© Volume 2, Issue 8, ***August*** 2026 | JATIR
ISSN: 3139-8464 (p)

Bifurcation Deferred a Case Comment on Klesch Group Holdings Limited and Others v European Union, Denmark and Germany

Dr Kajori Bhatnagar
SAU, New Delhi

I. INTRODUCTION

Since October 2023 the Klesch Group has been pursuing three parallel investment treaty claims against the European Union, the Kingdom of Denmark and the Federal Republic of Germany under the Energy Charter Treaty ('ECT'), arising out of the 'solidarity contribution' — an emergency windfall levy on fossil fuel companies introduced across the Union in response to the 2022 energy crisis.[1] Framed by its critics as an unprecedented attempt to relitigate a democratically enacted tax through investor-State dispute settlement, and by the Claimants as a straightforward application of ECT protections to a confiscatory measure, the Klesch arbitrations have already produced a rich and closely-watched procedural record. The first substantive ruling — the Tribunal's Decision on the Respondents' Request for Bifurcation, issued on 8 April 2025 — dismissed, by majority, an application to have four separate preliminary objections decided before the merits. This comment examines the factual and regulatory background to the dispute, the four objections raised, the Tribunal's reasoning for declining to bifurcate them, and the broader significance of the decision for the treatment of the recurring 'intra-EU objection' and for ECT-based challenges to European energy windfall taxes more generally.

II. FACTUAL AND REGULATORY BACKGROUND

The dispute originates in Council Regulation (EU) 2022/1854, adopted on 6 October 2022, which introduced an emergency 'solidarity contribution' on the surplus profits of undertakings active in the crude petroleum, natural gas, coal and refinery sectors, in order to fund household and business

[1]Decision on Respondents' Request for Bifurcation, Klesch Group Holdings Limited & Others v. European Union (ICSID Case No. ARB(AF)/23/1), Klesch Group Holdings Limited & Others v. Kingdom of Denmark (ICSID Case No. ARB/23/48), and Klesch Group Holdings Limited & Another v. Federal Republic of Germany (ICSID Case No. ARB/23/49), 8 April 2025 ('Decision'), para. 3.

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support during the energy crisis triggered by Russia's invasion of Ukraine.[2] Denmark implemented the Regulation through Act No. 502 of 16 May 2023, and Germany through Article 40 of its Annual Tax Act 2022.[3] The Claimants are entities within the Klesch Group: Klesch Group Holdings Limited, a Jersey-incorporated holding company, together with its Danish subsidiaries Klesch Refining Denmark A/S and Kalundborg Refinery A/S (which operate the Kalundborg refinery in Denmark), and its German subsidiary Raffinerie Heide GmbH (which operates the Heide refinery in Schleswig-Holstein).[4] The Claimants' home States for treaty purposes are identified as Germany, Denmark and the United Kingdom[5] — the latter connection being made through the Jersey holding vehicle, a structure that has attracted comment given that Jersey is a UK Crown Dependency and the ECT remained applicable to the United Kingdom notwithstanding Brexit.

The Klesch Group's German asset had itself previously been a beneficiary of European public support, including a reported EUR 30 million contribution toward a hydrogen facility at the Heide refinery in 2020, against a background in which the Group's principal, Gary Klesch, had publicly criticised EU investment regulation as burdensome.[6] The Claimants now allege that the solidarity contribution exposes them to current and future payment obligations aggregating approximately EUR 175.5 million, and that its imposition and enforcement breach Articles 10(1), 10(3), 10(7) and 13 of the ECT — respectively, the fair and equitable treatment, most-favoured-nation, 'umbrella clause' and expropriation protections.[7]

III. PROCEDURAL HISTORY

The Claimants commenced three separate ICSID proceedings in October 2023: an Additional Facility arbitration against the European Union (ICSID Case No. ARB(AF)/23/1, the Union not being a Contracting State to the ICSID Convention), and two ICSID Convention arbitrations against Denmark (ARB/23/48) and Germany (ARB/23/49).[8] A single tribunal — Mr Cavinder Bull SC (President), Judge O. Thomas Johnson Jr and Professor Jorge E. Viñuales — was constituted

[2]Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ L 261I, 7.10.2022.
[3]Decision, para. 3, referring to Danish Act No. 502 of 16 May 2023 and Article 40 of the German Annual Tax Act 2022.
[4]Decision, para. 2.
[5]UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Klesch v. EU', ICSID Case No. ARB(AF)/23/1, listing the home States of the investors as Germany, Denmark and the United Kingdom.
[6]Global Arbitration Review (n 6), reporting that the German government contributed EUR 30 million toward a hydrogen facility at the Heide refinery in 2020, and recalling earlier public comments by Gary Klesch criticising EU investment regulation.
[7]Decision, para. 3.
[8]Decision, paras. 1-2.

across all three cases, which the parties agreed to coordinate procedurally to the extent possible.[9] On 9 December 2024 the three respondents filed a joint Request for Bifurcation seeking the preliminary determination of four objections; the Claimants answered on 23 January 2025, and a joint hearing was held in Paris on 19 March 2025, closed to the public.[10] Given the substantial overlap between the submissions in the Three Arbitrations, the Tribunal issued a single Decision addressing the Request across all three cases.[11]

The proceedings also unfold against the backdrop of the European Union's withdrawal from the ECT, which took effect on 27 June 2024. Because Article 47(3) of the ECT contains a twenty-year 'sunset clause' preserving treaty protection for investments made before a Contracting Party's withdrawal takes effect, the Union's exit — and the parallel exits of Denmark, Germany and other Member States — does not extinguish jurisdiction over pre-existing claims such as those brought by Klesch.[12] The case is accordingly a live illustration of the practical durability of ECT protection notwithstanding coordinated withdrawal by EU Member States.

IV. THE FOUR PRELIMINARY OBJECTIONS

The Respondents advanced four objections, three of which (Objections A, C and D) were raised by all three respondents, while Objection B was raised only by Denmark and Germany.

A. Objection A — the 'intra-EU' objection

Objection A contends that the Tribunal lacks jurisdiction because neither the Union nor its Member States gave, or could give, valid consent under Article 26(3)(a) of the ECT to arbitrate disputes between investors connected to EU Member States and the Union or a Member State.[13] The Respondents relied principally on the Court of Justice of the European Union's decisions in Achmea and Komstroy, together with EU law more generally, for the proposition that Article 26 ECT does not apply to intra-EU disputes, with the consequence that no valid offer to arbitrate was ever made.[14] A further, case-specific wrinkle was added: because the Claimants' asserted UK nationality is routed through a Jersey holding company incorporated while the United Kingdom was still an EU Member State, the Respondents argued that no valid consent existed even at the outset, and that the UK made no fresh offer to arbitrate following its withdrawal from the Union.[15]

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[9]Decision, para. 5(a).
[10]Decision, paras. 5(b)-5(c).
[11]Decision, para. 6.
[12]Energy Charter Treaty (1994), Art. 47(3) (sunset clause); IBFD, 'Legality of the solidarity contribution under international law' (2025), noting the EU's withdrawal from the ECT took effect on 27 June 2024.
[13]Decision, paras. 11-12; Energy Charter Treaty, Art. 26(3)(a).
[14]Decision, para. 12, referring to Case C-284/16, Slowakische Republik v Achmea BV, Judgment of 6 March 2018, and Case C-741/19, République de Moldavie v Komstroy, Judgment of 2 September 2021.
[15]Decision, para. 12.

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B. Objection B — the proper respondent

Objection B, raised only by Denmark and Germany, contends that those States never gave consent to arbitrate under Article 26(3) ECT because, pursuant to Article 1(3) of the ECT (which addresses the position of Regional Economic Integration Organisations such as the Union) and the mechanism set out in the Statement submitted to the ECT Secretariat in 2019, responsibility for measures implementing EU law is to be allocated ex post between the Union and its Member States in accordance with Regulation (EU) No 912/2014.[16] Denmark and Germany asserted that, applying that mechanism, the European Commission notified the Claimants on 14 November 2023 that the Union — not Denmark or Germany — would be the sole respondent and would bear full financial liability, and that the Claimants were bound to accept that determination.[17][18]

C. Objection C — the taxation carve-out

Objection C invokes Article 21 of the ECT, which excludes 'Taxation Measures' from the scope of most substantive protections, including Article 10. The Respondents characterised the solidarity contribution as a direct tax on corporate net income falling within Article 21(7), with the consequence that the Tribunal would lack jurisdiction over the Claimants' Article 10 claims, leaving only the Article 13 expropriation claim (which is carved back into the taxation exception under Article 21(5)) available for adjudication.[19]

D. Objection D — the essential security exception

Objection D relies on Article 24(3)(a)(ii) of the ECT, which permits a Contracting Party to take measures it considers necessary for the protection of its essential security interests in an emergency in international relations, without those measures being reviewable under most of the Treaty's protections. The Respondents argued that the solidarity contribution was adopted specifically to address the effects of Russia's invasion of Ukraine on European energy security, and therefore fell within the exception, again leaving only the expropriation claim outstanding.[20]

V. THE APPLICABLE STANDARD ON BIFURCATION

There is no presumption for or against bifurcation in ICSID proceedings.[21] Rule 54(2) of the ICSID Additional Facility Arbitration Rules 2022 and the identically worded Rule 44(2) of the ICSID Arbitration Rules 2022 direct a tribunal to consider 'all relevant circumstances', including whether

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[16]Decision, para. 13; Energy Charter Treaty, Art. 1(3) (definition of a Regional Economic Integration Organisation).

[17]Decision, paras. 14-15, referring to the Statement submitted to the ECT Secretariat pursuant to Article 26(3)(b)(ii) of the ECT, published 2 May 2019, and Regulation (EU) No 912/2014.

[18]Decision, para. 15.

[19]Decision, paras. 16-17; Energy Charter Treaty, Art. 21(1) and 21(7) (Taxation Measures).

[20]Decision, paras. 18-20; Energy Charter Treaty, Art. 24(3)(a)(ii).

[21]ICSID Additional Facility Arbitration Rules 2022, r. 54(2); ICSID Arbitration Rules 2022, r. 44(2).

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bifurcation would materially reduce the time and cost of the proceeding, whether determination of the preliminary objection would dispose of all or a substantial portion of the dispute, and whether the objection is so intertwined with the merits as to make bifurcation impractical.[22] The Tribunal accepted the parties' shared position that this inquiry is also informed by a threshold requirement that the objections be prima facie serious and substantial, and by an overarching question of procedural fairness and efficiency.[23]

VI. THE TRIBUNAL'S REASONING

By majority (President Bull and Judge Johnson; Professor Viñuales dissenting throughout), the Tribunal dismissed the Request for Bifurcation in its entirety.

1. Objection B

The majority's central reasoning on Objection B was that excising Denmark and Germany as named respondents would not meaningfully shrink the dispute, because the conduct of those two States would remain squarely at issue in the EU Arbitration regardless of the outcome.[24] At the hearing, the Respondents themselves confirmed that, even if Objection B succeeded, the Tribunal would still be required to assess Denmark's and Germany's conduct against the ECT and, if a breach were found, simply enter an award against the Union.[25] The majority also considered that Objection B raises a genuinely novel question — how responsibility is allocated between the Union and its Member States for measures implementing EU secondary legislation — on which no ICSID tribunal had previously ruled, and which was better resolved with the benefit of a full evidentiary record rather than in the abstract.[26] It further noted uncertainty as to precisely which competences Denmark and Germany claim to have transferred to the Union for these purposes, and observed that Regulation (EU) No 912/2014 appears on its face to allocate financial responsibility rather than to speak to consent to arbitrate at all.[27] Professor Viñuales dissented, considering that the potential termination of two of the three arbitrations in their entirety self-evidently satisfied the efficiency criteria for bifurcation.[28]

2. Objection A

On the intra-EU objection, the majority declined to speculate about its prospects of success, observing that there were at least three possible outcomes — all three arbitrations disposed of, none disposed of, or (if the Claimants were correct that Komstroy does not extend to disputes in

[23]Decision, para. 8.
[24]Decision, paras. 30-37.
[25]Decision, paras. 33-34, quoting the Respondents' confirmation at the Hearing that the Tribunal would still be required to judge the acts of Germany and Denmark against the ECT even if Objection B succeeded (Transcript, p. 117, lines 7-17).
[26]Decision, para. 38.
[27]Decision, paras. 39-40.
[28]Decision, para. 30 (Arbitrator Viñuales, dissenting).

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which the Union itself is respondent) only the Denmark and Germany Arbitrations disposed of while the EU Arbitration continued.[29][30] Given that uncertainty, and the close doctrinal relationship between Objections A and B — the Respondents themselves treating B as pleaded in the alternative to A — the majority considered it more coherent to determine both together, with full submissions, at the merits stage.[31] In doing so, the majority situated its decision within a broader pattern: citing the tribunal's observation in Mainstream Renewable Power v Germany that the great majority of ECT tribunals confronted with the intra-EU objection have likewise deferred it to the merits rather than resolving it as a discrete jurisdictional threshold.[32]

3. Objections C and D

The majority treated Objections C and D similarly, and for a closely related reason. Both objections, even if fully successful, would leave the Article 13 expropriation claim standing.[33] The majority was not persuaded that adjudicating the 'Taxation Measure' characterisation, or the applicability of the essential security exception, could be confined to a narrow set of facts distinct from the merits: assessing whether the solidarity contribution was arbitrary or discriminatory — central to the surviving expropriation claim — would require the Tribunal to examine much the same conduct, and largely the same evidence, that would inform the Article 10 claims the objections seek to exclude.[34] On the majority's assessment, this evidentiary overlap meant that bifurcating Objections C and D would not achieve a genuine reduction in the scope of the merits phase, notwithstanding the Respondents' argument that a substantial share of the Claimants' pleadings was devoted to the Article 10 claims. Professor Viñuales again dissented, considering that confining the merits phase to a single claim rather than several would self-evidently be more efficient and would dispose of a 'substantial portion' of the dispute within the meaning of the Rules.[35][36][37]

4. Disposition

The Tribunal accordingly dismissed the Request for Bifurcation, directed the parties to follow the non-bifurcated procedural timetable already contemplated in Procedural Order No. 1, and reserved

[29]Decision, paras. 42-45.
[30]Decision, para. 46, distinguishing Case C-741/19, Komstroy, para. 66, on the basis that it addresses disputes between a Member State and an investor of another Member State, not disputes involving the EU itself as respondent.
[31]Decision, paras. 48-49.
[32]Decision, para. 50, citing Mainstream Renewable Power Ltd and others v Federal Republic of Germany, para. 42.
[33]Decision, paras. 51-58.
[34]Decision, paras. 53, 57-58.
[35]Decision, para. 55 (Arbitrator Viñuales, dissenting).
[36]Decision, paras. 59-63.
[37]Decision, para. 63 (Arbitrator Viñuales, dissenting).

costs.[38] It emphasised, however, that the refusal to bifurcate was without prejudice to any future ruling on the merits of the objections themselves, all four of which remain live and will be argued together with the substance of the claims.[39]

VII. COMMENTARY

A. The intra-EU objection: deferral as the default

The Decision is a further data point in what is now a well-established pattern: ECT tribunals confronted with the intra-EU objection overwhelmingly decline to resolve it as a threshold jurisdictional matter, preferring to join it to the merits.[40] There is a certain tension in that practice. The intra-EU objection is, by its own logic, an objection to the existence of consent to arbitrate in the first place — a matter classically suited to prior determination, since a tribunal without jurisdiction has, in principle, no power to proceed to the merits at all. Yet the practical reality identified by the majority is compelling on its own terms: because Objections A and B are interlinked, and because the very scope of the 'intra-EU' concept is contested as between disputes involving Member States and disputes involving the Union itself, a tribunal asked to rule on Objection A in isolation would risk doing so on an incomplete or provisional understanding of the surrounding facts. The Klesch tribunal's approach illustrates how the cumulative, three-factor bifurcation standard under the 2022 ICSID Rules — rather than any special solicitude for the merits — increasingly operates as the mechanism through which the intra-EU objection is deferred, almost as a matter of course, across the ECT docket.

B. A structural first: the Union as substitute respondent

Objection B is the more genuinely novel feature of the case. The mechanism by which the European Commission purported to designate the Union as sole respondent for measures adopted by Denmark and Germany implementing EU secondary legislation has, on the Tribunal's own account, never been tested in an ICSID proceeding.[41] The majority's scepticism about whether a regulation allocating inter-institutional financial responsibility can, without more, answer the distinct question of consent to arbitrate is a useful signal for future respondents relying on the 2019 ECT Secretariat Statement: the architecture built around Regulation (EU) No 912/2014 may prove less procedurally decisive than the Union and its Member States have assumed. At the same time, by declining to resolve the question early, the Tribunal has left Denmark and Germany fully engaged as active (if formally non-party) participants in the merits phase for at least the two years remaining before the merits hearing — a considerable cost for States that may ultimately be found never to have been proper respondents at all.

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[38] Decision, para. 64.
[39] Decision, para. 65.

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C. Taxation and security carve-outs: the expropriation claim as an anchor

The Tribunal's treatment of Objections C and D reflects a structural feature of ECT pleading practice that respondent States confront with some regularity: because expropriation claims typically incorporate an assessment of the reasonableness, proportionality and non-discriminatory character of the challenged measure, a 'clean' carve-out of fair-and-equitable-treatment claims rarely removes those same factual questions from the case. Where, as here, the Claimants have pleaded an expropriation claim that survives even a successful taxation or security objection, respondents seeking bifurcation face an uphill struggle to show that the preliminary phase would meaningfully narrow the evidentiary record — a difficulty that is likely to recur wherever states rely on Article 21 or Article 24 ECT to trim, rather than eliminate, an investor's claims.

D. Wider significance

Beyond its immediate procedural consequences, the Decision is a reminder of the durability of ECT exposure notwithstanding the coordinated withdrawal of the Union and its Member States from the Treaty.[42] It also illustrates the continuing salience of corporate nationality planning in ECT practice: the Claimants' invocation of a Jersey-incorporated holding company to anchor United Kingdom nationality — and thereby to avoid at least part of the intra-EU objection — has drawn criticism from civil society observers concerned about the use of offshore structures to access investor-State arbitration against Treaty Parties.[43][44] Whatever the eventual outcome, the case is likely to remain one of the more closely watched ECT proceedings of the mid-2020s, both for its bearing on the future of intra-EU investment arbitration and as a test of the limits of Article 21 and Article 24 ECT as tools for defending emergency fiscal measures adopted in response to the European energy crisis.[45]

VIII. CONCLUSION

The Klesch tribunal's Decision on Bifurcation is, on its face, a modest procedural ruling: a majority declined, and one arbitrator would have granted, an application to carve out four preliminary objections for early determination. Its real significance lies in what it reveals about how ICSID tribunals are managing the accumulated complexity of the intra-EU objection, the unresolved question of the Union's status as respondent for measures implementing its own secondary legislation, and the recurring difficulty of using the ECT's taxation and security carve-outs to

[43] ISDS Red Carpet Courts (n 8), noting that all three respondents, together with the EU, have withdrawn or are withdrawing from the ECT, and observing the effect of the Treaty's twenty-year sunset clause under Article 47(3).

[44] ISDS Red Carpet Courts (n 8).

[45] See generally Kyla Tienhaara and Lorenzo Cotula, 'Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets' (IIED/Queen's University, 2020), on the recurrent use of ECT arbitration to challenge State climate and energy measures.

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narrow claims that are anchored by a surviving expropriation cause of action. By declining to bifurcate, the Tribunal has committed the parties — and itself — to a long, factually dense merits phase, expected to conclude only in 2027, in which all four objections, and the underlying claims they target, will be argued together. The eventual outcome will be an important precedent both for the closing chapter of intra-EU ECT arbitration and for the broader question of how far investment treaties can be used to contest emergency energy taxation adopted across the European Union.