

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the arbitration proceeding between

MOL HUNGARIAN OIL AND GAS COMPANY PLC

Claimant

and

REPUBLIC OF CROATIA

Respondent

ICSID Case No. ARB/13/32

**DECISION ON RESPONDENT'S APPLICATION UNDER
ICSID ARBITRATION RULE 41(5)**

Members of the Tribunal

Sir Franklin Berman, President
Professor William W. Park, Arbitrator
Professor Brigitte Stern, Arbitrator

Assistant of the Tribunal

Dr. Peter Webster

Secretary of the Tribunal

Mr. James Claxton

Date: 2 December 2014

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I. Introduction

1. This is the Tribunal's Decision on an application under Arbitration Rule 41(5) lodged by the Republic of Croatia ("the Respondent") through which the Respondent seeks to have the Tribunal "[d]ismiss ... for lack of legal merit" the arbitration proceedings launched against it by MOL Hungarian Oil and Gas Company Plc ("the Claimant"), a juridical person organized under the laws of Hungary and engaged primarily in the exploration, production, refining, and marketing of hydrocarbons.
2. Were the Tribunal to uphold the Respondent's application, Rule 41(6) requires that that be done by an Award. As the Tribunal has however concluded that the application must be rejected, it will do so by way of the present Decision, for the reasons set out below which, in the circumstances, can be relatively brief.

A. Registration of the Request

3. The Claimant's request for arbitration (the "Request") was filed with the Centre on 26 November 2013, citing as its basis the Energy Charter Treaty (the "ECT") of 17 December 1994, to which it is uncontested that both Croatia and Hungary are Parties, and was registered by the Secretary-General on 5 December 2013, as ICSID Case No. ARB/13/32.

B. Constitution of the Tribunal

4. The Parties reached agreement on a commonly used formula under which each would appoint its arbitrator within a given time, following which the two arbitrators so appointed would within 30 days, in consultation with the Parties, jointly select a third arbitrator to serve as President.
5. Pursuant to the above, on 6 January 2014, the Claimant appointed Professor William W. Park, a national of the United States of America and Switzerland, who accepted his appointment on 27 January 2014; on 3 February 2014, the Respondent appointed Professor Brigitte Stern, a national of France, who accepted her appointment on 5 February 2014; and on 1 April 2014, the two Party-appointed arbitrators appointed Sir Franklin Berman QC, a national of the United Kingdom, to be President of the Tribunal; Sir Franklin accepted his

appointment on 14 April 2014. The Tribunal was accordingly constituted on 14 April 2014, and pursuant to Article 37(2)(a) the proceedings commenced on that day.

6. On 14 April 2014, the Secretary General informed the Parties that Mr. James Claxton would serve as Secretary of the Tribunal. It was agreed by the Parties, on the proposal of the President, that Dr. Peter Webster would act as Assistant to the Tribunal.

C. Written and Oral Proceedings

7. On 12 May 2014, the Respondent filed preliminary objections under Arbitration Rule 41(5) and a request, in the alternative, that the Tribunal should stay the proceedings in the arbitration as a provisional measure under Arbitration Rule 39. The basis for these applications (together, “the Respondent’s Rule 41(5) application”) is set out below.
8. On 20 May 2014, the Claimant filed an amended version of the Request for Arbitration, and within the days that followed each Party made proposals for the scheduling of further filings by the Parties on the Respondent’s Rule 41(5) application, including a request on the part of the Claimant for an oral hearing.
9. The scheduling problems created by the expectations inherent in Rule 41(5) as drafted are by now well-known and documented.¹ They were further exacerbated in the present case by the amendment of the Request for Arbitration as indicated in paragraph 8 above and by the existing commitments of all three Members of the Tribunal. It was accordingly agreed that the statutory first session of the Tribunal would be held by telephone conference within the time limit laid down in Rule 13(1), and that that occasion would be used to reach an agreement on scheduling for the purposes of Rule 41(5). The session was held on 28 May 2014, and the outcome is recorded in Procedural Order No. 1 issued on 9 June 2014.
10. During the first session, both Parties confirmed that the Tribunal was properly constituted and that they had no objection at that time to any of its members serving as arbitrator, and this was reconfirmed on behalf of each Party at the oral hearing described below.
11. Pursuant to Procedural Order No. 1, the Respondent duly filed a supplemental preliminary objection on 16 June 2014 (“R Preliminary Objections”), the Claimant its observations on

¹ See, for example, the Award in *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine* (ICSID Case No. ARB/09/11).

14 July 2014 (“C Observations”), the Respondent its reply on 6 August (“R Reply”), the Claimant its rejoinder on 29 August 2014 (“C Rejoinder”), and an oral hearing took place at the World Bank headquarters in Washington, D.C. on 11 September 2014, at which the Parties were represented by the following:

i) Claimant:

- Mr. Arif H. Ali, Weil, Gotshal & Manges LLP
- Mr. Alexandre de Gramont, Weil, Gotshal & Manges LLP
- Mr. Theodore R. Posner, Weil, Gotshal & Manges LLP
- Ms. Samaa Haridi, Weil, Gotshal & Manges LLP
- Ms. Marguerite C. Walter, Weil, Gotshal & Manges LLP
- Mr. Daniel Dózsa, Weil, Gotshal & Manges LLP
- Mr. Nathaniel Morales, Weil, Gotshal & Manges LLP
- Mr. Ricardo Ampudia, Weil, Gotshal and Manges LLP
- Dr. Pál Kara, General Counsel, MOL Hungarian Oil and Gas Company Plc

ii) Respondent:

- Mr. Read K. McCaffrey, Squire Patton Boggs LLP
- Mr. Stephen P. Anway, Squire Patton Boggs LLP
- Mr. Rostislav Pekař, Squire Patton Boggs LLP
- Ms. Kristen M. Jarvis Johnson, Squire Patton Boggs LLP
- Mr. Craig D. Gaver, Squire Patton Boggs LLP
- Mr. Luka S. Mišetić, Law Offices of Luka S. Mišetić
- Ms. Sabina Škrtić, Assistant Minister of the Economy, Republic of Croatia
- Mr. Predrag Bogičević, Cabinet Secretary, Ministry of Economy, Republic of Croatia.

12. The Tribunal expresses its gratitude to the Parties for their willing cooperation, both with each other and with the Tribunal itself, which has accordingly made it possible to achieve within a matter of four months two rounds of full written submissions and two rounds of oral argument on the Respondent’s Rule 41(5) application, as well as written answers to questions posed by the Tribunal.

D. MOL's Claims

13. Before considering the Respondent's Preliminary Objections and application for a stay, which together constitute the Rule 41(5) application, the Tribunal will summarize the Claimant's claims and the key facts which the Claimant alleges as the basis of those claims. Some of the facts (in particular, the circumstances in which certain agreements came to be entered into and manner in which Croatia conducted a criminal investigation into the conclusion of those agreements), are hotly disputed: this is a matter to which the Tribunal will revert below.
14. Industrija Nafta dd ("INA") is by common consent Croatia's most significant enterprise in the field of energy, with a strong regional position in oil and gas exploration, production, processing, and distribution. The Claimant says that in 2003, following a decision by the Croatian government and parliament to privatise INA, the Claimant acquired a 25% stake + 1 share in the company against payment in cash of USD 505 million, while the Government remained the major shareholder. As part of the arrangement, the Claimant and the Government (the Respondent in these proceedings) entered into a Shareholders' Agreement dated 17 July 2003 ("the Shareholders' Agreement") to demarcate the exercise of their shareholders' rights.
15. Between 2003 and 2007, the Respondent continued the process of privatising INA through reducing its own shareholding, which led in turn, in early 2008, to negotiation of a modification of the Shareholders' Agreement, as the basis (so the Tribunal understands it) for the Claimant to increase its stake in INA to 47.15% at a purchase price of approximately USD 1.1bn. The negotiations culminated in two agreements concluded on 30 January 2009 (the "2009 Agreements").
16. INA's gas business consisted of two parts: the gas storage business (which was lucrative) and the gas trading business (which was loss making). Under the 2009 Agreements, INA's gas business was to be 'unbundled' from INA and transferred to the Respondent (or an entity held by the Respondent), as follows:
 1. Under the Gas Master Agreement (the "GMA"), INA's gas storage and trading businesses were to be spun off into separate subsidiaries (hereafter referred to as the Gas Storage Company and the Gas Trading Company) and transferred to the Government

by specified dates in 2009. The GMA provided for INA to enter into a Long Term Gas Supply Agreement with the (by then unbundled) Gas Trading Company under which INA would sell domestically produced gas to the Gas Trading Company at a price hedged against the average gas sales price of INA during 2008. INA's expected losses under the Long Term Gas Supply Agreement were to be set off by a cap on the royalties payable by INA to the Government, which would gradually reduce over time.

2. Under the First Amendment to the Shareholders' Agreement ("the FASHA"), various changes were made to how INA was to be managed. In addition, the FASHA imposed controls on how MOL could deal with its shares in INA, which were subject to a five year 'lock-up'.
17. The circumstances in which the 2009 Agreements came about lie at the heart of the dispute between the Parties. The Respondent maintains that they were procured by MOL's CEO and Chairman Mr Zsolt Hernádi through bribery of Croatia's then Prime Minister, Mr Ivo Sanader. The Respondent relies on the fact that in November 2012 Mr Sanader was convicted in Croatian criminal proceedings for having accepted a 5m euro bribe from MOL in exchange for facilitating the GMA and the FASHA, and that the Supreme Court of Croatia dismissed Mr Sanader's appeal against that conviction on 3 April 2014. There is an indictment against Mr Hernádi as well, but the Respondent says that he has exerted himself to evade prosecution. The Claimant, on the other hand, emphasises that neither it nor Mr Hernádi have been convicted of any crime in relation to the GMA and the FASHA, and indeed relies upon the manner in which the criminal investigation has been conducted as one of its complaints of breach of the ECT; it says in fact that the criminal charges against Mr Hernádi are "baseless" and are being pursued in an effort by the Respondent to take control of INA.²
18. Following the 2009 Agreements, although the Respondent did acquire the spun-off Gas Storage Company, it did not acquire the Gas Trading Company, in breach (so the Claimant says) of the GMA. On 16 December 2009, the Parties entered into the First Amendment to the Gas Master Agreement ("the FAGMA") which, among other things, extended the time for the Respondent to acquire the Gas Trading Company until 1 December 2010 and made

² C Rejoinder para 48.

provision for royalty rates payable in respect of hydrocarbon exploitation fields until 2025. The Respondent did however still not acquire the Gas Trading Company and, so the Claimant maintains, breached various other provisions of the FAGMA as well. In 2011, the Respondent introduced regulatory caps on the price of gas marketed by INA to non-household consumers. The Claimant maintains that, in the face of these developments and the continued losses of the Gas Trading Company, it had to provide USD 460m additional financing in 2009–2011 in order to stave off INA’s bankruptcy.

19. The Claimant also alleges that the Respondent has undertaken a series of measures designed to damage and impair the Claimant’s investment in INA which can be summarised as follows:

1. When the Claimant sought to purchase additional INA shares in December 2010 on the Zagreb stock exchange, Croatian pension funds acted in concert to block the acquisition of more than 50% of INA’s shares. HANFA (the Croatian Financial Services Supervisory Authority) did not properly investigate the Claimant’s complaint of concerted action contrary to relevant Croatian legislation; indeed, it took action instead against the Claimant itself and some of its key executives. Administrative court claims in respect of HANFA’s action have not been responded to.
2. The Respondent has failed to grant or uphold licences and permits which are critical for the operation of INA, in breach of undertakings in the Shareholders’ Agreement.
3. The bribery allegations (see above) represented an illegal effort to harass and intimidate MOL into surrendering management control of INA. The Respondent has moreover initiated arbitration against the Claimant to invalidate the FASHA, GMA and FAGMA. This parallel arbitration (the “UNCITRAL Rules arbitration”) is of importance for some of the Respondent’s applications: it was commenced by the Respondent on 17 January 2014.³

20. It is further alleged that the Respondent has adopted a series of measures regarding the Croatian gas market which came into force on 1 April 2014, the nett effect of which is to require INA to supply gas at artificially depressed controlled prices and against higher

³ Request para 39.

hydrocarbon royalties, and at the same time require the Gas Trading Company to sell gas which it had in storage with the Gas Storage Company at short notice and at a large loss, while continuing to evade the Respondent's own obligation under the GMA and FAGMA to acquire the Gas Trading Company, INA's loss making subsidiary.

21. The Claimant claims that these actions are in breach of the various guarantees laid down in Article 10(1) of the ECT, including in particular the requirement under the final sentence of Article 10(1) to observe any obligations Croatia has entered into with an Investor or an Investment of an Investor (the "Umbrella Clause"); and are likewise in breach of the protections against expropriation in Article 13 of the ECT.

II. The Respondent's Rule 41(5) Application

A. Introduction

22. The Respondent's Rule 41(5) application was filed on 12 May 2014 and in an amended version on 20 May 2014 (paragraphs 7 & 8 above). During the subsequent written and oral submissions, the Respondent's objections focused themselves into the following:
 1. that, because Hungary is one of the Contracting Parties listed in Annex IA to the ECT, the Claimant, as a Hungarian investor, is disabled from invoking the "umbrella clause" in Article 10(1) ECT;
 2. that the forum selection clauses in the Shareholders' Agreement, the FASHA and the GMA mean that the Tribunal does not have jurisdiction over any claims arising out of, in relation to or in connection with those agreements; or, alternatively, that the Claimant is at least precluded from advancing its "umbrella clause" claim before this Tribunal;
 3. and that therefore in each case the Claimant's claims are manifestly without legal merit;
 4. that the following are equally manifestly without legal merit:
 - (a) the claim that the UNCITRAL proceedings are being brought in bad faith;
 - (b) the claims regarding Croatia's prosecution of Mr Hernádi;
 5. that all of the above claims should therefore be dismissed by the Tribunal in limine under Rule 41(6).

23. In the alternative, the Respondent seeks a stay of these proceedings as a provisional measure under ICSID Rule 39(1), pending (i) the resolution of the UNCITRAL arbitration and (ii) the completion of the criminal prosecutions in the Croatian courts.
24. The Tribunal accordingly turns, first, to the applicable standard under Rules 41(5) and 41(6), and then to the substantive merits of the Respondent’s application measured against that standard. In the light of its conclusions on the above, the Tribunal will then consider the Respondent’s alternative claim for a stay.

The applicable standard under Rule 41(5)

25. The Parties are agreed that the standard to be applied by the Tribunal when determining the Rule 41(5) Objection is a high one.⁴ Each referred to the decision of the tribunal in *Trans-Global Petrol v Hashemite Kingdom of Jordan*⁵ in which the Tribunal stated:

The Tribunal considers that these legal materials confirm that the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but it should never be difficult.

26. Earlier in the Tribunal’s Award in *Trans-Global*, it analysed how “manifest” had been interpreted in other contexts in the ICSID Rules, and distinguished between matters which are “clear” and “certain” on the one hand (which would be “manifest”) and those which are “susceptible to argument one way or the other” or where it is “necessary to engage in elaborate analyses” (which would not be).⁶
27. As noted above, each Party was allowed two rounds of written submissions in respect of the Respondent’s applications. These were developed orally at the hearing. The submissions

⁴ R Preliminary Objection paras 2.4 – 2.5; C Observations paras 24 – 25. At R Preliminary Objection, para 2.4, the Respondent states that it must show that the claim is “patently unmeritorious as a matter of law”.

⁵ ICSID Case No ARB/07/25, para 88. That was quoted with approval in *Global Trading Resource Corp & Globex International v Ukraine* (ICSID Case No ARB/09/11) para 35 and *Brandes Investment Partners LP v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) para 63.

⁶ ICSID Case No ARB/07/25, para 84.

were detailed and presented with great care. The summary which follows is not intended to repeat or deal with every point raised, but to capture the essence of the arguments presented. The Tribunal has, however, carefully considered all of the Parties' submissions and taken them into account in reaching its decision.

B. Because it is a Hungarian Investor, the Claimant's Umbrella Clause claim is manifestly without legal merit under Annex IA to the ECT

28. MOL is incorporated in Hungary, which is one of the states listed in Annex IA to the ECT. Article 26(3) ECT provides as follows:

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration ... in accordance with the provisions of this Article.

...

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).⁷

1. The Respondent's Argument

29. The Respondent submits that the effect of Annex IA is that, the States listed not having consented to arbitrating claims against themselves under the umbrella clause, their investors are likewise not in a position to bring to arbitration claims against other States Parties under that Clause.⁸ It submits that this follows from the text of the ECT and from an application of the principle of reciprocity, and that any other result would be inequitable.

30. The Respondent relies principally on the following:

1. Annex IA is headed "List of Contracting Parties not allowing an Investor or Contracting Party to Submit a Dispute Concerning the Last Sentence of Article 10(1) to International Arbitration ..."⁹

⁷ i.e. the "umbrella clause": "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

⁸ R Preliminary Objection, paras 3.3 – 3.13; R Reply, paras 38 – 62.

⁹ R Preliminary Objection, para 3.7.

2. An OECD paper on “Interpretation of the Umbrella Clause in Investment Agreements” states that the derogation “allows the contracting parties to opt out of the final sentence of Article 10(1) by not permitting “their investors” to submit a dispute concerning this provision to international arbitration” (emphasis added).¹⁰
3. Hungary has relied upon the provisions as a shield in two other ICSID arbitrations:¹¹ *AES Summit Generation*¹² and *Electrabel, SA*.¹³
4. It would be unfair to allow a Hungarian investor to rely on the umbrella clause to claim against another Contracting State when Hungary relies on Annex IA as a shield from such claims by investors of other Contracting States.¹⁴ This would be contrary to the “inherent norm” of reciprocity.¹⁵ cf. the ICJ *Norwegian Loans Case*¹⁶ and Article 21(1)(b) of the Vienna Convention on the Law of Treaties, which provides a rule of reciprocity in respect of reservations to multilateral treaties.

2. The Claimant’s Response

31. According to the Claimant, the proper interpretation of Article 26(3) is that the States listed in Annex IA withhold consent solely in respect of umbrella clause claims brought against them, not that such claims cannot be brought by investors of the named states.¹⁷ It submits that neither the text (nor context) of the relevant provisions of the ECT nor the principle of reciprocity support the Respondent’s objection:
 1. As to text and linguistic context:¹⁸ Article 26(2) is addressed to Investors, Article 26(3) to the Contracting Parties; Article 26(3) is concerned with a Contracting Party’s consent as a future respondent in arbitration, not with its consent as the home state of a future claimant. There is no requirement that an investor’s home state consent to arbitration in order for an arbitration to be possible. This reading is confirmed by Article 26(5)

¹⁰ R Preliminary Objection, para 3.09.

¹¹ R Preliminary Objection, paras 3.10 – 3.11.

¹² *AES Summit General Limited and AES-Tisza Eromu Kft v Republic of Hungary* (ICSID Case No. ARB/07/22).

¹³ *Electrabel, S.A. v Republic of Hungary* (ICSID Case No ARB/07/19).

¹⁴ R Preliminary Objection, para 3.12.

¹⁵ R Preliminary Objection, para 3.12 (especially fn 74); R Reply, paras 50 – 61.

¹⁶ *Case of Certain Norwegian Loans (France v Norway)* 1957 ICJ Rep 9.

¹⁷ C Observations, paras 27 – 58; C Rejoinder paras 7 – 19.

¹⁸ C Observations, paras 30 – 45.

which requires “the consent given in paragraph (3) [i.e. the Contracting State’s consent] together with the written consent of the Investor given pursuant to paragraph (4)”. The heading of Annex IA, which refers to contracting parties “not allowing an investor or Contracting Party to submit” an umbrella claim to arbitration cannot be read as the Respondent wishes, for it makes no sense for a State to refer to allowing itself to submit a claim by itself against another State to arbitration.

2. The document on which the Respondent relies does not have the status of an OECD document, and is in any event not relevant to the interpretation of the ECT and, at best, ambiguous and imprecise.
3. Previous cases do not support the Respondent’s position.¹⁹ In particular, in *Petrobart Ltd v Kyrgyz Republic*, the tribunal had stated: “Annex IA, to which reference is made in Article 26(3)(c), contains a list of Contracting Parties not allowing an investor or a Contracting Party to submit certain disputes to international arbitration. The Kyrgyz Republic is not included in this list.”²⁰ The tribunal did not ask whether the claimant’s home state was on the list.
4. The Respondent’s reciprocity argument is likewise of no avail: (i) Article 26(3) is not a “reservation” within the meaning of Article 21 Vienna Convention on the Law of Treaties – “reservations” to the ECT are prohibited by Article 46;²¹ (ii) Article 45 ECT contains a rule of reciprocity, which demonstrates that when the drafters of the ECT sought to write a rule of reciprocity into the ECT, they did so; they did not, however, do so in respect of Article 26(3) and Annex IA;²² (iii) the Respondent’s general discussion of “reciprocity” bears no relation to the text of the ECT;²³ (iv) in any event, the ECT is a complex treaty: there may have been any number of reasons for the Contracting Parties to allow Hungary to withhold its consent to umbrella clause claims against itself while permitting such claims by Hungarian investors against other States.²⁴

¹⁹ C Observations, paras 50 – 53.

²⁰ *Petrobart Ltd v The Kyrgyz Republic* (SCC Arb. No. 126/2003; Award 29 March 2005) p 15.

²¹ C Observations, para 55.

²² C Observations, paras 56 – 57.

²³ C Rejoinder, para 16.

²⁴ C Rejoinder, para 18.

C. The forum selection clauses in the Agreements preclude MOL from bringing its “contracts claims” outside the forum stipulated in those contracts

1. The Respondent’s Argument

32. This Objection relies on the forum selection clauses in the Shareholders’ Agreement (unchanged by the First Amendment) and the GMA (together, the “Agreements”) which are in materially identical terms. The clause in the Shareholders’ Agreement is as follows:

The dispute resolution procedures set forth in this Clause 15 shall, as between the Parties, be the binding and exclusive means to resolve all Disputes. ... All Disputes which may arise between the Parties out of or in relation to or in connection with this Agreement which are not settled as provided in Clause 15.1 shall be finally settled by arbitration in accordance with UNCITRAL.

33. As it developed in the course of argument, the Respondent’s objection came to have two strands:

1. that no ECT claims which relate to the Agreements can be submitted to ICSID arbitration because the forum selection clause in them provides exclusively for UNCITRAL arbitration and encompasses claims under the ECT, so that the Parties have agreed to resolve those Treaty claims by UNCITRAL arbitration ²⁵ not ICSID arbitration;
2. in the alternative, that a claimant cannot rely on a contract as the basis for an Umbrella Clause claim when the contract itself refers the claim exclusively to another forum (citing *BIVAC v Paraguay*²⁶).

34. The Respondent points out that under Article 26(4)(b) ECT, ad hoc UNCITRAL arbitration is one of several alternatives for ECT claims by an investor against a Contracting State; if therefore the Claimant and Respondent had freely agreed upon such arbitration as the

²⁵ R Reply, paras 71 – 77. In its Preliminary Objection, the Respondent’s position had been that the “essential basis” of what it characterized as the Claimant’s “Breach Claims” was contractual, that they were therefore not treaty claims and that the Tribunal ought to give effect to the forum selection clauses. However, the Claimant’s Observations focused to a considerable extent on the proper characterization of its claims and this point is not pursued.

²⁶ ICSID Case No. ARB/07/9; cited with approval in *Bosh v Ukraine* although not followed in *SGS v Paraguay*.

exclusive forum for resolving the disputes falling within the scope of the Agreements, the Tribunal ought to enforce their agreement to that effect.

35. The cases invoked by the Claimant are not relevant, for in none did the relevant clause designate an international arbitration forum which was expressly contemplated by the applicable investment treaty as a suitable forum for resolving treaty claims.²⁷
36. There is no question of it withholding or modifying the consent which it gave under Article 26; UNCITRAL arbitration would still be Treaty arbitration.²⁸

2. The Claimant's Response

37. In response, the Claimant relies upon various cases in which arbitral tribunals have held that contractual forum selection clauses did not mean that a treaty-based tribunal had no jurisdiction to hear treaty-based claims.²⁹ To hold otherwise would be inconsistent with Croatia's grant of unconditional consent to arbitration in Article 26(3) ECT. Even if it were possible for a contractual forum selection clause to bar submission of treaty claims to arbitration, the clause would have to be explicit, unlike here where they make no mention of the ECT.³⁰
38. As to the Respondent's argument that the Parties had agreed to resolve Treaty claims by UNCITRAL arbitration, the Claimant submits:
 1. The principle of choice is embedded in Article 26(2) ECT: the Investor has a right to choose any of the three options listed in Article 26(2), one of which is a "previously agreed dispute settlement procedure". Thus, even if such a procedure is available, the investor is not compelled to choose it. Absent language very clearly indicating otherwise, the Investor cannot be taken to have pre-emptively waived the other options provided by Article 26(2)(a) and (c).
 2. The UNCITRAL arbitration provided for by the Agreements is not the same as the UNCITRAL arbitration provided for by the ECT. UNCITRAL arbitration of the Treaty

²⁷ R Reply, para 74

²⁸ R Reply, para 73

²⁹ See C Observations, paras 80 – 83, in particular fn. 84 and C Rejoinder fn. 55.

³⁰ C Rejoinder, para 29.

claims would be governed by a combination of the UNCITRAL rules and Articles 26(3) to (8) ECT, whereas UNCITRAL arbitration under the Agreements would be governed only by the UNCITRAL Rules. Two key differences are: (1) governing law; (2) a successful treaty claim would give rise to an obligation under the ECT to carry out the award; a successful contractual claim would not.³¹

D. The criminal prosecution of Mr Hernádi

1. The Respondent's Argument

39. The Respondent submits that the criminal investigation against Mr Hernádi falls outside the scope of the ECT, which extends only to the protection of investments. MOL's allegations do not meet the relevant standard to bring them within the ambit of investment protection (as required in, e.g., *Rompetrol*.³²) An ECT Tribunal cannot “meddle with legitimate state investigations” or “enjoin a State from conducting the normal process of criminal, administrative and civil justice within its own territory”. It says that the investigating authority – USKOK – is widely respected, and accuses MOL of making “false and baseless accusations” of “an effort [by Croatia] to harass and intimidate” of a kind which do not comply with the pleading standard of Rule 41(5). On the contrary, the Respondent criticises Mr Hernádi's own behaviour, including in launching the present proceeding, as just another attempt to evade justice.

2. The Claimant's Response

40. The Claimant retorts that it is well-established that a State's actions against an investor's officers or owners (including criminal prosecutions) can violate the standards guaranteed by the ECT (citing, e.g., *Rompetrol*³³). In this case the investigation into Mr Hernádi is a sham and a pretext for stripping MOL of its control of INA. The factual assertions relied on by Croatia (e.g. USKOK's reputation, Mr Hernádi's motivation) are in dispute or irrelevant, or both.

³¹ C Rejoinder, para 34.

³² *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award of 6 May 2013.

³³ v. *sup.*

E. Further Preliminary Objections

41. In addition to the above, the Respondent has also, at various stages in the written and oral pleadings, put forward the argument that the UNCITRAL Rules arbitration was brought by Croatia in bad faith, in an attempt to frustrate the present arbitration. This did not however constitute a main plank in its argument; the Tribunal does not consider it necessary to deal with it at length, and refers to the reasoning at paragraphs 46ff. below.

F. The post-Hearing argument

42. At the close of the oral hearing, the Tribunal put the following questions to the Parties for subsequent answer³⁴:

(1) “In relation to the footnote [to Article 10(1)] which has been referred to by both Parties, is that footnote part of the Treaty text, or is it simply something which was added for the purpose of the publication of the text by the Treaty Secretariat?”

(2) “Can we be informed officially whether the countries appearing--let me put it differently--whether Annex IA was drawn up in the form in which it now appears as part of the final conclusion of the Energy Charter Treaty; in other words, whether the countries listed in the annex were so specified at that moment at which the Treaty texts were being finalized or whether they were added subsequently?”

(3) “And finally, it goes to the references that have been made – I noticed them in the PowerPoint presentations – to various publications by Judge Simma, which I think come from the Max Planck Encyclopaedia of International Law, and I notice the dates which seem to suggest that they refer to the previous edition of the encyclopaedia. There is now a new edition, not all parts of which have yet been released, but they are appearing on the internet sequentially. Could we please be told by both Parties whether there is a revised version of those chapters, for example on reciprocity, and if so, could we see the text of the revised version?”

(4) “At some point, I would like to have the Parties tell us whether the Tribunal is safe to proceed on the English text alone for the purposes of this dispute or whether we should, as good international lawyers, be looking at as many of them as we feel we can understand.”

43. The Tribunal indicated that because these were questions of basic documented fact, it looked forward to receiving a single answer agreed between the two Parties. This expectation was unfortunately not fulfilled, and in due course the Tribunal was in receipt of letters from the

³⁴ Extracted from the verbatim transcript.

Claimant dated 18 September and 9 October 2014, and from the Respondent dated 18 September and 1 October 2014. The Parties were in agreement on questions (1) and (3), i.e. that the footnote was not part of the treaty text but had been added for convenience in the published version; and that there were no significant differences between the two editions of the Max Planck Encyclopaedia. They agreed, too, that the listing of the States appearing in Annex IA to the ECT was part of the negotiation and appeared in the treaty text as it was adopted and opened for signature and ratification; they were however in clear disagreement over the consequences this might have for the interpretation of the treaty and its application to the present case. They were also in clear disagreement as to whether a minor variation as between the Spanish language text of Article 26(3)(a) and the other authentic language versions of the ECT had any significance for the interpretation of the treaty, and if so what.

III. Tribunal's analysis

44. The Tribunal begins with a brief observation on the standard to be applied for determining a Rule 41(5) Objection. There is no dispute between the Parties that the standard is a high one,³⁵ and that must be right. The Rule, as introduced in 2006, plainly envisages a claim that is so obviously defective from a legal point of view that it can properly be dismissed outright. By contrast, an objection to the jurisdiction or substantive defence (in terms, that a claim “lacks legal merit”³⁶), which requires for its disposition more elaborate argument or factual enquiry, must be made the subject of a regular preliminary objection under Rule 41(1) or a regular defence on the merits. This distinction seems to stem from the very nature of the new avenue of recourse opened by Rule 41(5), once account is taken in addition of the final sentence of the Rule.³⁷ But the present Tribunal sees further clear reinforcement of this conceptual approach to Rule 41(5) in the time limits laid down in it. These have already been the subject of comment in paragraph 9 above; in the present context it is merely necessary to add that, when the drafters of Rule 41(5) required a tribunal to rule literally at its first session “or promptly thereafter”, they can only have had in mind an objection that

³⁵ See paragraph 25 above.

³⁶ See fn. 37 below.

³⁷ “The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.”

was so clear-cut that it could be decided virtually on the papers or with a minimum of supplementary argument.

45. Each of the present Parties invoked in its submissions the decision in *Trans-Global Petroleum v Hashemite Kingdom of Jordan*³⁸ in which the tribunal stated, in assessing the meaning of “manifestly without legal merit” in Rule 41(5): “The Tribunal considers that these legal materials confirm that the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high.” The present Tribunal respectfully agrees. The *Trans-Global* tribunal went on however to add: “Given the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the Parties, together with questions addressed by the tribunal to those Parties. The exercise may thus be complicated; but it should never be difficult.” And about that, the present Tribunal is less convinced. It seems to be carrying a tribunal into hybrid territory somewhere between Rule 41(5) and Rule 41(1), and the present Tribunal has itself been carried some distance in that direction by the pattern of written, followed by oral, argument agreed between the Parties and the Tribunal at the first session. But the Tribunal is firmly of the view that the distinction has to be maintained between a claim by an investor that can properly be rejected out of hand, and one which requires more elaborate argument for its eventual disposition. The *Trans-Global* tribunal correctly distinguished between matters which are “clear” and “certain” on the one hand (which would be “manifest”) and those which are “susceptible to argument one way or the other” or where it is “necessary to engage in elaborate analyses” (which would not be).³⁹ In the opinion of the present Tribunal, that is the right test. It represents the only way to respect the evident intention behind Rule 41(5), to the benefit of the health of the ICSID system. The *Global and Globex v. Ukraine* tribunal found itself, no doubt, in a somewhat different situation when it posed itself the question, what materials must a tribunal have before it in order to enable it properly to uphold a Rule 41(5) objection, and in so doing bring

³⁸ ICSID Case No ARB/07/25, para 88. That was quoted with approval in *Global Trading Resource Corp & Globex International v Ukraine* (ICSID Case No ARB/09/11) para 35 and *Brandes Investment Partners LP v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) para 63.

³⁹ ICSID Case No ARB/07/25, para 84.

the arbitration to a premature end by issuing an Award to that effect. But that is not the situation of the present Tribunal – for which the issue is, are the matters raised by the Respondent sufficiently ‘clear and certain’ to enable them to be determined in summary proceedings of the present kind? Or must they be stood over to be determined (assuming that the Respondent chooses to pursue them) in the normal way in a jurisdictional phase or on the merits? That at all events is the approach which the present Tribunal will adopt.

46. The above having been once established, it becomes plain that none of the Respondent’s preliminary objections presently before the Tribunal can be upheld in Rule 41(5) proceedings. On each of them, the Respondent has advanced plausible arguments (see above), which in each case have been rebutted by plausible arguments from the Claimant (see above). Whatever the merits or demerits of the Respondent’s submissions (and the Tribunal expresses no view on that either generally or as between the different preliminary objections), the Claimant has countered them in a way that makes it impossible for the Tribunal to regard the Respondent’s objections as sufficiently ‘clear and certain’ to justify passing summary judgment on them now, at this preliminary stage, without full opportunity to assess the treaty, contractual and other legal arguments, the relationship between this arbitration and the UNCITRAL Rules arbitration, or to establish in full the facts that are relevant to a proper understanding of the acquisition and operation of the Claimant’s investments in Croatia.
47. Having arrived at that conclusion, the Tribunal might leave its decision there. In deference, however, to the careful argument that has been marshalled before it on both sides, even within the limitations of these summary proceedings, the Tribunal finds it appropriate to add a little more by way of explanation.
48. To take first the Preliminary Objection relating to Articles 26(3) and 10(1), read in conjunction with Annex IA, it will be clear from the discussion above that, as the argument between the Parties has developed, this objection depends in part on a textual interpretation of the treaty provisions in question, in part on the assessment of contextual and purposive elements that might throw light on, or condition, the meaning to be given to the text, and in part again on whether a State’s listing in Annex IA is to be understood as a reservation, or should be treated as having the equivalent effects to a reservation, seen within the context of

a treaty text that expressly excludes reservations. It would in addition raise the interesting question whether private investors could properly be assimilated to ‘the reserving State’ for the purposes of applying Article 21(1)(b) of the Vienna Convention on the Law of Treaties.⁴⁰ It should be noted that some of the argument between the Parties on these issues emerged after the hearing, and then only in response to questions raised by the Tribunal itself after having heard the written and oral argument of both Parties. That might be sufficient in itself to raise a serious question as to whether the answer was ‘manifest’. But, even without that additional element, it seems to the Tribunal that the issue, if seriously pursued by the Respondent, would require a detailed examination, against the limited amount of documentation publicly available, of the history and negotiation of the ECT, of a kind that would make it plainly unsuitable for summary determination under Rule 41(5). Moreover, part of the argument on this issue has revolved around the ‘fairness’ or ‘inequity’ of allowing Hungary to use Annex IA as a shield, while allowing its nationals to use as a sword the substantive treaty provisions which the Annex refers to. The introduction of that element into the argument would require the Tribunal to make an inevitably discretionary assessment of what constitutes, in the circumstances, fairness and equity, which is wholly antithetical to the basic notion of ‘manifestly *without legal merit*’ (emphasis supplied) that underlies Rule 41(5).

49. Similarly, in relation to the Preliminary Objection based on the allegedly preclusive effect of the forum selection clauses in the Shareholders’ Agreement and the GMA, the issue is essentially one of forum conveniens, a matter of considerable delicacy which, in domestic jurisdictions, entails a measure of discretionary assessment by the national court. If the matter is classified in that way, it seems inherently unsuited to the ‘knock-out’ operation of Rule 41(5), which does not by any means foresee an ICSID tribunal deciding as a matter of discretion not to exercise a jurisdiction formally vested in it, but rather ruling out a claimant’s claim with final and definitive effect as “manifestly *without legal merit*” (cf. paragraph 48 above). But, that aside, the very fact that the Respondent and the Claimant have between them cited some half a dozen ICSID cases on the relationship between treaty claims and contract claims, and in addition have locked horns over the possible differences between

⁴⁰ “A reservation established with regard to another party in accordance with articles 19, 20 and 23 ... (b) Modifies those provisions to the same extent for that other party in its relations with the reserving State.”

UNCITRAL arbitration under the ECT and under the terms of the Agreements, would seem to show that, whatever the merits of the Respondent's objection, it cannot be deemed 'manifest' so as to meet the standard set by Rule 41(5).

50. Finally, as regards the Preliminary Objection in relation to the criminal investigation against Mr Hernádi (and, so far as may be relevant, the prosecution of Mr Sanader), the underlying facts are subject to the strongest contestation between the Parties. The same applies to the reciprocal allegations of bad faith on each side. In the result, the Tribunal is simply not in a position, for the purposes of deciding the challenge under Rule 41(5), to proceed on the basis of the factual allegations put before it. This is particularly so, given that the crucial allegations are not those put forward by the Claimant as the basis for its claim, but those of the Respondent in answer to it; there is thus no room for a syllogism along the lines of 'even on the basis of the claim as put forward by the Claimant itself, the Tribunal finds that ...'. If one adds to this that there is substantial disagreement between the Parties as to whether the circumstances meet the very small number of cases in which tribunals have discussed whether the enforcement of the criminal law is capable of implicating the normal guarantees of investment protection (not to mention the underlying issues of Croatian law as to the effect of proven corruption on contracts), it becomes clear once again that the answers to these matters are simply not 'manifest' within the intendment of the Rule.
51. Contrast the two cases to date in which ICSID tribunals have upheld Rule 41(5) applications and dismissed the claimants' claims outright: in *Global and Globex v Ukraine*, the tribunal had simply to decide whether an admittedly straightforward purchase and sale had been transformed by special circumstances into an 'investment'; in *RSM v Grenada*, whether the claimant's claim was "no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues), dressed up as a Treaty case".⁴¹ These were straightforward and self-contained questions that suited themselves to summary determination.⁴²

⁴¹ Award, para 7.3.7.

⁴² Conversely, in *Accession Danubius v. Hungary* and *Emmis v. Hungary*, the Rule 41(5) proceedings discharged certain heads of claim on jurisdictional grounds, but left the arbitration to continue on others.

52. For the reasons given above, the Respondent’s preliminary objections are not therefore upheld under Rule 41(5), but without prejudice of any kind, as the Rule itself declares, to the Respondent’s right to raise any of them in subsequent stages of the arbitration.
53. The above notwithstanding, there is one amongst the issues canvassed in argument that merits further comment. In the revised Request for Arbitration, in a paragraph devoted to complaints about the criminal proceedings against Mr Hernádi, the Claimant adds a reference to the UNCITRAL Rules arbitration, which is described as an attempt to “expropriate MOL’s rights” under various commercial contracts between the Parties.⁴³ The reference was picked up in the Respondent’s revised Rule 41(5) application as a new claim of expropriation which the Tribunal should “summarily dismiss”. From such small beginnings, the matter then seems to have acquired something of a life of its own, and figured as a separate head of argument at the oral hearing. For the reasons already given, the Tribunal is not inclined to separate out individual aspects of the Rule 41(5) objections and give a definitive ruling at this stage on any or all of them. That said, the Tribunal wishes to make plain that, if it were to be argued that, simply by availing itself of a contractual arbitration clause, a party was putting itself in breach of its obligations to an investor under the ECT, that is a proposition the Tribunal would have the greatest difficulty in entertaining. In the present proceedings, however, the matter has become inextricably tied together with serious imputations of bad faith, inasmuch as the allegation by the Claimant ended up as being⁴⁴ that the Respondent is “pursuing claims that it knows are baseless in order to obtain relief to which it knows it is not entitled,” and that that is the very definition of a bad-faith claim which therefore violates Respondent’s obligations under the ECT. That is indisputably a matter on which the Tribunal could not be expected to pronounce in limine.

Costs

54. The Tribunal concludes this section of its decision with a brief word on costs. The costs of this phase of the proceedings, consisting as it did of more than one round of written argument, an oral hearing in Washington DC, and deliberations by the Tribunal, cannot be assumed to be negligible. Given that one of the main reasons behind the introduction of

⁴³ At para 39(e) in fine.

⁴⁴ C Rejoinder, para 37.

Rule 41(5) was to spare respondent States the wasted trouble and expense of having to defend wholly unmeritorious claims,⁴⁵ it must follow per contra that a Respondent invoking the procedure under the Rule takes on itself the risk of adverse cost consequences should its application fail. The Tribunal sees no need to make a costs order now, but will take the matter into account when considering the question of costs at the end of the arbitral proceedings. It recommends to the Parties, without making this into a formal request, that they make a separate accounting of the costs incurred in this phase of the arbitration, in case the Tribunal wishes to refer to them at that stage.

IV. The Respondent's alternative application for a stay

55. The Respondent's Preliminary Objections of 12 May/16 June 2014 (see paragraphs 7 and 13 above) included among its requests for relief that the Tribunal should "suspend, pursuant to its authority under ICSID Arbitration Rule 41(3), the proceedings on the merits of MOL's Request for Arbitration until the conclusion of proceedings on the Preliminary Objection." It added a further request for relief, for the event that the Tribunal did not uphold the Preliminary Objection in full, namely that the Tribunal should "at a minimum, pursuant to its authority under ICSID Convention Article 47 and Arbitration Rule 39(1), stay the present arbitration proceedings until (1) the criminal proceedings against Prime Minister Sanader and Zsolt Hernádi have been fully resolved and concluded, and (2) the UNCITRAL claims, including Croatia's request for nullification of the First Amendment and Gas Master Agreement, have been fully adjudicated." The first of these requests was met as a matter of course under Procedural Order No. 1 while the Tribunal had the Rule 41(5) application under consideration. As to the second, the Respondent argues that the rights it is seeking to protect are to the fair resolution of the investment dispute (which it submits can only occur if the validity of the First Amendment and the GMA are resolved, since the question will be determinative for MOL's rights under the ECT). It also seeks to avoid the cost of arbitrating a matter which is likely to be declared moot after the outcome of the UNCITRAL arbitration. It argues further that the corruption which underlies the First Amendment and the GMA will

⁴⁵ E.g. A Parra 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes' 22 ICSID Rev.—FILJ 55, 62 (2007) p 65. See also paragraph 55 below.

not only feature at the merits stage of these proceedings but will also form a jurisdictional objection based on *inter alia* lack of consent, lack of “investment”, lack of good faith and violation of public policy.

56. In response, the Claimant argues that the Respondent has made no effort in its Objection to show how the standard for provisional measures is met, given that provisional measures are an exceptional remedy, and are only to be ordered where necessary to avoid “imminent and irreparable harm” which is not present in this case, for Croatia will still be able to present any argument which it wishes as these proceedings continue. The Claimant points out in addition that the existence of two separate proceedings is not of its doing, but the Respondent’s.
57. The Tribunal’s impression during the oral hearing held on 11 September 2014 was that the argument shifted of its own momentum from provisional measures under Article 47 of the ICSID Convention into a discussion of the inherent powers of the Tribunal under Article 44 to arrange the procedures of the present Arbitration in such a way as to avoid, so far as possible, any clash with the UNCITRAL Rules arbitration or consequent prejudice to the rights of either Party to advance before the present Tribunal such claims as were proper for decision by it. In the light of that discussion, the Tribunal formed the provisional view that a stay was not justified under the then current circumstances, but would keep the matter under review. Nothing has intervened to lead the Tribunal to change that view. The Tribunal does not, accordingly, feel it appropriate to impose a stay on the proceedings in this Arbitration, whether as a provisional measure or on any other ground, but will continue, as indicated at the hearing, to keep the matter under review.
58. As to the future procedure, the Tribunal invited the Parties to consult with one another on the procedural options, an invitation which met with a positive response on both sides. In the light of the outcome of the present Decision, the Tribunal will now resume its contacts with the Parties on these matters, and further procedural decisions will follow in due course.

[Signed]

Professor William W. Park
Arbitrator

[Signed]

Professor Brigitte Stern
Arbitrator

[Signed]

Sir Franklin Berman
President of the Tribunal