

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Unión Fenosa Gas, S.A.

v.

Arab Republic of Egypt

(ICSID Case No. ARB/14/4)

PROCEDURAL ORDER NO. 5

The Tribunal

V.V. Veeder, President of the Tribunal

J. William Rowley, Arbitrator

Mark Clodfelter, Arbitrator

Secretary of the Tribunal

Milanka Kostadinova

4 March 2016

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1. *The Procedural Background*

- 1.1. This Procedural Order No. 5 addresses the Respondent's request for bifurcation and a stay, filed as part of its Memorial on Objections to Jurisdiction dated 25 November 2015 (the "Request").
- 1.2. The Tribunal and the Parties held a procedural conference call by telephone on 2 December 2015 at 1:00pm EST on the procedural schedule for the Parties' respective submissions on the Request.
- 1.3. Pursuant to the Tribunal's instructions given during the procedural conference call on 2 December 2015, on 9 December 2015, the Parties submitted letters containing their respective proposals for procedural calendars in bifurcated and non-bifurcated scenarios. The Respondent also submitted its proposal of a procedural calendar if the Tribunal were to order a stay of these proceedings pending the resolution of the Cairo Regional Centre for International Commercial Arbitration ("CRCICA") and the International Chamber of Commerce ("ICC") Arbitrations.
- 1.4. On 22 December 2015, the Tribunal issued Procedural Order No. 4, setting out the procedural timetable for the Parties' submissions on bifurcation, and reserving, for the time being, its decision regarding the Respondent's request for a stay, or suspension, of this arbitration.
- 1.5. On 22 December 2015, the Claimant filed its Objection to Respondent's Request for Bifurcation (the "Objection") in accordance with the Tribunal's Procedural Order No. 4.
- 1.6. On 30 December 2015, the Respondent submitted a letter in reference to the Tribunal's Procedural Order No. 4 and the proposed schedules in bifurcated and non-bifurcated scenarios, and requested adjustments of the dates according to a proposed schedule.
- 1.7. On the same day, the Tribunal requested the Claimant to submit its comments on the Respondent's letter, by no later than 11 January 2016.
- 1.8. On 11 January 2016, the Claimant submitted its letter in response to the Respondent's letter of 30 December 2015, objecting to any date adjustment of the proposed schedules for the bifurcated and non-bifurcated scenarios.
- 1.9. On 18 January 2016, the Respondent filed its Reply Memorial on its Request for Bifurcation (the "Reply").

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- 1.10. On 5 February 2016, the Claimant filed its Rejoinder on Bifurcation (the “Rejoinder”).
- 1.11. After summarising the Parties’ respective positions in Section 2 of this Procedural Order, the Tribunal provides the reasons for its decisions in Section 3. The Tribunal’s decisions are set out in Section 4.

2. *The Respective Positions of the Parties*

- 2.1. The Parties’ respective positions on the two procedural issues of bifurcation and a stay are summarised below, taken from their written submissions listed above.
- 2.2. *The Respondent’s Position:* In summary, as to its application for bifurcation, the Respondent contends that its jurisdictional objections are substantial on several grounds: (i) The Tribunal lacks jurisdiction over the Claimant’s alleged investments because they were procured through corrupt and illegal practices to which the Claimant was party; (ii) The Claimant has failed to establish that its alleged investments were ‘investments’ of a Spanish investor under the Spain-Egypt BIT at the time of the conduct of which the Claimant complains, by reference to (a) the Pledge of Unión Fenosa Gas’ shares in the Spanish Egyptian Gas Company (“SEGAS”) and (b) the Assignment of SEGAS’s rights under the Tolling Contracts; (iii) The Tribunal lacks jurisdiction or, alternatively (if it had any jurisdiction) the Tribunal should decline to exercise such jurisdiction, because the ‘Gas Supply Dispute’ is essentially contractual in nature, to be settled by the Parties’ contractually agreed fora (not ICSID arbitration); (iv) The Tribunal in any event lacks jurisdiction or, alternatively (if it had any jurisdiction) the Tribunal should decline to exercise such jurisdiction, because the Parties’ present dispute has previously been submitted to CRCICA and ICC Arbitrations.
- 2.3. The Respondent contends that its jurisdictional objections may lead to the dismissal of this entire case (or a substantial portion of the case). The Respondent further contends that its objections are not intimately linked with the merits of the case. It concludes that bifurcation would be fair in all the circumstances.
- 2.4. In summary, as to its application for a stay, the Respondent contends that the pending CRCICA and ICC Arbitrations warrant a stay of these ICSID arbitration proceedings.
- 2.5. In support of its two applications, the Respondent requests the Tribunal to make the following orders (as pleaded in Paragraph 73 of its Reply Memorial, at page 25): to “(a) Bifurcate these proceedings and hear the Arab Republic of Egypt’s objections set forth in Section II(A) above; [its Reply] (b) In *eventu*, suspend the proceedings pending the resolution of the Contractual [CRCICA and ICC]

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Arbitrations; (c) Grant all further relief requested in its Memorial on Objections to Jurisdiction and Request for Bifurcation.”

- 2.6. *The Claimant’s Position:* In summary, the Claimant opposes the Respondent’s application for bifurcation on the grounds that: (i) The Respondent’s unsubstantiated allegations of corruption (which the Claimant denies) cannot form a basis for bifurcation and do not give rise to any jurisdictional issue; (ii) The Claimant’s investment in the Sale and Purchase Agreement (“SPA”) and SEGAS qualify as ‘investments’ under the Spain-Egypt BIT because: (a) the Claimant continues to own its shares in SEGAS which in turn retains its rights under the Tolling Contracts; (b) the Respondent’s new contention that the SPA does not qualify as an ‘investment’ is not a substantial jurisdictional objection; and (c) the Respondent’s objections to the Claimant’s investment under the BIT are intimately linked to issues of damages (not therefore leading to the dismissal of the case on jurisdictional grounds); (iii) The Respondent’s unfounded allegation that the Claimant’s claims are contractual does not warrant bifurcation because: (a) that allegation is not a substantial jurisdictional objection; and (b) it is also inextricably linked to the merits of the case; and (iv) There is no basis for considering separately the Respondent’s jurisdictional objection based upon the Claimant’s and SEGAS’ pursuit of the CRCICA and ICC Arbitrations.
- 2.7. In summary, the Claimant opposes the Respondent’s application for a stay because: (i) the doctrines of *res judicata* and collateral estoppel do not warrant the dismissal of the Claimant’s claims or any stay of these arbitration proceedings; (ii) the Respondent’s reliance upon the doctrine of *lis pendens* is inapposite; and (iii) judicial comity and procedural efficiency require that these arbitration proceedings continue without any stay.
- 2.8. In support of its opposition to the Respondent’s two applications, the Claimant requests the Tribunal to make the following orders (as pleaded in Paragraph 90 of its Rejoinder Memorial, at page 45): to reject the Claimant’s request to bifurcate these arbitration proceedings because none of the Respondent’s jurisdictional objections merit bifurcation; instead, to join those objections to the merits of this case; and to dismiss the Respondent’s request for a stay of these proceedings as an improper attempt to achieve further delay.

3. *The Tribunal’s Analysis*

- 3.1. These proceedings are conducted in accordance with the ICSID Convention and the ICSID Arbitration Rules in force as of 10 April 2006 (the “ICSID Arbitration Rules”).

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- 3.2. ICSID Arbitration Rule 19 provides generally that: “[t]he Tribunal shall make the orders required for the conduct of the proceeding.” The decisions to bifurcate or stay these arbitration proceedings are thus, as general matters, decision for the Tribunal’s discretion under the ICSID Convention and the ICSID Arbitration Rules.
- 3.3. As regards jurisdictional objections, Article 41(2) of the ICSID Convention specifically provides that: “Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”
- 3.4. ICSID Arbitration Rule 41(4) provides (in relevant part) that the Tribunal “may deal with the objection as a preliminary question or join it to the merits of the dispute. [...]” The word “may” confirms the existence of an arbitral discretion to order bifurcation of the objection or its joinder to the merits.
- 3.5. As noted in Schreuer et al, *The ICSID Convention* (2nd ed., 2009), “the choice between a preliminary decision [upon bifurcation] is a matter of procedural economy. It does not make sense to go through lengthy and costly proceedings dealing with the merits of the case unless the tribunal’s jurisdiction has been determined authoritatively. On the other hand, some jurisdictional questions are so intimately linked to the merits of the case that it is impossible to dispose of them in preliminary form ...” (p. 537).
- 3.6. *Schreuer* continues: “... Tribunals deciding to join the jurisdictional question to the merits of the dispute sometimes stated that the questions of jurisdiction were closely related to the merits of the dispute, that they were not yet ripe for decision, or required a fuller examination of factual evidence. The need for a joinder to the merits is apparent where the answer to the jurisdictional questions depends on testimony and other evidence that can only be obtained through a full hearing of the case. This would be the case, in particular, if the jurisdictional questions are closely related to the merits and depend on the same factual questions. In such a case, the decision on jurisdiction can only be made after a full consideration of the evidence.” (pp. 538-539, citations here omitted).
- 3.7. The Tribunal adopts this authoritative approach to the exercise of its discretion, based on the arbitral jurisprudence there cited. The Tribunal has considered the further legal materials cited by the Parties in their written submissions; but it does not consider that these affect such approach. In addition, the Tribunal acknowledges that the criteria to assess whether bifurcation or joinder is warranted will of course vary in significance from case to case. It will invariably include, however, arbitral

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economy, procedural efficiency and, above all, overall fairness to all Parties. In deciding whether or not these proceedings should be bifurcated, the Tribunal must take into account, in particular, whether any of the Respondent's objections could dispose of the case in its entirety (should such objections be sustained) and the degree to which the Respondent's objections are intertwined with the merits of Claimant's claims.

- 3.8. The Tribunal does not consider that it can determine at this stage of the submissions whether any of the Respondent's objections would necessarily, if bifurcated and sustained by the Tribunal, dispose of the entirety of the Claimant's claims as a matter of jurisdiction, nor even a significant distinct part of the Claimant's case.
- 3.9. The Tribunal also considers that certain of the Respondent's objections turn on disputed issues of fact requiring evidence (including testimony) that is likely to overlap materially with evidence on the merits of the dispute and that, as stated by *Schreuer*, "can only be obtained through a full hearing of the case" as it relates to those issues. The Tribunal therefore considers that bifurcation, if here ordered, would pose too great a risk of the Parties' incurring significant additional expense and delay, contrary to procedural efficiency and overall fairness to both Parties.
- 3.10. To say anything more at this early stage of these proceedings would be misplaced. The Tribunal has not formed any concluded view as to the decisive issues in the case, still less taken any concluded view as to those issues. Nor could it do so without receiving further submissions, evidence and testimony from the Parties. It can only here state its conclusion that this case does not appear to call for any bifurcation, but rather for the joinder to the merits of the Respondent's jurisdictional objections. It is manifestly the safer procedural choice, being the least likely to prejudice either Party or the arbitral process itself.
- 3.11. As regards the Respondent's application for a stay of these proceedings, the Tribunal requests that it continue to be informed on regular basis by the Parties of the progress made in the CRICCA and ICC arbitrations (insofar as it may be permissible for each of them to do so). For the time being, the Tribunal reserves its decision regarding the Respondent's stay application and makes no order for a stay of these arbitration proceedings.

4. *The Tribunal's Decision*

- 4.1. For the reasons set out above, the Tribunal decides as follows:
 - (i) The Respondent's application for bifurcation of its jurisdictional objections is rejected;

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- (ii) The Claimant's application to join the Respondent's objections to the merits is granted; and
- (iii) The Parties are requested, **within 15 days** of this order, to agree a modified procedural timetable leading up to and including a hearing on jurisdiction and merits.

For and on behalf of the Tribunal,



V.V. Veeder
President of the Tribunal
Date: 4 March 2016