INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic

(ICSID Case No. ARB/17/17)

PROCEDURAL ORDER No. 2

Members of the Tribunal
The Honorable Ian Binnie C.C., Q.C., President of the Tribunal
Mr. Klaus Reichert S.C., Arbitrator
Professor Campbell McLachlan Q.C., Arbitrator

Secretary of the Tribunal
Ms. Alicia Martín Blanco

---

21 December 2018

A. Introduction

1. On 5 October 2018, the Respondent filed its Memorial on Preliminary Objections and Request for Bifurcation. On 13 November 2018, the Claimants filed their Observations on Respondent's Request for Bifurcation.

2. On 7 December 2018, the Respondent submitted comments on the Claimants' Observations. On the same date, the Respondent requested "that the Tribunal not review Argentina's submission and inform the Parties that the submission is rejected." On 15 December 2018, the Tribunal stated as follows:

> The Tribunal is deliberating regarding the bifurcation issue. Procedural Order No 1, in the provisions to which both parties agreed, there is no contemplation of a Respondent's rejoinder to the Claimant's observations on the Respondent's submissions in that regard. The Tribunal is to render a decision on bifurcation by next Friday December 21, 2018. Were a rejoinder to be filed there would undoubtedly be a Claimant's request to reply to the Respondent's rejoinder and resulting delay. In the circumstances, the Tribunal considers that it already has ample submissions on the bifurcation issue and will decline to receive further submissions or observations.

3. On 14 December 2018, the Claimants submitted a statement on their costs "incurred in reviewing Respondent's Memorial on Preliminary Objections and Request for Bifurcation and preparing Claimants' Observations." On 18 December 2018, the Respondent submitted a communication objecting to the Claimants' costs statement and requesting that both Parties be given an opportunity to submit their statements of costs and present their arguments before the Tribunal makes any costs decisions.

B. Tribunal's Analysis

4. The Tribunal refers to the application by the Respondent to bifurcate the hearing of its five jurisdictional objections from the merits with a view to bringing this dispute to an efficient and expeditious conclusion. Bifurcation is opposed by the Claimants on the basis that it would add nothing except delay and costs. In addition, the Claimants argue that "most of these objections would not dispose of all or a substantial part of the case even if they were meritorious, (which they are not)."

5. The Claimants raise the threshold objection of the timing of the application, which the Claimants say ought to have been brought "as soon as possible" after the Respondent had been put on formal notice of the claim on receipt of the Notice of Dispute on October 5, 2016. (There is some irony in this position having regard to the fact the Claimants waited almost eight and a half years after passage of the Nationalization Act in 2008 before bringing the present claim based on the failure of that Act to pay compensation). In any event, while Rule 41(1) requires the objection to be made as "soon as possible" it then adds "and in any event no later than expiration of the time limit fixed for the filing of the Counter Memorial." The Respondent set out its objections to jurisdiction in the Memorial on Preliminary Objections and Request for Bifurcation. Some tension is apparent between these two limbs of Rule 41, however the Tribunal does not regard the words "as soon as possible" as abridging the explicit time limit "no later than the expiration of the time limit fixed for the filing of the Counter Memorial." The Respondent complied with this time limit. The timeliness objection is therefore dismissed.

6. Article 41 of the ICSID Convention establishes no presumption on the question whether jurisdictional objections ought to be decided as a preliminary question or whether they should be joined to the merits. It simply provides that the Tribunal ''shall determine whether to deal with [such a question] as a preliminary question or join it to the merits of the dispute."

7. The Claimants and Respondent are agreed that the fundamental reason to bifurcate or not to bifurcate is procedural efficiency. Their disagreement is as to the application of this principle on the current facts. Reference is made to ICSID's Commentary on its Arbitration Rules, which considers relevant considerations to include (1) the merits of the objection; (2) whether bifurcation would materially reduce time and costs; and (3) whether jurisdiction and merits are so intertwined as to make bifurcation impractical. These considerations are not exhaustive. The Tribunal ought also to assess whether bifurcation is likely to materially *increase* time and costs as well as the possibility of *reducing* them. Moreover, caution must be exercised in assessing "the merits of the objection" so as not to conflate the merits of the objections with the prior question of the merits of bifurcation. The fact is that some cases lend themselves to bifurcation and others do not. It is a case specific inquiry. In the end, a

Tribunal will generally have to weigh the cost and likely prejudice to one party if bifurcation is granted against the likely cost and prejudice to the other party if bifurcation is refused.

8. The Respondent raises five preliminary objections:

(a) That the claim must be dismissed because of undue delay;

(b) That the Claimants have not established that they are investors with an investment in the Respondent state;

(c) That the claim exceeds the scope of the BIT because:

(i) Claimants have not proved that the facts amount to a violation of the BIT;

(ii) Any claim based on Law 26,425 had to be submitted to the Argentine courts.

The Respondent adds that in any event certain issues "will have to be excluded in a potential merits stage." (para. [150]).

9. For reasons that will be apparent, the Respondent places its primary emphasis on the ground of delay. It invokes general principles of extinctive prescription, acquiescence, good faith and abuse of rights.

10. The Claimants point out that there is no explicit limitation period on claims in either the BIT or the ICSID Convention, and that many ICSID Tribunals have proceeded with claims after delays lasting decades. Nevertheless, a delay of eight and a half years is significant and the cause for some concern. Some cogent explanation is required.

11. The reason for the delay offered by Mr. Oscar Schmidt, witness for the Claimants (at paras. [64]-[65] of his statement) is that as long as the Kirchner government remained in power, any claim against Argentina would have risked retaliation against the Claimants' other business interests in that country. The new government of President Macri took office in December 2015. The Claimants say they moved promptly once there was a change of government.

12. At this stage the only issue before the Tribunal is the desirability of bifurcation. Whether or not the Claimants' explanation is ultimately accepted as a defence to acquiescence or laches, and in any event the assessment of legal impact one way or the other, will be explored at a

hearing. Mr. Schmidt will be a key witness at any hearing on the merits. Efficiency suggests that he be called in one hearing to give his entire evidence.

13. An important question that would arise at a bifurcated hearing respecting delay is not just whether material delay has occurred, and whether it is imputable to the Claimant, but also whether the delay has occasioned significant prejudice to the Respondent (See Claimants' Observations at [61]-[77]: Bin Cheng, *General Principles of Law as applied by International Court and Tribunals* (1987) AL RA 15, pp.379-83; James Crawford, *State Responsibility: The General Part* (2013) at p 563, CL-128). In some cases an important witness may have died, or a cache of key documents inadvertently destroyed.

14. On this point the Claimants say the Respondent was put on notice of a likely claim by letter dated June 2010 and could thus have taken appropriate steps to preserve relevant evidence that was not already in the public record. In cases of real prejudice, where a respondent's defence might be hampered by a claimant's delay, consideration might be given to dismissal of the claim.

15. The Respondent has not produced compelling evidence of efficiency savings that would result from bifurcation. Moreover, if bifurcation is granted and the objections are ultimately rejected, it seems likely there will be overlap on some of the issues to be discussed during the jurisdictional phase and the merits phase including timing, delay and fear of retaliation.

16. The Respondent also alleges that the timing of the claim violates the requirement of good faith and amounts to an abuse of process. In this respect, the Respondent relies on the definition of abuse of process in *Transglobal v. Panama* as follows:

> To determine whether an abuse of rights has occurred, tribunals have considered all the circumstances of the case, including, for instance, the timing of the purported investment, the **timing of the claim**, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring. (emphasis added)

17. The Respondent's argument appears to assume the point in issue, i.e. whether the reason for the delay given by the Claimants' witness Mr. Schmidt is or is not a sham. If the Tribunal

accepts Mr. Schmidt's evidence there may be no factual foundation for a claim of abuse of process.

18. Whether or not the Claimants ought first to have litigated their claims in the courts of Argentina despite the absence of an exhaustion of local remedies clause in the treaty or ICSID Convention is a matter that can easily be resolved at a hearing on the merits.

19. In terms of proof of jurisdictional facts under ICSID and the BIT, the Respondent calls into question whether (1) all of the Claimants are protected investors; and (2) whether all of the investments in respect of which claims are made are protected investments under the BIT and ICSID. These are among the standard issues that arise in almost all investor–state disputes. If the raising of such issues warranted bifurcation, bifurcation would invariably be granted, which is not the case. The Respondent has not identified a case-dispositive fact or specific sub-issue which calls out for early resolution. The allegations will require a close examination of the Claimants' corporate structure and operations. If the hearing of the jurisdictional objections were to be bifurcated, and such objection did not succeed, much of the same ground would have to be covered at the hearing on the merits into the corporate structure, who owned what, what investments were taken and (if any were taken) how are they to be valued. Once again the Claimants' case and the Respondent's jurisdictional objections are sufficiently intertwined to make bifurcation an inefficient way to proceed.

20. Moreover, the Respondent has reserved the right to subsequently raise additional "objections" at any potential merits stage. (See Respondent's Preliminary Objections para. 10, note 18.) That being the case, efficiency would best be served by hearing all preliminary objections at once instead of permitting the Respondent to split its case on objections.

21. As stated earlier, the Respondent has identified a number of issues which, if the case proceeds to a hearing on the merits, the Respondent will ask to be excluded from the Tribunal's consideration. [*Memorial on Preliminary Objections*, para. 150.] This is not a bifurcation issue but it is duly noted and will be dealt with at the appropriate stage of the proceedings.

22. The Claimants have asserted facts which, *if established*, would amount to a violation of the Treaty notwithstanding that the Respondent seeks to justify its conduct. The Tribunal has

formed no opinion on the correctness or otherwise of those claims nor on any defence that the Respondent may wish to allege. The dispute should be brought to a hearing and disposition as quickly as circumstances permit. Bifurcation would do a disservice to that objective.

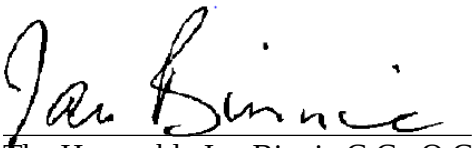
23. In summary, the Respondent has failed to establish that bifurcation would serve the interest of an efficient arbitration. On the contrary, it would lead to significant delay. The Respondent's preliminary objections will be more appropriately dealt with – and with less duplication of effort – at a single hearing for jurisdictional and substantive issues. A hearing without bifurcation will result in the Tribunal being able to consider on a complete record the full factual context of the issues raised by way of preliminary objections. If the Respondent is ultimately successful in its jurisdictional objections, the tribunal has power to compensate it for any prejudice in terms of costs. If the jurisdictional objections do not succeed, the Tribunal will be in a position to proceed immediately to a consideration of the merits in light of a complete factual and legal record.

C. Tribunal's Order

24. In the circumstances the application for bifurcation is dismissed. In accordance with scenario 2.1 of Annex A to Procedural Order No. 1, the Respondent shall file its Counter-Memorial on the Merits on 22 April 2019. The Tribunal further confirms the hearing dates as 14 through 18 and 21 through 25 September 2020 pursuant to scenario 2.1 of said order, and releases all other hearing dates in scenarios 1 and 2.2.

25. The Tribunal reserves its decision on costs.

For and on behalf of the Tribunal,



The Honorable Ian Binnie C.C., Q.C.
President of the Tribunal
Date: 21 December 2018