

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bay View Group LLC and The Spalena Company LLC

v.

Republic of Rwanda

(ICSID Case No. ARB/18/21)

**PROCEDURAL ORDER NO. 2
ON BIFURCATION**

Members of the Tribunal

Rt. Hon. Lord Phillips KG, PC, President of the Tribunal
Mr. J. Truman Bidwell, Jr., Arbitrator
Ms. Barbara Dohmann QC, Arbitrator

Secretary of the Tribunal

Mr. Alex B. Kaplan

June 28, 2019

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. This Arbitration arises out of the alleged investment of Bay View Group LLC (“Bay View”) and The Spalena Company LLC (“Spalena”) (together, the “Claimants”), limited liability companies organized under the laws of Delaware, U.S.A., in the Republic of Rwanda (“Rwanda”, or the “Respondent”). The Claimants and Rwanda are hereinafter collectively referred to as the “Parties.”
2. On May 14, 2018, the Claimants submitted a Demand for Arbitration to the International Centre for Settlement of Investment Disputes (“ICSID”) on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention”) and the Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, which entered into force on January 1, 2012 (the “BIT” or “Treaty”). The Claimants submitted an Amended Demand for Arbitration on June 12, 2018, as supplemented by email of June 18, 2018 and by letter of June 21, 2018. On June 22, 2018, the ICSID Acting Secretary-General registered the Amended Request, as supplemented.
3. The Tribunal was constituted on October 3, 2018. Its members are: Mr. J. Truman Bidwell, Jr., a U.S. national, appointed by the Claimants; Ms. Barbara Dohmann QC, a British and German national, appointed by Rwanda; and the Right Honourable Lord Nicholas Phillips KG, PC, a British national, appointed by agreement of the Parties as President of the Tribunal.
4. Following the first session with the Parties held by telephone conference on December 3, 2018, the Tribunal issued Procedural Order No. 1 (“PO1”) on December 12, 2018. PO1 governs the procedure of the arbitration and includes a procedural calendar.
5. Pursuant to the procedural calendar, on March 1, 2019, the Claimants filed a Memorial on the Merits, together with supporting documentation.

6. On May 24, 2019, Rwanda filed: (i) a Counter-Memorial on the Merits, together with supporting documentation; (ii) a Memorial on Jurisdiction, together with supporting documentation; and (iii) a request to address the objections to jurisdiction as a preliminary question (“Request”).
7. It is noted that pursuant to Section 14.1 of PO1, the Tribunal decided at the First Session to bifurcate quantum from the merits. The Request that is presently under consideration by the Tribunal is therefore a request to trifurcate this proceeding into a jurisdictional phase, a merits phase, and a quantum phase.
8. On June 21, 2019, the Claimants filed their Observations on Rwanda’s Request for Bifurcation (“Observations”).

II. THE REQUEST FOR BIFURCATION

9. While the Parties disagree on whether Rwanda’s objections to the Tribunal’s jurisdiction should be decided as a preliminary question, they largely agree on the standard which the Tribunal should apply to the issue at hand. According to the Parties, tribunals have consistently applied three factors articulated in *Philip Morris v. Australia* to determine whether bifurcation is appropriate.¹ They are: (i) Is the objection *prima facie* serious and substantial?; (ii) Can the objection be examined without prejudging or entering into the merits?; and (iii) Could the objection, if successful, dispose of all or an essential part of the claims raised?
10. The Parties add that the Tribunal should also take into account whether the bifurcation will save time and cost.

¹ Request para. 15 (citing *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8 on Bifurcation, 14 April 2014, para. 109.) Observations para. 6 (citing same)

A. RWANDA’S POSITION

11. Rwanda requests that the Tribunal decide four preliminary objections as a preliminary question because the resolution of these preliminary objections will either dispose of the case in its entirety or significantly reduce its scope and complexity.
12. Jurisdiction *ratione temporis*: Rwanda alleges that the Tribunal lacks jurisdiction *ratione temporis*. It alleges that the acts and facts upon which Claimants’ claims regarding the alleged failure by Rwanda to grant Natural Resources Development (Rwanda) LTD (“NRD”) long term-licenses are based took place prior to the entry into force of the BIT. In addition, Rwanda also alleges that the Claimants’ claims are time-barred because the acts underlying the claims, the knowledge of the supposed breach and subsequent loss were acquired outside of the limitation period prescribed in Article 26(1) of the BIT.
13. It is Rwanda’s position that this preliminary objection is serious and substantial and will either dispose of the case or at least significantly reduce its scope and complexity.
14. Jurisdiction *ratione personae*: Rwanda submits that the Claimants do not have standing before the Tribunal under Article 24 of the BIT, as they have failed to discharge the burden to prove that Spalena or Bay View suffered a loss. Further, Rwanda also submits that Bay View has no standing under Article 24 where it does not own or control NRD.
15. In Rwanda’s view, a determination of the Claimants’ standing is not intertwined with the merits of this case and will dispose of the proceeding in its entirety.
16. Jurisdiction *ratione materiae*: According to Rwanda, the Claimants never held investments that qualify for protection under either the ICSID Convention or the BIT because they have not shown that they own or made a substantial contribution of funds or assets to the mine concessions at issue or to the economic development of Rwanda.
17. Again Rwanda states that this preliminary objection is not intertwined with the merits and will dispose of the case in its entirety.
18. Jurisdiction *ratione voluntatis*: According to Rwanda, Spalena did not comply with the mandatory settlement procedure set out in Article 24(2) of the BIT. The applicable notice

of intent did not identify Spalena has a potential claimant to this dispute. Instead it only identified Bay View and NRD.

19. It is Rwanda's position that it is serious and substantial that Spalena never informed it of and did not seek to settle any of the claims it now brings. The issue is also independent of the merits of this case and would significantly reduce the scope and complexity of the proceeding by eliminating Spalena's claims from the case.

B. THE CLAIMANTS' POSITION

20. The Claimants oppose bifurcation of each of Rwanda's preliminary objections from the merits.
21. Jurisdiction *ratione temporis*: The Claimants disagree that their claims arose before the BIT entered into force or are otherwise time barred by Article 26 of the BIT.
22. According to the Claimants, Rwanda is relying exclusively on the fact that the initial term of the Contracts for Acquiring Legal Licenses expired before the BIT entered into force. However, the licenses were extended through at least October 2012, as Rwanda acknowledges. Therefore, the actions leading to this arbitration took place *after* the BIT entered into force.
23. Rwanda's allegations that the Claimants' claims are "out of time" illustrates that it fails to understand the nature of the claims. The Claimants allege that Rwanda engaged in a pattern of behaviour that culminated in violations of the BIT. Rwanda's view that each individual act alleged by the Claimants should be considered in isolation, without a reference to later conduct, is misplaced.
24. Further, the Claimants contend that a resolution of these competing viewpoints would require the Tribunal to prejudge the merits. The tribunal in *Global Telecom Holding S.A.E. v. Canada* reached this same conclusion. In that case, the tribunal found that consideration of a *ratione temporis* objection in a bifurcated jurisdictional phase would

inevitably require a consideration of the facts and context underlying the specific measures in question to decide whether the four measures should

be considered cumulatively as argued by the Claimant or each separately as contended by Rwanda, which will then be revisited in a merits phase. Added to this is the Claimant's position that even if certain breaches were not cumulative and fall outside the relevant time period, they are still background facts relevant to the analysis of alleged breaches that are clearly timely.²

Thus, the Tribunal should deny the Request on as to the *ratione temporis* preliminary objections.

25. *Jurisdiction ratione personae*: The Claimants state that this preliminary objection is not appropriate for bifurcation because it is not serious and substantial and does not have the potential to dispose of all or an essential part of the claims. The preliminary objection addresses only Bay View. Thus, if Bay View was eliminated from the case, all of the same merits arguments, evidence, witnesses would still be proffered on behalf of Spalena, resulting in no time and cost savings.
26. Further, the Claimants say that an objection that Bay View did not suffer a loss is a merits argument, not a preliminary objection in the first place. The issue was raised in *Glamis Gold, Ltd. v. United States of America*, in which the tribunal stated, "The requirement that the Claimant establish through evidence the existence of a loss is typically a part of the merits of a case and is not transformed into a jurisdictional limitation."³
27. *Jurisdiction ratione materiae*: The Claimants disagree with Rwanda's objection that they do not have a covered investment for failing to make a substantial contribution of money or other assets and because NRD's contributions are not attributable to them.
28. To the contrary, the Claimants say that they set out their contributions and steps to invest in and develop the concessions in the Memorial. Whether the Claimants have a covered investment is not a legal question but a factual one closely intertwined with the merits. The Claimants rely on *Gavrolovic v. Croatia*, in which the Tribunal declined to bifurcate because the same issue raised in that proceeding was found to be intertwined with the

² Observations para. 18 (*Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2, Decision on Request for Bifurcation, December 14, 2017, para. 95, RL-134).

³ Observations para. 22 (quoting *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2, 31 May 2005, para. 23, CL-047).

merits.⁴ Indeed, Rwanda refers to the same evidence in support of this jurisdictional objection in its defense of the merits, as another indication that these issues are intertwined.

29. Rwanda also argues that the Claimants' investments are not protected under the BIT because the "Claimants have no legal right to the assets of NRD, including the Concessions" and as such, the Claimants cannot establish damages. The Claimants argue that this objection is also intertwined with the merits and quantum phases of this proceeding and again refers to *Glamis Gold* that found that the issue of whether there is a loss is a merits issue.⁵
30. Finally, Rwanda argues that the Contract is excluded from protection under the BIT. According to the Claimants, it is not the Contract but instead NRD that is the covered investment. As Rwanda's objection stems from an apparent misunderstanding, this objection is not serious and substantial to warrant bifurcation. To the extent that Rwanda is arguing that NRD is not a covered investment, that issue is intertwined with the merits.
31. Jurisdiction *ratione voluntatis*: The Claimants submit that Rwanda's objection that Spalena did not comply with the consultation and negotiation period of the BIT are not serious and substantial. Thus, bifurcation of this preliminary objection is inappropriate in their view.
32. First, the Claimants explain that a consultation and negotiation requirement is directory and procedural and not jurisdictional in nature. As stated in *SGS v. Pakistan*, "Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."⁶ Thus, the Claimants contend that Rwanda's preliminary objections are not serious and substantial.
33. In any event, the Claimants observe that Article 23 of the BIT does not require consultation and negotiation, it merely recommends it. It says, "In the event of an investment dispute,

⁴ Observations para. 28 (citing *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, January 21, 2015, para. 69, CL-046).

⁵ Observations para. 31 (citing *Glamis Gold*, para. 23, CL-047).

⁶ Observations para. 38 (quoting *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, August 6, 2003, para. 184, CL-050).

the claimant and Rwanda *should* initially seek to resolve the dispute through consultation and negotiation” The use of the word “should” and not “shall” distinguishes this case from the *Kilic Insaat v. Turkmenistan*⁷ case on which Rwanda relies.

34. Second, it would have been futile for Spalena to have sent a notice of intent to Rwanda pursuant to Article 24 of the BIT. The purpose of such a provision is to “grant the host State an *opportunity* to redress the problem before the investor submits a dispute to arbitration.”⁸ Rwanda did not engage in negotiations at any point in the more than one year that had elapsed between the Bay View’s Notice of Intent and the filing of its Demand for Arbitration. As Spalena’s claims are identical to those set out by Bay View, Rwanda did not learn of the claims for the first time at the filing of the Request of Arbitration. Accordingly, the Claimants say they met their obligations under Article 24.
35. In any event, as Spalena and Bay View’s claims are identical, if Spalena was dismissed from the proceeding, a full case on the merits would proceed with Bay View as the claimant. Thus, there is no time and cost efficiency to be gained from bifurcating this preliminary objection.

III. THE TRIBUNAL’S ANALYSIS

36. The Tribunal takes note that the Parties agree on the test that the Tribunal should use to determine whether each of Rwanda’s preliminary objections shall be determined as a preliminary question in these proceedings.
37. The Tribunal has deliberated and finds that certain of the four categories of preliminary objections warrant determination as a preliminary question. In reaching this determination, the Tribunal is mindful that the Parties consented at the First Session to bifurcate the quantum phase from the merits phase, and a trifurcated proceeding last longer in duration than a bifurcated one. Therefore, the Tribunal considers that those preliminary objections

⁷ Observations para. 42 (citing *Kilic Insaat Ithalat Ithracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/01, Award, July 2, 2013, para. 6.2.8, RL-120).

⁸ Observations para. 44 (quoting *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05, Decision on Jurisdiction, 2 June 2010, para. 315, RL-119).

it has determined to bifurcate, if successful, will either dispose of all or a substantial part of the claims and save time and cost.

38. Additionally, the Tribunal wishes to state that by no means should its determination that one of Rwanda's jurisdictional objections is appropriate for bifurcation prejudice the merit of the objection. Rather, the object of this Order is merely to determine whether the proceedings on the merits shall be suspended pending the outcome of the bifurcated preliminary objections.
39. Jurisdiction *ratione temporis*: The Tribunal has determined that the Claimants' Observations have not adequately challenged Rwanda's contention that they are time barred from bringing a claim in relation to breaches of which they had, or should have had, knowledge prior to May 14, 2015, which is the first "Cut-off Date".⁹
40. In their Observations, the Claimants state that they "in the Demand for Arbitration and the Memorial, allege that Rwanda's pattern of behaviour towards Claimants was connected and in combination ultimately led to an expropriation and other violations of the BIT."¹⁰
41. While the Demand for Arbitration alleges breaches after the Cut-off date, the allegations in the Memorial almost all relate to acts and omissions by Rwanda **before** the Cut-off Date. These are repeatedly described as a "*pattern of mistreatment*" "*culminating*" in expropriation.¹¹ The Tribunal has failed to find any reference to precisely when this expropriation occurred or what constituted the expropriation. The Claimants allege:

Rwanda holds the position that Claimants could not mine, and therefore were not entitled to retaining (sic) their covered investments, because Claimants did not submit information sufficient to "meet the requirements for the grant of mining licenses" under Rwandan law. The process to reach this decision spanned years....¹²

Yet, the Memorial does not specify when the decision in question was reached.

⁹ Memorial on Preliminary Objections para. 32.

¹⁰ Observations para. 17.

¹¹ See Memorial paras. 202, 216, 217, 249.

¹² Memorial para. 271 (citing letter from R. Marshall to F. Gatara dated March 23, 2015, p. 7, C-112).

42. In short it is unclear what the Claimants case is as to whether, and if so what, claims are founded on conduct by Rwanda alleged to have occurred after the Cut-off Date.
43. Thus, the Tribunal has decided to resolve Rwanda's objection to jurisdiction *ratione temporis* as a preliminary question. However, the Tribunal will reconsider this determination if the Claimants' Counter-Memorial on Preliminary Objections pleads a viable claim based on matters post-dating the Cut-off Date that require exploration on the merits.
44. *Jurisdiction ratione personae*: The Tribunal agrees with Rwanda that the issue of whether Bay View owns or controls a covered investment is appropriate for bifurcation. At this early stage of the proceeding, the pleas in paragraphs 137 and 138 of the Memorial, which are quoted in the Rwanda's Memorial on Preliminary Objections, pose a serious and substantial issue as to whether Bay View owns or controls the alleged investment. The Tribunal also takes note of the Claimants' pleas in paragraph 23 of the Observations in this regard. Thus the issue—as it relates to Bay View—will be decided on a bifurcated basis.
45. However, the Tribunal does not find that a determination of whether Spalena owns or controls the investment that NRD is alleged to have had is similarly appropriate for bifurcation. Precisely what that investment was is a complex issue that will fall to be investigated at the merits hearing.
46. *Jurisdiction ratione materiae*: The Tribunal has determined that this preliminary objection turns on factual issues that will fall to be determined during the merits phase, and as such these objections will not be determined as a preliminary question.
47. *Jurisdiction ratione voluntatis*: The Tribunal agrees with Rwanda that its preliminary objections raise issues of law and none of fact. Such issues are well-suited to resolution as preliminary question.

IV. DECISION

48. For the reasons set forth above, the Tribunal orders as follows:

- (a) Rwanda's request to determine its preliminary objections to jurisdiction *ratione temporis* as a preliminary question is granted, save that the Tribunal will reconsider this decision if the Claimants' Counter-Memorial on Preliminary Objections pleads a viable claim based on matters post-dating the Cut-off Date that require exploration on the merits;
- (b) Rwanda's request to determine its preliminary objections to jurisdiction *ratione personae* as a preliminary question is granted as to Bay View and denied as to Spalena;
- (c) Rwanda's request to determine its preliminary objections to jurisdiction *ratione materiae* as a preliminary question is denied;
- (d) Rwanda's request to determine its preliminary objections to jurisdiction *ratione voluntatis* is granted;
- (e) The proceedings on the merits are hereby suspended pending the outcome of the preliminary objections that are to be determined as a preliminary question;
- (f) The Parties shall confer and propose a procedural calendar for the jurisdictional phase by July 15, 2019. In so doing, the Parties shall recall that the hearing on bifurcated preliminary objections shall take place on November 18-22, 2019 (number of hearing days to be decided, maximum of five) as stated in page 24 of Procedural Order No. 1; and
- (g) The hearing dates held in reserve from March 16-25, 2020 are cancelled.

On behalf of the Tribunal,

[signed]

Rt. Hon. Lord Phillips KG, PC
President of the Tribunal
Date: June 28, 2019