INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceedings between

KLESCH GROUP HOLDINGS LIMITED & OTHERS
Claimants
and
EUROPEAN UNION
Respondent

ICSID Case No. ARB(AF)/23/1

KLESCH GROUP HOLDINGS LIMITED, KLESCH REFINING DENMARK A/S AND KALUNDBORG REFINERY A/S
Claimants
and
KINGDOM OF DENMARK
Respondent

ICSID Case No. ARB/23/48

KLESCH GROUP HOLDINGS LIMITED AND RAFFINERIE HEIDE GMBH
Claimants
and
FEDERAL REPUBLIC OF GERMANY
Respondent

ICSID Case No. ARB/23/49

DECISION ON BIFURCATION

Members of the Tribunal
Mr. Cavinder Bull SC, President
Judge O. Thomas Johnson, Jr., Arbitrator
Professor Jorge E. Viñuales, Arbitrator

Secretary of the Tribunal
Ms. Aurélia Antonietti

Assistant to the President of the Tribunal
Ms. Elisabeth Liang

8 April 2025

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I. PROCEDURAL BACKGROUND

1. This Decision addresses the Request for Bifurcation made on 9 December 2024 by each of the Respondents in ICSID Cases Nos. ARB(AF)/23/1 ("**EU Arbitration**"), ARB/23/48 ("**Denmark Arbitration**") and ARB/23/49 ("**Germany Arbitration**") (collectively, the "**Three Arbitrations**").

2. The parties in the Three Arbitrations are as follows (the "**Parties**").

   (a) Klesch Group Holdings Limited, Klesch Refining Denmark A/S, Kalundborg Refinery A/S and Raffinerie Heide GmbH are the Claimants and the European Union ("**EU**") is the Respondent in the EU Arbitration.

   (b) Klesch Group Holdings Limited, Klesch Refining Denmark A/S and Kalundborg Refinery A/S are the Claimants and the Kingdom of Denmark ("**Denmark**") is the Respondent in the Denmark Arbitration.

   (c) Klesch Group Holdings Limited and Raffinerie Heide GmbH are the Claimants the Federal Republic of Germany is the Respondent ("**Germany**") in the Germany Arbitration.

3. The disputes in the Three Arbitrations arise out of the "solidarity contribution" imposed on the Claimants pursuant to the EU's adoption and enforcement of European Union Council Regulation 2022/1854 of 6 October 2022 ("**EU Regulation 2022/1854**") and Denmark and Germany's consequent enactment of Danish Act No. 502 of 16 May 2023 ("**Danish Act**") and Article 40 of the German Annual Tax Act 2022 ("**German Act**")

respectively.[1] The Claimants allege that the solidarity contribution subjects them to current and future payment obligations in the aggregate amount of EUR 175.5 million,[2] and the Respondents have, amongst other things, breached Articles 10(1), 10(7), 10(3) and 13 of the Energy Charter Treaty ("**ECT**") by imposing and enforcing the solidarity contribution.[3]

4. The Claimants' claims in the Three Arbitrations are similar but not identical. The Parties have agreed to coordinate the proceedings in the Three Arbitrations to the extent possible.[4]

5. In respect of the present application:

   (a) On 9 December 2024, the Respondents filed a single Request for Bifurcation for the Three Arbitrations ("**Respondents' Request**").

   (b) On 23 January 2025, the Claimants filed a single Answer to Respondents' Request for Bifurcation for the Three Arbitrations ("**Claimants' Answer**").

   (c) On 19 March 2025, the joint Hearing on Bifurcation took place in-person at the World Bank facilities in Paris, France, with passive participants attending by video conference. The Hearing was closed to the public pursuant to §36 of Procedural Order No. 3 dated 13 February 2025 in each of the Three Arbitrations.

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1 Claimants' Memorial in EU Arbitration, para. 5.

2 Claimants' Memorial in EU Arbitration, para. 10.

3 Claimants' Memorial in Denmark Arbitration, para. 1139(2); Claimants' Memorial in Germany Arbitration, para. 1071(2); Claimants' Memorial in EU Arbitration, para. 1156(2).

4 Procedural Order No. 1 dated 14 June 2024 in each of the Three Arbitrations ("**PO1**"), §28.1.3.

6. In the premises, the Tribunal considers it reasonable and practical to issue a single Decision addressing the Respondents' Request.[5] The Parties should note that this Decision deals only with the Respondents' Request for Bifurcation and should not be considered as finally determining or pre-judging any issue of fact or law concerning jurisdiction or the merits of this case.

II. APPLICABLE LEGAL PRINCIPLES

7. It is trite that there is no presumption for or against bifurcation in ICSID arbitration.[6] It is clear to the Tribunal from the Parties' extensive submissions on the applicable legal principles that the Respondents must, amongst other things, establish each of the three requirements in Rule 54(2) of the ICSID Additional Facility Arbitration Rules 2022 and Rule 44(2) of the ICSID Arbitration Rules 2022[7] for bifurcation to be granted.[8] Rule 54(2), which is identical to Rule 44(2), states:

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

8. The phrase "*all relevant circumstances, including*" indicates that there are other relevant requirements other than those itemised in Rule 54(2). While the Parties differ

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5 PO1, §28.1.4.

6 Respondents' Request, para. 19; Claimants' Answer, para. 10.

7 Rule 54(2) of the ICSID Additional Facility Arbitration Rules 2022 applies to the EU Arbitration and Rule 44(2) of the ICSID Arbitration Rules 2022 applies to the Denmark and Germany Arbitrations.

8 Claimants' Answer, para. 10; Transcript of Hearing on Bifurcation on 19 March 2025 ("**Transcript**"), page 5 lines 16-17; Exhibit RL-34, para. 39.

on the exact parameters of the applicable legal standards and the circumstances in which bifurcation ought to be granted, the Parties agree that in addition to the three requirements above, the Tribunal must consider: (a) as a preliminary matter, whether the Respondents' preliminary objections are *prima facie* serious and substantial;[9] and (b) ultimately, whether bifurcation would be procedurally fair and efficient.[10]

9. The Tribunal will assess the Respondents' objections separately within the context of each of the Three Arbitrations.[11] However, the Tribunal also considers that it is entitled to assess the objections together to determine if all of the objections could collectively render bifurcation appropriate, or if only some or none of the objections should be bifurcated.[12] This is consistent with the Respondents' submission that "*the Tribunal must consider the potential for the disposal or material reduction and simplification of the dispute not only on the basis of each individual objection, but when they are assessed holistically.*"[13]

III. THE PARTIES' POSITIONS

A. RESPONDENTS' POSITION

10. In their Request for Bifurcation, the Respondents refer to four preliminary objections that they intend to raise in a bifurcated phase. Save for Objection B, which is made only with respect to the consent to jurisdiction by the Respondents in the Denmark and

9 Respondents' Request, para. 30; Claimants' Answer, para. 17.

10 Respondents' Request, para. 37; Claimants' Answer, para. 50.

11 Transcript, page 17 lines 20-21.

12 Respondents' Request, paras. 43, 208, 230; Exhibit RL-35, para. 50; Exhibit RL-39, para. 46; Transcript, page 50 lines 12-22.

13 Respondents' Request, para. 220.

Germany Arbitrations, all of the objections are made with respect to the consent by the Respondents in each of the Three Arbitrations.

11. **Objection A** is the Respondents' objection that the Tribunal does not have jurisdiction in the Three Arbitrations because "*the European Union and its Member States could not give (and did not give) valid consent to arbitrate investment protection disputes between, on the one hand, investors from those Member States, and, on the other hand, the European Union or one of its Member States. In particular, while the United Kingdom was a Member State of the European Union, the European Union, Denmark and Germany could not give (and did not give) valid consent to arbitrate investment protection disputes between investors from Jersey on the one side, and the European Union, Denmark, and/or Germany, on the other, and no such consent has been given since then.*"[14]

12. Article 26(3)(a) of the ECT provides that "*[s]ubject 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.*" The Respondents rely primarily on the decisions of the Court of Justice of the European Union ("**CJEU**") in *République de Moldavie v Komstroy* ("***Komstroy***") [15] and *Slowakische Republik v Achmea BV* ("***Achmea***")[16] and EU law to argue that Article 26 of the ECT does not apply in "intra-EU" cases such as the Three Arbitrations, hence no consent to arbitrate was given by the Respondents.[17] The Respondents also claim that

14 Respondents' Request, para. 50.

15 Exhibit RL-45.

16 Exhibit RL-49.

17 Respondents' Request, paras. 51-55.

an interpretation of Article 26 of the ECT based on Article 31 of the Vienna Convention on the Law of Treaties would lead the Tribunal to the same conclusion as the CJEU in *Komstroy* and *Achmea*.[18] Further, the Respondents assert that the UK did not make any offer to arbitrate after it exited the EU.[19] Thus, the Respondents submit that there is no valid arbitration agreement between the Parties and the Tribunal lacks jurisdiction over the dispute.

13. **Objection B** is the Respondents' objection that Denmark and Germany have not given consent to submit disputes to arbitration pursuant to Article 26(3) of the ECT, and the proper respondent, to be determined *ex post* in accordance with EU law, is the EU.[20]

14. The Respondents assert that Article 1(3) of the ECT "*acknowledges the transfer of competences from the constituent States to the REIO, and implicitly the ensuing apportionment of international responsibility between them* [but] *the ECT itself does not set out a specific procedure for determining the proper respondent. However, a REIO and its constituent States may adopt appropriate procedures for operationalizing the rule contained in Article 1(3) of the ECT*."[21]

15. According to the Respondents,[22] to determine the proper respondent, the Tribunal should follow the procedure set out in the Statement submitted to the ECT Secretariat pursuant to Article 26(3)(b)(ii) of the ECT published on 2 May 2019 ("**Statement**")[23]

18 Respondents' Request, paras. 56-57.

19 Respondents' Request, para. 58.

20 Respondents' Request, paras. 60, 68-70.

21 Respondents' Request, para. 81.

22 Respondents' Request, paras. 82-89.

23 Exhibit RL-54.

to do so. The Statement provides that the proper respondent is to be determined in accordance with Regulation (EU) No 912/2014 and notified by the European Commission. Denmark and Germany submit that the EU informed the Claimants that it had determined that the EU would act as the sole respondent in and be fully responsible vis-à-vis the Claimants for any financial liability that may arise from the Denmark and Germany Arbitrations on 14 November 2023, and the Claimants ought to accept this determination.[24]

16. **Objection C** is the Respondents' objection that the Tribunal lacks subject-matter jurisdiction over the Claimants' claims under Article 10 of the ECT ("**Art 10 Claims**"), because the measures on which the Claimants' claims are based are "Taxation Measures" within the meaning of Article 21 of the ECT.[25] According to the Respondents, "[t]*he measures against which the Claimants bring their cases are 'Taxation Measures' within the meaning of Article 21 ECT and the Tribunal's jurisdiction is therefore limited according to the provisions of that article. In particular, the Tribunal does not have jurisdiction for the Claimants' claims under Article 10 ECT.*"[26]

17. The Respondents submit that the solidarity contribution constituted by Articles 14-17 is a direct tax on corporate net income intended to generate revenue for the public authorities to contribute to the affordability of energy for households and companies, and not a levy where specific services or goods are received in return (which would not be considered a tax under EU law).[27] The Danish and German Acts implementing EU

[24] Respondents' Request, paras. 90-118.

[25] Respondents' Request, paras. 119-158.

[26] Respondents' Request, para. 121.

[27] Respondents' Request, paras. 131-137.

Regulation 2022/1854 similarly provide for the solidarity contribution as a "tax".[28] Thus, the Respondents claim that the Tribunal lacks jurisdiction over these measures, which are "Taxation Measures" as defined in Article 21(7) of the ECT, pursuant to Article 21(1) of the ECT which states that "*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties*."[29]

18. **Objection D** is the Respondents' objection that the Tribunal lacks subject-matter jurisdiction over all of the Claimants' claims except for their expropriation claims based on Article 13 of the ECT (the "**Art 13 Claim**"), "*because the measures at issue meet all the requirements of Article 24(3)(a)(ii) of the ECT.*"[30]

19. Article 24(3)(a)(ii) states that "[t]*he provisions of* [the ECT] *other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary … for the protection of its essential security interests including those … taken in time of war, armed conflict or other emergency in international relations*".[31]

20. The Respondents claim that EU Regulation 2022/1854 was adopted to specifically address the effects of Russia's war of aggression against Ukraine on the supply of energy products to the EU.[32] The war threatened the Respondents' "*essential security interests*"[33] and rendered the solidarity contribution "*necessary*" in the Respondents'

28 Respondents' Request, paras. 140-156.

29 Respondents' Request, para. 120.

30 Respondents' Request, para. 159.

31 Respondents' Request, paras. 159-202.

32 Respondents' Request, paras. 171-172.

33 Respondents' Request, paras. 173-186.

view.[34] The solidarity contribution was intended to ensure that companies in certain energy sectors, which had earned an extraordinary profit as a result of the energy crisis, contributed to the mitigation of the economic and social effects of the energy crisis, by enabling the redistribution of these proceeds as financial support to households and businesses, and therefore, enabling the continuation of the actions taken by the Respondents in response to Russia's full-scale invasion of Ukraine.[35] Thus, it falls within the exception in Article 24(3)(a)(ii) of the ECT and cannot be the basis for the Claimants' allegations that the Respondents breached the ECT.

21. The Respondents submit that each of these four objections meet the requirements for bifurcation to be granted. The Respondents submit:[36]

(a) Each of the objections are *prima facie* serious and substantial. The Respondents have described in sufficient detail the grounds for each objection with adequate factual and legal support and the objections are not frivolous.[37]

(b) Bifurcation would materially reduce the time and cost of the proceedings.[38] The Hearing would be completed by 30 January 2026 if bifurcation were granted and the objections were upheld, whereas the Hearing is foreseen to conclude on 29 January 2027 in a non-bifurcated procedure (*i.e.* 1 year later).

34 Respondents' Request, paras. 166, 187.

35 Respondents' Request, paras. 198-201.

36 Respondents' Request, para. 203.

37 Respondents' Request, para. 205.

38 Respondents' Request, paras. 206-212.

(c) The determination of the preliminary objections to be bifurcated would dispose of all or a substantial portion of the present dispute.[39] If Objection A were upheld, all Three Arbitrations would end in their entirety. If Objection B were upheld, two of the three disputes (*i.e.* the Denmark and Germany Arbitrations) would end. If Objections C and/or D were upheld, the Tribunal's jurisdiction would be limited to the Claimants' Art 13 Claim.

(d) The questions to be addressed in separate phases of the proceedings are not so intertwined as to make bifurcation impractical.[40] Objection A relates to a "*discrete legal issue*" of whether the Respondents had given valid consent to arbitration pursuant to Article 26(3) of the ECT, where the investor is from the UK. Similarly, the only legal issue the Tribunal has to consider for Objection B is whether Denmark and Germany had given valid consent to arbitration pursuant to Article 26(3) of the ECT, where it has been determined in accordance with the Statement that the EU is the proper respondent. As for Objections C and D, these raise a "*separate and independent question*" from the merits, of whether the contested measures are "Taxation Measures" within the meaning of Article 21 of the ECT, or whether they meet the requirements of Article 24(3)(a)(ii) of the ECT, respectively.

[39] Respondents' Request, paras. 213-220.

[40] Respondents' Request, paras. 221-229.

22. Consequently, the Respondents submit that granting their Request for Bifurcation would ensure the overall efficiency of the proceedings without resulting in any procedural unfairness or prejudice to the Claimants.[41]

B. CLAIMANTS' POSITION

23. The Claimants disagree that the Respondents' objections have met any of the requirements for bifurcation to be granted.[42]

24. The Claimants have explained at length in their written submissions why they do not consider the Respondents' objections to be *prima facie* serious and substantial.[43] The Tribunal will not reproduce the Claimants' arguments in this Decision but would note that that the Claimants disagree with the substance of all of the Respondents' objections.

25. Further, the Claimants argue that:

(a) Bifurcation would not materially reduce the time and cost of the proceedings. Amongst other things, the Claimants assert that they would require document production in the jurisdictional phase of proceedings for each of the objections, which could result in a further delay of up to 152 days to the proceedings and additional costs.[44]

(b) Bifurcation would not dispose of or substantially reduce the disputes in question. Even if Objections A and/or B were upheld, the EU Arbitration would still

41 Respondents' Request, para. 204.

42 Claimants' Answer, para. 56.

43 Claimants' Answer, paras. 59-80, 89-115, 141-146, 169-187.

44 Claimants' Answer, paras. 81-84, 129-138, 163-167, 196-201.

proceed, and potentially with greater delay.[45] As for Objections C and D, the Claimants' Art 13 Claim would still continue, and the Tribunal would still need to consider "*virtually the entirety of Klesch's Memorials*".[46]

(c) Save for Objection A, every objection is too intertwined with the merits of the Claimants' claims for bifurcation to be practical. Objections B, C and D all require a factual determination of the nature of the solidarity contribution which cannot be determined on a preliminary basis in isolation from the merits.[47]

26. Thus, the Claimants submit that bifurcation would do nothing but delay the proceedings[48] and result in the balance of procedural fairness bearing heavily against the Claimants.[49] The Claimants submit that the Respondents' Request should be dismissed.

IV. TRIBUNAL'S ANALYSIS

27. In accordance with Rule 54(2) of the ICSID Additional Facility Arbitration Rules 2022 and Rule 44(2) of the ICSID Arbitration Rules 2022, the Tribunal has taken all the relevant circumstances into account and carefully reviewed and considered all the arguments presented by the Parties in their written submissions and at the Hearing, even if it does not address each and every argument made by the Parties in this Decision. The Tribunal also emphasises that it is concerned only with analysing whether the

45 Claimants' Answer, paras. 81, 85, 116-119, 129-132.

46 Claimants' Answer, paras. 147-153, 188-189.

47 Claimants' Answer, paras. 120-128, 154-162, 190-195.

48 Claimants' Answer, paras. 5, 203-205.

49 Claimants' Answer, paras. 54, 206-208.

requirements for bifurcation have been met in relation to the Respondents' Request in this Decision. It does not deal with the substance of the Respondents' jurisdictional objections at this stage.

28. The majority's view is that the Respondents' Request should be dismissed and none of the objections should be bifurcated. Arbitrator Viñuales disagrees and considers that all of the objections should be bifurcated. We elaborate below.

A. OBJECTION B

29. The Tribunal deals first with Objection B, which concerns only the consent of Denmark and Germany.

30. The Tribunal is divided on whether there would be efficiencies to be gained from bifurcating Objection B. It is undisputed that the EU Arbitration would proceed regardless of the effect of Objection B on the Denmark and Germany Arbitrations.[50] Arbitrator Viñuales considers that if Objection B were upheld, it would entirely dispose of two out of the three arbitrations. Given that the grounds for bifurcation must be assessed for each one of the arbitrations separately, this would amount to potentially disposing "*of all … of the dispute*" for each of the Denmark and Germany Arbitrations, as per the Rule 44(2)(b) of the ICSID Arbitration Rules 2022. Even if all three arbitration proceedings were considered together, which is not what the applicable standard requires, potentially disposing of two out of three disputes would constitute a significant saving of time and costs that would justify bifurcation. In addition, leaving the decision on Objection B to the merits phase would deprive this objection of a

[50] Respondents' Request, para. 215; Transcript, page 17 lines 10-20.

significant part of its procedural effects, as it would require that all three arbitrations proceed in parallel until the merits stage. Thus, not bifurcating effectively means depriving the objection of part of the effects it would have if upheld.

31. In the majority's view, leaving the decision on Objection B to the merits phase would not amount to depriving the objection of a significant part of its procedural effects. If that were true, all jurisdictional objections would have to be dealt with on a bifurcated basis because of the mere possibility that they could be right. That, in the majority's view, cannot be correct.

32. The majority of the Tribunal considers that even if two of the three arbitrations are disposed of, most if not all of the issues would still have to be dealt with in the EU Arbitration. To the majority, it is difficult to see how there would be a material reduction in the amount of time and costs that would have to be expended to dispose of the dispute. Whilst Denmark and Germany would in that scenario no longer be named respondents, they would still be intimately involved in the dispute as the issues that the EU would need to address would still require their active participation.

33. There can be no doubt that what would be left after a successful Objection B would still be a dispute concerning the treatment afforded by Denmark and Germany to the Claimants. After all, in making Objection B, the Respondents rely on Article 9(1)(b) of the Regulation (EU) No 912/2014, which is contained in Section 2 of Chapter III of the Regulation titled "*conduct of disputes concerning* ***treatment afforded by a Member State****"* (emphasis added).[51] Clearly, the Danish and German measures vis-à-vis the

[51] Exhibit RL-59.

Claimants would continue to be the heart of the dispute and the list of substantive issues to be considered by the Tribunal would remain essentially the same. The Respondents expressly confirmed this understanding in an answer to Arbitrator Johnson's question during the Hearing:

> "JUDGE JOHNSON: […] If we were to grant bifurcation on B and then let's go a step further and say we accepted Objection B. Would that mean that we still -- the Tribunal still would judge the acts of Germany and Denmark as against the ECT? And if we found that those acts violated the ECT, we would simply issue an award against the EU? We would still judge the acts of Germany and Denmark as they implemented the authority granted them by the EU. We would still judge those acts against the ECT; is that right?
>
> [redacted]: That is correct."[52]

34. Thus, the majority of the Tribunal accepts the Claimants' submission that "*Klesch's claims against the EU would still continue and each and every claim against Germany and Denmark would be attributed to, and pleaded against, the EU*".[53] For that reason, the majority is not persuaded that the work to be done by the Parties and the Tribunal would be significantly reduced, or the amount of fees saved would be substantial, even if two out of the three arbitrations are terminated and only the EU Arbitration proceeds.[54] Even Denmark and Germany would continue to have to expend time and costs in dealing with the dispute because their actions are what the dispute is about. It

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52 Transcript, page 117 lines 7-17.

53 Claimants' Answer, para. 117.

54 *Cf* Respondents' Request, para. 216.

is not realistic to think that the EU would be able to deal with the dispute without the active participation of Denmark and Germany, albeit as non-parties to the arbitration.

35. In any event, the time taken for the entire dispute to be disposed of would certainly not be abridged by a successful Objection B. In fact, the time needed to dispose of the entire dispute would be lengthened by the time taken to deal with Objection B preliminarily.[55] Objection B would be dealt with first and thereafter, all the substantive issues will still have to be dealt with, with the EU as the respondent. The latter phase would thus be no shorter than if there was no bifurcation. The majority concludes that this entire dispute concerning Denmark and Germany's treatment of the Claimants will take more time to conclude if there is bifurcation (regardless of whether Objection B is allowed or not), than if the matter is not bifurcated.

36. In taking this view, the majority recalls that the Parties' approach has been to coordinate these Three Arbitrations and to have one procedural timetable for the three cases to be dealt with together. This was and is eminently sensible. In the context of the present bifurcation application, it is fair for the majority to consider the prompt disposal of the *entire* proceeding rather than considering two of the arbitrations separately from the third. This is especially so as Denmark and Germany will inevitably remain substantively engaged in dealing with these proceedings even if Objection B succeeds.

37. Further, Objection B raises an important question of how the EU ought to be treated in arbitrations commenced against its Member States. The majority is of the view that this question would be more appropriately dealt with together with the merits.

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55 Claimants' Answer, paras. 130-131.

38. As the Respondents themselves had emphasised at the Hearing, "*[t]he cases before [the Tribunal] are exceptional. Bringing essentially identical claims arising from EU measures in separate proceedings against the [EU] and two of its Member States is wholly unprecedented.*"[56] In determining whether Denmark, Germany or the EU ought to be the proper respondent, the Tribunal would be required to consider the EU's arrangements with its Member States and how those arrangements could relate to which entity is (or entities are) the proper respondents in an ICSID arbitration. None of the Parties have referred the Tribunal to an ICSID decision dealing directly with these issues. Without guidance from precedent, it is all the more important that this issue be dealt with by the Tribunal with full knowledge of the facts and the evidence.

39. The Respondents also submit that "***[g]iven the evolving character of the scope and nature of the EU's external competences**, the determination of who (the European Union or a Member State) is responsible for a breach of a mixed agreement [such as the ECT] is **to be made ex post**, that is when an alleged wrongful act is committed*" (emphasis added).[57] This is an important point. It reinforces the majority's view that the EU's external competences should be viewed in the context of specific facts and therefore would be best decided when the full facts and evidence are before the Tribunal.

40. While the Respondents submitted at the Hearing that "*the application of investment protection [and] the standards between the EU and a third country is now EU competence [although] it was not like that in the 1990s*" when the EU and its Member

[56] Transcript, page 3 lines 13-17.

[57] Respondents' Request, para. 68.

States acceded to the ECT,[58] it remains unclear to the Tribunal which are the competences purportedly surrendered to the EU by Denmark and Germany that the Tribunal should consider in determining Objection B.[59] This is a live issue since the Claimants have highlighted that Regulation (EU) No 912/2014[60] on which Denmark and Germany rely appears to deal only with the allocation of "financial responsibility" between the EU and its Member States, and not with the question of consent to arbitration.[61] Simply put, the exact scope of Objection B is presently unclear. This is so not just because the competences in question have not been identified, though that is illustrative of the situation. The exact scope of Objection B is not yet clear because we have not yet reached the stage at which the Respondents would spell that out in full. As a result, the Tribunal does not know what facts it will need to examine in order to deal with Objection B. This means that the Tribunal cannot properly conclude that Objection B can indeed be dealt with summarily or that it would be efficient to do so.

41. In the circumstances, the majority considers it more appropriate for the Tribunal to deal with the important question of who the proper respondent is together with the merits, after the Parties have been given a full opportunity to be heard and the Tribunal has been fully briefed with all the relevant facts, including on the conduct of the various Parties. This would allow the Tribunal to give Objection B proper consideration and avoid the risk of any procedural unfairness to the Parties. The majority therefore declines to bifurcate Objection B.

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58 Transcript, page 106 line 18 to page 107 line 6.

59 Claimants' Answer, para. 124.

60 Exhibit RL-59.

61 Claimants' Answer, para. 103.

B. OBJECTION A

42. The majority of the Tribunal is not convinced that bifurcation of Objection A would materially reduce the time and cost of the proceeding. There is significant uncertainty about the potential time and costs savings of considering Objection A on a bifurcated basis. In the majority's view, the Respondents have not established why it would be better for the Tribunal to address Objection A sooner, in bifurcated proceedings, rather than later, with the merits and with the benefit of the Parties' full arguments. Arbitrator Viñuales disagrees because he considers that, given the nature of Objection A, which the Claimants themselves consider to be detachable from the merits and which could potentially dispose of all three arbitrations, it is inefficient to wait until the merits stage to potentially dispose of all three cases. The standard applicable for bifurcation in no way entails consideration of the prospects of success of a given objection, which in any event is not possible at this stage, given that the objection has not yet been fully stated. The case for bifurcation is further strengthened, in his view, by the specific facts of the three arbitrations, in which the intra-EU objection presents specificities which have not been addressed in the past.

43. However, in the majority's view, ultimately, in a bifurcation application, the applicant must convince the tribunal that it would be worthwhile to take the chance that some of the claims in dispute can be dealt with earlier, while acknowledging that if the applicant turns out to be wrong about its objections, the entire dispute will be disposed of later. The law on bifurcation (as set out above) requiring the tribunal to consider factors such as how intertwined the applicant's objections are with the merits of the case, and whether bifurcation would dispose of all or a substantial portion of the dispute, is a

reflection of how the tribunal should deal with that conundrum. This is part and parcel of the analysis required by Rule 54(2) of the ICSID Additional Facility Arbitration Rules 2022 and Rule 44(2) of the ICSID Arbitration Rules 2022.

44. In this case, the Respondents have only presented the Tribunal with this conundrum without offering much more to persuade the Tribunal to take this chance. The main justification the Respondents have proffered in support of bifurcating Objection A is simply that if Objection A were upheld, it could potentially dispose of all Three Arbitrations.[62] However, the majority has no basis to measure how likely this is. That would require a proper examination of the merits of Objection A which cannot be done at this stage. For now, it must be an equal possibility that Objection A may be dismissed preliminarily with none of the Three Arbitrations being disposed of. In that case, not only would there be a second merits phase which would result in additional time and costs being incurred by the Parties and additional work to be done by the Tribunal, there may also be duplicative evidence and arguments led before the Tribunal.

45. The Respondents' primary argument that Objection A could dispose of all three arbitrations is also less compelling as there are more than these two possible outcomes in relation to Objection A. The third possibility is that only part of these proceedings is disposed of by Objection A.

46. The Claimants submit that Objection A could not apply to the EU because *Komstroy* only states that "*Article 26(2)(c) ECT must be interpreted as not being applicable to disputes* ***between a Member State and an investor of another Member State***

62 Respondents' Request, paras. 214, 219.

concerning an investment made by the latter in the first Member State" (emphasis added).[63] *Komstroy* does not address the situation of an arbitration between the EU itself (which the Respondents do not consider a Member State[64]) and an investor of a Member State. The Tribunal has not been referred to any ICSID decisions in which the EU, as a party to the arbitration, successfully relied on the *Achmea* and/or *Komstroy* decisions to challenge the tribunal's jurisdiction. If the Claimants are right that the EU is not entitled to rely on *Komstroy* for the "intra-EU objection", but Denmark and Germany succeed on Objection A, the third possible outcome would be that the EU Arbitration continues while the Denmark and Germany Arbitrations are terminated.

47. Thus, it is not even that an early disposal of the entire proceedings is one of two possibilities. Rather, there are at least three possible outcomes, only one of which "*would materially reduce the time and cost of the proceeding*". This is hardly a compelling basis for bifurcation. The majority therefore declines to bifurcate Objection A.

48. Further, the Tribunal is of the view that Objection A should be heard together with Objection B. The Parties have themselves have noted the link between Objections A and B, with the Respondents submitting that "*Objection B is made in the alternative to Objection A*",[65] and the Claimants asserting that Objections A and B are inconsistent with one another[66] and "*incompatible*".[67]

63 Exhibit RL-45, para. 66; Claimants' Answer, para. 80.

64 Claimants' Answer, para. 80.

65 Transcript, page 11 line 18, page 111 lines 12-21.

66 Claimants' Answer, paras. 79-80.

67 Transcript, page 47 line 14-17.

49. The Tribunal finds that there is a real chance that its decision on Objection B regarding the proper respondent in the Three Arbitrations may have a bearing on which Claimants are allowed to bring their claims against the proper respondent, whether valid consent to arbitrate had been given by the respective Claimants and Respondent, and thus, whether Objection A can be sustained. Since Objection B potentially has some relevance to how Objection A ought to be analysed, and the majority of the Tribunal has decided not to bifurcate Objection B, the majority also considers it appropriate to decline bifurcation of Objection A and to deal with it together with the merits at a later stage when all the relevant facts and evidence have been adduced.

50. In this regard, the majority observes that in deciding not to bifurcate Objection A, it joins a number of other tribunals who have considered the "intra-EU objection" and declined bifurcation of this objection. As the majority in *Mainstream Renewable Power Ltd and others v Federal Republic of Germany* notes at para. 42, "*almost every one of the 42 tribunals that has considered the "intra-EU objection" … has in its discretion determined instead to join the preliminary question regarding the "intra-EU objection" to the merits"*.[68]

C. OBJECTION C

51. It is undisputed that Objection C, even if upheld after bifurcation, would not dispose of the entire case in each of the Three Arbitrations. The Respondents accept that the Claimants' Art 13 Claim would still survive.[69]

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68 Exhibit RL-39.

69 Respondents' Request, para. 217; Claimants' Answer, para. 148; Transcript, page 26 lines 11-12, page 32 lines 21-23.

52. However, the Respondents assert that bifurcation of Objection C would still result in substantial savings of time and costs and would materially reduce the scope of the proceedings in the merits phase, because "*a significant portion of the Claimants' Memorials and offers of evidence are devoted to its arguments and claims under Article 10 ECT*".[70] The Respondents claim that the Tribunal need only determine whether the contested measures are "Taxation Measures" within the meaning of Article 21 of the ECT in the jurisdictional phase of proceedings,[71] which is a "*separate and independent question from the merits which does not require the Tribunal to consider the argument and evidence that would be relevant in order to determine whether the measures at issue infringe any of the other provisions of the ECT invoked by the Claimants*."[72] The disputes would be limited to "*just one claim*" (*i.e.* the Art 13 Claim), so deadlines could be shorter and the Tribunal would need less time to consider and rule on that single claim.[73]

53. The Claimants disagree. The Claimants highlight their reliance on their arguments on the fair and equitable treatment standard regarding their Art 10 Claims, to support their arguments that the Respondents' alleged expropriation was unlawful.[74] Thus, the Claimants argue *inter alia* that there will not be any substantial savings of time and costs nor a material reduction of the scope of proceedings if Objection C were bifurcated. Their case on the Art 10 Claims "*will be larger if dealt with on its own*" and

70 Respondents' Request, paras. 213, 217-218, 220; Transcript, page 26 lines 15-17.

71 Respondents' Request, para. 228.

72 Respondents' Request, para. 228.

73 Transcript, page 33 lines 4-7.

74 Claimants' Answer, paras. 149-151; Transcript, page 76 lines 10-25, page 77 lines 1-7.

"*around 70% of [the Claimants'] Memorials would still need to be considered even if Objection C were upheld*".[75]

54. Having heard the Parties, the majority of the Tribunal finds that the Respondents have not shown that Objection C would involve reviewing only a narrow set of facts that could be dealt with preliminarily in bifurcated proceedings. The Tribunal accepts that if Objection C is successful, it may only have to deal with the Art 13 Claim instead of multiple claims under Article 10 of the ECT. However, it is not clear to the majority that this would result in "*a completely different case, in terms of scope, in terms of work which [the Tribunal has] to do and which [the Parties] have to do*", such that the scope of the issues to be briefed at the merits stage would be materially reduced and bifurcation would be "*very cost-efficient*".[76]

55. Arbitrator Viñuales considers, instead, that the need for the Parties to litigate several claims instead of focusing – if the objection were to be upheld – on a single claim is not cost-effective. Moreover, in his view, the potential to dispose of several claims under Article 10 of the ECT clearly meets the threshold of a "*substantial portion of the dispute*".

56. To the majority, however, the Art 13 Claim does not appear to be as limited as the Respondents suggest. That claim appears to be directed at the very same conduct as the Claimants' Art 10 Claims. It is thus not unreasonable to expect that similar facts and evidence would have to be considered when the Tribunal assesses the Art 13 Claim at

75 Claimants' Answer, paras. 152-153, 163-167.

76 Transcript, page 136 lines 2-15.

the merits stage, even if Objection C had already been determined preliminarily and the Claimants' Art 10 Claims had been disposed of.

57. For example, the Tribunal would have to analyse the alleged arbitrary and discriminatory nature of the solidarity contribution in relation to the Claimants' Art 13 Claim, even if it had already considered such issues when determining whether the solidarity contribution was a "Taxation Measure" within the meaning of Article 21 of the ECT[77] or had decided that it had no jurisdiction to rule on whether the Respondents breached Article 10(1) of the ECT by "*an unreasonable or discriminatory measure that has impaired the Claimants' management, maintenance, use, enjoyment or disposal of its investments*".[78]

58. Hence, the majority's view is that the Respondents have not established that bifurcation of Objection C would materially dispose of a substantial portion of the dispute, or result in significant savings of time and cost. The majority declines to bifurcate Objection C.

D. OBJECTION D

59. Objection D, like Objection C, would not dispose of the entire case in each of the Three Arbitrations even if it were upheld after bifurcation. The Respondents also accept that the Tribunal would still have to consider the Claimants' Art 13 Claims if Objection D succeeds.[79]

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77 Claimants' Answer, paras. 160-161.

78 Claimants' Memorial in EU Arbitration, para. 1156(2)(b); Claimants' Memorial in Denmark Arbitration, para. 1139(2)(b); Claimants' Memorial in Germany Arbitration, para. 1071(2)(a).

79 Respondents' Request, paras. 217-218; Claimants' Answer, paras. 188-189; Transcript, page 39 lines 23-24.

60. The Respondents make similar arguments in respect of Objection D as they did for Objection C. In particular, the Respondents claim that Objection D "*also raises a separate and independent question, namely whether the measures at issue meet the requirements of Article 24.3(b)(ii) of the ECT.*"[80] The Tribunal need only consider whether there is a "*situation of war, armed conflict or emergency in international relations*" and whether the Respondents are entitled to "*consider*" that the measures at issue are "*necessary*" to protect their "*essential security interests*", which are "*legal issues [that] can be addressed and resolved by the Tribunal without considering the merits of any of the claims in the three cases, or the argument and evidence submitted in support of those claims*".[81]

61. The Claimants again disagree. Amongst other things, the Claimants argue that if the Tribunal determines that an emergency situation did exist when the solidarity contribution was created, the Tribunal would also have to assess the reasonableness of the solidarity contribution, which would overlap with the Claimants' Art 10 and Art 13 Claims.[82] There would not be any material reduction in the time and costs of the proceedings nor the scope of the dispute.[83]

62. The majority notes the Respondents' rebuttal that the issues that the Tribunal has to decide under Objection D are "*finite, circumscribed, [and] very different from a complete fair and equitable treatment case*" (*i.e.* regarding the Claimants' Art 10

80 Respondents' Request, para. 229.

81 Respondents' Request, para. 229; Transcript, page 40 line 12 to page 42 line 3, page 133 line 17 to page 134 line 1.

82 Claimants' Answer, paras. 194-195.

83 Claimants' Answer, paras. 188-189, 197.

Claims).[84] However, that does not suggest that the issues raised in Objection D would not be a subset of the issues which must also be considered in relation to the Claimants' Art 10 and Art 13 Claims, such that there would not be any procedural efficiencies to be gained by determining Objection D preliminarily.

63. In the premises, as with Objection C, the majority of the Tribunal is not persuaded that the bifurcation of Objection D would materially dispose of a substantial portion of the dispute and result in significant time and costs savings. The majority declines to bifurcate Objection D. Arbitrator Viñuales disagrees. In his view, it would be more efficient to focus on a single claim – if the objection were to be upheld – rather than on multiple claims. Moreover, the objection meets the standard of potentially disposing of "*a substantial portion of the dispute*".

V. DECISION

64. For the foregoing reasons, the Tribunal, by majority, orders that:

(a) the Respondents' Request for Bifurcation is dismissed;

(b) the Parties shall follow the procedural timetable set out in Scenario 2 of Annex B to Procedural Order No. 1 in each of the Three Arbitrations; and

(c) the costs of this application are reserved to be dealt with at a later stage.

65. For the avoidance of doubt, the Tribunal's decision not to bifurcate the proceedings is without prejudice to any future ruling as to whether Claimants' claims fall within the

[84] Transcript, page 134 lines 7-10.

scope of its jurisdiction. The Parties are expected to address in full, and the Tribunal will thoroughly deal with, all of Respondents' preliminary objections in the next phase of the proceedings, together with the issues pertaining to the merits of the case. The Tribunal's decision is also without prejudice to any future ruling as to liability or quantum.

On behalf of the Tribunal,

[signed]

Cavinder Bull S.C.
President of the Tribunal
Date: 8 April 2025