INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Stratius Investments Limited

v.

Hungary

ICSID Case No. ARB/24/6

PROCEDURAL ORDER No. 3
Reasons for prior bifurcation decision

Members of the Tribunal
Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Ms. Juliet Blanch, Arbitrator
Prof. Philippe Sands KC, Arbitrator

Secretary of the Tribunal
Ms. Aïssatou Diop

Assistant to the Tribunal
Dr. Magnus Jesko Langer

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12 February 2025

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND

1. On 29 February 2024, Stratius Investments Limited ("Stratius" or the "Claimant") submitted to the International Centre for Settlement of Investment Disputes (the "Centre" or "ICSID") a Request for Arbitration instituting proceedings against the Republic of Hungary ("Hungary" or the "Respondent"; together with the Claimant, the "Parties") under Article 26 of the Energy Charter Treaty (the "ECT") and Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

2. The Tribunal held its first session with the Parties on 6 September 2024, and issued Procedural Order No. 1 ("PO1") on 11 September 2024.

3. On 16 October 2024, the Tribunal issued Procedural Order No. 2 on transparency and confidentiality.

4. On 18 October 2024, the Claimant filed its Memorial.

5. On 29 November 2024, in accordance with the procedural calendar in PO1, the Respondent filed a Request for Bifurcation (the "Request").

6. On 13 December 2024, the Claimant filed its Response to the Request (the "Response").

7. On 19 December 2024, the Centre informed the Parties of the Tribunal's decision to deny the Request, with reasons to follow in due course:

> [T]he Tribunal has decided to deny the request for bifurcation and. . .as anticipated, the reasons for this decision will follow in due course. As a result of the Tribunal's decision on bifurcation, the arbitration will now proceed under Scenario 2(b) of the procedural calendar, which is applicable to the situation where bifurcation is requested but denied.

8. This Order provides the reasons for the Tribunal's decision.

II. PARTIES' POSITIONS

A. The Respondent's Position

1. Introduction

9. Relying on Rule 44 of the 2022 version of the ICSID Arbitration Rules (the "2022 Arbitration Rules"), the Respondent requested that the Tribunal bifurcate the proceedings to adjudicate the following two jurisdictional objections in a preliminary phase before the merits:

   (i) The Claimant's "*true* purported investment" is an ICC award rendered on 13 December 2012 (the "ICC Award") which does not constitute an investment under Article 25 of the ICSID Convention (the "First Objection"); and

(ii) The Hungarian courts "conclusively determined" that the put option that underlay the ICC Award breached Hungarian criminal law (the "Second Objection").[1]

10. The Respondent contended that bifurcation would increase efficiency, as it had the "potential to dispose of Stratius' claim" and therefore "[could] save costs and time".[2] It added that its two preliminary objections raised discrete issues that were not intertwined with the merits.[3]

11. Hungary further reserved its right to present additional preliminary objections in case the Tribunal were to decline bifurcation or if the two preliminary objections were to be dismissed in a bifurcated phase.[4]

2. Legal Standard

12. The Respondent submitted that, under Rule 44 of the 2022 Arbitration Rules, bifurcation was warranted, if (i) it materially reduced time and cost, (ii) disposed of all or a substantial portion of the dispute and (iii) the preliminary objection and the merits were not intertwined.[5]

3. The Objections

a. The First Objection

13. In reliance on *GEA v. Ukraine*, the Respondent argued that the ICC Award, which opposed Stratius and Magyar Villamos Művek Zártkörűen Működő Részvénytársaság ("MVM"), did not qualify as an investment under Article 25 of the ICSID Convention "because it [did] not exhibit the attributes and characteristics of an investment".[6] Although the Claimant gave a "broad definition" of its investment in Hungary, including its shares in Kárpát-Energo, its rights under the shareholders and share purchase agreements, its right to arbitration and its right to receive payment under the ICC Award, the fact was that the Claimant's "entire claim [arose] from alleged violations of the Treaty [i.e. the ECT] with respect to the enforcement of the ICC Award".[7]

14. For the Respondent, the ICC Award was the only purported investment that "survive[d]".[8] This was so, said the Respondent, because the Claimant only sought to recover the amount of the ICC Award and did not raise any claims in relation to its other purported

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1 Request, pp. 2-3.

2 Request, p. 2.

3 Request, p. 2.

4 Request, p. 2 and note 6.

5 Request, p. 3.

6 Request, p. 4, referring to *GEA Group Aktiengesellschaft v. Ukraine*, Final Award, 31 March 2011, para. 161 (RL-1).

7 Request, p. 5.

8 Request, p. 6.

investments.[9] Moreover, the shares in Kárpát-Energo lacked any value since that company had been liquidated and rights in those shares had been "realized in the ICC Award itself".[10]

15. The Respondent further submitted that the Tribunal would need to consider if the claims related only to the ICC Award and, if so, whether that award constituted an investment under the ICSID Convention. These two questions were distinct from the merits and should be determined in a bifurcated phase in order to save time and costs.[11] A determination that the Claimant had no protected investment would leave the Tribunal without jurisdiction and thus dispose of the entire case.[12] Moreover, said the Respondent, this objection was "narrowly tailored" and not intertwined with the merits.[13]

b. The Second Objection

16. The Respondent further asserted that the Claimant's purported investment was not made in accordance with Hungarian law. It explained that the ICC Award arose from the Claimant's exercise of a put option in the shareholders agreement of 30 October 2007 that "purportedly allowed Stratius to compel MVM to purchase Stratius' shares in Kárpát-Energo if the Vásárosnamény project did not meet certain profitability metrics" (the "Put Option").[14]

17. Hungary then noted that its courts had determined that, when signing the Put Option, an MVM executive violated Hungarian criminal law. Specifically, granting the Put Option to Stratius breached that executive's "fiduciary duty because it was offered in exchange for no consideration".[15] It followed, so argued the Respondent, that the ICC Award was "premised on an agreement that [was] illegal" and that, therefore, the Claimant's purported investment did not comply with Hungarian law.[16]

18. For the Respondent, if the Tribunal were to find that the Put Option was illegal under Hungarian law, then it would lack jurisdiction to hear this dispute.[17] Additionally, Hungary stressed that this objection was not intertwined with the merits and that bifurcation would save time and costs.[18]

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9 Request, p. 6.

10 Request, p. 6.

11 Request, pp. 6 and 9.

12 Request, p. 8.

13 Request, p. 9.

14 Request, p. 7.

15 Request, p. 7.

16 Request, pp. 7-8.

17 Request, p. 8.

18 Request, pp. 8-9.

4. Request for Relief

19. On this basis, the Respondent requested that the Tribunal:

> "1. Order bifurcation of these proceedings to hear Hungary's preliminary objections separately from and prior to any consideration of the merits;
>
> 2. Establish an appropriate procedural calendar for hearing the preliminary objections; and
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> 3. Reserve all questions of costs for subsequent determination".[19]

B. The Claimant's Position

1. Introduction

20. The Claimant requested that the Tribunal deny the Request, because the criteria set in Rule 44 of the 2022 Arbitration Rules were not met and because bifurcation would not serve the interests of justice, efficiency or procedural economy.[20] It argued that the jurisdictional objections lacked substance, were intertwined with the merits, would not dispose of all or a substantial portion of the dispute, and would not reduce time and costs if heard in a bifurcated phase.[21]

2. Legal Standard

21. The Claimant submitted that Rule 44(2) of the 2022 Arbitration Rules required the Tribunal to consider all relevant circumstances, including whether bifurcation would dispose of the case or significantly reduce its complexity, and whether bifurcation would be impractical and inefficient.[22] It disputed the Respondent's test that it was sufficient for there to be "potential" that a bifurcated phase could dispose of the claim or that bifurcation could save costs and time.[23] For the Claimant, the Tribunal must be satisfied that bifurcation would materially reduce time and cost and would dispose of all or part of the dispute.[24] Stratius added that another relevant circumstance to be considered was whether the preliminary objections were *prima facie* likely to succeed.[25]

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19 Request, p. 10.

20 Response, para. 1.2.

21 Response, paras. 3.1-3.5.

22 Response, paras. 2.2-2.3.

23 Response, para. 2.4.

24 Response, para. 2.4.

25 Response, paras. 2.5-2.15.

3. The Objections

a. The First Objection

22. The Claimant contended that the First Objection lacked substance because its investments in Hungary which underlay the ICC Award continued to exist and to be entitled to protection "unless and until the ultimate disposal of the ICC Award ha[d] been completed".[26] Even if the Tribunal were to find that the ICC Award did not constitute an investment under Article 25 of the ICSID Convention, it would still have to determine whether the other investments, including the shares and the related Put Option, fell within the scope of Article 25.[27] In contrast to *GEA v. Ukraine*, where the "underlying agreements were not investments", the tribunal in *White Industries v. India* recognized that arbitral awards relating to investment disputes "represent[ed] a continuation or transformation of the original investment".[28]

23. The Claimant further argued that the resolution of the First Objection would not dispose of all or a substantial portion of the dispute.[29] It highlighted that the Respondent had noted the Claimant's wide definition of investment and "expressly acknowledge[d]" that the Put Option was an investment.[30] Accordingly, the Tribunal had jurisdiction regardless of whether the ICC Award was a protected investment.[31]

24. The Claimant further asserted that this objection was intertwined with the merits,[32] because the Tribunal would have to investigate "each aspect of Stratius' investments (including every part of the transaction relating to the Vásárosnamény Power Plant and the subsequent history of the enforcement of the Put Option and the ICC Award, together with what happened in the Hungarian civil and criminal courts)".[33] According to the Claimant, this investigation "substantially overlap[ped] with the merits phase" and would involve reviewing the same documents and hearing the same witnesses and experts on jurisdiction and on the merits.[34]

b. The Second Objection

25. Similarly, it was the Claimant's submission that the Second Objection had no merits, was intertwined with the merits, and its determination would not dispose of all or a substantial

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26 Response, para. 5.8.

27 Response, para. 4.2.1.

28 Response, paras. 5.2-5.6, referring to *White Industries Australia Ltd. v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, para. 7.6.7 (CL-16).

29 Response, paras. 5.11-5.13.

30 Response, para. 5.12.

31 Response, para. 5.13.

32 Response, paras. 5.14-5.18.

33 Response, para. 5.15.

34 Response, paras. 5.15-5.17.

portion of the dispute.[35] Indeed, the Hungarian courts had upheld the ICC tribunal's decision that the Put Option was valid.[36] While the Hungarian criminal courts did find that an MVM official had breached his fiduciary duty when signing the Put Option, those proceedings did not involve the parties to the Put Option, namely MVM and Stratius, and thus had no *res judicata* effect.[37] Furthermore, the criminal courts did not find that the Put Option or the ICC Award were illegal and neither Stratius nor MVM had been accused of any crime.[38]

26. Stratius added that resolving the Second Objection would not dispose of all or a substantial portion of the dispute because the Tribunal would in any event have to address the effective means and denial of justice claims.[39] Those claims concern the "sequestration and confiscation of Stratius' claims" in a forum in which Stratius was not a party.[40]

27. The Claimant further argued that the Second Objection was "so intertwined with the merits as to make bifurcation impractical". This was so, because the Tribunal would have to assess what happened in the Hungarian criminal courts and thus consider the same facts, documents, witness and expert evidence, in the bifurcated phase and at the merits stage.[41]

4. Request for Relief

28. Based on these submissions, the Claimant requested that:

> "9.2.1 Hungary's Bifurcation Request be denied and dismissed; and
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> 9.2.2 The Tribunal Find, Order and Award that Hungary pay the costs of and occasioned by its Bifurcation Request".[42]

III. ANALYSIS

A. Legal Framework

29. At this juncture, the Tribunal merely provides the reasons underlying the decision to deny jurisdiction which was notified to the Parties on 19 December 2024. When it took that decision, the Tribunal only assessed whether the preliminary objections mentioned in the Request should be heard and decided as a preliminary matter or joined to the merits. It did not decide on the merits of these objections. Its decision was based on the record as

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35 Response, paras. 6.1-6.26.

36 Response, paras. 6.1-6.4.

37 Response, para. 6.5.

38 Response, paras. 6.6-6.9.

39 Response, paras. 6.18-6.22.

40 Response, paras. 6.19-6.20.

41 Response, paras. 6.23-6.26.

42 Response, para. 9.2.

it then stood. In other words, the decision did in no way prejudge the Tribunal's jurisdiction or the admissibility and/or the merits of the claims.

30. Considering that Article 26 of the ECT was silent on preliminary objections, the applicable rules were found in Articles 41(2) of the ICSID Convention and 44 of the 2022 Arbitration Rules. The Tribunal noted that its power to bifurcate proceedings between preliminary objections and the merits was provided in Article 41(2) of the ICSID Convention:

> (2) 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.

31. As for the requirements for bifurcation, the Tribunal noted that they were set forth in Article 44(2) of the 2022 Arbitration Rules, which reads as follows:

> (2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
>
> (a) bifurcation would materially reduce the time and cost of the proceeding;
>
> (b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
>
> (c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.

32. The Tribunal further noted that this framework established no presumption in favor of or against bifurcation. As such, it provided the Tribunal with discretion to assess whether bifurcation was warranted or not in the specific circumstances. In the exercise of this discretion, the Tribunal was to consider the three-pronged test established in Article 44(2) of the 2022 Arbitration Rules, which test focuses on whether bifurcation would promote efficiency. More specifically, the test inquires whether, if the objections were upheld, (i) bifurcation would reduce time and costs, (ii) the decision on the preliminary objection would resolve the entirety or a significant part of the dispute, and (iii) the preliminary objection was so closely linked to the merits that bifurcation would be detrimental to the efficiency of the arbitration.[43]

33. The Tribunal was further of the view that another relevant circumstance to consider was whether a preliminary objection was *prima facie* sufficiently serious or substantial to warrant bifurcation.[44] As noted in *Huawei v. Sweden*, this element involved determining "whether, on the basis of the record as it stands, an objection raises a serious issue

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[43] *EMS Shipping & Trading GmbH v. Republic of Albania*, ICSID Case No. ARB/23/9, Procedural Order No. 3 (Bifurcation), 23 February 2024, para. 39 (CL-62); *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Procedural Order No. 3 – Bifurcation, 29 August 2024, para. 35 (CL-68).

[44] *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Procedural Order No. 3 – Bifurcation, 29 August 2024, para. 36 (CL-68).

requiring consideration in a separate procedural phase on the force of the fact allegations and legal arguments as currently formulated".[45]

B. The Objections

34. As mentioned above, the Respondent requested bifurcation in order to address the following two jurisdictional objections:

    1) The ICC Award is not an investment under Article 25 of the ICSID Convention; and

    2) The Put Option breached Hungarian law and Stratius therefore cannot benefit from the substantive protections of the ECT.

1. The First Objection

35. The Respondent contended that Stratius' "*true* purported investment" was the ICC Award and that this award did not qualify as a protected investment under Article 25 of the ICSID Convention.[46] The Tribunal understood that the ICC arbitration concerned a dispute between Stratius and MVM (a State-owned entity whose conduct, said the Claimant, was attributable to Hungary), and arose out of a memorandum of understanding of 20 June 2007 regarding the construction of a gas-fired power plant, a shareholders agreement of 30 October 2007, and a share purchase agreement of the same date. These provided that Stratius' parent company, Meinl International Power Limited, acquired a 24% stake in Kárpát-Energo, the company that owned the Vásárosnamény power plant, for a price of EUR 12 million.[47] Under Article 9.6.1 of the shareholders agreement, Stratius benefitted from the Put Option entitling it to sell its shares for EUR 12 million plus any shortfall in dividends for the first 3 years equal to 10% of the invested amount.[48]

36. It appeared uncontested that, in January 2011, MVM cancelled the project for the construction of the Vásárosnamény power plant, that Stratius thereafter exercised its right under the Put Option, and that MVM refused to comply with the Put Option. The dispute was referred to an ICC tribunal, which awarded Stratius EUR 13.2 million plus arbitration costs.[49] Thereafter, according to the Claimant, Hungary prevented Stratius from

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45 *Huawei Technologies Co., Ltd. v. Kingdom of Sweden*, ICSID Case No. ARB/22/2, Procedural Order No. 3, para. 33 (CL-66).

46 *Stratius Investments Ltd. (Cyprus) v. Magyar Villamos Művek Zártkörűen Működő Részvénytársaság (Hungary)*, ICC Case No. 18302/GZ/MHM, Final Award, 13 December 2012 (C-11).

47 Memorandum of Understanding between MVM, SCC and Meinl Bank, 20 June 2007 (C-15); Share Purchase Agreement between SCC and MIP, 30 October 2007 (C-2); Shareholders Agreement between MIP, MVM, SCC and SCI, 30 October 2007 (C-16). The amount of EUR 12 million appears to have been paid in May 2008 (Wire Transfer Order, 27 May 2008 (C-17)). The Tribunal understands that, pursuant to the share purchase agreement between Meinl International Power Limited and System Consulting Zártkörűen Működő Részvénytársaság ("SCC"), Meinl International Power Limited transferred its shares to Stratius (Share Purchase Agreement between SCC and MIP, 30 October 2007, Article VII (C-2); see also, Memorial, paras. 3.2 and 6.7).

48 Shareholders Agreement between MIP, MVM, SCC and SCI, 30 October 2007, Article 9.6.1 and Annex 2 (C-16).

49 *Stratius Investments Ltd. (Cyprus) v. Magyar Villamos Művek Zártkörűen Működő Részvénytársaság (Hungary)*, ICC Case No. 18302/GZ/MHM, Final Award, 13 December 2012, Section XV (C-11).

recovering the amounts awarded and thereby deprived it of "the value of its investment".[50]

37. In ruling on the request for bifurcation, it was the Tribunal's view, that bifurcating the First Objection would neither dispose of the entire case nor significantly reduce its scope, if that objection were upheld. The Respondent appeared to accept that the Claimant had pleaded a wide notion of investment and, in the context of its Second Objection, did not rule out the possibility that Stratius' rights under the Put Option may constitute an investment albeit an illegal one.[51] In its Memorial, the Claimant contended that the 24% stake in the Vásárosnamény power plant, the rights under the shareholders agreement, including the Put Option, the right to arbitration and the right to receive payment under the ICC Award, qualified "separately and together" as protected investments under Article 1(6) of the ECT and Article 25 of the ICSID Convention.[52]

38. At the stage of its decision on bifurcation, the Tribunal considered that it was not in a position to determine whether the ICC Award was the Claimant's "true" investment, as the Respondent argued, or whether the various investments identified by the Claimant could be said to constitute investments under the ECT and the ICSID Convention. What was clear to the Tribunal, however, was that, in due course, it would have to rule on whether each alleged investment fell within the ambit of Article 1(6) of the ECT and Article 25 of the ICSID Convention. Accordingly, regardless of whether the ICC Award qualified as an investment, the Tribunal would still have to assess whether its jurisdiction derived from one or several of the other alleged investments. It thus appeared that bifurcating the First Objection would not increase efficiency, and for that reason the Tribunal decided not to hear that objection in a bifurcated phase.

2. The Second Objection

39. In the Request, the Respondent contended that the Put Option violated Hungarian law, because the Hungarian criminal courts had found that the former MVM executive who signed the option had breached his fiduciary duty and thus committed a criminal offense. The Claimant responded by arguing that the criminal proceedings against that executive did not involve the parties to the Put Option, MVM and Stratius, that the Hungarian courts did not declare the Put Option null and void, and that the ICC tribunal considered it valid.

40. In reviewing the Second Objection, the Tribunal considered that it was so closely linked to the merits of the case that bifurcation would be impractical, or very difficult. Determining whether Stratius benefitted from an allegedly "illegal" Put Option would require the Tribunal to assess the circumstances surrounding the conclusion of the Put Option and possibly the content and import of the criminal proceedings. At first sight, this would require examining the same facts and evidence at the jurisdictional and merits stages. Moreover, it seemed doubtful to the Tribunal that determining this objection as a preliminary question would materially reduce the scope of the dispute. Indeed, irrespective of whether the Put Option was illegal as a matter of Hungarian law, the

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50 See, for instance, Memorial, para. 5.1.4.

51 Request, pp. 5 and 8.

52 Memorial, paras. 18.2 and 21.2.2. See also Response, para. 4.2.1.

Tribunal considered that it would in any event need to consider Hungary's conduct in relation to the ICC Award when addressing Stratius' effective means and denial of justice claims.

41. Accordingly, the Tribunal decided not to bifurcate the Second Objection.

C. Conclusion

42. For the reasons set out above, the Tribunal decided to deny the Request, which denial was communicated to the Parties on 19 December 2024. As the Parties were further advised then, the arbitration has since followed Scenario 2(b) of the procedural calendar.

43. At this stage, the Tribunal also rejects the Claimant's request that the Respondent be ordered to pay the costs associated with the Request and it reserves its decision on costs for subsequent determination.

On behalf of the Tribunal,

[signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 12 February 2025