 or 2022 ICSID Arbitration Rules, the date of such consent cannot be any later than the filing of the Request for Arbitration, but they also agree that a claimant's acceptance and consent can take place earlier. The Tribunal notes that this agreement is in accord with the view that other tribunals and authorities have taken in such matters." [Emphasis added]*

38. In support of this proposition, the tribunal cited no less than 11 ICSID awards or decisions. While these ICSID awards and decisions are not from cases brought under the ECT, the Tribunal is aware of at least one public ECT case, which it references here *iura novit curia*, in which arbitral tribunal (constituted under the SCC Rules) found that an investor's consent to arbitration under Article 26 of the ECT was contained in a notice of dispute filed *prior* to the request for arbitration.[29]

39. Third, the case can be distinguished on the facts. In *Benabderrahmane v. Qatar* the tribunal found that the language used by claimant in his notice of dispute was "ambiguous" and did not constitute an unequivocal consent in writing[30]. There is no such ambiguity in the present case: in their Notice of Intent, Claimants *clearly* and *unambiguously* gave their consent in writing to ICSID arbitration.

[28] *Tayeb Benabderrahmane v. The State of Qatar*, ICSID Case No. ARB/22/23, Procedural Order No. 1 dated 13 March 2023, "Enclosure A", para. 17.

[29] *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, paras. 122-126.

[30] *Tayeb Benabderrahmane v. The State of Qatar*, ICSID Case No. ARB/22/23, Procedural Order No. 1 dated 13 March 2023, "Enclosure A", paras. 26-30.

IV. DECISION

40. For the above reasons, the Tribunal decides that:

(i) Claimants' consent to arbitration[31] was given in the Notice of Intent of 27 April 2021. Therefore, the "date on which the parties consented to arbitration", for the purposes of Article 44 of the ICSID Convention, was 27 April 2021.

(ii) The 2006 Arbitration Rules are applicable to this proceeding, as these were the "Arbitration Rules in effect on the date on which the parties consented to arbitration".

[signed]

Juan Fernández-Armesto
President of the Tribunal

Date: 18 July 2023

[31] Without prejudice to the Tribunal's decision on Respondent's Objection that Claimants are not "Investors" under the ECT and thus are not eligible to consent to arbitrate any alleged ECT dispute (*see* Respondent's Objection under ICSID Arbitration Rule 41 dated May 30, 2023; Respondent's Application, paras. 12-13).