INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Suomi Power Networks TopCo B.V., Supernova II Bidco BV and AMF Tjänstepension AB

v.

Republic of Finland

(ICSID Case No. ARB/24/37)

PROCEDURAL ORDER NO. 3
Decision on the Respondent's Request for Bifurcation

Members of the Tribunal
Mr. Eric Schwartz, President of the Tribunal
Mr. Peter Turner KC, Arbitrator
Prof. Zachary Douglas KC, Arbitrator

Secretary of the Tribunal
Ms. Anna Holloway

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8 August 2025

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I. PROCEDURAL BACKGROUND

1. The present Decision concerns the Request for Bifurcation ("**Req. Bif.**") made on 9 June 2025 by the Respondent in the present arbitration, which was commenced by Suomi Power Networks TopCo B.V. ("**SPN**"), Supernova II Bidco BV ("**Supernova**") and AMF Tjänstepension AB ("**AMF**") (together, the "Claimants") against the Republic of Finland (the "**Respondent**" or "**Finland**") in respect of the Claimants' investment in Caruna, a Finnish group of companies engaged in the distribution of electricity in Finland (**"Caruna"**).

2. The arbitration has been commenced under Article 26 of the Energy Charter Treaty ("**ECT**") in respect of Finland's alleged violation of Article 10 of the ECT and Finland's obligations under the applicable rules and principles of international law.

3. The ICSID Acting Secretary-General registered the case on 23 August 2024, and the Tribunal was constituted on 14 February 2025.

4. On 16 April 2025, the Tribunal issued Procedural Orders Nos. 1 and 2 in this proceeding (respectively, "**PO1**" and "**PO2**").

5. In accordance with the procedural calendar set forth in PO1, the Claimants submitted a Memorial in support of their claims on 22 May 2025 ("**Memorial**").

6. The Memorial was then followed by a Request for Bifurcation, which the Respondent submitted on 9 June 2025 on the basis of Rule 43(4) of the 2022 ICSID Arbitration Rules (the **"Rules"**), which provides that "the Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits." In its Request for Bifurcation, the Respondent advanced three preliminary objections (as described below), which the Respondent considers warrant bifurcation in accordance with Rule 44(2) of the Rules, which directs the Tribunal, when deciding whether to bifurcate, to "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."

7. By an Answer on Bifurcation, dated 27 June 2025 ("**Answer**"), the Claimants submitted that the Tribunal should "reject Finland's Request for Bifurcation, and awards [sic] the Claimants their full costs incurred for this phase of the proceedings."[1]

8. The Respondent then submitted a Reply on Bifurcation on 7 July 2025 ("**Reply**"), which was followed by the Claimants' Rejoinder on Bifurcation on 17 July 2025 ("**Rej. Bif.**").

9. Following its review of the above submissions, the Tribunal has deliberated and agreed upon the decision set forth in Section V below. The Tribunal emphasizes that it has carefully reviewed and considered all of the arguments presented by the Parties, whether or not specifically described in this Procedural Order. The Tribunal summarizes the Parties' arguments below only to the extent that it considers it helpful to do so for the purpose of providing context for its decision.

II. THE RESPONDENT'S PRELIMINARY OBJECTIONS

10. The Respondent has, as indicated, raised three preliminary objections, which it contends should be the subject of a bifurcated phase because, according to the Respondent, they can all be

[1] Answer, para. 63.

addressed "without any fact-finding pertaining to the merits"[2] and, thus, should be addressed in a first phase of the arbitration in the interest of saving "enormous amounts of resources, money and time if sustained."[3] The Respondent's preliminary objections are briefly summarized in turn below.

A. First Objection: Finland Has Denied SPN and Supernova The Benefits Of The ECT, Rendering Their Claims Inadmissible

11. The Respondent asserts that, by a denial of benefits notice of 15 July 2024, Finland exercised the right reserved to it under Article 17(1) of the ECT to deny the benefits of the ECT to SPN and Supernova.[4] Article 17(1) provides that a Contracting Party may deny the advantages of Part III of the ECT to a legal entity if "nationals of a third [S]tate own or control such entity" *and* "if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised."[5]

12. The Respondent argues that both limbs of Article 17(1) are satisfied in the case of SPN and Supernova, given that:

    i. [redacted]

    ii. [redacted]

    iii. [redacted]

13. Although the Claimants first asserted rights under the ECT and indicated their intent to pursue arbitration in their Notice of Dispute, dated 9 January 2024, the Respondent submits that, contrary to the position of the Claimants, this did not deprive it of its right under Article 17(1) to deny the benefits of the ECT to SPN and Supernova on 15 July 2024, before the arbitration was commenced and the applicable deadline under the Rules for raising preliminary objections. According to the Respondent, Article 17(1) does not impose any temporal conditions on the exercise by an ECT Contracting Party of its right to deny benefits and it was therefore entitled to do so "at any time and without formality, including after the commencement of … [the] arbitration, provided that the procedural rules for raising preliminary objections are complied with."[7] It contends further

[2] Req. Bif., para. 12.

[3] Req. Bif., para. 2.

[4] Req. Bif., paras. 14-15.

[5] Id.

[6] Req. Bif., paras. 17-34

[7] Req. Bif., paras. 34-35.

that its position is supported by "a considerable number of ECT and non-ECT tribunals, as well as academic commentary."[8]

14. On this basis, the Respondent therefore considers that the claims of SPN and Supernova are inadmissible.

B. Second Objection: Finland Did Not Extend An Offer To Arbitrate To Companies Incorporated in the Netherlands And Sweden (Intra-EU Objection)

15. While the Claimants have commenced this arbitration on the basis that they were extended an offer to arbitrate by Finland under Article 26 of the ECT, it is the Respondent's position that Article 26 has been "disapplied as between EU Member States in light of the conflict between two treaties: [the Treaty on the Functioning of the European Union ("**TFEU**")] …and the ECT …."[9] The Respondent submits that the conflict "has been identified and declared by the Court of Justice of the European Union ("**CJEU**")" in the *Moldova v Komstroy* case, which is "authoritative and binding on EU Member States."[10]. In the Respondent's view, the *ex tunc* effect of CJEU judgments means that Article 26 was disapplied as between EU Member States "from the moment the conflict with the TFEU first emerged, which is at the latest in 2009."[11]

16. The Respondent argues that it "is clear from the CJEU's decision in *Komstroy* that the EU and the EU Member States have decided, and are free to decide as a matter of international law, that Article 26 of the ECT is disapplied for disputes between EU Member States and investors incorporated in other EU Member States."[12] It adds: "[t]hat is a choice they are entitled to make as between themselves" and "their freedom to choose extends to their ability to prioritise the [TFEU] conflicts rule of Primacy over any conflict resolution clause contained in Article 16 of the ECT [upon which the Claimants rely]."[13]

17. The Respondent relies further on an *inter se* declaration and agreement of 26 June 2024 among 26 of the 27 EU Member States, including the Netherlands, Sweden and Finland, "that the conflict between the ECT and the … [TFEU] is to be resolved—in respect of entities incorporated within their jurisdictions—in favour of the TFEU, by reference to the treaty conflict rule of EU primacy." [14]

18. The Respondent also emphasizes that the claims of the Claimants in this case "amplify th[e] imperative to respect the choice of the Netherlands, Sweden and Finland to disapply Article 26 of the ECT as between them in respect of investors incorporated in their jurisdictions," given that

[8] Reply, para. 26.

[9] Req. Bif., para. 48

[10] Req. Bif., para. 59.

[11] Req. Bif., paras. 60-62, 64.

[12] Req. Bif., para. 68.

[13] Id.

[14] Req. Bif., paras. 46 and 69, referring to *Declaration on the Legal Consequences of the Judgment of the Court of Justice in Komstroy and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings*, 26 June 2024, **RL-023**; and *Agreement on the Interpretation and Application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States*, 26 June 2024, **RL-003**.

the dispute gives rise to a "risk that the Tribunal will be called upon, directly or indirectly, to wade into matters of EU law that the Netherlands, Sweden and Finland have reserved for the CJEU."[15]

19. As Finland has disapplied Article 26 of the ECT with respect to the Claimants, the Respondent submits that the Tribunal is without jurisdiction to consider their claims.

C. THIRD OBJECTION: THE CLAIMANTS' PURSUIT OF PARALLEL PROCEEDINGS IN THE FINNISH COURTS DEPRIVES THE TRIBUNAL OF JURISDICTION (FORK-IN-THE ROAD OBJECTION) OR, ALTERNATIVELY, RENDERS THE CLAIMS INADMISSIBLE

20. The Respondent asserts that the Claimants "deprived the Tribunal of jurisdiction or, alternatively, rendered their claims inadmissible when they elected [through Caruna] to submit the dispute to the Finnish [Market Court] …, where proceedings are ongoing."[16]

21. While the Claimants themselves are not parties to the Market Court proceedings, it is the Respondent's position that they should be considered to be "involved" in those proceedings, given that the Caruna companies are wholly owned by SPN and 52.5% of SPN is owned by the Supernova and AMF, from which it follows that "[t]he Caruna companies are privies of the Claimants."[17] In addition, the Respondent argues that, "through their representatives on the Caruna board, the Claimants are … directing and controlling Caruna's prosecution of [Caruna's] claim in … [the Market Court] proceeding."[18]

22. The Respondent accepts that Caruna's claim has been brought before the Market Court on the basis of domestic Finnish law, rather than under the ECT, as here, but nevertheless argues that the claim "overlap[s] in all relevant respects" with the claims advanced in this arbitration, given that: (a) Caruna is "challenging the same measure in the Market Court proceedings that the Claimants are challenging here – the [Finnish] Energy Authority's 2023 Confirmation Decision;" (b) "Caruna is … requesting the same relief that the Claimants are requesting here …;" (c) "Caruna is making the same allegations and running the same arguments that the Claimants are running here …;" and (d) "Caruna is relying on much of the same documentary, witness and expert evidence as that submitted with the Claimants' Memorial [in this arbitration]."[19]

23. Hence, the Respondent argues, the Claimants' privies have elected to submit the same measure that is the subject of this arbitration "for judicial review by the Finnish courts," with the following consequences under the ECT and international law:[20]

24. First, the condition to Finland's consent to arbitration in Article 26(3)(b)(i) of the ECT Tribunal has not been met. Article 26(3)(b)(i) provides: "The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute" to the Contracting Party's domestic courts under subparagraph (2)(a) or (b). Finland is one of the Annex ID listed Contracting Parties, and, here, the Claimants "acting through their privies" elected to

[15] Req. Bif., paras. 60-61.

[16] Req. Bif., para. 1(c).

[17] Req. Bif., paras. 23 and 74.

[18] Id.

[19] Req. Bif., para. 75.

[20] Rq. Bif., para. 76.

pursue local remedies in Finnish courts.[21] The Tribunal therefore has no jurisdiction ("Fork-in-the-Road Objection").

25. Second, even if the Tribunal has jurisdiction, "any assessment by … [it]" of the Claimants' ECT claim in this arbitration "must now await the final decision of the Finnish courts" ("Inadmissibility Objection"), given that the ECT requires an assessment of the "totality" of Finland's conduct in respect of the Claimants' investment, including the treatment accorded to it by the Finnish courts.[22]

26. Third, even if the Tribunal had jurisdiction and the claims were admissible, "sound and efficient case management requires that the Tribunal await final judgment from the Finnish courts and use the intervening time to hear Finland's other preliminary objections first, in a bifurcated proceeding."

III. THE PARTIES' POSITIONS ON BIFURCATION

A. THE RESPONDENT'S POSITION

1. The Applicable Test for Bifurcation

27. It is the Respondent's position that its preliminary objections "satisfy the applicable test for bifurcation – whether considered individually or collectively."[23] It starts from the position (as do the Claimants, as indicated below) that the Tribunal is to be guided by Rule 44(2) of the Rules (see para. 6 above) in deciding whether to bifurcate the arbitration.

28. Thus, referring to Rule 44(2)(a) and the related decisions of other ICSID tribunals, the Respondent argues that "the overarching consideration for tribunals is whether bifurcation 'would be efficient, which is to say whether it would result in a gain of time or in reduced costs.'"[24] It adds that "[o]ne element in this assessment is whether [based on a *prima facie* review] the preliminary objections are 'serious' and 'substantial', as opposed to 'frivolous or vexatious.'"[25] The Respondent acknowledges that the "actual efficiency gain will ultimately depend on the outcome of the objections."[26] However, it submits that "the 'possibility' for procedural economy, coupled with the serious nature of the questions raised by an objection, will outweigh any risk of inefficiency should the preliminary objections subsequently be dismissed."[27]

29. With respect to this, the Respondent asserts that the Claimants wrongly argue that a *prima facie* assessment of whether the preliminary objections are "serious" and "substantial" requires prejudgment of whether a preliminary objection is likely to succeed.[28] In the Respondent's view, however, "there is no legal basis … for conflating the question of whether an objection is 'serious' or 'substantial' with the question of whether it is likely to succeed."[29] Rather, the Respondent

[21] Req. Bif., paras. 80-81.

[22] Req. Bif., paras. 101-102.

[23] Req. Bif., para. 13.

[24] Req. Bif, paras. 6.

[25] Id.

[26] Req. Bif., para. 8.

[27] Id.

[28] Reply, para. 8.

[29] Reply, para. 9.

says that the Tribunal is "merely required to consider whether the objections have 'factual and legal support' and are 'arguable and advanced in good faith.'"[30]

30. In addition, the Respondent criticizes the Claimants for undertaking a "constrained assessment" of the procedural efficiencies associated with bifurcation by focusing "narrowly" on a comparison of: (a) "the six-month time difference between (i) the hearing on preliminary objections scheduled for September 2026, if bifurcation is granted, and (ii) the full hearing scheduled for March 2027, if bifurcation is denied;" and (b) "the time it would hypothetically take to schedule a hearing on the merits if Finland's preliminary objections were rejected after their bifurcation."[31] The Respondent notes that the Claimants argue that a full hearing on the merits "would likely not take place until some time in 2029" and "would add at least two years to the procedural timetable."[32]

31. According to the Respondent, however, "'efficiency has to … be understood in a broader sense', in that 'the assessment of the efficiency of a bifurcation involves not only an analysis of the possible duration of a bifurcated arbitration', but also an assessment of: a[.] 'the possible cost reduction that could result from the limitation or simplification of the matters to be decided at the merits phase' and b[.] whether 'other factors' – such as the 'serious' nature of the preliminary objections – 'weigh in favour of bifurcation'."[33]

32. For the Respondent, the difference in time between the hearings in the bifurcated and non-bifurcated scenarios is "irrelevant," given the seriousness of its preliminary objections and the possibility that they could eliminate the need for further proceedings relating to the merits or at least narrow the scope of the merits and quantum issues to be considered.[34] The Respondent adds that, in any event, if it succeeds on its preliminary objections bifurcating them would result in a time savings of "at least a year (and possibly more)", while, in its view, only a "little over a year" would be added to the timetable if, in a bifurcated scenario, it were to fail on its preliminary objections.[35] In "similar circumstances," according to the Respondent, tribunals have granted bifurcation if the request satisfies the other applicable criteria.[36]

33. The Respondent next notes, with reference to Rule 44(2)(b), that the "second factor in the bifurcation analysis is whether the preliminary objections, if upheld, would resolve all or a significant part of the dispute."[37] It submits that "[i]t is not necessary for the objections to dispose of the entire dispute – a narrowing of the scope of issues to be addressed in the merits phase is sufficient to warrant bifurcation."[38] The Respondent emphasizes further that bifurcation may be considered to dispose of a significant part of the dispute where it has the effect of reducing the number of claimants or the number of claims.[39] Moreover, "[w]here various preliminary

[30] Reply, paras. 9-10 (referring *inter alia*, to *Mainstream Renewable Power and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 3 (Decision on Bifurcation), 7 June 2022, CL-083).

[31] Reply, paras. 18 and 20.

[32] Reply, para. 19.

[33] Reply, para. 20.

[34] Reply, para. 22.

[35] Id.

[36] Reply, para. 23, referring to *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/63), Procedural Order No. 2, dated 13 April 2023, RL-054.

[37] Req. Bif., para. 9.

[38] Id.

[39] Reply, para. 13.

objections are raised," the Respondent observes that "ICSID tribunals have considered their cumulative effect when deciding a bifurcation application."[40]

34. Lastly, with respect to Rule 44(2)(c), which provides for the consideration of whether the preliminary objection and the merits are so intertwined as to make bifurcation impractical, the Respondent argues that "the rationale behind this consideration is to avoid 'the risk of a duplication of factual arguments and evidence in the jurisdiction and merits phase' if jurisdiction is ultimately upheld."[41] It follows, according to the Respondent, that this will only "militate against bifurcation" if the questions of fact that need to be addressed with respect to the objection are duplicative of questions and evidence that would need to be addressed in a possible merits phase.[42] Thus, for the Respondent, "where preliminary objections can be addressed without any fact-finding pertaining to the merits, bifurcation would be the procedurally efficient course of action."[43]

35. The Respondent argues that there is no basis for the Claimants' suggestion that any overlap with the merits, no matter how small, should militate against bifurcation. Rather, the question is whether the objection is "so intimately linked to the merits of the case that it is impossible to dispose of … [the objection] in preliminary form."[44] According to the Respondent: "Merely because a preliminary objection may require examination of 'some factual evidence' does not, by itself, render the objection unsuitable for determination on a bifurcated basis."[45]

2. Application of the Test

36. Having regard to the above considerations, the Respondent argues in summary as follows with respect to each of its preliminary objections:

a. *Denial of Benefits Objection*

37. The Respondent first submits that this objection is "legally and factually distinct from any matters pertaining to the merits of the Claimants' allegations."[46] It notes that the "only relevant questions of fact" concern the ownership, control and activities of Supernova and SPN and that "the only relevant question of treaty interpretation is whether the right of Article 17(1) can be exercised in respect of disputes that have already arisen."[47] As to this, the Respondent argues that "there is a compelling body of authority (and logic) answering the question in the affirmative."[48]

38. Although, as discussed below, the Claimants argue that this objection faces "significant legal challenges," the Respondent responds that its "position clears the bar of a reasonably arguable

[40] Req. Bif., para. 10.

[41] Req. Bif., para. 11.

[42] Id.

[43] Req. Bif., para. 12.

[44] Reply, para. 15.

[45] Id.

[46] Req. Bif., para. 40.

[47] Id.

[48] Id.

proposition by a wide margin" and therefore is neither frivolous nor vexatious but, to the contrary, is sufficiently "serious" to warrant bifurcation.[49]

39. Moreover, while the Claimants also contend, as noted below, that dealing with the objection will "require complex factual investigation which risks overlapping materially with merits issues," the Respondent maintains that the evidence upon which it relies in support of this objection "does not overlap at all … with the evidence on which the Claimants rely to establish their case on the merits."[50]

40. The Respondent accepts that, if successful, this objection would not dispose of the merits entirely, given that it is only concerned with the claims of SPN and Supernova and not those of AMF. However, the Respondent submits that the scope and complexity of the dispute would nevertheless be reduced substantially, given that there would be a reduction in the number of Claimants and the number and the value of the claims.[51] [redacted] The Respondent argues that prior tribunals have held that a reduction in the number of claimants and value of the claims is a significant factor to be taken into account when deciding to bifurcate an arbitration.[53]

41. Moreover, the Respondent argues that the scope and complexity of the factual evidence and damages assessment at the merits phase would be reduced if its preliminary objection were upheld.[54]

42. The Respondent notes finally that the Tribunal must assess Finland's preliminary objections as a whole and that if any of its other preliminary objections were to be upheld, they would "in any event result in the dismissal of all claims, including those of AMF."[55]

b. *Intra-EU Objection*

43. The Respondent notes that, as is not disputed, this objection, if upheld, would result in the dismissal of the arbitration in its entirety.[56]

44. It also argues that this objection is "purely legal and capable of resolution without a detailed investigation of the underlying facts of this case."[57] Rather, the Respondent submits that "[a]ll it requires is a determination of discrete points of public international law" without there being any need to engage with the merits of the Claimants' case.[58]

45. While the Claimants contend, as discussed below, that this objection is "not of sufficient legal quality" to give rise to a serious and substantial issue, as required to warrant bifurcation, the

[49] Reply, paras. 25-28.

[50] Reply, para. 34.

[51] Reply, paras. 36-40.

[52] Reply, para. 36.

[53] Reply, para. 39.

[54] Reply, paras. 38 and 40.

[55] Req. Bif., para. 45.

[56] Req. Bif., para. 71.

[57] Req. Bif., para. 70.

[58] Id. See also Reply, paras. 53-55.

Respondent argues that the Claimants inappropriately invoke the "outcomes reached in prior awards" to support their position.[59] According to the Respondent: "… the procedural issue … before this Tribunal requires it to reach a conclusion on whether Finland's objection is so inherently weak as to be '[un]arguable', 'frivolous' or '[in]substantial'," and that question "cannot be reliably answered by tallying up the ultimate outcomes reached in prior awards as the Claimants do."[60]

46. The Respondent emphasizes that Finland's arguments in this case "cannot be described as the 'very same' as those in the awards listed by the Claimants," and it states that "its articulation of its objection will be distinct from the articulation by other respondent EU Member States" in prior cases and will rely, *inter alia*, on general PIL principles relating to treaty conflict and [redacted].[61] It notes also that a "considerable portion" of the awards upon which the Claimants rely were issued prior to the CJEU decision in *Komstroy* and the 26 June 2024 *inter se* agreement of EU Member States dealing with the applicability of Article 26 of the ECT.[62]

47. For the Respondent, the Claimants have "fail[ed] to engage with the substance of Finland's detailed explanation of its objection and fail to explain why Finland's position … is not arguable."[63]

c. *Parallel Proceedings Objections (Fork-in-the-Road and Inadmissibility)*

48. As in the case of its intra-EU objection, the Respondent argues that its parallel proceedings objections would, if successful, result in the dismissal of the case in its entirety.[64]

49. In addition, it contends, with respect to its Fork-in-the-Road objection, that it is both "serious" and "discrete and distinct from the merits," with only the following two points of law being required to be decided: (a) "whether the claim in the Finnish Courts can be said to be pursued by the 'Investor' where privies of the Claimants who have previously notified Finland of their status as "Investors' are pursuing that claim;" and (b) "whether the Market Court is seized of the same dispute where the Claimants' privies deploy substantially identical allegations, arguments and evidence and seek the same relief in respect of the same measure, but rely on 'domestic Finnish law' rather than the ECT."[65]

50. Although, as discussed below, the Claimants contend that the Respondent's objection is not "serious" and note in this regard that (i) no ECT tribunal has ever upheld a fork-in the road objection and (ii) the Respondent's "novel 'privies' argument could only succeed if the Tribunal were to ignore entirely the separate legal personality of Caruna and … its shareholders,"[66] the Respondent again responds that the prior decisions of other ECT tribunals are irrelevant for the

[59] Reply, para. 43

[60] Reply, para. 44.

[61] Reply, paras. 48-49.

[62] Reply, paras. 43-52.

[63] Reply, para. 47.

[64] Req. Bif., paras. 99 and 116.

[65] Req. Bif., para. 81; Reply, para. 66.

[66] Answer, para. 52.

purpose of assessing the seriousness of its objection, which is both legally arguable and factually tenable.[67]

51. The Respondent also rejects the Claimants' contention, as discussed below, that the objection "presents substantial overlap with the merits" insofar as "Finland invites the Tribunal to investigate" the degree of overlap between the claims in this arbitration and the claims before the Market Court. The Respondent responds that "it is one thing for a preliminary objection to overlap with the merits in a way that would require a tribunal to determine disputed points of facts relating to the merits; quite another for a preliminary objection to require a simple comparison of points of facts which are being claimed before different fora." According to the Respondent, "Finland's Fork-in-the-Road Objection requires the latter assessment, not the former" and "is not linked 'intimately' with the merits such as to render its bifurcation 'impractical.'"[68] For the Respondent, no detailed examination of the evidence is required.[69]

52. Similarly, the Respondent submits, contrary to the Claimants, that its Inadmissibility objection is both serious and separate from the merits insofar as it only requires the resolution of a discrete point of international law, "which is whether the Tribunal can test 'the totality of the State's conduct vis-à-vis its treatment of the investment' against the standards of Article 10(1) of the ECT where the Claimants have elected to petition the Finnish courts for remedial action against the 2023 Confirmation Decision and those proceedings remain pending."[70]

53. The Respondent contends, moreover, that the Claimants have "distort[ed] Finland's objection, by arguing that the objection imposes a requirement of exhaustion of local remedies," which "[i]t does not."[71] The Respondent explains that the objection arises only because the Claimants decided to seek judicial review, and a final decision of the Finnish courts remains pending.[72] Having made that decision, the Claimants, according to the Respondent, "must now await the final decision of the Finnish courts, as also held by the … tribunal" in the *Alghanim* case.[73]

54. Finally, the Respondent reiterates that even if the Tribunal were to reject its Fork-in-the-Road and Inadmissibility Objections, "it would still be more efficient to defer any consideration of the merits until the conclusion of those Finnish court proceedings."[74] According to the Respondent, this "should cause no delay as Finland's preliminary objections warrant bifurcation in any event."[75]

B. The Claimants' Position

1. The Applicable Test for Bifurcation

55. The Claimants begin by arguing that bifurcation "is a procedural tool aimed at promoting the efficiency and fairness of arbitral proceedings."[76] They submit that "[u]nless bifurcation is likely

[67] Reply, paras. 58-65.

[68] Reply, para.69.

[69] Id.

[70] Req. Bif., para. 115; Reply, para 76.

[71] Reply, para. 71.

[72] Id.

[73] Id., ref.

[74] Req. Bif., para. 117; Reply, para. 77.

[75] Id.

[76] Answer, para. 4.

to reduce the time and cost of the proceedings as a whole, there is no basis to consider preliminary objections in a distinct phase" and that the Tribunal "should undertake a holistic and case-specific assessment of Finland's Request against that overarching standard."[77]

56. The Claimants agree with the Respondent that the Tribunal's "starting point" is Rule 44(2) of the Rules but emphasize, consistent with the above, that the "overarching factor" in Rule 44(2) that the Tribunal must consider is the issue, as set forth in Rule 44(2)(a), of whether "bifurcation would materially reduce the time and cost of the proceeding."[78]

57. In this regard, the Claimants also agree with the Respondent that, "as a threshold matter the Tribunal should consider on a *prima facie* basis the seriousness and substantiality" of the Respondent's preliminary objections.[79] However, for the Claimants, unlike the Respondent, the Tribunal's *prima facie* analysis of the "seriousness and substantiality" of an objection should take account of "settled authority" on the basis of which an objection "is less likely to succeed" and "therefore unlikely to result in efficiency gains by being heard in a separate phase."[80] The Claimants, thus, submit that "[u]nmeritorious objections or objections that are likely to fail do not justify the substantial risk of delay, increase in costs and prejudice which would be caused if the bifurcated objections are subsequently dismissed, and the ensuing merits phase is significantly delayed."[81]

58. While, as already indicated, the Respondent criticizes the Claimants for inviting the Tribunal to consider the likelihood of success of the Respondent's preliminary objections and contends that the Claimants effectively require the Tribunal to prejudge those objections, the Claimants deny that they are asking the Tribunal to prejudge either side's case.[82] Rather, they argue that what the Tribunal must do is determine whether the Respondent "has demonstrated that … [its] objection[s] … [are] sufficiently serious and substantial so as to justify the real risk that the bifurcated phase may simply result in significant additional expense and added time."[83] For the Claimants, "Finland is wrong to suggest that the test for bifurcation is 'merely' the demonstration … [that a preliminary objection has] factual and legal support."[84] In the view of the Claimants, that does not suffice for the purpose of determining, on a *prima facie* basis, whether the objections are serious and substantial enough to warrant bifurcation.

59. In the view of the Claimants, "Finland trivialises the potential consequences of bifurcation, asserting that the mere 'possibility' of success 'will outweigh any risk of inefficiency,'" although, for the Claimants, "that is not the correct standard to be applied by the Tribunal."[85]According to the Claimants, the Tribunal is required by Rule 44 to "consider all relevant circumstances and determine whether bifurcation is more likely to increase or to decrease, the time and costs [of the proceeding]."[86]

[77] Id.

[78] Answer, para. 6.

[79] Answer, para. 7.

[80] Answer, para. 8.

[81] Id.

[82] Rej. Bif., para. 7.

[83] Rej. Bif., paras. 8.

[84] Id.

[85] Answer, para. 10.

[86] Answer, para. 10.

60. The Claimants place particular emphasis on the "significant and costly delay in an unsuccessful bifurcation scenario" and argue that the Respondent wrongly underestimates the delay that would inevitably result from an unsuccessful bifurcated phase.[87] While, as noted above, the Respondent argues that an unsuccessful bifurcated scenario would add "a little over a year" to the procedural timetable, the Claimants contend that, based on a comparison of the likely dates by which the Tribunal would issue its rulings, it is more likely an award in the unsuccessful bifurcated scenario "would not be rendered until sometime in December 2029, compared to May 2028 in a no-bifurcation scenario," i.e., a delay of 1.5 years or more.[88]

61. For the Claimants, "the risk of approximately a 1.5 to 2-year delay to the proceedings cannot be justified." [89]

2. Application of the Test

62. The Claimants argue in summary as follows with respect to each of the Respondent's preliminary objections:

a. *Denial of Benefits Objection*

63. The Claimants argue first that this objection "falls at the first hurdle: it cannot result in the disposal of the case or substantially reduce its complexity or scope."[90] While the Claimants accept that, if successful, the objection would eliminate the claims of SPN and Supernova, they argue that a "full merits stage … [would] necessarily follow for AMF."[91] They argue further that reducing the number of Claimants and amount of damages claimed would not result "in any material efficiency gains" because the scope and complexity of the case would remain unaffected.[92] According to the Claimants, "all of the major issues set out in the Claimants' Memorial would still need to be fully briefed by the parties and decided by the Tribunal."[93] Moreover, the scope and complexity of the damages assessment would not be reduced.[94] The Claimants add that, even if that were not the case, "this would not be enough to justify bifurcation under Rule 44(2)(b) which requires disposal of 'a substantial portion of the dispute', not simply a reduction in the value of damages claimed."[95] In the view of the Claimants, any minor procedural savings from reducing the number of claims would be far outweighed by the "significant additional time and cost of having to conduct the arbitration in two separate phases."[96]

64. The Claimants next argue that the objection is neither serious nor substantial.[97] In support of this submission, the Claimants note that "[t]he vast majority of ECT tribunals have consistently found that a State cannot validly exercise … a choice [to deny benefits under Article 17(2) of the ECT]

[87] Rej. Bif., paras. 14-17.

[88] Rej. Bif., para. 16.

[89] Rej. Bif., para. 17.

[90] Answer, para. 23.

[91] Id.

[92] Answer, paras. 24-25.

[93] Rej. Bif., para. 20, referring to Answer, para. 26.

[94] Rej. Bif., para. 23.

[95] Id.

[96] Answer, paras. 14, 23-25, 27.

[97] Answer, para. 30.

once a dispute has already arisen (which is … what … Finland has attempted to do in this case)."[98] As already indicated, the Claimants consider, contrary to the Respondent, that, "it is part of the analysis that the Tribunal must undertake to determine if the objection is serious and substantial," it is appropriate for the Tribunal to "consider the long line of cases which show that Article 17 [of the ECT] cannot be applied in the circumstances of this case."[99]

65. Finally, the Claimants contend that the Respondent "is wrong to assert that the denial of benefits objection can be determined 'based on a limited set of documents and representations'" concerning the Claimants' ownership, control and business activities.[100] For the Claimants, the "factual questions of ownership, control and substantial business activities will not be 'limited', but rather they are intertwined with the evidence the Tribunal will need to review in respect of the merits."[101] The Claimants assert that "both the denial of benefits objection and the case on the merits will require the Tribunal to consider … evidence on: (i) the Claimants' investment structure; (ii) the form of the investment; (iii) its nature and purpose; (iv) the Claimants' due diligence; and (v) the day-to-day operations of the Claimants since the investment was made.[102]

66. For all of the above reasons, the Claimants consider that bifurcation on the basis of this objection is not warranted.

b. *Intra-EU Objection*

67. As in the case of the denial of benefits objection, the Claimants argue that "the overwhelming weight of authority goes against Finland, making the objection unsuitable for bifurcation."[103] The Claimants note: "The very same EU law arguments raised by Finland have already been considered and dismissed by no less than 116 arbitral tribunals and ICSID *ad hoc* committees, including at least 63 ECT tribunals."[104] According to the Claimants, the decisions of these tribunals establish a *'jurisprudence constante,"* which should be respected, save only where there may be "compelling contrary grounds" or "a strong reason to distinguish the current case from previous ones."[105] The Claimants add that "[u]nsurprisingly therefore, tribunals hardly ever bifurcate ECT cases based on the intra-EU issue" and that "bifurcation of this issue has been rejected by at least 14 ECT tribunals."[106]

68. The Claimants submit that "Finland does not even attempt to set out any reasons which would justify a departure from the *jurisprudence constante*."[107] While, as noted above, the Respondent has contended that the arguments that it will be making "cannot be considered as the very same as in the awards listed by the Claimants," and it has noted that a "considerable portion" of those awards pre-date *Komstroy* and the 26 June 2024 *inter se* agreement of EU Member States, the Claimants respond that there have been "numerous decisions [rejecting the intra-EU objection]

[98] Answer, para. 31.

[99] Rej. Bif., para 27.

[100] Rej. Bif., para. 30.

[101] Rej. Bif., para. 31.

[102] Id.

[103] Answer, para. 38.

[104] Rej. Bif., para. 33.

[105] Id.

[106] Answer, para. 40.

[107] Rej. Bif., para. 34.

which post-date *Komstroy* and the [EU Member State agreement (and the accompanying declaration)]."[108] They add that neither *Komstroy* nor the 2024 EU Member State agreement and declaration add anything "new or novel," in any event: to the contrary, they merely "repeat the same position that the EU and numerous EU Member States have taken for more than 10 years."[109]

69. The Claimants submit further that while the Respondent "asserts that its intra-EU argument is novel because it is purportedly founded on public international law principles relating to treaty conflict rather than 'an exclusive focus on the internal EU law rule of primacy," this is wrong.[110] Rather, the Claimants observe that the Respondent has thus far devoted "a significant part of its arguments" to the EU primacy principle, which, according to the Claimants has "consistently and repeatedly been rejected by every single ICSID ECT tribunal that has ever considered it."[111] They add that "if Finland's arguments were truly based on public international law principles of treaty conflict … they would also not be novel" as they, to the contrary, have repeatedly been invoked and rejected by ECT tribunals.[112] In addition, the Claimants do not consider that the [redacted] also relies say anything "new or novel that would justify departure from the *jurisprudence constante* and therefore warrant bifurcation of the intra-EU objection."[113]

70. In the view of the Claimants, bifurcating the intra-EU objection would, in these circumstances, be "highly likely to prolong the proceedings and significantly increase their cost."[114]

71. The Claimants argue further that this objection is, in any event, unsuitable for bifurcation as the Respondent has "put[] the merits of the dispute right at the centre of its objection."[115] The Claimants contend that the Respondent has done so by asserting that the Claimants' claim will require the Tribunal "to wade into matters of EU law" that are allegedly reserved for the CJEU.[116] It is the Claimants' position that the Tribunal will not be "called upon to decide any issue of EU law which would allegedly deprive the Tribunal of jurisdiction," but that the Tribunal would need to deal with the merits of the case in order to determine whether EU law is engaged, thus leading to wasteful duplication of work and a risk of the Tribunal prejudging the merits.[117]

c. *Parallel Proceedings Objections (Fork-in-the-Road and Inadmissibility)*

72. For the Claimants, neither of the Respondent's objections relating to Caruna's claims in the Finnish Market Court warrant bifurcation.

[108] Rej. Bif., para. 37.

[109] Id.

[110] Rej. Bif., para. 38.

[111] Id.

[112] Rej. Bif., para. 39.

[113] Rej. Bif., para. 37.

[114] Answer, paras. 40-42.

[115] Answer, para. 43.

[116] Answer, para. 44.

[117] Answer, paras. 45-48.

73. The Claimants argue, first of all, that "with over 16 decisions rendered on the issue … no ECT tribunal has ever upheld … [a fork-in-the-road] objection."[118]

74. The Claimants add that a fork-in-the-road provision can only validly be triggered by the satisfaction of a "triple identity test," which requires an identity of object, parties and cause, and submit that that test is not satisfied here.[119] Rather, the Claimants submit, "Finland makes unsubstantiated assertions which rely on collapsing the separate corporate personalities of different legal entities" in support of its objection.[120] In particular, the Claimants note that the Respondent relies on a "novel privies" argument, which could only succeed if the Tribunal, without any factual or legal basis, were to pierce the corporate veil of Caruna.[121] Moreover, the Claimants deny that the claims brought by Caruna for violations of Finnish administrative law "can be elevated and transposed into the 'same dispute' as the claims brought by the Claimants" in this proceeding for breach of the ECT.[122] According to the Claimants, the only decision cited by the Respondent "supports the opposite conclusion."[123]

75. The Claimants argue further that the Respondent has offered no legal basis for its objection and that, in these circumstances, the Tribunal should not "'roll the dice' to bifurcate an objection that is neither serious nor substantial."[124]

76. In the Claimants' view, the Respondent's fork-in-the-road objection also "cannot be resolved without engaging with the merits of the Claimants' case in a significant manner," which weighs heavily against bifurcation.[125] This is because, according to the Claimants, the Tribunal would be required, for the purpose of deciding upon the objection, to "investigate the scope of the Claimants' claims for breach of the ECT and to determine the degree of overlap with, or independence from, the claims commenced by Caruna in the Market Court."[126] The Claimants argue that this, in turn, would require the Tribunal "to engage in a full review of the same or substantially the same facts, legal arguments and evidence which it will need to consider in the merits stage of the case."[127]

77. The Claimants reject the Respondent's contention that the Tribunal "would only need to do a 'simple comparison of points of facts' to determine the fork-in-the-road objection."[128] According to the Claimants, "bifurcation of this objection presents a serious challenge to the Tribunal as it cannot address the alleged overlap between the two cases on [a] preliminary basis" without "risk[ing] an overly simplified and premature review of the Claimants' case, posing a significant

[118] Answer, para. 50.

[119] Answer, para. 51.

[120] Id.

[121] Answer, para. 52.

[122] Rej. Bif., para. 50.

[123] Id., referring to RL-044.

[124] Rej. Bif., paras. 52-54.

[125] Rej. Bif., para. 55; Answer, paras. 53-56.

[126] Answer, para. 53.

[127] Answer, para. 54.

[128] Rej. Bif., para. 59.

risk to due process and procedural fairness."[129] The Claimants therefore consider that the objection cannot be decided without "a review of the Claimants' evidence on the merits."[130]

78. For the Claimants, the Respondent's inadmissibility objection is equally unsuitable for bifurcation, firstly because it lacks any legal basis and secondly, because it is intertwined with the merits for the same reasons as the fork-in-the-road objection.[131]

79. With respect to the first of these two points, the Claimants submit that the Respondent's reliance on the award of the tribunal in the *Alghanim* case is misguided.[132] According to the Claimants, the tribunal in that case "made a different finding – that it would be inappropriate to exclude domestic court decisions that had already been rendered from an assessment of whether taxes imposed by Jordanian authorities were arbitrary."[133] It does not follow, in the Claimants' view, that a pending arbitration should not be permitted to proceed until the treatment of an investment by "'all organs' of the State" is known, as contended by the Respondent here.[134] The Claimants submit: "[o]n Finland's case, an investment arbitration would never be ripe simply because circumstances may change in the future."[135]

80. The Claimants add that the Respondent is effectively arguing that the Claimants' subsidiaries must exhaust their local remedies before the arbitration can proceed, "a question that has long been settled in the Claimants' favour."[136]

81. In the Claimants' view, the Respondent's "election" argument is no more serious and is "simply a retread of its fork-in-the-road objection which would require the Tribunal to look at the triple identity test which Finland accepts it cannot meet."[137]

82. As already stated, the Claimants consider that this would also require the Tribunal to review the merits in the same manner as the fork-in-the-road objection.[138]

83. Lastly, the Claimants reject the Respondent's suggestion that, pending the Market Court proceedings, the arbitration is suitable for bifurcation on "case management grounds."[139] The Claimants submit that "there is no authority for bifurcating a case to accommodate pending domestic proceedings," and the Respondent's argument does not support bifurcation.[140] The Claimants conclude that if the Respondent "wishes to apply … for a stay of these proceedings, it is open to do so and the Claimants will respond to any such application.[141]

[129] Id.

[130] Id.

[131] Answer, paras. 57-58.

[132] Id.

[133] Answer, para. 58(a).

[134] Answer, para. 58(b).

[135] Id.

[136] Answer, para. 58(a).

[137] Rej. Bif., para. 63.

[138] Answer, para. 58(c).

[139] Answer, paras. 59-60.

[140] Answer, para. 60.

[141] Id.

IV. THE TRIBUNAL'S ANALYSIS

84. It is common ground that, in deciding upon the Respondent's application, the Tribunal is to be guided by Rule 44(2) of the Rules, which, as already stated (para. 6 above), provides that:

> *In determining whether to bifurcate [in respect of a preliminary objection], 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.*

85. It is uncontroversial that the above provision confers broad discretion upon the Tribunal to decide whether or not to bifurcate the proceedings when a preliminary objection has been advanced, without creating a presumption for or against bifurcation.

86. While the Tribunal is directed to "consider all relevant circumstances," three in particular are specifically identified, with the "material[] reduc[tion of] the time and cost of the proceeding" being identified first in subparagraph (a).

87. The Tribunal agrees with the Claimants (and the Respondent does not appear to disagree) that the second and third "circumstances" identified in subparagraphs (b) and (c) of Rule 44(2) derive from the first insofar as the "time and cost" of a proceeding would be unlikely to be "materially reduce[d]" if (i) the determination of the preliminary objection would not "dispose of all or a substantial portion of the dispute" or (ii) the "preliminary objections and the merits are so intertwined as to make bifurcation impractical."[142]

88. It therefore seems clear, as both Parties accept (see paras. 28 and 56 above), that the "overarching consideration" that should guide a Tribunal under Rule 44(2) when deciding whether or not to bifurcate an arbitration in respect of a preliminary objection is whether bifurcation would "materially reduce the time and cost of the proceeding."

89. This being said, whether bifurcation "would materially reduce the cost and time of the proceeding" or whether it would, to the contrary, increase their cost and time (and possibly quite substantially) is a matter that, by its very nature can be difficult, if not impossible, to determine without knowing whether the preliminary objection being advanced will succeed. In reality, all that it is often possible for a Tribunal to do, without engaging with the merits of the objection, is to decide what appears to be most fair and efficient, taking account, as Rule 44(2) directs it to do, of all of the "circumstances" that it considers to be "relevant."

90. As noted by the ICSID tribunal in its bifurcation decision in the case of *Canepa Green Energy Opportunities I and II v. Spain* (to which both Parties have referred): "The analysis of a bifurcation request is rarely blessed with absolute certainty as to whether bifurcation would be procedurally fair and efficient."[143] The tribunal added: "[t]he [t]ribunal is principally weighing the fairness to the Claimants in not unnecessarily prolonging the proceedings (with the attendant costs) as against

[142] Answer, para.6.

[143] *Canepa Green Energy Opportunities I, S.à r.l. and Canepa Green Energy Opportunities II, S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/19/4), Procedural Order No. 3 (CL-075), para. 68.

the efficiencies that might be gained by disposing of all or large parts of the case at a preliminary stage."[144]

91. In the present case, the Tribunal has three preliminary objections before it. In the event that they are all ultimately rejected, the time and cost of the proceedings will increase substantially if the proceedings are bifurcated. The Claimants have speculated that bifurcation could in that scenario cause a 1.5 to 2-year delay to the proceedings, with a final award unlikely to be rendered before December 2029 (i.e., more than four years from now) compared to May 2028 in a no bifurcation scenario.[145] The Tribunal agrees that a delay of that magnitude, with the attendant additional costs, in that scenario is a reasonable expectation.

92. In considering each of the Respondent's preliminary objections, the Tribunal is, thus, ultimately required to decide whether the possible savings in time and cost that would or could be derived from deciding them in a preliminary phase of the arbitration are such as to justify the risk of the substantial additional time and cost that would be incurred if the arbitration were to continue to a merits phase.

93. In the case of the first of the Respondent's preliminary objections (denial of benefits), considered alone, the Tribunal is not persuaded that there would be savings of time and cost that would be sufficient to justify the additional time and costs that would be likely to be incurred even if the preliminary objection were successful. It is common ground that, as the objection only concerns the claims of SPN and Supernova but not AMF, the preliminary objection, if upheld, would not dispose of all of the dispute. While the Parties disagree concerning how "substantial[ly]" the dispute might be reduced, it is undisputed that AMF's claim of [redacted] (which is not an insignificant sum) would not be affected, and the Respondent has failed to establish that the factual and legal issues and evidence to be considered would be so substantially reduced as to warrant bifurcating the proceeding.

94. In the case of the third of the Respondent's preliminary objections (parallel proceedings), the Tribunal is also not persuaded that bifurcation is warranted. As discussed above, the objection has been advanced on two alternative bases: fork-in-the-road and inadmissibility. In addition, the Respondent has argued that consideration of the merits of the Claimants' claims should be deferred, in any event, in the interest of "efficient" case management, pending the conclusion of the Finnish court proceedings involving Caruna (para. 54 above). The Tribunal does not consider here whether a stay of the arbitration would be appropriate pending the conclusion of the Finnish court proceedings but only the question, which is presently before it, of whether it is appropriate to bifurcate the arbitration in order to permit the early consideration of the Respondent's fork-in-the-road objection or alternatively its inadmissibility objection.

95. With respect to those objections, the Tribunal agrees with the Claimants that in order for the Tribunal to rule upon them it would be required to investigate, *inter alia*, the scope of the Claimants' claims for breach of the ECT in this arbitration and to determine the degree of overlap with, or independence from, the claims commenced by Caruna before the Finnish Market Court under Finnish administrative law.

96. While the Respondent disputes the extent of the review of the claims that would be required, in the case of its fork-in-the-road objection it does not disagree that its objection overlaps with the merits.[146] The Tribunal does not consider that the Respondent has established that the Tribunal

[144] Id.

[145] Rej. Bif., paras. 16-17.

[146] See, e.g., Reply, para. 69.

could address the objection satisfactorily without being required to engage with the merits in a manner that would be inappropriate for the purpose of addressing a preliminary objection without prejudice to the Tribunal's subsequent possible determination of merits issues.

97. While the Respondent contends that its alternative inadmissibility objection would not, unlike its fork-in-the road objection, require the Tribunal to engage with the merits,[147] the Tribunal agrees with the Claimants that, in advancing its objection on the basis that the Claimants decided "to submit the 2023 Confirmation Decision [of the Finnish Energy Authority] for judicial review by the Finnish courts … and seek the same restitutionary relief that they seek from this Tribunal,"[148] the merits are necessarily engaged. Independently of that, however, the Tribunal considers, based solely on the submissions, that the Respondent's objection might be more concerned with a problem of coordination between two different tribunals than a basis for the outright dismissal of the claims due to their inadmissibility. Accordingly, the Tribunal is not persuaded that bifurcation of the arbitration is justified.

98. The Tribunal is, thus, left to consider the second of the Respondent's preliminary objections (the intra-EU objection).

99. As to this, it is not contested that, if upheld, the objection would dispose of the entirety of the dispute. The Tribunal also accepts, notwithstanding the Claimants' arguments to the contrary, that the Respondent's objection raises discrete questions of public international law regarding conflicts of treaties that are separate from, and do not require the Tribunal to engage with, the merits of the dispute.

100. The Tribunal further agrees that, as contended by the Respondent, the objection is a "serious" and "substantial" one in the sense that, as argued by the Respondent and based on a *prima facie* review, it is not "manifestly without merit" and appears to be "arguable and advanced in good faith."[149] In arriving at this view, the Tribunal accepts that the issue that is the subject of this objection (i.e., whether Article 26 of the ECT has been validly disapplied as between EU Member States) has "been extensively considered and rejected by no less than 116 arbitral tribunals and ICSID *ad hoc* committees," as noted by the Claimants.[150] However, it is also true, as the Respondent notes, that "Finland has not previously had an opportunity to state its position on this question"[151] and that most (although not all) of the jurisprudence upon which the Claimants rely precedes, and therefore has not considered, the possible impact on the Respondent's objection of the 26 June 2024 declaration and agreement among EU Member States (see para. 17 above); [redacted]

101. The Tribunal has not formed a view, nor would it be appropriate for it to undertake to do so at this stage, as to whether the objection raised by the Respondent in the present proceedings, would, in view of recent developments or the arguments that the Respondent may develop, possibly or be likely to fare better than have similar objections raised by other EU Member States before the other arbitral tribunals and ICSID *ad hoc* committees to which the Claimants have referred. In these circumstances, the Tribunal accepts that the objection remains a "serious" one in the sense

[147] Reply, para. 76.

[148] Reply, para. 71.

[149] Req. Bif., para. 6.

[150] Answer, para. 38 and Annex 1.

[151] Req. Bif., para. 49.

indicated above, notwithstanding the considerable existing authority to which the Claimants have referred.

102. It does not, however, follow from this, in the Tribunal's view, that it would be appropriate to bifurcate the arbitration in this case.

103. The Respondent submits, based on the decisions of other ICSID tribunals that decided to bifurcate the proceedings in those cases,[152] that bifurcation is also warranted here because: "While the actual efficiency gain will ultimately depend on the outcome of the objections, the 'possibility' for procedural economy, coupled with the serious nature of the questions raised by an objection, will outweigh any risk of inefficiency should the preliminary objections subsequently be dismissed."[153] However, the Respondent at the same time appears to accept that, as noted by the tribunal in the *Apotex* case,[154] the Tribunal "must decide the Respondent's application in the particular circumstances of this case" and, accordingly, that "[i]t serves no purpose for this Tribunal to follow blindly what other [t]ribunals have or have not done in other circumstances [in respect of bifurcation]."[155]

104. In the present case, while the Tribunal, as noted, accepts that there is a possibility that the Respondent's intra-EU objection will succeed, there is also a possibility that it will not and that, if the proceedings are bifurcated, the time and cost of the proceeding will be substantially increased. The Tribunal is therefore required to weigh the relative advantages and disadvantages of bifurcating, taking account of all "relevant circumstances" in accordance with Rule 44(2). Where, as here, the Tribunal has not undertaken to determine the likelihood of success of the Respondent's objection, the Tribunal considers that it is appropriate for it, when weighing the risks of bifurcating or not bifurcating (and solely for that purpose), to take account as a "relevant circumstance" of the existence, which is not disputed, of a substantial body of jurisprudence that, as here, appears to disfavor the objection being made. The existence of that jurisprudence is a factor that, in the Tribunal's view, weighs against bifurcation in this case, particularly given the risk, in a bifurcation scenario, that the final resolution of this dispute could be so substantially delayed. The Tribunal refers to the existence of this jurisprudence as a factual matter; it has not assessed the persuasiveness of the substantive reasons given by these tribunals and it would not be appropriate at this stage to do so. Moreover, when the time does come to rule upon the intra-EU objection, it will be the persuasiveness of those substantive reasons, and not the frequency with which they have been repeated, that will be at the forefront of the Tribunal's assessment.

105. The Tribunal therefore considers, in the exercise of its discretion and taking account of the relevant circumstances, that it is preferable not to bifurcate the proceedings to permit the early consideration of the intra-EU objection.

[152] *Access Business Group LLC v. United Mexican States* (ICSID Case No. ARB/23/15), Procedural Order No. 3, dated 29 August 2024, RL-002, para. 45, and *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/63), Procedural Order No. 2, dated 13 April 2023, RL-054, para. 35.

[153] Req. Bif., para. 8.

[154] *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Procedural Order Deciding Bifurcation and Non-Bifurcation, dated 25 January 2013, CL-064, para. 10.

[155] Reply, paras. 10-11.

V. DECISION

106. For the foregoing reasons, the Respondent's request for bifurcation is dismissed and the arbitration shall proceed in accordance with the Scenario 1 timetable set forth in the Schedule at Annex B of Procedural Order No. 1 dated 16 April 2025.

107. The Tribunal reserves its decision concerning the costs incurred in respect of the bifurcation request for its Final Award.

On behalf of the Tribunal,

[signed]

Eric Schwartz
President of the Tribunal
Date: 8 August 2025