INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EUROHOLD BULGARIA AD AND EUROINS INSURANCE GROUP AD

– v –

ROMANIA

(ICSID Case No. ARB/24/18)

DECISION ON THE RESPONDENT'S RULE 41 AND RULE 48 OBJECTIONS

Members of the Tribunal

Sir Daniel Bethlehem KC, Presiding Arbitrator
Sir Christopher Greenwood KC, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

Date of dispatch to the Parties: 30 September 2025

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I. INTRODUCTION

1. By a Request for Arbitration dated 21 May 2024 ("**RfA**" or "**Request**"), Eurohold Bulgaria AD and Euroins Insurance Group AD (respectively, "**Eurohold**" and "**EIG**"; together, the "**Claimants**") initiated arbitral proceedings against Romania (the "**Respondent**") pursuant to Article 36 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("**ICSID Convention**"), Rules 1 and 2 of the ICSID Institution Rules, and Articles 9 and 12 of the Agreement between the Government of the Republic of Bulgaria and the Government of Romania on Mutual Promotion and Protection of Investments ("**BIT**").[1] The Claimants are incorporated under the laws of the Republic of Bulgaria ("**Bulgaria**"). Both Bulgaria and Romania are Contracting States to the ICSID Convention. Both are also Member States of the European Union ("**EU**") and parties to the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union ("**EU Termination Agreement**").[2]

2. The proceedings are subject to the ICSID Arbitration Rules in force as of 1 July 2022 ("**ICSID Rules**"). The Request was registered by the ICSID Acting Secretary-General as ICSID Case No. ARB/24/18 on 7 June 2024 and notified on the ICSID website. Case information, including the Tribunal's Orders and Decisions, are published on the ICSID website pursuant to paragraph 30.2 of the Tribunal's Procedural Order No. 1 ("**PO1**") and ICSID Rule 63.[3]

[1] CLA-3.

[2] CLA-7.

[3] https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/24/18

3. This Decision addresses the Respondent's objections under Rule 41 (manifest lack of legal merit) and Rule 48 (ancillary claims) of the ICSID Rules (respectively, the "**Rule 41 Objection**" and "**Rule 48 Objection**"; together "**the Objections**"). For the reasons that follow, the Respondent's Rule 41 Objection is dismissed, although expressly without prejudice to the substance of the objection and subject to the Tribunal's directions concerning further proceedings on the matter. The Respondent's Rule 48 Objection is upheld.

II. PROCEDURAL HISTORY AND BACKGROUND

4. Citing Rule 48 of the ICSID Rules, the Claimants submitted a Supplement to the Request for Arbitration dated 1 November 2024 ("**RfA Supplement**"), "supplement[ing] the Request with additional claims" and requesting additional relief.

5. Following appointment by the Claimants of Sir Christopher Greenwood KC, a national of the United Kingdom, by the Respondent of Professor Brigitte Stern, a national of France, and by the party-appointed arbitrators of Sir Daniel Bethlehem KC, a national of the United Kingdom, the Tribunal was constituted on 4 November 2024. Ms. Aïssatou Diop, ICSID Senior Legal Counsel, was appointed Secretary of the Tribunal.

6. By correspondence from the Tribunal to the Parties dated 5 November 2024, the Tribunal, referencing pre-constitution correspondence, stated, *inter alia*, as follows:

> "Without prejudice to the rights of the Parties under ICSID Arbitration Rule 41 (including issues of timing under paragraph 2(a) thereof), as well as Rules 42 and/or 43, the Tribunal, having regard to the efficient organisation of the proceedings, as well as to the possible exercise in due course of its *proprio motu* powers under Rules 43(3) and 42(5), invites **the Respondent** to indicate by **Tuesday, 12 November 2024** (a) whether a manifest lack of legal merit objection is anticipated, (b) if not, whether the registration of the Request for Arbitration remains a live issue, and (c) in any event, whether (without specifying the details thereof) the Respondent anticipates the possibility of any other objection/s to jurisdiction, competence or admissibility."[4]

7. In response to this enquiry, by correspondence to the Tribunal dated 8 November 2024, the Respondent stated, *inter alia*, that "it anticipates making a manifest lack of legal merit objection pursuant to ICSID Arbitration Rule 41." It also indicated that, depending on the outcome of its Rule 41 objection, it "anticipates making other objections to jurisdiction, competence or admissibility under Rules 43–44." By the same letter, the Respondent further stated that "it anticipates objecting [to the Claimant's RfA Supplement] on the basis it is not an 'ancillary claim' within the meaning of Rule 48."[5]

8. The First Session was held on 28 November 2024, by video conference. The Tribunal issued PO1 on 12 December 2024. The place of the proceedings is Washington D.C. The procedural language of the arbitration is English.

9. Having regard to the Respondent's 8 November 2024 notifications, as well as the Parties' agreement on the procedure to be followed in respect of both the Rule 41 and Rule 48 Objections, the Tribunal laid down the procedural calendar to be followed

[4] Letter from the Tribunal, 5 November 2024 (emphasis in the original).

[5] Letter from the Respondent, 8 November 2024.

in respect of the Objections.[6] This provided for two rounds of written submissions on the Objections, an in-person hearing on the Objections on 20–21 May 2025, and a Decision or Award on the Objections to be issued on 30 September 2025.

10. The Parties duly filed their written submissions on the Objections in accordance with the specified schedule, as follows: the Respondent's Objections under Rules 41 and 48 of the ICSID Arbitration Rules, dated 20 December 2024 ("**Respondent's Objections**"); the Claimants' submissions on Rules 41 and 48 Objections, dated 31 January 2025 ("**Claimants' Submissions**"); the Respondent's Reply on Rules 41 and 48 Objections, dated 21 February 2025 ("**Respondent's Reply**"); and the Claimants' Rejoinder on Rules 41 and 48 Objections, dated 14 March 2025 ("**Claimants' Rejoinder**"). A one-and-a-half day in-person hearing was held in London on 20–21 May 2025 ("**Hearing**"). There were no post-hearing submissions. This Decision is transmitted to the Parties in accordance with the prescribed schedule.

11. Through its close enquiry of the Parties in the course of the Hearing, the Tribunal canvassed with the Parties, for purposes of their comment, all of the elements that are reflected in this Decision, including with regard to the Rule 41 Objection. The Tribunal's Decision on this aspect will accordingly not come as a surprise to the Parties. The Tribunal is grateful to the Parties for their constructive engagement with the Tribunal in the course of the Hearing, including with regard to the Tribunal's active case-management approach to the issues raised by the Rule 41 Objection.

[6] PO1, ¶¶ 15–16 and Annex B.

12. In the course of the preparations for the Hearing, the European Commission ("**Commission**") submitted an Application for Leave to Intervene as Non-Disputing Party, dated 11 April 2025 ("**NDP Application**"). Having canvassed the views of the Parties on the NDP Application, neither the Claimants nor the Respondent supported the Application. Having considered the Parties' submissions, the Tribunal denied the Commission's NDP Application "at this stage of the proceedings".[7] In so deciding, the Tribunal noted, *inter alia*, as follows:

> "[…] the Tribunal considers that the Commission's NDP Application pertains to the present phase of the proceedings focused on addressing the Respondent's objections under Rule 41 and Rule 48 of the ICSID Arbitration Rules. While, as will become apparent, the Tribunal considers that the NDP Application must be rejected, this does not preclude the possibility that the Commission may make a fresh, reasoned application to intervene in due course, should the proceedings move beyond the present phase. To be clear, this observation should not be taken as an invitation to the Commission to make such an application, nor as an indication that the Tribunal would be minded to accept any such application. It simply confines the present Decision to the NDP Application currently in issue and the present phase of the proceedings, without prejudice to developments in the future.
>
> […]
>
> The Tribunal considers that the NDP Application cannot satisfy the requirements of [Rule 67 of the ICSID Arbitration Rules]. Rule 41 establishes an expedited procedure to address a claim that is said to be manifestly without legal merit. This is a threshold contention that the claim advanced is so utterly lacking in legal merit that it should be summarily dismissed before it even gets to an objection to jurisdiction or other challenge to competence. It is a summary procedure subject to tight pleading and decision-making constraints. While the Tribunal does not shut the door to the possibility of non-disputing party submissions in Rule 41 procedures, the expedited nature of Rule 41 proceedings requires that special attention is given,

[7] Procedural Order No. 3, *European Commission — Non-Disputing Party Application to Intervene*, 25 April 2025, ¶ 29 ("**PO3**").

and rigour attached, to the requirements of Rule 67(2)–(7). Failing this, Rule 41 procedures would risk becoming an inequitable or tactical conduit for preliminary objections, requiring a claimant to establish a definitive basis to proceed in an expedited and truncated procedure.

Having regard to the Respondent's Rule 41 and Rule 48 objections, that these objections are rooted in bespoke ICSID procedures, and that they do not engage considerations of EU law on which the Commission's voice would have special resonance, the Tribunal considers that the NDP Application cannot satisfy the requirements of Rule 67(2). For this reason alone, it must be rejected."[8]

III. HEADLINE ISSUES AND RELEVANT TEXTS

13. The factual background to the dispute and the Claimants' substantive legal case beyond the issues engaged by the Objections are not immediately relevant for purposes of this Decision. Both for this reason and as the Tribunal has yet to receive any substantive pleading from the Respondent going to such issues, the Tribunal refrains from recounting the facts or legal issues going to the dispute apart from the brief elements set out in the following paragraphs. Noting the Respondent's affirmation that, in addition to its Objections here in issue, it also has other "objections to jurisdiction, competence or admissibility under Rules 43–44", the Tribunal emphasises that nothing in what follows can be taken as a definitive statement or appreciation of the issues apart from those immediately relevant to the issues addressed in this Decision. Insofar as any issues may form the basis of the case of either Party in due course, or may be otherwise necessary for decision by the Tribunal, these would fall to be addressed by the Tribunal in a subsequent phase of the proceedings.

[8] PO3, ¶¶ 21, 24–25.

14. Eurohold is said by the Claimants to be "the largest public holding company in Bulgaria by revenue and one of the leading financial and energy groups in Southeast Europe."[9] EIG is said to be "one of the largest independent insurance groups operating in Central, Eastern and Southeastern Europe," being 90.1% owned by Eurohold, the European Bank for Construction and Development owning the remaining 9.9%.[10] A third company, Euroins România Asigurare-Reasigurare S.A. ("**Euroins**"), is said to be a company incorporated under the laws of Romania, 98.57% of its capital being held by EIG.[11]

15. Eurohold and EIG are said to have made substantial investments in the Romanian insurance market through EIG's acquisition of Euroins in 2007.[12]

16. In its essence, the Claimants' case is, *inter alia*, that on 9 June 2023, at the behest of Autoritatea de Supravghere Financiară ("**ASF**"), "the State agency responsible for the supervision and regulation of the insurance sector in Romania,"[13] "Euroins was declared bankrupt […] result[ing] in the complete loss of Eurohold's and EIG's investment in Romania."[14] Through this and other conduct, the Claimants contend that the Respondent "has effectively destroyed the Claimants' investment in Romania and driven them out of the Romanian market."[15]

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[9] Request, ¶ 5.

[10] Request, ¶ 6.

[11] Request, ¶ 9.

[12] Request, ¶ 13.

[13] Request, ¶ 19.

[14] Request, ¶ 59.

[15] Request, ¶ 63.

17. In respect of their substantive claims, the Claimants contend, *inter alia*, that Romania:

(a) unlawfully expropriated the Claimants' investment in breach of Article 5.1 of the BIT;

(b) breached its obligation under Article 2.1 of the BIT to accord fair and equitable treatment and not to act in a discriminatory or arbitrary manner against the Claimants' investment;

(c) breached its obligations under Article 6 of the BIT not to restrict the free transfer of funds; and

(d) failed to provide effective means of asserting claims and enforcing rights with respect to investments contrary to the "effective means" standard incorporated into the BIT *via* the MFN provision in Article 3 of the BIT.

18. In their Request, the Claimants aver that they are protected investors and made qualifying investments under the BIT. They say, further, that they "rely on the MFN provision in Article 3 of the BIT to interpret the dispute resolution provision for arbitration under Article 9.3 of the BIT to cover any 'investment dispute' as Romania has agreed in other investment agreements it has entered into."[16] They further contend that the jurisdictional requirements under the ICSID Convention are met.

19. Pre-emptively addressing the issue that stands at the heart of the Respondent's Rule 41 Objection, the Claimants contend that they are entitled to bring their BIT claim

[16] Request, ¶ 82.

notwithstanding the EU Termination Agreement.[17] This is addressed further in the following Section of this Decision. For present purposes, the Tribunal notes simply that the EU Termination Agreement "purport[ed] to terminate intra-EU BITs and their sunset clauses."[18] The Claimants contend, however, that the "BIT, or at a minimum its Sunset Clause, have not been validly terminated, and that they may therefore rely upon Article 9(3) or Article 12(3) to refer their dispute with Romania for adjudication by an international arbitral tribunal."[19]

20. In contrast, the Respondent's Rule 41 Objection is in essence that the EU Termination Agreement "took effect for Bulgaria and Romania on 24 March 2022, *i.e.*, more than two years before the Claimants initiated the current arbitration," and that accordingly "there is no valid arbitration agreement on which the Claimants can advance [their] claims". On this basis, "the Claimants' claims in the Request are manifestly without legal merit and should thus be dismissed pursuant to Rule 41 of the ICSID Arbitration Rules."[20]

21. By their RfA Supplement, the Claimants seek to advance claims based on the Romanian Government Emergency Ordinance No. 92 of 30 December 1997 on stimulating direct investment ("**GEO No. 92/1997**")[21] and on Law No. 241 of 14 December 1998 for the approval of GEO No. 92/1997 ("**Law No. 241/1998**"),[22]

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[17] Request, Section V.

[18] Request, ¶ 91.

[19] Request, ¶ 91. The Claimants' reference to the BIT's "Sunset Clause" is a reference to Article 12(3) of the BIT (reproduced below).

[20] Respondent's Objections, ¶ 2.

[21] CLA-85.

[22] CLA-86.

together Romania's "**Investment Law**". By reference to these provisions, the Claimants seek to supplement their RfA (i) by invoking Romania's offer to arbitrate disputes with foreign investors pursuant to Article 4(2)(g) and Article 11(b) of the Investment Law; (ii) by relying on the Most Favoured Nation ("**MFN**") clause under Article 9 of the Investment Law to raise claims for violation of Romania's other bilateral investment treaties which provide for more favourable treatment; and (iii) by raising claims for breaches of the Investment Law.[23]

22. Objecting to the Claimants' application to supplement their Request, the Respondent contends that "the Claimants seek to bring claims under a different instrument of consent from the one pursuant to which the Request was registered" and that as such the RfA Supplement "does not advance an ancillary claim within the meaning of Rule 48 of the ICSID Arbitration Rules and thus should be dismissed as inadmissible in these proceedings."[24]

23. For ease of reference, the key provisions invoked by the Parties referred to above are as follows:

ICSID Rules

> "**Rule 41**
> **Manifest Lack of Legal Merit**
>
> (1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.

[23] RfA Supplement, ¶¶ 2–3.

[24] Respondent's Objections, ¶ 3.

(2) The following procedure shall apply:

(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;

(b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;

(c) the Tribunal shall fix time limits for submissions on the objection;

(d) if a party files the objection before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and

(e) the Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection.

(3) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding.

(4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 or to argue subsequently in the proceeding that a claim is without legal merit."

"Rule 48
Ancillary Claims [25]

(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim ('ancillary claim') arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented no later than in the reply, and a counterclaim shall be presented no later than in the counter-memorial, unless the Tribunal decides otherwise.

(3) The Tribunal shall fix time limits for submissions on the ancillary claim."

Articles 9(3) and 12(2) and (3) of the BIT

9(3) "The investor may instead [of] the procedure provided for in paragraph 2 of this Article herein, choose to submit the dispute with regard to Articles 4 and 6 to an ad hoc arbitration established under the Arbitration Rules of United Nations Commission on International Trade Law (UNCITRAL) or to the International Center for Settlement of Investment Disputes (ICSID) in case both Contracting Parties are Parties to the Convention on Settlement of Investment Disputes between States and Nationals of Other States, done in Washington, March 18,1965."

12(2) "The present Agreement shall be in force for a period of fifteen years. Its validity shall be extended automatically for every following period of five years, unless either Contracting Party notifies in writing, at least 5 months prior to its expiry, the other Contracting Party of its decision to terminate the Agreement."

12(3) "With respect to investments made prior to the date when the notice of denunciation of this Agreement is received by the other Contracting Party,

[25] Article 46 of the ICSID Convention provides: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

the provisions of Article 1 to 11 shall remain in force for a further period of fifteen years from that date."

EU Termination Agreement[26]

"**Article 2**
Termination of Bilateral Investment Treaties

1. Bilateral Investment Treaties listed in Annex A are terminated according to the terms set out in this Agreement. [27]

2. For greater certainty, Sunset Clauses of Bilateral Investment Treaties listed in Annex A are terminated in accordance with paragraph 1 of this Article and shall not produce legal effects.

[…]

Article 4
Common provisions

1. The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.

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[26] Pursuant to Article 1 of the EU Termination Agreement, *inter alia*, the following definitions apply:

- "'Arbitration Proceedings' means any proceedings before an arbitral tribunal established to resolve a dispute between an investor from one Member State of the European Union and another Member State of the European Union in accordance with a Bilateral Investment Treaty";
- "'New Arbitration Proceedings' means any Arbitration Proceedings initiated on or after 6 March 2018";
- "'Sunset Clause' means any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time."

[27] The Bulgaria – Romania BIT is listed in Annex A of the EU Termination Agreement.

2. The termination in accordance with Article 2 of Bilateral Investment Treaties listed in Annex A and the termination in accordance with Article 3 of Sunset Clauses of Bilateral Investment Treaties listed in Annex B shall take effect, for each such Treaty, as soon as this Agreement enters into force for the relevant Contracting Parties, in accordance with Article 16.

[…]

Article 5
New Arbitration Proceedings

Arbitration Clauses shall not serve as a legal basis for New Arbitration proceedings."

24. In addition to these provisions, the Tribunal notes the following provisions of ICSID Rules 42, 43 and 44 which are germane to the analysis and conclusions that follow.

"**Rule 42**
Bifurcation
[…]
(6) The Tribunal may at any time on its own initiative decide whether a question should be addressed in a separate phase of the proceedings."

"**Rule 43**
Preliminary Objections
[…]
(3) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within the jurisdiction of the Centre or within its own competence.

(4) The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits. It may do so upon request of a party pursuant to Rule 44 or at any time on its own initiative, in accordance with the procedure in Rule 44(2)-(4)."

"**Rule 44**

Preliminary Objections with a Request for Bifurcation

[…]

(3) If the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall:

(a) suspend the proceeding on the merits, unless the parties agree otherwise;

(b) fix time limits for submissions on the preliminary objection;

(c) render its decision or Award on the preliminary objection within 180 days after the last submission, in accordance with Rule 58(1)(b); and

(d) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award.

[…]"

IV. THE PARTIES' ARGUMENTS

25. As is noted above and addressed more fully below, the Tribunal has concluded that the Respondent's Rule 41 Objection should be dismissed in the form that it was brought although without prejudice to the substance of the Respondent's objection, which warrants careful attention in a procedure appropriate to the issues that are raised. As, pursuant to this Decision and further directions to be given by the Tribunal in due course, such procedure will now follow, the Tribunal considers it prudent to describe the Parties' arguments on the Rule 41 Objection only in high-level summary terms. For the avoidance of doubt, as will be apparent from the Tribunal's engaged enquiry of the Parties on both Objections in the course of the Hearing, the Tribunal has had close regard to the Parties' arguments on the issues in question. That an argument advanced by either Party is not referenced in what follows should not be taken to indicate that it was not carefully considered by the Tribunal for purposes of this Decision.

A. The Rule 41 Objection

26. There is broad agreement between the Parties as to the standard applicable to Rule 41 proceedings. As described by the Respondent, citing to arbitral case law, it is a high standard that requires the Respondent to establish a legal impediment that operates as a fundamental flaw in the way that the claim is formulated, no matter what evidence may be adduced.[28] Its aim is "to safeguard the good administration of justice by preventing frivolous and manifestly defective claims."[29]

27. Within this framework, the Respondent notes the following developments:[30]

(a) Romania and Bulgaria concluded the BIT on 1 June 1994.

(b) They became Member States of the European Union on 1 January 2007.

(c) On 6 March 2018, the Court of Justice of the European Union ("**CJEU**") issued its by now well-known *Achmea* judgment which found that European Union law precluded, *inter alia*, provisions in intra-EU Member State investment agreements under which an investor of one Member State may bring proceedings against another Member State before an international arbitral tribunal.[31]

[28] Respondent's Objections, ¶¶ 4–10.

[29] Respondent's Objections, ¶ 5.

[30] Respondent's Objections, ¶¶ 12–20.

[31] CLA-8, ¶ 60.

(d) On 15 January 2019, EU Member States issued a Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union ("**EU MS Declaration**").[32] By this Declaration, EU Member States, *inter alia*:

- informed investment arbitration tribunals about the legal consequences of the *Achmea* judgment;
- undertook to take certain actions to set aside investment arbitration awards or not to enforce them "due to a lack of valid consent";[33]
- informed the investor community that no new intra-EU investment arbitration proceedings should be initiated;
- indicated that they would "terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally";[34]
- In its preambular paragraphs, the EU MS Declaration stated, *inter alia*, the following:

> "Member States are obliged to provide remedies sufficient to ensure the effective legal protection of investors' rights under Union law. In particular, every Member State must ensure that its courts or tribunals, within the meaning of Union law, meet the requirements of effective judicial protection.

[32] CLA-10.

[33] CLA-10, EU Member States Declaration, p. 3, ¶ 2.

[34] CLA-10, EU Member States Declaration, p. 4, ¶ 5.

> Member States underline the importance of providing guidance on how Union law protects intra-EU investments, including on legal remedies. In this context, Member States take note of the Communication 'Protection of intra-EU investment' adopted by the Commission on 19 July 2018.
>
> In light of the ECOFIN Council conclusions of 11 July 2017, Member States and the Commission will intensify discussions without undue delay with the aim of better ensuring complete, strong and effective protection of investments within the European Union. Those discussions include the assessment of existing processes and mechanisms of dispute resolution, as well as of the need and, if the need is ascertained, the means to create new or to improve existing relevant tools and mechanisms under Union law."[35]

(e) Acting pursuant to the EU MS Declaration, 23 of the EU Member States, including Romania and Bulgaria, concluded the EU Termination Agreement on 5 May 2020. This entered into force as a general matter on 29 August 2020 and, pursuant to Article 16(2) of the Agreement, entered into force for Romania and Bulgaria on 24 March 2022.

28. Having regard to the EU Termination Agreement, the Respondent contends that each BIT listed in the Annexes of the Agreement "was mutually terminated after both parties to that BIT had ratified the Termination Agreement."[36] On this basis, the Respondent contends, *inter alia*, that "the 1994 BIT has been validly terminated by mutual agreement of its contracting parties as of 24 March 2022. That was more

[35] CLA-10, EU Member States Declaration, pp. 2–3.

[36] Respondent's Objections, ¶ 20.

than two years before the Claimants submitted the Request on 21 May 2024, and it was registered on 7 June 2024."[37]

29. The Respondent therefore contends that the claims in the Request are manifestly without legal merit as the BIT, including the offer of arbitration and the Sunset Clause in Article 12(3), was terminated, with the result that the Tribunal "has no jurisdiction in this case due to the absence of an ICSID arbitration agreement between the Parties on the date of the Request, *i.e.*, 21 May 2024."[38] The Respondent goes on to take issue with the Claimants' contentions that the BIT was improperly terminated, that its purported termination was void, and/or that the Claimants have "acquired rights" that persist despite the EU Termination Agreement.[39]

30. As noted above, the Claimants addressed the substance of the Rule 41 Objection pre-emptively in their RfA, advancing the following contentions:

(a) the BIT had not been validly terminated by the EU Termination Agreement in accordance with its terms or in accordance with the principles reflected in the Vienna Convention on the Law of Treaties ("**VCLT**") and accordingly "remains extant";[40]

[37] Respondent's Objections, ¶ 22.

[38] Respondent's Objections, ¶ 25.

[39] Respondent's Objections, Section C.

[40] Request, ¶¶ 92.1, 100–112.

(b) the purported termination of the BIT and its Sunset Clause by the EU Termination Agreement was void for lack of valid consent or for conflict with a peremptory norm of international law;[41]

(c) regardless of the purported termination of the BIT, the Claimants have subsisting acquired rights that "had accrued under the Bulgaria-Romania BIT prior to any valid termination whether by denunciation or by consent" and that they can accordingly bring their claim in reliance on Article 9(3) and/or the Sunset Clause in Article 12(3) of the BIT;[42] and

(d) by ratifying the EU Termination Agreement, Romania has committed an internationally wrongful act and is obliged to make reparation by way of restitution by reinstating the Claimants' rights under Article 9(3) and Article 12(3) of the BIT.[43]

31. These substantive arguments are developed in greater detail in the Claimants' Submissions.[44]

32. Addressing the Rule 41 character of the Respondent's Objection, invoking arbitral case law, the Claimants contend that the Respondent must show (a) that the Claimants' legal arguments on jurisdiction "obviously cannot succeed"; (b) "by applying indisputable rules of law to uncontested facts"; (c) "in a way that is evident

[41] Request, ¶¶ 92.2, 113–140.

[42] Request, ¶¶ 92.3, 141–166.

[43] Request, ¶¶ 92.4, 167–183.

[44] Claimants' Submissions, Section A.

and can be easily proven."[45] Elaborating on this test, the Claimants say, *inter alia*, as follows:

> "The Claimants' case is the first case to rely on an intra-EU BIT where the Request for Arbitration has been filed after ratification of the Termination Agreement by both States parties to the relevant intra-EU BIT. It is an entirely novel situation, and correspondingly, raises a multitude of complex and novel legal arguments which are fact-specific and therefore inappropriate for consideration within the context of a Rule 41 procedure. This is evident not least from the fact that the Respondent has failed to show that the Claimants' legal arguments are manifestly without legal merit, as it has been unable to convincingly rebut and dispose of the Claimants' jurisdictional case in its Objections. In the Claimants' respectful submission, the Tribunal cannot effectively examine these fact-specific, novel and difficult legal arguments, and determine them by way of a summary procedure, in a way which safeguards the Claimants' procedural and substantive rights."[46]

33. Building on this argument, the Claimants contend that the Respondent cannot prove that its objections "meet the required threshold for summary dismissal under Rule 41."[47]

34. Having elaborated on their substantive contentions in reply to the Respondent's arguments, the Claimants make three further broad contentions, that: (a) the issues in contention between the Parties "are complex and involve novel issues of interpretation and analysis";[48] (b) the Respondent's objections "require an in-depth

[45] Claimants' Submissions, ¶ 1.

[46] Claimants' Submissions, ¶ 3.

[47] Claimants' Submissions, ¶ 4.

[48] Claimants' Submissions, ¶¶ 140–144.

enquiry into factual matters";[49] and (c) the Respondent's jurisdictional contentions "are far from evident and cannot be easily proven."[50]

35. In essence, while the Claimants contend that the Respondent's Rule 41 Objection is flawed on its merits, they additionally, and indeed primarily, in these proceedings, contend that the Respondent's substantive objection, resting on the purported termination of the BIT and its Sunset Clause by the EU Termination Agreement, cannot properly be addressed in a Rule 41 summary procedure. On the Claimants' case, this is the first case of its kind to put in contention complex issues of contestable fact and law and it is accordingly not properly amenable to resolution through a Rule 41 procedure. While the Claimants' request for relief ultimately goes beyond this, having regard to the RfA Supplement (addressed further below), their key request for relief under this item is that the Tribunal should deny the Respondent's request that the Claimants' claims be dismissed "as being manifestly without legal merit."[51]

36. Each Party elaborates on its contentions and responds to the arguments of the other in their second round written submissions. Having regard to its Decision on the Rule 41 Objection and the proceedings to come, the Tribunal does not consider it either necessary or appropriate to describe the Parties' arguments on the Rule 41 Objection in further detail. But for some elements that warrant comment below arising from the Parties' submissions in the course of the Hearing, in response to enquiry from the Tribunal, the Tribunal similarly does not consider it necessary or appropriate to recount the Parties' substantive arguments, made in the course of the Hearing, on the

[49] Claimants' Submissions, ¶¶ 145–150.

[50] Claimants' Submissions, ¶¶ 151–152.

[51] Claimants' Submissions, ¶ 201.2.

issue of whether the EU Termination Agreement deprives the Tribunal of any jurisdiction which it might have possessed.

37. The Respondent's request for relief on its Rule 41 Objection is that the Tribunal dismiss "by way of an Award issued under ICSID Arbitration Rule 41(3) the Claimants' claims set forth in the Request as manifestly without legal merit."[52]

38. The Claimants' principal request for relief on the Rule 41 Objection is that the Tribunal deny "the Respondent's request under Arbitration Rule 41 that the Claimants' claims be dismissed as being manifestly without legal merit."[53] As a subsidiary request, in the alternative, the Claimants request that, in the event that the Tribunal upholds the Respondent's Rule 41 Objection, the Tribunal allows "the Claimants' claims under the Investment Law to be heard in this arbitration, pursuant to the independent jurisdiction conferred on the Tribunal by the Investment Law."[54] In their RfA, the Claimants advance more extensive requests for relief seeking declarations from the Tribunal going to the Tribunal's jurisdiction under Article 9(3) and/or Article 12(3) of the BIT notwithstanding the purported termination of the BIT by the EU Termination Agreement.

39. The Tribunal raised extensive questions on the Rule 41 Objection with the Parties in the course of the Hearing. While, as noted above, the Tribunal does not consider it necessary or appropriate, for purposes of this Decision, to recount the Parties' oral

[52] Respondent's Objections, ¶ 81(i); Respondent's Reply, ¶ 85.

[53] Claimants' Submissions, ¶ 201.2; Claimants' Rejoinder, ¶ 166.

[54] Claimants' Submissions, ¶ 202.1; Claimants' Rejoinder, ¶ 166.

submissions or responses to questions, it is useful, in the context of this Decision, to note the following.

(a) The Parties were in initial disagreement, in their first-round submissions in the Hearing, about whether there was further factual evidence to be adduced and legal argument to be canvassed, *i.e*., not already before the Tribunal, going to the issues engaged by the Rule 41 Objection. The Respondent, given the "*manifestly* without legal merit" standard, largely took the view that there was no hinterland of additional evidence to be adduced or legal argument to be canvassed, although leaving open the possibility that, were the Tribunal to dismiss its Rule 41 Objection, there may be more to be said on various issues in objections to jurisdiction that the Respondent may be minded to bring thereafter. In contrast, the Claimants were clear that they considered that there would be more to be said about the issues, including through evidence of fact and legal arguments to be canvassed, beyond what was already before the Tribunal in the Rule 41 procedure.

(b) As is evident from the transcript of the Hearing, distinct from the substantive merits of the Respondent's objection, the Tribunal was exercised by the application of the "manifestly" without legal merit standard in the context of the present proceedings.

(c) The Tribunal was similarly exercised by the interpretation of Article 12 of the BIT and the relevance and application of the principles expressed in, *inter alia*, Articles 54 and 70(1)(b) of the VCLT.

(d) The Tribunal also enquired closely about the interpretation and application of the EU Termination Agreement.

40. At the close of the first day of the Hearing, the Tribunal put a number of issues to the Parties for consideration in advance of their closing oral submissions. Amongst these were the following:

> "What issues, if any, do you consider have not been fully canvassed in this phase of the proceedings that go to the jurisdiction of the Tribunal around the Rule 41 issue?
>
> […]
>
> Rule 41 is a preliminary procedure, with tight turnaround times and a very high legal standard. Let's take the hypothesis that the Tribunal is with the Claimants that the 'manifest' standard in Rule 41 has not been met, but that we are with the Respondent that there is a very serious issue here to be addressed.
>
> The Tribunal would be competent, under Rule 42(6), to order of our own initiative that a question should be addressed in a separate phase of the proceedings. It would be competent to consider, under Rule 43(4) and Rule 44(3), to bifurcate the proceedings and order the proceedings to move straight into a bifurcated jurisdictional phase, which would suspend the proceedings on the merits and would take us into, if you like, a phase which would be broadly parallel to the phase that we're in at the moment, but would not be a Rule 41 phase: it would be a full-blown jurisdictional hearing.
>
> It would be helpful to have the parties' reactions to such a possibility."[55]

41. The Parties addressed these and other questions in the course of their closing oral submissions. On the question of whether there were matters that had not been fully

[55] Transcript, Day 1, page 220, line 9 to page 221, line 13.

canvassed in the Rule 41 proceedings that may have a bearing in the issues, both Parties responded affirmatively, even if the Respondent carefully caveated its reply on this point.[56]

42. On the question of what the Tribunal emphasised was at that point a purely hypothetical enquiry concerning the possibility of a bespoke jurisdictional procedure triggered by a *proprio motu* decision of the Tribunal under ICSID Rules 42(6), 43(3) and (4), and 44(3), both Parties accepted that the Tribunal "has the power to make such a direction proprio motu".[57] To this, the Respondent added, *inter alia*: "if it is the best way forward for the issues solely arising in this Rule 41 application to be dealt with in a bespoke procedure as a preliminary objection, the Respondent would consent, to the extent that consent is needed, to that process." In so saying, the Respondent cautioned about widening any such bespoke procedure to include other objections to jurisdiction, competence or admissibility that the Respondent might otherwise be minded to bring. For their part, the Claimants, while expressing agreement with a "bespoke jurisdictional phase, before we put in our memorial on the merits", contended that it should be "a full-scope jurisdictional phase … ventilat[ing] all the issues that are out there that pertain to jurisdiction."[58] Pressed further by the Tribunal on this point, however, the Claimants walked back their opposition to a bespoke jurisdictional phase focused only on "the EU termination point", even though they continued to emphasise the complexity of the issues.[59]

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[56] *Inter alia*, at Transcript, Day 2, page 1, line 20 to page 6, line 20; page 12, line 19 to page 17, line 11; page 80, line 10 to page 83, line 17; page 86, line 6 to 87, line 21; page 92, line 20 to page 96, line 21.

[57] As per the Respondent, Transcript, Day 2, page 11, lines 13 to 16; as per the Claimants, Transcript, Day 2, page 76, lines 12 to 18.

[58] Transcript, Day 2, page 76, line 19 to page 77, line 5.

[59] Transcript, Day 2, page 78, lines 2 to 21.

B. The Rule 48 Objection

43. In their Request dated 21 May 2024, the Claimants rooted the jurisdiction of the Tribunal in the BIT, along with the ICSID Convention. This is evident from the opening paragraphs of the Request, which reference the BIT, cite Articles 9 and 12 thereof as the basis for jurisdiction, and allege breaches of the BIT. The discussion of jurisdiction in Part IV of the Request similarly addresses the institution of proceedings by reference to the BIT as the basis of jurisdiction. In Part V of the Request, the Claimants pre-emptively defend their Request, expressly rooted in the BIT, on the grounds of the continued application of the BIT and/or its Sunset Clause. The requests for relief in the RfA similarly focused exclusively on declarations regarding the continuing force of the BIT and/or the Sunset Clause. It was this Request that was registered by the ICSID Secretariat on 7 June 2024 as Case No. ARB/24/18 and notified on the ICSID website.

44. By their RfA Supplement dated 1 November 2024, the Claimants applied to "supplement the Request" by invoking the Respondent's "offer to arbitrate disputes with foreign investors" pursuant to Article 4(2)(g) and Article 11(b) of the Investment Law.[60] As noted above, the Investment Law is the title given to GEO No. 92 of 30 December 1997 on stimulating direct investment and, alongside it, to Law No. 241 of 14 December 1998 revising and approving GEO No. 92/1997. By reference to these provisions, the Claimants seek to supplement, or augment, both the jurisdictional basis of their claim – the offer to arbitrate rooted in Articles 4(2)(g) and

[60] RfA Supplement, ¶ 3.

11(b) of the Investment Law – and their substantive allegations, invoking the MFN clause in Article 9 of the Investment Law to rely upon Romania's other bilateral investment treaties which provide for more favourable treatment and thus raise claims for breaches of the Investment Law itself.

45. While Rule 48 of the ICSID Rules is referenced in the RfA Supplement, the Claimants do not address in the Supplement the issue of whether the claims advanced in the Supplement are "ancillary" to those advanced in the Request. They confine their comment on Rule 48 to the footnoted assertion that "[t]his Supplement is timely because in accordance with Rule 48(2) the Claimants are permitted to file additional claims no later than in the reply."[61]

46. Articles 1, 4(2)(g), 9 and 11(b) of the Investment Law provide as follows:[62]

> "**Article 1**
>
> This Emergency Ordinance establishes the general framework regarding the guarantees and facilities which direct investments in Romania benefit from."
>
> "**Article 4(2)(g)**
>
> (2) Investors in Romania benefit mainly from the following guarantees and facilities: […]
>
> g) the right of investors to choose the competent courts or arbitral tribunals for the settlement of potential disputes;"

[61] RfA Supplement, footnote 1.

[62] From the explanation provided by footnote 2 of the RfA Supplement, the Tribunal understands the relevant and applicable text to be that of GEO No. 92/1997 as amended by Law No. 241, this being the "approved" Investment Law. The extracts cited above are accordingly taken from Law No. 241.

"**Article 9**

Investors will have the same rights and obligations, regardless of whether they are residents or non-residents, Romanians or foreigners, subject to the provisions of this chapter."

"**Article 11**

Disputes between the foreign investors and the Romanian State regarding the rights and obligations resulting from the provisions of Chapters II and III, as well as those of Chapter V, will be resolved, at the option of the investor, according to the procedure established by:

[…]

b) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington on 18 March 1965 and ratified by Romania through the Decree of the Council of State no. 62/1975, published in the Official Gazette, Part I, no. 56 on 7 June 1975, when the foreign investor is a citizen of a State party to the Convention and the dispute is resolved by conciliation and/or arbitration. In such situations, a Romanian company where the foreign investors own – according to the Romanian legislation – a controlling stake will be considered, as per art. 25 para. (2) letter b) of the Convention, as having the nationality of the foreign investors".[63]

47. In their RfA Supplement, noting that the consent of parties to arbitrate need not be reflected in a single instrument, the Claimants contend, *inter alia*, that "Romania has made a standing offer to arbitrate *'[d]isputes between foreign investors and the Romanian State'* regarding the rights and obligations set out in Chapters II, III and V of the Investment Law. Romania's offer is clear, unambiguous and unconditional."[64] This is said to be "an additional basis for the Tribunal's

[63] CLA-85 as amended by CLA-86.

[64] RfA Supplement, ¶ 12.

jurisdiction," the Claimants maintaining the BIT basis of jurisdiction advanced in the Request.[65]

48. On the substantive breaches that are alleged by reference to the new heads of jurisdiction in the Investment Law, the Claimants invoke the MFN clause in Article 9 of the Investment Law, noting that they are "entitled to invoke provisions in other BITs concluded by Romania." They go on to state, however, that they "will specify the other BITs they seek to rely on in due course."[66] This aspect of the supplementary claim is accordingly unparticularised, although the Claimants do assert separate breaches of the Investment Law.[67]

49. In the Request for Relief indicated in the RfA Supplement, the Claimants maintain the requests for relief set out in the Request and add five additional requests for relief by reference to the Investment Law.[68]

50. In its Rule 48 Objection, the Respondent notes that the Claimants, in the RfA Supplement, did not address the substantive requirements of Rule 48.[69] Citing to arbitral case law, the Respondent goes on to contend as follows:

> "[…] before being entitled to make an incidental or additional claim to extend the scope of a dispute, a claimant would need first to show, as a precondition, that the

[65] RfA Supplement, ¶ 15.

[66] RfA Supplement, ¶ 17.

[67] RfA Supplement, ¶ 19.

[68] RfA Supplement, ¶ 22.

[69] In footnote 1 of the Respondent's Objections, the Respondent states that its Rule 48 Objection "deals only with the admissibility of the Supplement and does not address the scope and applicability of the GEO no. 92/1997 to this dispute, on which the Respondent's rights are reserved."

> jurisdictional requirements of the original claim are fulfilled pursuant to Article 25 (1) of the ICSID Convention. Given that jurisdiction is established on the dates of consent and registration of the dispute, one cannot cure a defect in the original claim by transforming it into a different claim via ICSID Rule 48, which has a completely different purpose."[70]

51. The Respondent further contends, again by reference to arbitral case law, that the Claimants "failed to show (i) how their new Investment Law claims arise directly out of the subject matter of the original BIT dispute, and (ii) why the examination of one (BIT claim) cannot be carried out without the other (Investment Law claim)."[71] It additionally contends that, as well as a close factual connection between the original and ancillary claims, it is also necessary that there is "a legal connection between the primary and the ancillary claim".[72] Having regard to these elements, the Respondent concludes that "it is plain that the Claimants' purported 'ancillary claim' deals with a new legal claim under the Investment Law and not under the 1994 BIT pursuant to which the Request was registered, the Tribunal constituted, and jurisdiction is based."[73]

52. In their Submissions on the Respondent's Objections, the Claimants contend that the substantive requirements for ancillary claims within the meaning of Article 46 of the ICSID Convention and Rule 48 of the ICSID Arbitration Rules are met, namely that the claim arises "directly out of the subject-matter of the dispute" that has already been submitted to ICSID and that it is "within the scope of the consent of the parties"

[70] Respondent's Objections, ¶ 74.

[71] Respondent's Objections, ¶ 77.

[72] Respondent's Objections, ¶ 78.

[73] Respondent's Objections, ¶ 79.

and "otherwise within the jurisdiction of the Centre".[74] They further contend that, properly also to be weighed in the balance are: (1) the risks of inconsistent decisions, in the event that the additional claims were heard by a different tribunal;[75] (2) the timeliness within which the additional claims were raised;, (3) the consideration of whether hearing the claims in the same proceeding would be prejudicial to the Respondent;[76] and (4) the overall procedural economy of hearing the additional claims in the same proceedings.[77]

53. On the relationship between the claims set out in the Request and those set out in the RfA Supplement, the Claimants say that the claims under the Investment Law "could hardly be more closely connected to the BIT claims" as both sets of claims relate to the same investors and investment, arise from the same factual matrix, relate to the same types of breaches, and result in the same loss.[78]

54. On the issue of jurisdiction, the Claimants say, *inter alia*, the following:

(a) Their claims under the Investment Law are within the scope of the jurisdiction of ICSID having regard, *inter alia*, to the requirements of Article 25(1) of the ICSID Convention and Articles 4(2)(g) and 11(b) of the Investment Law.[79]

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[74] Claimants' Submissions, ¶¶ 153–154; 156–189.

[75] Claimants' Submissions, ¶¶ 191–193.

[76] Claimants' Submissions, ¶¶ 194–196.

[77] Claimants' Submissions, ¶¶ 197–200.

[78] Claimants' Submissions, ¶ 157.

[79] Claimants' Submissions, ¶¶ 163–165.

(b) Romania has consented to arbitrate the claims under the Investment Law (i) independently of the BIT, having regard to Articles 4(2)(g) and 11(b) of the Investment Law,[80] or, in the alternative, (ii) that Romania's consent to arbitrate under the BIT extends to the claims made under the Investment Law.[81]

55. On the contention that the Respondent has consented to arbitrate the claims independently of the BIT pursuant to Articles 4(2)(g) and 11(b) of the Investment Law, the Claimants contend further as follows:

> "[…] in making their ancillary claims under Rule 48, the Claimants do not need to rely on Romania's consent to arbitrate in the BIT. Romania's consent to arbitrate in respect of claims under the Investment Law exists independently of the BIT, and hence, even if the Tribunal were to dismiss the Claimants' BIT claims under Rule 41 for being manifestly without legal merit, the Claimants' position is that the Tribunal could continue to hear the Claimants' claims brought under the Investment Law on the basis of its separate and independent jurisdiction conferred by it."[82]

56. Characterising the Respondent's position, and the decision required of the Tribunal, the Claimants state as follows:

> "In the present circumstances, critically, the Respondent does not assert that there is any defect in Romania's offer to arbitrate pursuant to the Investment Law, nor that there is any defect in the Claimants' acceptance of that offer. Nor does the Respondent argue that it has been deprived of an opportunity to choose a different tribunal to hear claims under the Investment Law. In sum, the Respondent does not have any objection to the Claimants bringing claims under the Investment Law, and

[80] Claimants' Submissions, ¶¶ 166–180.

[81] Claimants' Submissions, ¶¶ 181–190.

[82] Claimants' Submissions, ¶ 169.

> nor does it have any objection to this particular Tribunal hearing the Claimants' claims under the Investment Law.
>
> The Respondent's ***only*** objection is that these claims should not be heard in the same set of proceedings as the claims brought under the BIT. Therefore, the Tribunal's only decision to make is whether the claims brought under the Investment Law arise from the same subject-matter and are therefore sufficiently similar in order to allow them to be heard alongside those brought under the BIT in the same set of proceedings. The claims clearly are sufficiently similar, given the same factual nexus and damage being alleged in both sets of claims as set out in the Supplement to the Request for Arbitration and in sub-section A above."[83]

57. In its Reply to the Claimants' Submissions, the Respondent addresses the Claimants' immediately preceding point with the following comment: "Such statement is misleading, as the Respondent has not addressed the scope and applicability of the Foreign Investment Law for Rule 48 purposes, reserving its right to do so in due course if the Tribunal admits the Supplement (*i.e.* as part of the preliminary objections on jurisdiction per the agreed Procedural Timetable)."[84]

58. Addressing the Claimants' submissions more generally, the Respondent contends, *inter alia*, that Article 46 of the ICSID Convention "presupposes jurisdiction under the original BIT claim, which cannot be cured or extended in scope via the ancillary claim provision – *i.e.,* the starting point is whether or not the Tribunal has jurisdiction to hear the original BIT claim. […] As such, if the Claimants' claims under the 1994 BIT are dismissed, the ancillary Foreign Investment claim should also fail."[85] The Respondent further contends that the Claimants have not shown a close legal

[83] Claimants' Submissions, ¶¶ 173–174 (emphasis in the original).

[84] Respondent's Reply, ¶ 78.

[85] Respondent's Reply, ¶ 68.

connection between the BIT claims and the Investment Law claims and that the Claimants have failed "to meet their burden of proof under Rule 48 as the principal and ancillary claims are based on different legal instruments."[86] Finally, the Respondent contends that the Claimants should not be permitted to "circumvent important ICSID rules and party rights" under Rule 48 and Article 46 on alleged grounds of procedural efficiency. In this regard, the Respondent points to ICSID Rules relating to the registration of requests for arbitration, the ICSID Secretary-General's screening powers, and the rights of a party to know the scope of the arbitration when constituting the tribunal.[87]

59. In their Rejoinder on the Rule 48 Objection, the Claimants revisit their core first-round submissions on the issues, contending that (a) the BIT and Investment Law claims arise directly out of the same subject matter of the dispute, (b) the Investment Law claims fall within the scope of the Parties' consent to arbitrate, and (c) the Investment Law claims fall within the scope of ICSID jurisdiction.[88] The Claimants further contend that the admission of the Investment Law claims favours procedural fairness and the efficient administration of justice.[89]

60. The Parties' oral submissions on the Rule 48 Objection during the Hearing did not go materially beyond their written submissions and need no recitation for purposes of this Decision.[90]

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[86] Respondent's Reply, ¶¶ 69–77, at 77.

[87] Respondent's Reply, ¶ 83.

[88] Claimants' Rejoinder, Section V.

[89] Claimants' Rejoinder, Section VI.

[90] *Inter alia*, Transcript, Day 1, page 105, line 24 to page 113, line 8, page 204, line 1 to page 218, line 6.

V. THE TRIBUNAL'S ANALYSIS

61. The present phase of the proceedings is pre-preliminary, in the sense that the Claimants have not yet filed their Memorial on the Merits, with the result that the substance and contours of the Claimants' case are not known beyond their Request. The RfA Supplement adds little to this appreciation including for the reason that the Claimants expressly reserve therein any reference to the legal basis on which their substantive allegations would in due course be advanced, were the Tribunal to permit their application to supplement their Request.[91] The Respondent has quite properly also reserved its position, not simply on the merits but also on the detail of what it has expressly signalled would be likely further objections to jurisdiction, competence and admissibility should the Tribunal dismiss with prejudice its Rule 41 Objection. While the Respondent has been more elliptical with regard to its future position on the issues addressed in the RfA Supplement, were the Tribunal to accede to the Claimants' application, it has expressly reserved its position on all issues beyond its admissibility objection raised under Rule 48.[92]

62. As such, the Tribunal emphasises the point made in opening that nothing in this Decision can be taken as a dispositive appreciation by the Tribunal of any issue of fact or law in issue in these proceedings beyond those elements which form the essential basis of this Decision.

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[91] RfA Supplement, ¶ 17.

[92] Respondent's Objections, footnote 1; Respondent's Reply, ¶ 78.

63. It is convenient to address the Rule 48 Objection first, turning thereafter to the Rule 41 Objection.

A. The Rule 48 Objection

64. As follows from the caveat in respect of facts and law made above, the Tribunal is neither called upon nor in a position to make an assessment of the substantive solidity of the Claimants' alternative basis for founding the Tribunal's jurisdiction in the Investment Law. Issues of potential dispute going to jurisdiction and the competence of the Tribunal, as well as the admissibility of any claim under this head beyond the Rule 48 Objection, have not been advanced by either Party. Nor have allegations of substance been developed by the Claimants beyond the most cursory and insubstantive references. The Tribunal therefore has no appreciation of any objections that may be advanced by the Respondent were its Rule 48 Objection to be dismissed and the case to move forward in some or other way by reference to putative jurisdiction under the Investment Law.

65. This said, and subject to this caveat, the Tribunal notes that, as a matter of *prima facie* appreciation, the Investment Law appears to provide, through its Article 11(b), a basis of jurisdiction for a claim to be advanced to ICSID. This is not to say what any such claim might be, whether the Claimants could bring themselves within the scope of the Investment Law, whether there would be a sustainable basis for claims by the Claimants alleging a breach of the Investment Law itself, or whether there could be sustainable claims by reference to Article 9 of the Investment Law and any as yet unidentified investment treaties concluded by Romania. Were the substance

of the Respondent's EU Termination Agreement objection, currently advanced as its Rule 41 Objection, to be sustained, there may be separate questions to be addressed about the sustainability of intra-EU claims under the Investment Law in such circumstances. All of these issues, and no doubt more, are not visible to the Tribunal at this point.

66. Without prejudice to this, the Tribunal notes its *prima facie* appreciation above as it appears that the Investment Law would provide a basis for the Claimants to invoke the jurisdiction of ICSID and to advance substantive claims of breach, even if such a case may be amenable to challenge by the Respondent at a preliminary objections stage.

67. In its submissions on the Rule 48 Objection, the Respondent contests the Claimants' arguments about procedural efficiency and prejudice. It observes that the Claimants should not be permitted to circumvent ICSID rules and party rights by adding a new jurisdictional basis at an advanced stage under the guise of an ancillary claim, pointing to ICSID rules relating to the registration of requests for arbitration, the ICSID Secretariat's screening powers, and the rights of a party to know the scope of the arbitration when constituting the tribunal.

68. The Tribunal has some sympathy for these points, including as addressed below, but notes also that, were the Claimants to be resolved to pursue their claims under the Investment Law, there may indeed be economies and efficiencies in the consolidation into a single arbitration of their claims under the BIT and the Investment Law. This said, even were the Claimants to endeavour to constitute the same tribunal to address

their Investment Law claims, the Respondent must be afforded its right to nominate a different arbitrator for such proceedings, with the result that different tribunals might be addressing overlapping claims.

69. While the Tribunal appreciates that there may be issues of economy and efficiency in the constitution of a single tribunal to address the Claimants BIT claims and Investment Law claims, and that such an approach would also address the risk of inconsistent decisions or of double-counting, this appreciation cannot drive the Tribunal's analysis of whether the Claimants' application to supplement their Request can be accepted.

70. The Request was submitted to ICSID on 21 May 2024. By that Request, the Claimants sought to found jurisdiction in the BIT, alongside the ICSID Convention. The ICSID Secretariat communicated the Request to Romania on 22 May 2024.

71. By correspondence dated 28 May 2024, a senior official from the Romanian Ministry of Finance wrote to ICSID stating that "certain bilateral intra-EU investment treaties, **including their sunset clauses** have already been terminated bilaterally in accordance with the [EU Termination Agreement], including Bulgaria and Romania … **Thus, this arbitration cannot be registered**."[93]

72. By correspondence subsequently copied to the Claimants dated 31 May 2024, the ICSID Secretariat acknowledged Romania's correspondence noting that "[p]ursuant

[93] Email from the Ministerul Finanțelor of Romania to the ICSID Secretariat, 28 May 2024 (emphasis in the original).

to Article 36(3) of the ICSID Convention, the Secretary-General shall register the Request unless she finds, on the basis of the information contained in the Request, that the dispute is manifestly outside the jurisdiction of ICSID. Therefore, the Secretary-General's power to consider any objections to a request for arbitration is limited."[94]

73. By correspondence dated 2 June 2024, the Claimants wrote to the ICSID Secretariat requesting registration of the Request "for the reasons stated in the Request, i.e., Romania has not effectively withdrawn its offer of consent to arbitrate this dispute under the Vienna Convention on the Law of Treaties and international law, the Claimants have accepted such offer by submitting the Request for Arbitration …"[95] Implicit in this correspondence is the Claimants' assertion of the jurisdiction of ICSID as particularised in the Request, *i.e.*, the BIT, alongside the ICSID Convention.

74. By correspondence dated 7 June 2024, the ICSID Secretariat informed the Parties that the Request had been registered.

75. Following an agreed procedure, the ICSID Secretariat wrote to the Parties on 15 October 2024 indicating that it would seek the present presiding arbitrator's agreement to his appointment.

[94] Letter from the ICSID Secretariat to Romania, 31 May 2024.

[95] Letter from the Claimants to the ICSID Secretariat, 2 June 2024.

76. On 1 November 2024, prior to the constitution of the Tribunal on 4 November 2024, the Claimants, citing Rule 48 of the ICSID Rules, submitted their RfA Supplement, *inter alia*, seeking to augment the jurisdictional basis of their claim and add substantive, though largely unspecified, allegations of breach.

77. As this chronology makes clear, the Claimants' application to supplement their Request, while timely within the constraints of Rule 48(2), came some months after the Respondent had signalled its objection to the registration of the Request and the Claimants had affirmed their request for registration on the grounds of the jurisdictional basis indicated in the Request. While this sequence is not of itself sufficient to taint the RfA Supplement, the Tribunal considers that it both points to the purpose of the intended supplement of the Request and highlights the procedural elements that had been undertaken in appreciation of the basis of the Claimants' jurisdictional case.

78. The timeline indicated in Rule 48(2) within which ancillary claims must be presented highlights a further consideration which the Tribunal considers to be material in the circumstances of this case.

79. Rule 48(2) requires that ancillary claims are presented "no later than in the reply" (unless the tribunal decides otherwise). While this does not exclude the possibility that an ancillary claim may be brought before the jurisdiction of the tribunal has been established, and there are many examples of ancillary claims being presented and permitted in advance of the resolution of objections to jurisdiction, the temporal constraint on the presentation of ancillary claims necessarily leaves open the

possibility that such a claim may be resisted not simply by reference to the terms of Article 46 of the ICSID Convention and Rule 48(1) but also on jurisdictional or competence grounds. This follows not only as a matter of logic but also from the express terms of Rule 43(1) of the ICSID Rules, which provide that "[a] party may file a preliminary objection that the dispute **or any ancillary claim** is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal" (emphasis added).

80. While acknowledging that there is scope to contend that the conclusion to be drawn from this appreciation cuts both ways, the implication that the Tribunal draws from this is that to pass muster as an "ancillary claim" – for these purposes "an incidental or additional claim […] arising directly out of the subject-matter of the dispute" – the incidental or additional claim must come within the jurisdictional ambit of the claim initially brought. Any other interpretation would open the possibility that, as late as the reply phase of a proceeding, a claimant could bring a new claim that rests on an entirely different jurisdictional basis from the original claim, already materially advanced in the pleading schedule. Doing so, however, could potentially upset an already settled jurisdictional finding by the tribunal or have the effect of resetting the procedural schedule.

81. The Tribunal notes, also, that ancillary claims include counter-claims, the same rule applying to "incidental or additional claims" and "counterclaims" under Article 46 of the ICSID Convention and Rule 48 of the ICSID Rules. As it is tolerably clear that a counterclaim cannot *per se*, without more, be advanced by reference to a different jurisdictional basis from the claim originally advanced – for example, one

that is not within the jurisdiction of ICSID or one that has not been the subject of consent by the parties – the same constraint must apply to other ancillary claims. While the "arising directly out of" requirement in Article 46 of the ICSID Convention and Article 48(1) of the ICSID Rules is not a matter of jurisdiction, this does not obviate the need for jurisdiction to be independently established.

82. In the present case, although an element of the Claimants' argument in support of their Investment Law claims is that Romania's consent to arbitrate under the BIT extends to the claims made under the Investment Law, they also contend that the Respondent's consent to arbitration under the Investment Law is independent of the BIT. In this regard, the Claimants state that "Romania's consent to arbitrate in respect of claims under the Investment Law exists independently of the BIT" and that the claims would, in consequence, survive as an independent cause of action even if the Tribunal were to dismiss the Claimants' BIT claims, whether under Rule 41 or in some other procedure.

83. Materially, the very purpose and essence of the RfA Supplement appears to be to attempt to cure the vulnerability of the Claimants' jurisdictional case as advanced in the Request. But for bare bones allegations of alleged substantive breaches of the Investment Law, the Claimants reserve their case on alleged substantive breaches under the jurisdictional heading of the Investment Law to a later pleading, the core purpose of the RfA Supplement being to augment the jurisdictional basis of the original claim advanced by reference to the BIT.

84. The effect of the Tribunal's acceptance of the Claimants' application to supplement their Request would be materially to change the jurisdictional basis of the claim that the Claimants had originally advanced. While, at this early stage of the proceedings, it might be said, as the Claimants have done, that no material prejudice would be caused to the Respondent – as the Claimants could always bring a separate claim under the Investment Law, even if the BIT claim is struck down – the Tribunal is not in a position to make such an assessment with any reliability. The Tribunal knows not, for example, whether a time-bar constraint may operate in respect of a fresh claim based in the Investment Law or whether any other impediment to the bringing of a fresh claim may operate, or may operate differently, if the application to supplement the Request is accepted.

85. Having regard to these considerations, the Tribunal construes the requirement that an ancillary claim must be "within the scope of the consent of the parties", in Article 46 of the ICSID Convention and Rule 48(1) of the ICSID Rules, to mean "within the scope of the consent of the parties *relied upon in the original claim or otherwise given expressly for purposes of the claim*".

86. The Tribunal does not accept the Claimants' contention, advanced in the alternative, that the Investment Law claim is a claim that arises under the BIT and can thus be advanced by reference to what is said to be the subsisting consent of the Respondent to arbitrate under the BIT. Insofar as the Claimants have advanced substantive allegations of breach in their RfA Supplement, they have either done so in only skeletal form by reference to the Investment Law or have reserved their right to do so by reference to as yet unidentified Romanian investment treaties with third States

said to be applicable through the medium of the MFN clause in Article 9 of the Investment Law. On the basis of their pleadings, the Tribunal does not understand the Claimants' RfA Supplement to be rooted in the BIT but rather to be an attempt to augment both the jurisdictional basis of the original claim and its material reach.

87. The Tribunal accordingly upholds the Respondent's Rule 48 Objection and dismisses the Claimants' application to supplement their Request through their RfA Supplement.

88. Two further observations are warranted. The first is that the Tribunal does not consider it either necessary or appropriate to reach a view on whether the Investment Law claims arise directly out of the subject-matter of the dispute advanced in the Request. The Claimants aver that they do, and the Tribunal acknowledges that, on the Claimants' pleaded case to this point, it appears that, on the substance, the Claimants' case under the Investment Law is closely connected to their case under the BIT. This said, the subject-matter of a claim will frequently be defined or circumscribed by the jurisdictional circumference of the case. And, on the claims as presently framed before the Tribunal, the jurisdictional circumference of the Claimants' BIT claims and Investment Law claims are materially different. The Tribunal accordingly refrains from reaching a view on the "subject-matter" requirement in Article 46 of the ICSID Convention and Rule 48(1) of the ICSID Rules.

89. The second observation is to revisit, for purposes of emphasis, the Tribunal's comment in opening its analysis of this issue that there may be economies,

efficiencies and administration of justice coherence in the consolidation into a single arbitration of the Claimants' claims under the BIT and under the Investment Law. The risk that the Respondent faces is that the Claimants initiate a separate claim under the Investment Law. If the Respondent thereafter fails in its objections in respect of the BIT claim, the Investment Law claim will subsist side-by-side with the BIT claim. If, in contrast, the Respondent succeeds in its objections in respect of the BIT claim, the Investment Law claim will remain. There would therefore, in the Tribunal's estimation, be coherence, economies and efficiencies in the consolidation of the two separate claims into a single proceeding at this early stage. This, though, is not ultimately a matter for the Tribunal but simply an *obiter* case-management observation on which the Parties may wish to reflect as they contemplate the next phase of the proceedings.

B. The Rule 41 Objection

90. For reasons that will become clear, the Tribunal proposes to address the substance of the Respondent's Rule 41 Objection only briefly. While it dismisses the Rule 41 Objection, it does so without prejudice to the substance of the Respondent's contentions and expressly acknowledges that the objections raised by the Respondent under this head are weighty and properly warrant early resolution.

91. Rule 41 establishes an expedited procedure – both in terms of the filing of the initial objection and in respect of the tribunal's decision or award. The procedure is distinguished from the normal adjudicatory process in that the burden on the moving party, almost invariably the respondent, is to establish not simply that the claim is

without legal merit, which would be the outcome of the normal adjudicatory process, but that it is *manifestly* so. The Respondent accepts, and the Parties are in agreement, that the burden on the Respondent to meet this test is high; namely, that the claim with which the Respondent is faced is "patently unmeritorious."[96]

92. A Rule 41 objection will almost invariably have to be submitted before the filing of the claimant's memorial in the proceedings in issue, the 45-day timeline for the filing of the objection, from the date of the constitution of the tribunal, coming before the expiration of the 60-day time-limit within which the First Session must be held pursuant to Rule 29 of the ICSID Rules. At the point of the filing of the Rule 41 objection, therefore, all that a tribunal will likely know of the claimant's case is what is set out in the request for arbitration, which may be stated in the barest of terms. The respondent may not know much more. An objection that a claim is manifestly without legal merit is thus a request to a tribunal to dispose of that claim in an expedited manner on the basis of a summary statement of the claimant's case. It is as such a remedy that should be sparingly used and only in circumstances in which, seen either from the request for arbitration itself or from wider circumstances of which the tribunal will properly be aware, it is evident that there is no realistic possibility that the claim can succeed. It is an objection that the claim is so "manifestly and fundamentally defective"[97] that on the mere sight of it the tribunal can be persuaded that the claimant should be denied the opportunity to elaborate its claim in its memorial.

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[96] RL-1, *Bank of Nova Scotia v. Republic of Peru*, ICSID Case No. ARB/22/30, Decision on Respondent's Rule 41 Application, 31 May 2024, ¶ 96**.**

[97] RL-2, *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020, ¶ 159.

93. A Rule 41 objection is without prejudice to the possibility of preliminary objections, if the former objection has been dismissed. This is expressly contemplated by Rule 41(4). It follows that a Rule 41 objection cannot be construed as akin to a preliminary objections procedure simply because it takes place at a preliminary stage of the proceedings. As the Tribunal noted in PO3, addressing the NDP Application of the Commission, were a Rule 41 objection to be perceived as a speculative, minimal cost, "try-it-on" preliminary objections gambit available to a respondent, Rule 41 would risk becoming an inequitable, tactical conduit for preliminary objections, deployed for optical reasons to signpost weakness in a claimant's case, and requiring a claimant to establish a basis to proceed in an expedited and truncated procedure.

94. For this reason, the Tribunal regards it as axiomatic that a Rule 41 objection must be held to the test of a threshold contention that the claim advanced is so utterly lacking in legal merit that it should be summarily dismissed before it even gets to an objection to jurisdiction or other challenge to competence.

95. The Respondent's Rule 41 Objection in the present case is evidently weighty and serious, and grounded in a manifestly credible assertion of legal rights arising from a relevant and applicable, even if contestable, legal instrument in the form of the EU Termination Agreement, of which both Parties are fully aware. It cannot be easily dismissed. Equally, however, there are serious, credible and considered legal arguments, and perhaps also contentions of fact, on the other side of the equation that properly warrant weighing in the balance.

96. The Claimants submit that there is complexity in the issues raised by the Rule 41 Objection that warrant more careful and complete scrutiny. They note that this is the first case in which the purported termination of an intra-EU investment treaty, and its Sunset Clause, by the EU Termination Agreement is being tested.

97. The Tribunal has sympathy for these contentions and notes that, when pushed in the Hearing, both Parties acknowledged that there were issues to be addressed or to be more fully explored beyond those that had been canvassed in the Parties' submissions. The Tribunal agrees.

98. In PO3, the Tribunal denied the Commission's NDP Application. In the circumstances of that Application, it was necessarily rejected. As a consequence, however, the Tribunal and the Parties were denied the possibility of hearing the Commission on the interpretation and application of the EU Termination Agreement. The Tribunal notes also that, in addition to the possibility of a non-disputing party application under Rule 67 of the ICSID Rules, Rule 68 of the ICSID Rules holds the possibility of participation in the proceedings by a non-disputing Treaty Party, here Bulgaria, being the other party to the BIT and whose bilateral agreement with Romania, through the medium of the EU Termination Agreement, is said to have resulted in the termination of the BIT.

99. This observation should not be taken as giving the Commission, or Bulgaria, *carte blanche* with respect to possible applications under Rules 67 or 68 of the ICSID Rules in respect of the proceedings to come. Any such application would fall to be assessed on its merits, in accordance with the requirements of the relevant rules.

100. With this said, the Tribunal considers that the Respondent's Rule 41 Objection does not meet the *manifestly* without legal merit standard. An objection advanced under Rule 41 that is met by credible, even if questionable, contentions on the other side does not meet the "patently unmeritorious" or "manifestly and fundamentally defective" standard articulated by earlier tribunals, with which this Tribunal agrees.

101. The Tribunal also expresses elevated caution about whether a dispute of law of systemic reach and importance is properly amenable to resolution through a Rule 41 summary procedure.

102. This said, having acknowledged the weight and seriousness of the Respondent's objections, the Tribunal also considers that the issues at the heart of the objection cannot be left to languish, only to surface again as perhaps one of a number of preliminary objections in a procedure which may, for reasons of substance or efficiency, see the objections joined to the merits phase of the proceedings. The issues raised by the Respondent are threshold points. They are discrete. If upheld after full argument, they would dispose of the entirety of the Claimants' case.

103. For the foregoing reasons, the Tribunal dismisses the Respondent's Rule 41 Objection but does so expressly without prejudice to the substance of the underlying objections, as opposed to the form in which they were raised. Having regard to the arguments and issues raised in the Parties' pleadings to this point, and the Tribunal's appreciation that there are further issues to be canvassed, the Tribunal concludes that

the *manifestly* without legal merit standard is not met *at this summary stage of the proceedings*.

104. Without prejudice to this finding, having regard to its assessment that the issues at the heart of the Respondent's objection cannot be left to languish, the Tribunal decides, pursuant to Rules 42(6) and 43(3) of the ICSID Rules, that the EU Termination Agreement issues raised by the Respondent through its Rule 41 Objection should be addressed in a separate phase of the proceedings (the "**Bifurcated Preliminary Procedure**"). Pursuant to Rules 43(4) and 44(3) of the ICSID Rules, the Tribunal further decides that, unless the Parties agree otherwise, the proceedings on the merits shall be suspended. Following transmission of this Decision, the Tribunal will consult with the Parties on the appropriate procedure for, and the scope of, the Bifurcated Preliminary Procedure.

105. The Bifurcated Preliminary Procedure shall be without prejudice to the right of a Party to present any objection to jurisdiction, competence or admissibility that is not included in the Bifurcated Preliminary Procedure, after the conclusion of that Procedure.

106. Having regard to paragraph 30.2 of PO1 and Rule 63(1) of the ICSID Rules, the Tribunal invites the Parties to agree to the early publication of this Decision, reflecting the Parties respective commitments made in the course of, or shortly following, the Hearing.

VI. DECISION

107. Having regard to the preceding, the Tribunal:

(a) Upholds the Respondent's Rule 48 Objection and dismisses the Claimants' application to supplement their Request for Arbitration;

(b) Dismisses the Respondent's Rule 41 Objection;

(c) Directs, pursuant to Rules 42(6) and 43(3) of the ICSID Rules, that the EU Termination Agreement issues raised by the Respondent through its Rule 41 Objection should be addressed in a separate preliminary phase of the proceedings;

(d) Directs, pursuant to Rules 43(4) and 44(3) of the ICSID Rules, that, unless the Parties agree otherwise, the proceedings on the merits shall be suspended;

(e) Dismisses any and all other requests for relief;

(f) Reserves its decision on costs to be addressed in due course.

[signed]

Sir Christopher Greenwood KC
Arbitrator
30 September 2025

[signed]

Professor Brigitte Stern
Arbitrator
30 September 2025

[signed]

Sir Daniel Bethlehem KC
Presiding Arbitrator
30 September 2025