

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. 3

(Decision on Claimants' comments to Annex A of Procedural Order No. 2)

Members of the Tribunal

Prof. Juan Fernández-Armesto, President of the Tribunal

Prof. Jan Paulsson, Arbitrator

Mr. Toby Landau KC, Arbitrator

Secretary of the Tribunal

Ms. Anna Holloway

Assistant to the Tribunal

Ms. Francisca Seara Cardoso

October 13, 2023

I. PROCEDURAL BACKGROUND

1. Scenario 2 of the Procedural Timetable contained in Annex A of Procedural Order No. 2, issued on September 22, 2023 [**“PO 2”**] applies if Respondent files a Request for Bifurcation and the Tribunal decides to join Respondent’s preliminary objections [**“Preliminary Objections”**] to the merits.
2. On September 7, 2023 the Parties had filed their comments to the draft Procedural Timetable and noted that they had three main disagreements regarding Scenario 2:
 - a. Whether a procedural conference call would be warranted after the Tribunal made its Decision on Bifurcation;
 - b. From when Respondent’s preparation time for its Counter-Memorial and Preliminary Objections [**“Counter-Memorial”**] should be counted;
 - c. When Respondent should submit its Rejoinder.
3. With regards to point (b), both Parties had agreed that in Scenario 2 they should each have eight months to present their Memorial and Counter-Memorial and that Claimants would submit their Memorial on March 1, 2024, *i.e.*, eight months and one week after the First Session. The Parties disagreed, however, when the time for Respondent’s Counter-Memorial should start to run:
 - Claimants argued that the deadline should run from the date of Claimants’ Memorial (*i.e.*, Claimants would not grant Respondent additional preparation time to account for the fact that between the Memorial and the Counter-Memorial Respondent would be busy briefing the Tribunal on bifurcation);
 - Respondent countered that the time-period to submit the Counter-Memorial should be measured from the Tribunal’s Decision on Bifurcation (*i.e.*, Respondent should file the Counter-Memorial eight months after the Tribunal’s Decision on Bifurcation).
4. On September 22, 2023, the Tribunal issued its decision on the Parties’ disagreements on Scenario 2 in its PO 2, in which it established that the period to file the Memorial and Counter-Memorial should, in fact, start counting from the Tribunal’s Decision on Rule 41(5) Preliminary Objection and the Tribunal’s Decision of Bifurcation [the **“Tribunal’s Decisions”**], respectively. The Tribunal also established that each Party would have seven months and one week (instead of eight months) after the relevant Tribunal’s Decision to file their pleadings.

5. Therefore, Scenario 2 would translate as follows:

<u>Date</u>	<u>Lapse (in days)</u>	<u>Party / Tribunal</u>	<u>Description</u>
May 30, 2023	N/A	Respondent	Respondent's Preliminary Objection under ICSID Arbitration Rule 41(5)
June 30, 2023	One (1) month from Respondent's Preliminary Objection	Claimants	Claimants' Observations on Respondent's Rule 41(5) Preliminary Objection
July 25, 2023		Tribunal	Tribunal's Decision on Rule 41(5) Preliminary Objection
Fri., Mar. 1, 2024	Seven months and one week from the Decision on Rule 41(5)	Claimants	Claimants' Memorial
Fri., Mar. 15, 2024	Two (2) weeks	Respondent	Notice of intention to request Bifurcation
Fri., Apr. 12, 2024	Four (4) weeks	Respondent	Request for Bifurcation
Fri., May 24, 2024	Six (6) weeks	Claimants	Observations on Request for Bifurcation
Fri., June 14, 2024	Within three (3) weeks	Tribunal	Decision on bifurcation or joinder of preliminary objections to the merits
January 21, 2025	Seven months and one week from Decision on Bifurcation	Respondent	Counter-Memorial and Preliminary Objections

6. On September 27, 2023, Claimants requested that the Tribunal reconsider the date when Respondent should submit its Counter-Memorial in Scenario 2 of the Procedural Timetable [**“Claimants’ Request”**].
7. On September 29, 2023, the Tribunal granted Respondent until October 2, 2023, to convey a response to Claimants’ Request. On October 2, 2023, Respondent did so.
8. That same day, Claimants submitted a reply to Respondent’s comments, and Respondent requested that the Tribunal disregard the additional submission.

II. POSITIONS OF THE PARTIES

A. CLAIMANTS’ POSITION

9. Claimants request that the Tribunal reconsider the date for Respondent to file its Counter-Memorial under Scenario 2, arguing that, although the Tribunal recognized that:

“[...] the Parties should have equal time to prepare their submissions [and] while the Parties are occupied preparing other side-submissions (and not their main pleadings), the time should not count entirely for the preparation of the main written submissions”,

the Tribunal did not consider the fact that the time that Respondent will be dedicating to the issue of bifurcation is not “idle time” when no progress can be made on the Counter-Memorial. In fact, the Claimants argue, Respondent will be reviewing the case material

regardless of whether or not it ends up filing a notice of intention to request Bifurcation [**“Notice of Bifurcation”**].

10. Finally, Claimants assert, after Respondent files its Request for Bifurcation, it will have nine weeks (six weeks until Claimants’ filing of their Observations on Request for Bifurcation and three weeks until the Tribunal renders its Decision on Bifurcation) during which it can continue developing its Preliminary Objections, which will be used in the Counter-Memorial if the Tribunal decides not to bifurcate. It follows that this 9-week period cannot be considered “idle time” for the drafting of the Counter-Memorial.

B. RESPONDENT’S POSITION

11. Respondent requests that the Tribunal reject Claimants’ Request. Respondent notes that when they submitted their disagreement on Scenario 2 for the Tribunal’s decision, the Parties had already agreed on the proposed dates for:
 - Respondent’s Notice of Bifurcation,
 - Respondent’s Request for Bifurcation;
 - Claimants’ Observations on Request for Bifurcation; and
 - The Tribunal’s Decision on Bifurcation.
12. The Parties had also agreed on a period of eight months and one week for Respondent to prepare its Counter-Memorial, but had not agreed on when the time-period should start. Nonetheless, the Tribunal shortened the agreed time-period by one month and decided that it would start after the Tribunal’s Decisions.
13. Respondent avers that Claimants do not deny that they will have the same time to prepare their Memorial counting from the Tribunal’s Decision on Rule 41(5) as Respondent will have from the Tribunal’s Decision on Bifurcation.
14. Contrary to Claimants’ contention, Respondent will not use 50% of the time between the filing of Claimant’s Memorial and the Decision on Bifurcation to prepare its Counter-Memorial. This is because before a Decision on Bifurcation is issued, it is uncertain whether Respondent will have to prepare a Counter-Memorial at all. Claimants fail to acknowledge that the Tribunal has already shortened Respondent’s preparation time for the Counter-Memorial by a full month, from eight months and one week to seven months and one week, thus considering that Respondent will be working in the time between the Memorial and the Decision on Bifurcation.
15. Therefore, Respondent requests that the Tribunal reject Claimants’ Request and maintain the dates established in Scenario 2.

III. TRIBUNAL'S DECISION

16. After duly considering each Parties' arguments, the Tribunal finds that the time-periods established in Scenario 2 grant both Parties equal and sufficient time to prepare their substantive submissions.
17. As already stated in PO 2, the Tribunal took into account that:

“[...] while the Parties are occupied preparing other side-submissions (and not their main pleadings), the time should not count entirely for the preparation of the main written submissions.”
18. Therefore, the Tribunal was well aware – and fully considered – that the time used by each Party to make or review submissions on the Rule 41(5) Preliminary Objection, or on the Request for Bifurcation, was not idle time.
19. The Tribunal also decided that the appropriate solution was to give the Parties the same amount of time to prepare their submissions starting from the relevant Tribunal's Decision, since this is the relevant moment when the Parties learn what the Tribunal's decision is and whether or not they have to expend further efforts in preparing their next submission (the Memorial and the Counter-Memorial, respectively). Indeed, if the Tribunal had upheld the Rule 41(5) Preliminary Objection, Claimants would not have had to prepare a Memorial; likewise, if the Tribunal were to decide to bifurcate the proceedings, Respondent would not have to prepare at that stage a full-fledged Counter-Memorial.
20. Even though they would be unaware of the outcome of the relevant Tribunal Decision, the Tribunal is certain that both Parties will already start performing some work for their main submissions. To account for this, the Tribunal shortened the preparation time from eight months to seven months and one week, starting from the relevant Tribunal Decision.
21. The Tribunal is fully convinced that the Parties will have ample time to prepare their submissions and that this decision does not cause any detriment to due process or equality between the Parties.
22. In view of the above, the Tribunal decides to maintain the Procedural Timetable as is.

IV. ORDER

23. On the basis of the foregoing, the Tribunal makes the following decisions:

- The Claimants' Request is dismissed.
- The Procedural Timetable, set forth in Annex A of Procedural Order No. 2, is maintained.

[signed]

Prof. Juan Fernández-Armesto
President of the Tribunal
Date: October 13, 2023