

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Nasib Hasanov**

**v.**

**Georgia**

**(ICSID Case No. ARB/20/44)**

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**PROCEDURAL ORDER NO. 2**

***Members of the Tribunal***

Mr. Laurence Shore, President of the Tribunal  
Professor Stanimir Alexandrov, Arbitrator  
Mr. J. William Rowley QC, Arbitrator

***Secretary of the Tribunal***

Ms. Celeste E. Mowatt

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March 26, 2021

## I. Procedural Background

1. The Request for Arbitration of Mr. Hasanov dated October 19, 2020, was registered by the Secretary-General of ICSID on October 30, 2020, in accordance with Article 36(3) of the ICSID Convention.<sup>1</sup> The Tribunal was subsequently constituted on February 18, 2021, in accordance with Article 37(2)(a) of the ICSID Convention.
2. On February 24, 2021, the Respondent filed a request for bifurcation of the proceeding (“**Bifurcation Request**”). With reference to Articles 41(2) and 44 of the ICSID Convention, as well as ICSID Arbitration Rules 19 and 41(3), the Bifurcation Request asked that the Tribunal exercise its discretion to bifurcate the proceeding to hear the Respondent’s objection based on Article 9 of the Azerbaijan-Georgia Bilateral Investment Treaty as a preliminary objection.
3. The Claimant opposed the Bifurcation Request by letter dated March 8, 2021. The Claimant argued that the objection was not meritorious, and that bifurcation would not promote procedural economy and would cause unnecessary cost and delay. If the Bifurcation Request were granted, the Claimant requested that the bifurcated issue proceed on an expedited calendar.
4. Pursuant to ICSID Arbitration Rule 13(1), the Tribunal held a first session with the parties on March 19, 2021, by videoconference, during which the parties made oral submissions on the Bifurcation Request, supported by ‘power point’ slides.
5. Following the first session, the Tribunal informed the parties, by ICSID’s letter of March 19, 2021, of its decision to grant the request for bifurcation:

*In view of the parties’ agreed timetable for a potential bifurcation phase, the Tribunal wishes to indicate now the determination that it reached in deliberations following today’s first session. In due course, once Procedural Order No. 1 has been issued, the Tribunal shall issue a further procedural order in which the bifurcation determination is formally rendered.*

*The Tribunal has decided that Respondent’s Application for Bifurcation of the “Inter-State Negotiation Objection” shall be granted. Accordingly, the parties are directed to adhere to Steps 1-3 in the joint timetable previously submitted to the Tribunal, with the hearing date in Step 3 being 12 May 2021, as discussed during the first session.*

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<sup>1</sup> The Request for Arbitration included an application for provisional measures (RfA, paras 110-124). In accordance with Arbitration Rule 39(5), the Secretary-General fixed a schedule for further submissions on the provisional measures request following registration of the Request for Arbitration. The parties’ further submissions on provisional measures were filed on December 21, 2020 (Respondent’s observations); January 12, 2021 (Claimant’s response) and February 5, 2021 (Respondent’s reply). Correspondence from the parties of March 17 and 18, 2021, addressed factual developments connected to the provisional measures request. In its letter of March 18, 2021, the Claimant stated that his provisional measures application should be postponed *sine die*, given the developments.

*The Tribunal thanks the parties for their submissions today.*

6. On March 26, 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the parties on procedural matters as indicated by the parties' comments on the draft Order and the discussion during the First Session. Procedural Order No. 1 sets out the agreed procedural calendar, including the timetable for addressing the bifurcated issue.

## II. Tribunal's Analysis

7. ICSID Arbitration Rule 19 states that "[t]he Tribunal shall make the orders required for the conduct of the proceeding."
8. The Tribunal further notes that bifurcation is a matter for the Tribunal's discretion under the ICSID Convention and the applicable 2006 ICSID Arbitration Rules. Article 41(2) of the ICSID Convention indeed 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.*

9. 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 [...]."
10. The objection at issue is, as the Respondent characterizes it, the "Inter-State Negotiation Objection" ("**Objection**").
  - (i) Article 9.1 of the Azerbaijan-Georgia BIT ("**BIT**," translation of the Russian text) provides as follows: "Any dispute that may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the latter Contracting Party, will be subject to negotiation between the Contracting Parties in dispute."
  - (ii) Article 9.2 of the BIT provides, in pertinent part: "If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be settled in such a manner within six months from the day on which a written claim was submitted, the investor shall be entitled to refer the matter : . . . ."

The Respondent contends that Article 9 "conditions resort to international arbitration on prior negotiations between Georgia and the Republic of Azerbaijan for six months," and it "is undisputed that no such negotiations have even been sought or initiated, much less conducted for six months. Claimant's claims must therefore be dismissed at the outset" (letter dated February 24, 2021).

11. As noted above, the Claimant opposes the Bifurcation Request on the grounds that the Objection is "highly unmeritorious" and bifurcation would not promote procedural

economy. If the Tribunal were to grant bifurcation, the Claimant requests an expedited schedule (letter dated March 8, 2021).

12. The parties broadly agree (letters of February 24 and March 8, 2021) that the following tripartite test applies in investment arbitration for determining whether bifurcation is warranted:
- whether the Objection is substantial or frivolous;<sup>2</sup>
  - whether the Objection is closely intertwined with the merits; and
  - whether all or an essential part of the claims may be disposed of by the Objection.

The cases cited by the parties regarding this test include, but are not limited to, *Emmis International v. Hungary*, ICSID Case No. ARB/12/2 (Decision on Respondent's Application for Bifurcation dated June 13, 2013; RL-55); *Alliy Ltd. v. Czech Republic*, UNCT 15/1 (Decision on Bifurcation dated October 5, 2015; RL-56); and *Glamis Gold, Ltd. v. USA*, UNCITRAL (Procedural Order No. 2 dated May 31, 2015; RL-61).<sup>3</sup>

A. The Respondent's Position in Support of Bifurcation

13. The Respondent submits that its Objection satisfies each element of the tripartite test:
- (i) The language of the prevailing Russian of Article 9, with the phrase "the Contracting Parties" being expressly defined as the Government of Georgia and the Government of Azerbaijan, requires that negotiations between the two Governments are a condition of their consent to arbitration. To adopt the Claimant's position – the phrase refers to the investor and the host State – would be to rewrite the BIT. Other investment treaties also require inter-State negotiations as a condition to arbitration. Further, the doctrine of estoppel, invoked by the Claimant, is inapplicable in this context, and the Respondent rejects any allegation that it has not acted in good faith in raising the Objection (Tr. pp. 30-36).

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<sup>2</sup> In oral submissions, the parties diverged on the precise meaning of this element. The Claimant citing *Eco Oro Minerals Corp. v. Colombia*, ICSID Case No. ARB/16/41 (Procedural Order No. 2 dated June 28, 2018; RL-58), that the Objection must have merit in the sense that it is serious and substantial; *i.e.*, the threshold is higher than merely showing that the Objection is not frivolous. Transcript ("Tr.") p. 40. The Respondent referred to the authorities cited at fn 3 of its February 24 letter, and submitted that the Tribunal should bifurcate if the Objection is "prima facie plausible, prima facie arguable." Tr. p. 58. See also Tr. p. 29: "the applicable standard is whether the objection is prima facie serious."

<sup>3</sup> See fn 3 in the Respondent's letter of February 24, 2021. The Claimant adds that even if the Respondent satisfies the test elements, bifurcation is not obligatory and remains a matter of discretion for the Tribunal (letter dated March 8, 2021).

- (ii) It is clear – and the Claimant does not contest – that the issues raised by the Objection are “entirely separate from the merits of the case” (Tr. p. 29).
- (iii) The Objection would effectively dispose of the entire case whether characterized as a matter of jurisdiction or admissibility. If the former, many treaty tribunals have ruled that a negotiation requirement must be satisfied to establish the arbitral jurisdiction. If the latter, all claims of the investor should be dismissed as inadmissible. Even if the case were stayed to allow for negotiations rather than dismissed, inter-State negotiations may lead to a settlement, thereby disposing of the entire case (Tr. pp. 38-39).

**B. The Claimant’s Opposition to Bifurcation**

14. The Claimant submits that the Objection is not meritorious and bifurcation would not support procedural economy:
- (i) On its face, the Objection is entirely lacking in merit; it is frivolous (Tr. p. 55). The Respondent’s interpretation of Article 9 is plainly incorrect,<sup>4</sup> and by raising it at this time, rather than in the March to September 2020 time frame, the Respondent is not acting in good faith. The Respondent has not identified an award in favor of its position regarding language similar to that in Article 9. However, the award in *Capital Financial Holdings Luxembourg SA v. Cameroon*, ICSID Case No. ARB/15/18 (June 22, 2017),<sup>5</sup> is instructive and points, in a similar context, to there not being an obligation on the investor to ensure that diplomatic conciliation takes place.<sup>6</sup>
  - (ii) The Claimant does not contest that the Objection raises a discrete issue not intertwined with the merits. However, the Claimant argues that briefing the Objection separately for there to be a separate hearing while the Claimant is preparing its memorial will cause cost and prejudice to the Claimant (Tr. p. 64).
  - (iii) The Objection does not raise a jurisdictional condition: it relates to a purely procedural matter that has no effect on the Tribunal’s jurisdiction. It would not be just, in this context, to consider that the Objection would dispose of the entire proceeding (Tr. p. 56).

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<sup>4</sup> Although Article 9.1 refers to the “Contracting Parties,” “the drafters of this treaty intended to refer to the investor and the sovereign having a dispute.” Tr. p. 55.

<sup>5</sup> The Claimant relied on this case in oral submissions. Tr. pp. 49-53. The Respondent objected to the Claimant’s referring to an authority not previously in the record. The Tribunal notes that in view of the Tribunal’s resolution of the Bifurcation Request, it has not been necessary to provide an opportunity to the Respondent to submit any new authorities in response. Tr. p. 51.

<sup>6</sup> The Claimant’s March 8, 2021, letter includes a footnote (fn 18) which states that the Claimant requested the Azerbaijani Government to “engage with” the Government of Georgia to resolve the dispute, but the Azerbaijani Government did not take any action. The Claimant says that it will provide details when the Objection is briefed. Absent such details, this point does not bear on the Tribunal’s assessment of the Bifurcation Request.

C. The Tribunal's Resolution of the Bifurcation Request

15. While the parties have devoted substantial portions of their submissions, written and oral, to discussion of the merits of the Objection, the evaluation of the Bifurcation Request does not entail an extensive examination of the merits. The tripartite test identifies the relevant elements for the Tribunal's consideration. The Tribunal finds that each individual element weighs in the Respondent's favor, and the elements taken collectively support the Tribunal's granting the Bifurcation Request:
- (i) The Objection is not frivolous. On its face, the Objection is arguable; the text of Article 9 raises a question about the potential relevance of Inter-State negotiation as a condition to arbitration that requires further submissions from the parties. It is not apparent that, as the Claimant asserts, the Objection is based on a "*patently* incorrect interpretation of Article 9" (emphasis supplied; letter of March 8, 2021, para. 12). Thus, whether the standard under the cited authorities is taken to be either "prima facie plausible" or a "higher threshold" than merely not frivolous or vexatious, the Objection satisfies the standard.
  - (ii) The Objection clearly raises a discrete issue that is not intertwined with the merits. While the Claimant does not contest that this element weighs in favor of bifurcation, it argues that it will be disadvantaged in terms of time and costs by a separate briefing and a separate hearing. However, the Tribunal considers that an expedited briefing schedule, early hearing, quick decision, and lack of intertwining with the merits point to bifurcation as being consistent with procedural economy while causing relatively limited cost to the Claimant.
  - (iii) If the Tribunal were to find that Article 9 of the BIT includes a jurisdictional requirement that has not been fulfilled in this case, all claims may potentially be disposed of by the Objection.

**III. Decision**

16. For the reasons set out in paragraph 15 above, the Tribunal determines that the Bifurcation Request is GRANTED. The briefing and hearing schedule for addressing the Objection as a preliminary issue shall proceed as set out in Annex A to Procedural Order No. 1.
17. Costs are reserved.

For and on behalf of the Tribunal

[signed]

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Laurence Shore  
President of the Tribunal  
Date: March 26, 2021