

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC

v.

Democratic Republic of Timor-Leste

(ICSID Case No. ARB/15/2)

**PROCEDURAL ORDER NO. 3
DECISION ON BIFURCATION AND RELATED REQUESTS**

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President
Mr. Stephen Jagusch, Arbitrator
Professor Campbell McLachlan QC, Arbitrator

Secretary of the Tribunal

Ms. Lindsay Gastrell

Assistant to the Tribunal

Mr. Rahul Donde

8 July 2016

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I. PROCEDURAL BACKGROUND

1. In accordance with the revised Procedural Calendar of 18 May 2016 (“Procedural Calendar”):
 - a. On 19 May 2016, the Respondent filed its Preliminary Objection to Jurisdiction and Request for Bifurcation in which it requested bifurcation (“Respondent’s Application”).
 - b. On 13 June 2016, the Claimants filed their Observations on the Respondent’s Application for Bifurcation (“Claimants’ Observations”).
2. In its communication of 17 June 2016, the Respondent alleged that the Claimants had introduced “new unsworn material” as part of the Claimants’ Observations, to which it objected. It requested the Tribunal not to receive or consider paragraphs 56 to 58 of the Claimants’ Observations and the Claimants’ Exhibits C-0197-200 (collectively “the New Material”), and to stay its decision on bifurcation until the Tribunal had determined that request.
3. Acting on the Tribunal’s invitation, on 17 June 2016, the Claimants commented on the Respondent’s communication.
4. On 4 July 2016, the Tribunal notified the Parties that because requests were made to the Tribunal after the Parties’ scheduled submissions on bifurcation, the Tribunal would not be able to issue its decision as scheduled in the Procedural Calendar, but would do so shortly.
5. The principal issue to be addressed by the Tribunal is whether or not bifurcate the present proceeding. The Tribunal will address the other requests made by the Respondent referenced above in the course of its analysis.

II. THE PARTIES' POSITIONS

A. Respondent's Position

6. The Respondent submits that the Tribunal has the power under the ICSID Convention to bifurcate the present proceeding into jurisdictional and merits phases. If necessary, the Tribunal could even suspend the merits phase pending the outcome of the jurisdictional phase.
7. It contends that in deciding whether to bifurcate, previous tribunals largely focused on four issues: “(a) do the jurisdictional objections have substance?; (b) if the jurisdictional objections are successful will this result in a dismissal of the entire case or a significant reduction in the scope and complexity of the arbitration?; (c) are the jurisdictional issues distinct from the merits issues or are they intertwined?; (d) will bifurcation harm or prejudice the Claimant.” According to the Respondent, a consideration of each of these issues supports bifurcation in the present case:
 - a. First, the Respondent presently advances three jurisdictional objections: (a) that there has been no consent by it to ICSID arbitration; (b) that there has been no “investment” for the purposes of the ICSID Convention or the Timor-Leste Foreign Investment Law (“FIL”); and (c) that the Claimants are not a “foreign investor” for the purposes of the FIL. These objections are all “substantial”, and not “trivial or frivolous”;
 - b. Second, if all its objections are successful, there would be no need for a merits phase. Even if only one objection is successful, it would still lead to a significant reduction in the scope of the arbitration;
 - c. Third, the jurisdictional objections do not substantially raise merits issues. While the first objection would require an examination of some underlying facts, those facts “are of small compass”. Moreover, those facts would have no bearing on the Claimants’ case on merits. The second objection can be decided by accepting most of the evidence as presented by the Claimants. While the Respondent does contest some

of that evidence, deciding on that evidence “[would] not infringe upon or otherwise affect the substantive consideration of the Claimants’ merits case.” Resolution of the third objection too would not require consideration of any facts that are likely to form part of the Claimants’ case on merits; and,

- d. Fourth, no “irreparable harm” will be suffered by the Claimants because of bifurcation. As the Claimants have only claimed monetary losses, any possible prejudice that they would suffer can be compensated by an award from the Tribunal.

B. Claimants’ Position

8. The Claimants submit that neither the ICSID Convention nor the ICSID Arbitration Rules contain a presumption in favor of bifurcation once a jurisdictional objection is raised.
9. They contend that while the four requirements identified by the Respondent would have to be considered by the Tribunal, the Tribunal would also have to consider an “overarching” question as to “whether fairness and procedural efficiency would be preserved or improved” as a result of bifurcation.
10. According to the Claimants, considerations of procedural efficiency do not always support bifurcation. This is also true in the present case because of the “factual overlap” between the Respondent’s jurisdictional objections and the merits. It makes little sense, so the Claimants’ submit, to bifurcate here as the Tribunal will have to consider the same evidence (and call the same witnesses) twice. Further, bifurcation would make it difficult for the Tribunal to arrive at a fair determination of the disputed issues as the Tribunal would be unable to assess how factual questions in the jurisdictional context would affect the subsequent merits context. Moreover, bifurcation would delay the proceeding and increase the costs of the arbitration.
11. The Claimants also submit that the Respondent’s jurisdictional objections are not appropriate for bifurcation. None of the objections is “serious” or “substantial”. Further, all the objections are intertwined with the merits of the Claimants’ claims. The Tribunal may have to hear testimony from multiple witnesses in circumstances where they may need to

be recalled as witnesses for the merits phase, which would not only be procedurally inefficient, but would also create difficulties for the Tribunal. Finally, the Claimants point out that even if the third jurisdictional objection was accepted, this would not materially reduce the scope of the proceeding.

III. ANALYSIS

A. Preliminary matters

12. At the outset, the Tribunal emphasizes that this decision is made on the basis of the Tribunal's understanding of the record as it presently stands. Nothing contained herein shall pre-empt any later or different finding of fact or conclusion of law.
13. As a further preliminary matter, the Tribunal notes that the purpose of this Order is to decide whether to bifurcate the present proceedings between the three jurisdictional objections advanced by the Respondent on the one hand, and, on the other, all other objections that may arise and the merits. At this stage, it is not to decide on the merits of the jurisdictional objections themselves. The Tribunal will do so later at the relevant time as provided in the calendar for this proceeding.
14. Finally, as mentioned above, in its correspondence of 17 June 2016, the Respondent objected to the inclusion of the New Material in the Claimants' Observations. It requested that this Material not be "received or considered" by the Tribunal "for the purpose of the Respondent's Application [...] or otherwise in this proceeding." In reaching its decision on bifurcation below, the Tribunal has not considered this Material. However, as mentioned further below, the Tribunal does not reject this Material.

B. Legal framework

15. The Tribunal's power to rule on the Respondent's Application is composed of the ICSID Convention and the ICSID Arbitration Rules.
16. With regard to the procedural stage at which the Tribunal may address any objection to its jurisdiction, Article 41(2) of the ICSID Convention states that:

Article 41

(2) Any objection by a party to the dispute that the 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.”

17. Furthermore, Rule 41(4) of the Arbitration Rules provides in relevant part that:

**Rule 41
Preliminary Objections**

(4) [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.”

18. It is clear from ICSID jurisprudence that Article 41(2) of the ICSID Convention and Article 41(4) of the Arbitration Rules do not establish a presumption either in favor of or against bifurcation.

C. Discussion

19. As a general matter, the Tribunal believes that it is good practice to deal with jurisdictional objections preliminarily, so as to avoid imposing full-fledged proceedings on a party disputing that it is subject to arbitration, whenever bifurcating such objections would likely result in increased efficiency in terms of both time and costs. On the other hand, if the bifurcation was unlikely to eliminate the need for a merits stage, either because the jurisdictional objections *prima facie* were not substantial, or because they were only directed to a few claims, a tribunal should be disinclined to bifurcate, unless there are other circumstances that would lead to a contrary conclusion.

20. Here, the Parties agree that four factors are to be examined by the Tribunal in deciding whether to bifurcate:

- a. Whether the jurisdictional objections have substance;

- b. Whether, the objections, if accepted, would result either in a dismissal of the entire case or at least a material reduction in the “scope and complexity” of the proceeding;
 - c. Whether the objections raise questions of merits which would need to be examined; and,
 - d. Whether the bifurcation would prejudice the Claimants.
21. These factors largely replicate considerations found to be relevant by other investment tribunals.¹ For instance, the tribunal in *Philip Morris Asia Ltd v Australia* considered the following factors:
- “(1) Is the objection prima facie serious and substantial? (2) Can the objection be examined without prejudging or entering the merits? (3) Could the objection, if successful, dispose of all or an essential part of the claims raised?”²
22. The Claimants submit that while all these factors are to be considered, an “overarching question” to be decided is “one of procedural efficiency”. According to the Claimants, bifurcation is “procedurally inefficient” in the present case as (i) the same individuals may have to be examined twice; (ii) the jurisdictional objections advanced by the Respondent cannot be fully segregated from the merits; and (iii) it would result in a longer proceeding with higher costs. These issues are considered in the course of the Tribunal’s analysis of the four factors listed above.
23. Turning now to these factors, the Tribunal notes first that the Respondent’s objections do not appear frivolous:
- a. The first objection, concerning the Respondent’s consent to ICSID arbitration raises genuine questions of incorporation of an ICSID arbitration clause. The Parties dispute

¹ See, for instance, Exh. RL-0028, *Accession Mezzanine Capital LP v Republic of Hungary* (ICSID Case No ARB/12/13, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation of 8 August 2013); Exh. CL-0040, *Emmis International Holding BV v Hungary* (ICSID Case No ARB/12/2, Decision on Bifurcation of 13 June 2013), para. 37(2).

² CL-0048, *Philip Morris Asia Ltd v Australia* (Procedural Order No 8 of 14 April 2014), para. 109.

not only the law applicable to such incorporation, but also whether the relevant contractual documents incorporate consent to ICSID arbitration.

- b. The second objection, that there has been no “investment” for the purposes of the ICSID Convention or the FIL, is equally legitimate as it raises questions as to whether the matters listed in paragraph 251 of the Claimants’ Memorial on Merits of 14 March 2016 satisfy the requirements of an “investment” under the ICSID Convention and the FIL.
 - c. Finally, the third objection, that the Claimants are not a “foreign investor” for the purposes FIL, is also substantial as it raises concerns of satisfaction of the requirements of Article 18 of the FIL, particularly whether the Claimants hold a “Foreign Investors’ Certificate” and whether the Fuel Supply Agreement constitutes a “Special Investment Agreement” for the purposes of Article 18.
24. Second, if any of the Respondent’s jurisdictional objections were to succeed, they would, at least, likely narrow the scope of the issues to be briefed at the merits stage. The first two objections are directed towards the Contract Claim.³ Therefore, if they were to succeed, this would significantly narrow the scope of issues to be briefed at the merits stage, which the Claimants do not specifically dispute. Similarly, the third objection, if successful, would exclude consideration of the Investment Law Claim.⁴ Bifurcating the proceedings may thus result in a reduction in the time and costs of any future merits phase. In such event, neither Party is likely to be put to the burden of raising/defending the entire case on the merits.
25. Third, on the basis of the record as it presently stands, it appears to the Tribunal that the facts likely to be involved in determining the Respondent’s jurisdictional objections may not be sufficiently intertwined with the facts likely to be involved in determining the merits of the claims. The Respondent’s jurisdictional objections give rise to legal questions that are likely to be largely separate and distinct from those arising on the merits:

³ Defined in the Respondent’s Application, para. 9.

⁴ Id.

- a. For the first objection concerned with the Respondent's consent to ICSID arbitration, the Respondent submits that the facts to be examined "are of a small compass" and that they are independent of the Claimants case on merits. The Claimants do not specifically object to this submission, rather they point out that the same witnesses may have to be recalled at the merits stage. While this may happen (equally for the second objection mentioned below), for now this is merely a possibility that may not even occur. Moreover, even if the same individuals are to be examined twice, which is not yet certain, the subject-matter of their testimony will probably be substantially different.
 - b. The Claimants submit that the second objection involves consideration of "(a) the proper characterisation of the Fuel Supply Agreement [...] (b) the extent of the Claimants' rights to Port Caravela; and (c) whether the Claimants actually made the contributions asserted in the Memorial on the Merits." The Tribunal believes that to address these issues it may not have to enter into a full array of facts pertinent to the merits. While the Tribunal may have to engage with some factual evidence, it is not sufficiently convinced that significant issues involved in the Claimants substantive claims would have to be determined.
 - c. In respect of the third objection, the Tribunal would probably have to determine whether the Claimants hold a "Foreign Investors' Certificate" and whether the Fuel Supply Agreement constitutes a "Special Investment Agreement" for the purposes of Article 18 of the FIL. Here too, the issues to be considered appear likely to be unrelated to the Claimants' case on merits in respect of the FIL (that the Respondent breached its obligations under the FIL, specifically Articles 10 and 11 thereof).
26. It thus appears to the Tribunal that the issues to be analysed to determine the Respondent's jurisdictional objections are not very likely to overlap with the issues to be reviewed at the merits phase, if any. Consequently, separating the presentation of these objections and the rest of the proceedings could possibly lead to a more efficient proceeding.

27. Fourth, the Tribunal does not believe the Claimants will suffer any material prejudice as a result of bifurcation. While it is true that the proceedings will last longer and possibly be more expensive if the Tribunal were to reject the Respondent's objections, this would apply to both Parties. Moreover, this is something that can be taken into account when fixing interest on the sums awarded to the Claimants (in the event their claim is successful) and costs.

28. As a result of this analysis, the Application is granted.

D. Other requests

29. Having decided to bifurcate the proceeding, the Tribunal believes it is no longer necessary to decide the Respondent's request not to "receive or consider" the New Material. Indeed, in the bifurcated scenario, the next step is for the Claimants to submit a Counter-Memorial on Preliminary Objections. In that submission, the Claimants could attach evidence and raise defences in response to the Respondent's jurisdictional objections. The Claimants have merely submitted the New Material earlier (in their Observations), and should not be penalized as a result.

30. The Tribunal believes that this decision will not prejudice the Respondent. The New Material is now part of the record and may form the subject-matter of document production requests by the Respondent. Besides, the Respondent will have an opportunity to address all of the Claimants' submissions including the New Material in its Reply on Preliminary Objections, including by raising new jurisdictional objections in respect of the New Material.

31. The Tribunal notes that in its Application, the Respondent has submitted that "this memorial does not constitute the entirety of its objections to the Tribunal's jurisdiction. The other objections maintained by the Respondent are [...] properly not the subject of a request for bifurcation [...] Those further jurisdictional objections will (if necessary) be the subject of further submissions during any merits phase." The Claimants submit that the Respondent has not acted in accordance with its duty to file jurisdictional objections as

soon as possible which “exposes [the Claimants] to prejudice”. However, they have not made any specific request in respect of the jurisdictional objections “reserved” by the Respondent. The Tribunal will address the issue, including admissibility of these other objections, if and when such objections are raised by the Respondent and opposed by the Claimants.

IV. DECISION

32. For the foregoing reasons, the Arbitral Tribunal:

- (1) Grants the Respondent’s request to bifurcate the proceeding between (i) the three jurisdictional objections advanced by the Respondent, and (ii) all other objections that may arise and the merits of the case;
- (2) Directs the Parties to follow the scenario in the Procedural Calendar of 18 May 2016 that assumes bifurcation; and,
- (3) Reserves its decision on the costs of this application for a later stage of these proceedings.

On behalf of the Tribunal,

[signed]

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal

Date: 8 July 2016