

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Marvo Gavazzi and Stefano Gavazzi v. Romania
(ICSID Case No. ARB/12/25)

PROCEDURAL ORDER NO 2

Prof. Hans van Houtte, President of the Tribunal
Mr. V. V. Veeder, Arbitrator
Mr. Mauro Rubino-Sammartano, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

September 13, 2013

I. Background

1. The Tribunal's Procedural Order No. 1 foresaw that, in an initial phase of the proceeding, the Respondent would file its objections to jurisdiction and admissibility and any counter-claim (13.1.3 of the Order), and that the parties would file submissions on whether or not any possible objections to jurisdiction and admissibility should be bifurcated from the merits of the case (13.1.4 of the Order). Procedural Order No. 1 further anticipated that, if the parties did not agree on bifurcation, the Tribunal would, following a telephone conference with the parties, decide the matter. Depending on the Tribunal's decision, either of two separate scenarios of pleading schedules would ensue (13.1.6-9 of the Order).
2. Pursuant to the procedural calendar, on July 15, 2013, the Respondent filed Preliminary Objections, a Counter-Memorial and a Counterclaim. The Respondent's Preliminary Objections consisted of objections to ICSID jurisdiction and a defense of time-bar under the substantive applicable law.
3. On July 31, 2013, the Claimants filed a Reply Memorial on Respondent's Objections to Jurisdiction and on the Admissibility of the Counterclaim. While the Claimants objected to the jurisdiction and admissibility of the Counterclaim, they requested that all objections to jurisdiction and admissibility raised by the parties be joined to the merits of the case and that the Tribunal adopt Scenario B at paragraph 13.3 of Procedural Order No. 1.
4. On August 23, 2013, the Respondent filed its Submission on Bifurcation of the Proceedings, requesting that the Tribunal order the bifurcation of the proceedings and the adoption of Scenario A at paragraph 13.2 of Procedural Order No. 1. It also requested the suspension of the proceeding on the merits, pending the resolution of its preliminary objections.
5. On September 9, 2013, the Tribunal held a telephone conference with the parties concerning the possible bifurcation of the proceeding, during which the parties confirmed their positions. The Tribunal asked the parties for their views on a third option which in its view would constitute a compromise solution. As an alternative to a bifurcation of the Respondent's preliminary objections and the Claimants' objections to the admissibility and jurisdiction of the Counterclaim from the merits of the case, the Tribunal presented a scenario in which the parties' preliminary

objections would be joined to issues of liability, bifurcated from issues of quantum (i.e. any matters relating to the compensation sought as a result of the Respondent's liability for the Claimants' claims and the Claimants' liability for the Respondent's counterclaim). The Tribunal further suggested that the schedule in Scenario B could in essence be adopted with the necessary amendments to exclude briefs on quantum. If the Tribunal were to dismiss the parties' objections as to jurisdiction/admissibility and find liability in regard to their respective claims or counterclaim, the Tribunal, in consultation with the parties, would decide upon a timetable for a quantum phase.

6. The Respondent's position on bifurcation can be summarized as follows: If the preliminary objections are *prima facie* grounded, they must be considered as preliminary matters, since a possible upholding of such objections would lead to the disposal of the case without entering into the merits. In this case, the four objections to jurisdiction and defense of time-bar must be found to be *prima facie* substantial and are strong arguments in favor of dismissal of the case. Therefore, reasons of procedural economy compel bifurcation of the jurisdictional and admissibility objections from the merits of the case. Each of the preliminary objections are distinct from the merits of the case and may be analyzed separately without prejudging in any manner the decision on the merits. A bifurcation of the proceedings would simplify the resolution of the jurisdictional and admissibility issues, giving the parties the opportunity to properly present their cases regarding preliminary matters. During the telephone conference, the Respondent stated that it could only accept Scenario A, recalling its arguments for a bifurcated proceeding confined to preliminary objections. It therefore did not approve the alternative scenario presented by the Tribunal.
7. The Claimants' position on bifurcation can be summarized as follows: The Respondent's preliminary objections are clearly *prima facie/ictu oculi* without basis if not frivolous. Consequently, procedural economy warrants that they be joined to the merits of the case. Bifurcation would unnecessarily extend the length of the proceedings. Although the Claimants have strong objections in regard to the admissibility and jurisdiction of the Respondent's Counterclaim, these objections may also be joined to the merits. The Claimants found the scenario presented by the Tribunal during the telephone conference acceptable.

II. Tribunal's Decision

8. Article 41(2) of the ICSID Convention provides as follows:

Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

9. The Parties do not disagree that the Tribunal has discretion to decide whether or not to bifurcate the proceedings.
10. The Tribunal has considered both parties' arguments for and against bifurcation, as well as their pleadings filed to date. In particular, the Tribunal notes the Respondent's remark at paragraph 22 of its Submission on Bifurcation that "*the determination of the issues raised on the merits, especially (but not only) of the issues related to the Quantum implies necessarily the production of expert evidence by both parties, thus in fact increasing both the duration and cost of the proceedings.*" The Tribunal also notes, as did the Respondent at paragraph 24 of its Submission on Bifurcation, that the difference in time between Scenario A and B is approximately two months.
11. It was in this light that the Tribunal presented its compromise solution during the telephone conference with the parties. It agrees with the Respondent that the preparation of submissions on quantum may be time consuming and costly, and that oral arguments and examination of experts may require a longer hearing. At the same time, the Tribunal is of the view that the preliminary objections are intertwined with issues of liability and would thus be greatly assisted by a joint proceeding on preliminary objections and liability. It notes in this respect that the parties have already filed a Memorial and Counter-Memorial on liability.
12. Considering the short delay of two months compared with the benefits of hearing the preliminary objections with the issues of liability, the Tribunal is of the view that procedural fairness and efficiency would be better served without bifurcation as between jurisdiction/admissibility and liability. Accordingly, the Tribunal decides to join the parties' preliminary objections to issues of liability, and to bifurcate issues of quantum to a further stage of the proceedings, if applicable. The proceeding on the merits is therefore not suspended under ICSID Arbitration Rule 41(3).

13. Having regard to the above, the Tribunal decides to adopt the following timetable:

- i. The Claimants shall file a Reply on Liability and a Counter-Memorial on Jurisdiction/Admissibility and the Counter-Claim by Friday, November 29, 2013;
- ii. The Respondent shall file a Rejoinder on Liability and a Reply on Jurisdiction/Admissibility and the Counter-Claim by March 31, 2014;
- iii. The Claimants shall file a Rejoinder on Jurisdiction/Admissibility and the Counter-Claim by Tuesday, April 30, 2014;
- iv. The Tribunal shall hold an organizational pre-hearing telephone conference on Monday, May 12, 2014 at 3 p.m., Brussels time, 2 p.m. London time, 4 p.m. Bucharest time; and
- v. A hearing on jurisdiction/admissibility and liability will be held in Paris the week of June 2, 2014 (while the whole week is reserved, the exact amount of days will be determined in due course).

On behalf of the Tribunal

[signed]

Prof. Hans van Houtte, President of the Tribunal