INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mr. Edmond Khudyan and Arin Capital & Investment Corp.

v.

Republic of Armenia

(ICSID Case No. ARB/17/36)

PROCEDURAL ORDER NO. 3
DECISION ON THE RESPONDENT'S REQUEST FOR BIFURCATION

Members of the Tribunal
Ms. Melanie Van Leeuwen, President of the Tribunal
Ms. Ank Santens, Arbitrator
Professor Zachary Douglas QC, Arbitrator

Secretary of the Tribunal
Ms. Laura Bergamini

December 5, 2018

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I. PROCEDURAL HISTORY

1. On June 7, 2018, the Tribunal issued Procedural Order No. 1 providing *inter alia* directions on the subsequent conduct of the arbitration and the timetables applicable to these proceedings. Paragraph 1.1 of Procedural Order No. 1 provides that the ICSID Arbitration Rules in force as of April 10, 2006 ("**Arbitration Rules**") govern these proceedings.[1]

2. On July 20, 2018, the Claimants submitted the Memorial on Jurisdiction and the Merits, along with the witness statements of Mr. Edmond Khudyan, Mr. Lernik Hovhannisyan, and Mr. Nikolay Baghdasaryan, Exhibits C-0001 through C-0131, and Legal Authorities CL-0001 through CL-0081 (the "**Memorial**").

3. On August 31, 2018, in accordance with the agreed timetable, the Respondent submitted an application for bifurcation, along with Legal Authorities RL-0009 to RL-0021 (the "**Application for Bifurcation**"). The Respondent set out three jurisdictional objections that, it indicated, would be detailed further in the jurisdictional phase. The Respondent also requested that the proceedings be bifurcated into a preliminary phase dealing with its jurisdictional objections and the proceedings on the merits be suspended pending a decision on the Respondent's jurisdictional objections.

4. On September 14, 2018, the Respondent submitted its requests for production of documents related to jurisdiction.

5. On September 17, 2018, the Claimants filed their response to the Respondent's Application for Bifurcation along with Legal Authorities CL-83 through CL-100 (the "**Response to the Application for Bifurcation**"), requesting that the Tribunal deny the Application for Bifurcation.

6. On October 1, 2018, the Parties were informed that the Tribunal decided to join the Respondent's jurisdictional objections to the merits and that the reasons for its decision would follow in due course.

7. This Procedural Order sets out the reasons for the Tribunal's decision on the Respondent's bifurcation request.

II. THE POSITION OF THE PARTIES

A. The Respondent's Position

8. In its Application for Bifurcation, the Respondent presented three jurisdictional objections:

   a. First, an objection to the Tribunal's jurisdiction *ratione personae* over Mr. Edmond Khudyan (the "**First Claimant**") on ground that he is "*precluded from invoking the jurisdiction of*

[1] Capitalized terms used but not defined in this Procedural Order No. 3 have the meaning ascribed to them in the Decision on the Respondent's Application for the Removal of Dr. Tumanov (Procedural Order No. 2).

ICSID as he holds an Armenian passport with special residency status on which he relied to make his investment in Armenia;"[2]

b. Second, an objection to the Tribunal's jurisdiction *ratione personae* over Arin Capital & Investment Corp. (the "**Second Claimant**") on the ground that the Claimants have failed to establish that the Second Claimant ever made an investment in Armenia;[3] and

c. Third, an objection to the Tribunal's jurisdiction *ratione materiae* because the Claimants' alleged investment in Armenia do not constitute an investment within the meaning of Article 25 of the ICSID Convention.[4]

9. The Respondent requests that the Tribunal deal with the jurisdictional objections on a preliminary basis in the interest of procedural efficiency.

(1) Legal standard

10. The Respondent submits that Article 41(2) of the ICSID Convention and Arbitration Rule 41(3) and 41(4) confer upon the Tribunal the power to determine jurisdictional objections on a preliminary basis, while suspending the proceedings on the merits.[5]

11. As to the legal standard by reference to which the Tribunal is to decide whether to bifurcate or not, the Respondent contends that in investment arbitration there is no presumption in favor of the exercise of jurisdiction. It emphasizes that jurisdiction must be established by the Tribunal and cannot simply be presumed. According to the Respondent, there are strong grounds for the Tribunal to consider the question of its jurisdiction as a preliminary issue separate from the merits.[6]

12. By reference to the decision in *Mesa v. Canada*,[7] the Respondent claims that in international arbitration, and especially in investment arbitration, there *is* a general presumption in favor of addressing issues of jurisdiction on a preliminary basis.[8] Although the Respondent recognizes that the *Mesa* arbitration was conducted under the UNCITRAL Arbitration Rules (1976 version), which in Article 21(4) set forth a presumption in favor of bifurcation of jurisdictional issues, it argues that cases decided under the UNCITRAL Arbitration Rules are relevant to the extent those tribunals "*discussed the reasons that the presumption exists, or why a tribunal chooses to depart from the presumption in certain circumstances.*"[9] Even if there is no presumption in favor of bifurcation, the Respondent argues that it is standard practice in ICSID arbitration to bifurcate the arbitral proceedings in a jurisdictional and a merits phase.[10]

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[2] Application for Bifurcation, paras. 2 and 26- 29.
[3] Application for Bifurcation, paras. 2 and 30.
[4] Application for Bifurcation, paras. 2 and 31.
[5] Application for Bifurcation, paras. 4-6.
[6] Application for Bifurcation, paras. 7-10.
[7] *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Procedural Order No. 2 (January 18, 2013) (**RL-0012**).
[8] Application for Bifurcation, paras. 10-11; **RL-0012**, para. 16.
[9] Application for Bifurcation, para. 12 (emphasis omitted).
[10] Application for Bifurcation, para. 14, citing **RL-0014**.

13. As to the factors that the Tribunal ought to take into consideration when deciding whether to bifurcate the proceedings, the Respondent argues that the primary concern should be that of procedural efficiency.[11] In that context, the Respondent submits that other investment tribunals have developed a number of criteria that the Tribunal should take into account, being:

    a. Whether the jurisdictional objections are *prima facie* serious or frivolous;

    b. Whether the objections, if granted, would result in a material reduction in the proceedings at the next stage; and

    c. Whether bifurcation is impractical in the sense that the issues of jurisdiction are too intertwined with the merits.[12]

(2) Application of the standard

14. The Respondent further contends in respect of each of its jurisdictional objections that (i) they are *prima facie* serious and not frivolous; (ii) if accepted by the Tribunal, they either completely or substantially dispose of the Claimants' case; and (iii) they are not intertwined with the merits.

15. First, the Respondent submits that its jurisdictional objections are *prima facie* serious and not frivolous. Relying on the decision in *Resolute Forest Products v. Canada*,[13] the Respondent argues that the required standard should not "*entail a preview of the jurisdictional objections themselves*;" instead, the Tribunal only needs to satisfy itself that the objections are "*not frivolous or vexatious*" and are "*credible and brought in good faith and cannot be excluded on a prima facie basis.*"[14] Moreover, the Respondent suggests that an objection passes the test of being *prima facie* serious and not frivolous if it has been upheld by tribunals in earlier cases.[15] Again by reference to the decision in *Mesa v. Canada*, the Respondent contends that, if other tribunals have declined jurisdiction on the basis of a particular jurisdiction objection, the threshold requirement of being substantial and not frivolous is met.[16]

16. In respect of its first jurisdictional objection, the Respondent argues that the First Claimant is precluded from invoking the jurisdiction of the Tribunal because Mr. Khudyan holds an Armenian passport with special residency status on which he relied to make his investment in Armenia. The Respondent submits that, because ICSID tribunals have previously declined jurisdiction in cases where investors possessed dual nationality of the host state and the contracting state, and that "[t]*his is precisely the situation before the present Tribunal,*"[17] its first jurisdictional objection "*clearly satisfies the requirement of being substantial and not frivolous.*"[18]

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11 Application for Bifurcation, para. 15.
12 Application for Bifurcation, paras. 16-22.
13 *Resolute Forest Products Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Procedural Order No. 4 (November 18, 2016) (**RL-0017**).
14 Application for Bifurcation, para. 25, citing **RL-0017**, para. 4.4.
15 Application for Bifurcation, para. 29.
16 Application for Bifurcation, para. 29, referring to **RL-0012**, para. 18.
17 Application for Bifurcation, paras. 27-28.
18 Application for Bifurcation, para. 29.

17. The Respondent's second jurisdictional objection is based on the contention that the Second Claimant did not make any investment in Armenia. The Respondent submits that the Claimants only make a "*vague reference to Claimant 2's alleged investment* <u>*once*</u> *in their 160-pages Memorial*" and that the Claimants did not provide a single factual exhibit or any other evidence in support of the Second Claimant's connection with the alleged investment in Armenia.[19] The Respondent argues that this objection is "*a jurisdictional objection* ratione personae *recognized by numerous investment tribunals*" and that therefore it is "*serious and not frivolous*" in nature.[20]

18. In support of its third jurisdictional objection, the Respondent contends that the Claimants' alleged investment in Armenia does not constitute an investment within the meaning of Article 25 of the ICSID Convention because, "[o]*n the face of Claimants' allegations as described in Claimants' Memorial, the alleged investment in Armenia was more of a commercial endeavor than an investment.*"[21] Because a similar jurisdictional objection was accepted by other ICSID tribunals, including the *Emmis v. Hungary* tribunal,[22] the Respondent claims that its third jurisdictional objection is *prima facie* serious and not frivolous.[23]

19. Second, the Respondent submits in respect of all of its jurisdictional objections that, if sustained by the Tribunal in the jurisdictional phase, the proceedings on the merits phase would be materially reduced in scope and length. The Respondent alleges that if its first jurisdictional objection were to be upheld, this would dispose of the Claimants' claims in their entirety because the Second Claimant's alleged investment was made entirely through the First Claimant.[24] According to the Respondent, the Claimants' claims would be disposed of in their entirety too if the third jurisdictional objection were to be upheld.[25] As to its second jurisdictional objection, the Respondent contends that if the Tribunal were to rule in its favor, there would be a substantial reduction of the "*scope of the issues to be briefed at the next stage,*"[26] factors which led other ICSID tribunals to bifurcate the arbitral proceedings, notably in *United Utilities and Tallinna Vesi v. Estonia*.[27]

20. Finally, the Respondent argues that its jurisdictional objections are distinct from and not intertwined with the merits of the case.

21. In respect of its first jurisdictional objection, the Respondent points out that it is based on the fact that the First Claimant holds an Armenian passport and that the Tribunal thus only needs to examine the applicable rules of international law and Armenian national law concerning nationality in order

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[19] Application for Bifurcation, para. 30 (emphasis in the original).
[20] Application for Bifurcation, para. 30.
[21] Application for Bifurcation, para. 31.
[22] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation (June 13, 2013) (**RL-0009**).
[23] Application for Bifurcation, paras. 31-32; **RL-0009**.
[24] Application for Bifurcation, paras. 36-37.
[25] Application for Bifurcation, para. 38.
[26] Application for Bifurcation, para. 42.
[27] Application for Bifurcation, paras. 43-45; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Procedural Order No. 2 (June 17, 2015) (**RL-0020**).

to make a decision with regard to this objection, without conducting an analysis of any facts or legal arguments relating to the merits of the Claimants' claims.[28]

22. With regard to its second jurisdictional objection, the Respondent argues that it is based on the fact that the "*Claimants have not adequately supported their argument that Claimant 2 made an alleged investment in Armenia*" and that in order to render its decision, the Tribunal would only need to examine "*the nature of Claimant 2's involvement in the alleged investment as pleaded by Claimants in Claimants' Memorial*," again without conducting any factual or legal analysis regarding the merits of the Claimants' substantive claims in this arbitration.[29]

23. With regard to its third jurisdictional objection, the Respondent contends that the Tribunal only needs to examine the nature of the Claimants' investment as described in the Claimants' Memorial and whether based on such description it qualifies as an "*investment*" under Article 25 of the ICSID Convention, without the need to "*examine the substantive grounds pleaded by Claimants in Claimants' Memorial.*"[30] The Respondent alleges that the Claimants' investment were made during the time period between 2004 and 2007, while the merits of the dispute and the Claimants' substantive claims are concerned with separate events which took place from 2010 onwards.[31]

24. Based on the foregoing, the Respondent argues that the Tribunal should exercise its discretion and order the bifurcation of the proceedings in this arbitration.

B. The Claimants' Position

25. In their Response to the Application for Bifurcation, the Claimants submit that none of the Respondent's jurisdictional objections "*justifies the delay and costs that a bifurcated proceeding would necessarily entail.*"[32] They argue that the Respondent's first and third jurisdictional objections are *prima facie* not serious and that the Respondent's second objection, even if upheld, will not materially reduce the scope of issues to be considered by the Tribunal.[33]

(1) Legal standard

26. The Claimants agree with the Respondent that the Tribunal has the discretionary power under Article 41(2) of the ICSID Convention and Arbitration Rule 41(3) and 41(4) to order bifurcation but disagree in two respects with the legal standard the Respondent proposes. While the Claimants accept that the Tribunal ought to consider (i) whether bifurcation, if granted, would lead to a material reduction in the proceedings; and (ii) whether the jurisdictional objections are too intertwined with the merits of the case for the bifurcation to be granted,[34] they do not agree with the third criterion of *prima facie* serious or frivolous, as formulated by the Respondent. According

[28] Application for Bifurcation, para. 51.
[29] Application for Bifurcation, para. 52 (emphasis in the original).
[30] Application for Bifurcation, para. 53.
[31] Application for Bifurcation, paras. 55-58.
[32] Response to the Application for Bifurcation, para. 2.
[33] Response to the Application for Bifurcation, para. 2.
[34] Application for Bifurcation, para. 21.

to the Claimants, the *prima facie* test should rather focus on "*whether the objections* have merit *and are not frivolous.*"[35]

27. In that framework, the Claimants submit that the standard proposed by the Respondent would allow "*conclusory objections unsupported by specific factual allegations*" to serve as a basis for bifurcation without considering whether or not such objection might actually succeed.[36] They dispute that, if a jurisdictional objection is of a type that other investment tribunals have upheld in the past, the *prima facie* standard is met. The Claimants assert that, in order for a jurisdictional objection to rise above the threshold of serious and not frivolous, it must be supported by specific factual allegations, demonstrating that the objection might succeed in that specific case.[37] In this respect, the mere articulation of a generic objection, upheld in other cases, is not sufficient to satisfy this standard, as held by the tribunals in *Eco Oro v. Colombia* and *Glencore v. Bolivia*.[38]

28. The Claimants further argue that the Respondent's reliance on the decisions in *Resolute Forest v. Canada* and *Mesa v. Canada* does not advance its case, as both arbitrations were conducted under the 1976 version of the UNCITRAL Arbitration Rules, which specifically provides for a presumption in favor of bifurcation, which is not the case for the ICSID Arbitration Rules since they were amended in 2006.[39] Furthermore, the Claimants point out that in *Mesa v. Canada* the tribunal considered the jurisdictional objection to be *prima facie* serious <u>not</u> because the same type of objection had been upheld by other tribunals before, but because in that case Canada had substantiated its objection with specific factual allegations.[40]

(2) Application of the standard

29. The Claimants submit that the jurisdictional objections advanced by the Respondent do not merit bifurcation for the following reasons.

30. First, the Claimants deny that there is a presumption in favor of bifurcation in ICSID arbitration and argue that the Respondent's contention to the effect that bifurcation of jurisdictional objections is "*standard procedure*" is wrong and contradicted by its own legal authorities.[41] The Claimants point out that both the ICSID website and the ICSID Secretariat's Working Paper for the proposed amendment of the Arbitration Rules unequivocally state that there is no presumption in favor of bifurcation, which is in line with the drafting history of the ICSID Convention and the Arbitration Rules.[42] In addition, the Claimants contend that the Respondent's assertion is contradicted by the statistics, which reveal that, in the majority of cases, ICSID tribunals did not bifurcate the

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[35] Response to the Application for Bifurcation, para. 10 (emphasis in the original).
[36] Response to the Application for Bifurcation, paras. 4 and 11.
[37] Response to the Application for Bifurcation, paras. 11-12.
[38] Response to the Application for Bifurcation, paras. 13-14; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 (June 28, 2018) (**CL-85**), para. 51; *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2016-39, Procedural Order No. 2 (January 31, 2018) (**CL-98**), paras. 45 and 47.
[39] Response to the Application for Bifurcation, paras. 8 and 16.
[40] Response to the Application for Bifurcation, para. 17, referring to **RL-0012**, para. 18.
[41] Response to the Application for Bifurcation, paras. 5-6.
[42] Response to the Application for Bifurcation, para. 7, referring to *inter alia* **CL-97**, **CL-90**, para. 393 and **CL-87**, pp. 35, 148-149 and 151.

proceedings to deal with jurisdictional objections on a preliminary basis.[43] Lastly, the Claimants argue that the Respondent's reliance on the UNCITRAL Arbitration Rules in its attempt to prove a presumption in favor of bifurcation is inapposite because that presumption was part of the 1976 version but has been removed from the UNCITRAL Arbitration Rules at the occasion of their revision in 2010.[44]

31. Second, the Claimants insist that for an objection to be *prima facie* serious, it must be supported by specific factual allegations, showing that the objection might succeed in the specific case. In that framework, the Claimants argue that the Respondent's first and third jurisdictional objections are simple conclusory statements and that neither of them is substantiated by factual allegations or evidence. On that basis, the Claimants conclude that the jurisdictional objections are not sufficiently serious to warrant bifurcation.[45]

32. More specifically, the Claimants submit that the Respondent's first jurisdictional objection to the effect that the Tribunal would lack jurisdiction *ratione personae* over the First Claimant does not warrant bifurcation because it is not *prima facie* serious. The Claimants point out that the Respondent does not allege that the First Claimant ever had Armenian nationality within the meaning of Article 25 of the ICSID Convention.[46] In addition, the Claimants argue that the Respondent's reliance on Mr. Khudyan's special residency status in Armenia is futile because that status is not equal to nationality under Armenian law. Rather, it is a special status granted to foreigners under the Law of the Republic of Armenia on Foreigners,[47] which defines foreigners as "*persons who are not citizens of the Republic of Armenia and hold the citizenship of another State (foreign citizens).*"[48] The Claimants argue that the mere fact that the First Claimant enjoyed special residency status demonstrates in and of itself that he was not a national of the Republic of Armenia and, therefore, the Respondent's first jurisdictional objections is not *prima facie* serious and is frivolous.[49] Moreover, the Claimants point out that even if one were to equate special residency status with nationality, the First Claimant no longer has special residency status since January 22, 2014.[50] As a result, on the date he consented to ICSID arbitration by submitting the Request for Arbitration (September 18, 2017) and on the date when the Request for Arbitration was registered by ICSID (September 27, 2017), Mr. Khudyan was not an Armenian national and therefore would still qualify as an investor under Article 25 of the ICSID Convention.[51]

33. Furthermore, the Claimants argue that the Respondent's second jurisdictional objection to the effect that the Tribunal lacks jurisdiction *ratione personae* over the Second Claimant does not warrant bifurcation because, even if upheld by the Tribunal, it would not lead to any reduction in the proceedings at the next stage. The Claimants submits that the Respondent's position is based on the erroneous assumption that the investment of each of the Claimants is separate and that the

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[43] Response to the Application for Bifurcation, para. 9.
[44] Response to the Application for Bifurcation, para. 8, citing **CL-95** and **CL-96**.
[45] Response to the Application for Bifurcation, para. 18.
[46] Response to the Application for Bifurcation, para. 20.
[47] Response to the Application for Bifurcation, para. 21, referring to the Claimants' Memorial, para. 22, as well as **Exhibit C-23**, Articles 14-18.
[48] **Exhibit C-23**, Article 2.
[49] Response to the Application for Bifurcation, para. 21.
[50] Response to the Application for Bifurcation, paras. 22-23, referring to **Exhibit C-17**.
[51] Response to the Application for Bifurcation, paras. 22-25.

Claimants are requesting an allocation of damages between them, which they are not, because their investment is one and the same.[52] It is the Claimants' case that the Second Claimant's standing follows from its indirect control of the First Claimant's investment, and that regardless of whether or not the Second Claimant is a party to this arbitration, the First Claimant can still claim full compensation for the harm caused by the Respondent to the investment.[53] As a result, the Tribunal would still need to analyze all of the Respondent's acts and omissions in respect of which the Claimants complain, as well as the issues of liability and damages. The Claimants further argue that there is not a single case in which a tribunal bifurcated proceedings to consider an objection "*that would remove only one out of multiple claimants in a case.*"[54] On that basis, the Claimants conclude that bifurcation of the Respondent's second jurisdictional objection would not lead to procedural efficiency and should therefore be rejected by the Tribunal.

34. Finally, the Claimants submit that the Respondent's third jurisdictional objection that the Tribunal does not have jurisdiction *ratione materiae* over the Claimants' investment does not pass the *prima facie* serious and not frivolous test because the Respondent did not allege a single fact in support of its objection but instead proffered the unsubstantiated statement to the effect that "[o]*n the face of Claimants' allegations as described in Claimants' Memorial, the alleged investment in Armenia was more of a commercial endeavor than an investment.*"[55] The Claimants further point out that the *Emmis v. Hungary* case relied on by the Respondent in support of this objection must be distinguished from the present case because Hungary's objection against the tribunal's jurisdiction *ratione materiae* was supported by specific factual allegations that challenged the existence of specific legal rights under Hungarian law, and Hungary substantiated its objection to such a degree that the claimants in that case adduced expert evidence in response to the objection.[56] According to the Claimants, the only thing that the Respondent's objection has in common with Hungary's objection is that, "*at the most general level, both are objections* ratione materiae."[57]

III. THE TRIBUNAL'S ANALYSIS

35. On a preliminary note, the Tribunal emphasizes that this decision only concerns the question whether the arbitral proceedings should be bifurcated or not. The Tribunal's analysis of the relevant issues and its decision are based on the record as it stood on October 1, 2018. The Tribunal is yet to form a view as to the merits of the Respondent's jurisdictional objections, which it will do only once these objections have been fully briefed by the Parties. Nothing in this decision is intended to prejudge the Respondent's jurisdictional objections or to preclude the Tribunal's full consideration of the factual or legal issues underlying the Respondent's jurisdictional objections at a later date.

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[52] Response to the Application for Bifurcation, para. 33.
[53] Response to the Application for Bifurcation, para. 33.
[54] Response to the Application for Bifurcation, para. 34.
[55] Response to the Application for Bifurcation, para. 28, quoting Application for Bifurcation, para. 31.
[56] Response to the Application for Bifurcation, para. 29 referring to **RL-0009**, paras. 33-34.
[57] Response to the Application for Bifurcation, para. 30.

A. Legal Standard

36. The Parties are in agreement that the Tribunal has the power to rule on the Respondent's Application for Bifurcation. The Tribunal's power stems from Article 41(2) of the ICSID Convention which provides that:

> [*a*]*ny 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.*

37. In the same vein, 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. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.*

38. It is common ground that this arbitration is brought under the ICSID Convention and conducted in accordance with the Arbitration Rules in force as of April 10, 2006. The Tribunal notes that neither the ICSID Convention nor the applicable Arbitration Rules require the suspension of the proceedings on the merits pending the resolution of jurisdictional objections, as did the ICSID Arbitration Rules before their amendment in 2004.[58] The ICSID Convention and the Arbitration Rules leave the matter to the discretion of the Tribunal. As there is no general presumption in favor of bifurcation under the ICSID Convention or the Arbitration Rules, the Tribunal will exercise its discretion under Article 41(2) of the ICSID Convention and Arbitration Rule 41(4) in light of the particular facts and circumstances of the present case.

39. The Tribunal is mindful that in deciding bifurcation applications, other tribunals have identified certain factors as important to their analysis. The Tribunal notes that the Parties are in agreement in respect of two of those factors, and that those factors ought to be taken into consideration by the Tribunal in deciding the Application for Bifurcation before it. These are:

   a. Whether the objections, if granted, would lead to a material reduction of the proceedings; and

   b. Whether substantial procedural economy can be gained by dealing with the jurisdictional objections advanced on a preliminary basis or whether the objections are so intertwined with the merits of the case that bifurcation is impractical.[59]

40. The Parties disagree as to the scope of a third potentially relevant factor, i.e., whether the jurisdictional objections raised by the Respondent are *prima facie* serious or frivolous. The Respondent argues that the *prima facie* test will be satisfied as long as objections similar to those

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[58] Rule 41(3), ICSID Rules of Procedure for Arbitration Proceedings 1984: "*Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended.*"

[59] Application for Bifurcation, para. 21; Response to the Application for Bifurcation, para. 10.

advanced in the present case have been "*upheld by tribunals in previous decisions.*"[60] The Respondent contends that, because jurisdictional objections of the same or similar nature have been accepted by other ICSID tribunals, the three jurisdictional objections it raised satisfy the *prima facie* test of being serious and therefore justify bifurcation.[61] The Claimants, by contrast, contend that "*the party seeking bifurcation of proceedings must support its application with specific factual allegations from which a tribunal can conclude that the objection might succeed in the specific case.*"[62]

41. The Tribunal does not accept that jurisdictional objections of the same or similar nature as jurisdictional objections that have been upheld in the past by other ICSID tribunals automatically satisfy the *prima facie* test. Jurisdictional objections are not raised in the abstract but in the context of a specific factual matrix that gave rise to the dispute. Therefore, the Tribunal will take into consideration all facts and circumstances in respect of the present dispute that have been adduced so far. For the Respondent to demonstrate on a *prima facie* basis that its jurisdictional objections are serious and not frivolous, it must adduce the relevant facts on a preliminary basis and substantiate why in the circumstances of this particular case its jurisdictional objections have a chance of succeeding.[63] Like the *Glencore* and *Eco Oro* tribunals, this Tribunal finds that mere assertions are not sufficient to satisfy the required threshold and that, in order for this factor to weigh in favor of bifurcation, the Respondent's jurisdictional objections must be supported by concrete factual allegations and the Respondent must make a *prima facie* showing of their potential success on their merits.[64]

42. In light of the foregoing, the Tribunal will assess the Respondent's bifurcation request against the three following criteria:

a. Whether the jurisdictional objections are *prima facie* serious and not frivolous;

b. Whether the jurisdictional objections, if successful, would dispose of the dispute in whole or in part, thereby leading to a material reduction of the scope of the proceedings; and

c. Whether and to what extent the jurisdictional objections are intertwined with the merits of the case so as to make bifurcation impractical.

B. Application of the Legal Standard to the Respondent's Jurisdictional Objections

(1) Jurisdiction Ratione Personae *over the First Claimant*

43. The Respondent's first jurisdictional objection to the effect that the Tribunal does not have jurisdiction *ratione personae* over the First Claimant is based on the allegation that the First Claimant used an Armenian passport with special residency status to make the purported investment in Armenia.[65] The Respondent alleges that, because a national of the host state cannot

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60 Application for Bifurcation, para. 29.
61 Application for Bifurcation, paras. 26-32.
62 Response to the Application for Bifurcation, para. 18.
63 Response to the Application for Bifurcation, para. 12.
64 **CL-98**, paras. 45-47. See also, **CL-85**, para. 51.
65 **Exhibit C-17**; Application for Bifurcation, para. 26.

qualify as an "*investor*" in the sense of Article 25(2)(a) of the ICSID Convention, the Tribunal does not have jurisdiction over Mr. Khudyan.[66]

44. The Tribunal notes that Article 25(1) of the ICSID Convention provides that the jurisdiction of the Centre shall extend to any legal dispute between a Contracting State to the Convention and a "*national of another Contracting State*." Article 25(2)(a) goes on to define the term "*national of another Contracting State*" as:

> *any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute*. (emphasis added)

45. It is commonplace that the test of Article 25(2)(a) is based on the notion of nationality. If the First Claimant held Armenian nationality on either the date of the filing of the Request for Arbitration, or on the date when the Request for Arbitration was registered by ICSID, the Tribunal would not have jurisdiction over the First Claimant. The Claimants placed on record the Armenian passport of Mr. Khudyan, which states "*SPECIAL RESIDENCY STATUS*."[67] The Tribunal notes that Article 21 of the Law of the Republic of Armenia "On the Status of Foreign Citizens in the Republic of Armenia" defines "*Special Resident Status*" as follows:[68]

> *Special resident status may be granted to foreign citizens of Armenian origin.*
>
> *The special resident status may also be granted to other foreign citizens who carry on economic, cultural activity in the Republic of Armenia.*
>
> *The special resident status shall be granted for a period of ten years. It may be granted more than once.* (emphasis added)

46. The Tribunal further notes that the Law of the Republic of Armenia "On Foreigners' provides in Article 18 'Grounds and terms for granting special residence status," as part of Chapter 3 "RESIDENT STATUS OF FOREIGNERS IN THE REPUBLIC OF ARMENIA" as follows:[69]

> *1. Special residence status shall be granted to foreigners of Armenian origin. Special residence status may also be granted to other foreigners who carry out economic or cultural activities in the Republic of Armenia.*

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66 Application for Bifurcation, paras. 26-27.
67 **Exhibit C-17**, p. 1.
68 **Exhibit C-7**, p. 3.
69 **Exhibit C-23**, p. 9.

> *2. Special residence status shall be granted for a term of ten years. It may be granted more than once.* (emphasis added)

47. In addition, Article 2 of the same Law defines "*foreigners*" as:

> *persons who are not citizens of the Republic of Armenia and hold the citizenship of another State (foreign citizens) or do not hold the citizenship of any State (stateless persons).* (emphasis added)

48. On the basis of the record at present, the Tribunal understands that, as a matter of Armenian law, special residency status is only granted to "*foreigners,*" who - by definition - do not hold Armenian nationality. This appears to have been the case for the First Claimant, as his Armenian passport not only carries the mention "*SPECIAL RESIDENCY STATUS*"[70] but also identifies Mr. Khudyan's nationality as "*UNITED STATES.*"[71] On the basis of the record to date, the Respondent has not made a *prima facie* showing that at any relevant moment Mr. Khudyan held Armenian nationality, and thus did not qualify as an "*investor*" within the meaning of Article 25(2)(a) of the ICSID Convention.

49. Moreover, the Tribunal notes that Mr. Khudyan's Armenian passport with the mention "*SPECIAL RESIDENCY STATUS*" expired on January 22, 2014,[72] as a result of which his special residency status in the Republic of Armenia had expired on the date of the submission of the Request for Arbitration on September 18, 2017, as well as on the date the Request for Arbitration was registered by ICSID on September 27, 2017.

50. Based on this *prima facie* analysis of the record to date, the Tribunal considers that the Respondent has not made a showing that this objection is *prima facie* serious and not frivolous. In these circumstances, it also appears at present that there is not a realistic chance that the first jurisdictional objection will dispose of the dispute in whole or in part. Therefore, the Tribunal is not convinced that any significant procedural efficiency can be gained by dealing with the first jurisdictional objection on a preliminary basis.

51. For these reasons, the Tribunal decides that the Respondent's first jurisdictional objection does not warrant bifurcation of the proceedings.

(2) Jurisdiction Ratione Personae *over the Second Claimant*

52. The Respondent's second jurisdictional objection to the effect that the Tribunal lacks jurisdiction *ratione personae* over the Second Claimant is based on the allegation that Arin Capital & Investment Corp. did not have an investment in Armenia. In response, the Claimants submit that, regardless of the merits of this objection, bifurcation would not lead to procedural efficiencies, because the Second Claimant's investment is not distinct and separate from the First Claimant's

[70] **Exhibit C-17**, p. 1.
[71] **Exhibit C-17**, p. 2.
[72] **Exhibit C-17**, p. 2.

and the Second Claimant's "*standing comes from its indirect control of Mr. Khudyan's investment.*"[73]

53. The Tribunal notes that Claimants do not object to bifurcation of this objection on the basis that it is not *prima facie* serious or is frivolous. Rather, they claim that, even if the objection had merit, bifurcation would not be warranted because it would not result in any procedural efficiencies. In view of the Tribunal's decision that the Respondent's first jurisdictional objection should not be bifurcated, the Tribunal considers that the second objection also should not be bifurcated because it appears unlikely to create procedural efficiencies. This is because the Claimants' claims appear to be one and the same. Even if the Respondent's second objection were successful, the Tribunal would still need to analyze and decide liability and quantum with respect to Mr. Khudyan.

54. On that basis, the Tribunal finds that the Respondent's second jurisdictional objection does not justify the bifurcation of the proceedings.

(3) Jurisdiction Ratione Materiae *over the Investment*

55. The Respondent's third jurisdictional objection to the effect that the Tribunal lacks jurisdiction *ratione materiae* is based on the allegation that the Claimants' alleged investment does not constitute an "*investment*" in the sense of Article 25 of the ICSID Convention. This jurisdictional objection is based on an assertion that "[o]*n the face of Claimants' allegations as described in Claimants' Memorial, the alleged investment in Armenia was more of a commercial endeavour than an investment*,"[74] without any factual or legal substantiation.

56. The Tribunal cannot form a *prima facie* view as to whether this jurisdictional objection is serious and has any chance of success on the basis of a mere assertion only, which is neither supported by facts nor by evidence. In light of the skeletal substantiation of the third jurisdictional objection so far, the Tribunal also is not presently in a position to determine whether there is any realistic chance that the third jurisdictional objection would dispose of the dispute in whole or in part and thereby reduce the scope of the proceedings on the merits.

57. On the other hand, the inquiry into the question as to whether the Claimants have a qualifying "*investment*" in the sense of Article 25(1) of the ICSID Convention involves issues of law and fact which are inextricably intertwined with the merits of the dispute. In order to form a view, the Tribunal requires a deeper understanding of the context and the circumstances in which the Claimants invested in Armenia, the use of their investment and their interaction with the Respondent and its organs. Accordingly, the Tribunal believes that the objection raises issues that are intertwined with the merits, rendering bifurcation impractical.

58. In light of the foregoing, the Tribunal is not convinced that the arbitral proceedings should be bifurcated to deal with the third jurisdictional objection on a preliminary basis.

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73 Response to the Application for Bifurcation, para. 33.
74 Application for Bifurcation, para. 31.

IV. DECISION

59. For the above reasons, the Tribunal decides and directs as follows:

(i) REJECTS the Respondent's Application for Bifurcation;

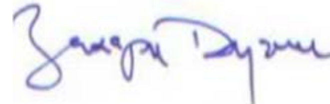
(ii) JOINS the Respondent's jurisdictional objections to the merits;

(iii) ORDERS the proceedings to go forward in accordance with the Timetable appended to Procedural Order No. 1 as Annex B-2; and

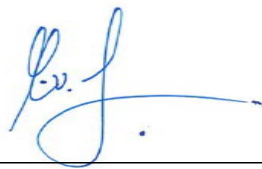
(iv) RESERVES the issue of costs for a later stage of these proceedings.

Date: December 5, 2018

Ms. Ank Santens
Arbitrator



Professor Zachary Douglas QC
Arbitrator



Ms. Melanie van Leeuwen
President of the Tribunal