INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited

v.

Republic of Serbia

(ICSID Case No. ARB/18/8)

PROCEDURAL ORDER NO. 3

DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN

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24 June 2019

1. Unfortunately, the Tribunal was unable to reach unanimity with regard to the request for bifurcation submitted by the Respondent. Unanimously, however, the Tribunal found that:

> "the Respondent's objections do not appear frivolous. The *ratione personae* objection against Sembi for instance will require the Tribunal to examine the meaning of Article 1(3)(b) of the Serbia-Cyprus BIT and determine whether Sembi lacks a seat in Cyprus because it is '*effectively managed*' from Canada. Similarly, the *ratione temporis* objection under the Canada-Serbia BIT would involve an analysis of the relevant Treaty provisions, as well as a review of the record to determine when the three-year limitation period started running. Other objections also raise genuine questions of treaty interpretation among others. As a consequence, the Respondent's objections must be deemed serious, and success on a combination of several objections could result in the denial of jurisdiction over the entire case."[1]

2. Nevertheless, the majority decided to treat the Respondent's objections together with the merits of the case. The main reason proposed for this decision has been a matter of efficiency. I feel compelled to state my dissent in that regard.

3. This dissenting opinion will be divided in two parts. The first part will address general considerations about preliminary objections in international adjudication. This is necessary in order to understand my approach to the specific decision on bifurcation in the instant case, which will be examined in the second part.

I. PRELIMINARY OBJECTIONS: BETWEEN BASIC PRINCIPLES OF INTERNATIONAL ADJUDICATION AND "EFFICIENCY"

4. I start with some general comments on preliminary objections before international courts and tribunals. The most important one is that objections to jurisdiction are related to the very existence of the judge or arbitrator's capacity to deal with a case: consent. Consent is not only necessary to decide the merits, but also to merely discuss them.[2] There must be

[1] This Order, paragraph 17.

[2] As the International Court of Justice (the "ICJ") stated: "Nor should it be overlooked that for the party raising a jurisdictional objection, its significance will also lie in the possibility it may offer of avoiding, not only a decision, but even a hearing, on the merits, -a factor which is of prime importance in many cases. An essential point of legal principle is involved here, namely that a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established." *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972,* p. 56, paragraph 18 (b).

serious reasons to impose upon a party asserting its lack of consent to a given case, the obligation to discuss nonetheless the merits of that case without having previously decided on jurisdiction. The best practice in this regard is that of the International Court of Justice (the "**ICJ**"). If the jurisdictional and/or inadmissibility objections can be dealt with preliminarily, this should be the rule. If such objections are inextricably linked to the merits, in a manner that they cannot be examined without examining the merits at the same time, then there is no bifurcation. In those instances, the parties will plead the entire case and the court or tribunal will issue a decision at the end of the proceedings, but first ruling on the question of its jurisdiction and/or of the admissibility of the claims.

5. I am aware, as the Order indicates, that Article 41 of the ICSID Convention and Article 41 of the ICSID Arbitration Rules have not explicitly established any kind of presumption in favour of or against bifurcation. However, if Article 41 of both instruments are read as a whole, their procedural priority character is apparent. These objections must be raised as early as possible, although the tribunal has the capacity to decide on its own jurisdiction at any stage of the proceeding. It is for the tribunal to decide whether an oral phase is needed to deal with preliminary objections and whether the procedure on the merits needs to be suspended or not. The tribunal fixes new time limits if the objections are considered not to have a preliminary character or if they are overruled (contrary to the current established practice of fixing two possible avenues –one with bifurcation and the other without – from the very beginning of the proceeding). Whereas the prior ICSID Arbitration Rules established the suspension of the proceeding on the merits as the applicable rule in case of preliminary objections, the current Rules leave it to the decision of the Tribunal.[3]

6. Indeed, it is the very rationale of *Preliminary* Objections (this is the title of Article 41 of the Arbitration Rules) that requires treating them preliminarily, if possible. I will quote the following statement of the ICJ, which in my view summarises the best practice in this matter, and which by no means is an extreme position of always deciding in favour of bifurcation:

> "In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the

[3] Compare the text of Article 41 of the ICSID Arbitration Rules of 1968 with the current version of the Rules.

> proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."[4]

7. Efficiency (I would prefer to use the expression "*procedural economy*") is not merely a question of cost and time. It is not an absolute criterion either. Alleged "efficiency gains" cannot be imposed, and even less assumed -as is necessarily the case here-, against basic elements of a sound administration of justice. The discussion here is essentially an issue of jurisdiction: the general rule is that it cannot be required from a party to discuss the merits of an issue for which it has not given its consent.[5] Procedural economy dictates that a court or tribunal deciding on preliminary objections first must do so *at the earliest opportunity*. Forcing the parties to argue and present their arguments on the merits (and even worse, also on quantum) to then reach the conclusion that the court or tribunal cannot decide on the merits is the very opposite of procedural economy. I do not consider here the argument of the potential psychological impact of having studied the entire merits of the case on a decision regarding jurisdiction.

8. As for the cost and the time elements of efficiency with regard to preliminary objections, an elementary idea must be taken into account: until it is not known whether the objections are accepted or not, it cannot be determined whether the bifurcation will have saved time and costs. It is obvious that if the objections are upheld and the case stops at that phase, there will be absolute "efficiency" in terms of time and costs. If they are rejected or considered that they do not possess a preliminary character, then the proceeding will be, at different possible degrees, more time and cost consuming. This risk is always present in the scenario of a challenge to jurisdiction, all the more so (but not exclusively) at the international level. The question for a tribunal is whether it is better to risk imposing upon

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[4] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 852, paragraph 51.

[5] As explained by Georges Abi-Saab: "the fundamental principle and basic rule in international adjudication, is that of the consensual basis of jurisdiction. It also explains the prominent place of questions of jurisdiction both in the jurisprudence and in the writings on international adjudication. It explains as well the widely shared perception that the first task of an international tribunal is to ascertain its jurisdiction; and the great care international tribunals take in establishing from the outset, the existence and limits of the consent of the parties before them, on which their jurisdiction is founded." *Abaclat and others v. Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Professor Georges Abi-Saab, paragraph 8 - iii).

a party the burden of discussing the merits without having jurisdiction to deal with the case or to decide on jurisdiction first, with the possibility of rejecting objections that would in turn lead to a longer proceeding. It is my perception that probable efficiency cannot be pursued at the cost of sacrificing a basic principle of international adjudication.

9. The decision taken in this Order not to bifurcate considered as "good practice to deal with jurisdictional objections in a preliminary phase to avoid imposing full-fledged proceedings on a party who disputes having consented to arbitration."[6] However, the Order explains the general criteria adopted by the majority in the following manner: "if the bifurcation is unlikely to produce efficiency gains, a tribunal should be disinclined to bifurcate."[7]

10. Limiting the scope of the case can be a legitimate purpose of preliminary objections. To consider that "efficiency" is not met if the objections do not lead to the disposal of the case is tantamount to accepting that a claimant benefitting from a jurisdictional link can require the respondent to discuss the merits of any matter, even beyond the scope of the jurisdiction, because at any rate the case will reach the merits phase. The same is true if the objections aim at disregarding some claimants but not all of them. Otherwise, a claimant having the capacity to validly invoke jurisdiction may attract any other person or corporation as a claimant even though there is no basis for jurisdiction, and impose on the respondent the burden of addressing the merits in their regard. Not only would the basic principle of consent to jurisdiction be breached in these circumstances, but also that of the equality of the parties.

II. THE CONDITIONS NOT TO BIFURCATE ARE NOT MET IN THIS CASE

11. I do not consider as irrelevant for the decision the fact that only one of the two BITs invoked by the Claimants could be set aside if some preliminary objections were to be upheld. Whether the factual background would essentially be the same if one or both BITs were applicable is not decisive either.[8] It was the Claimants' choice to submit claims based on two different BITs in a single case. A party to a treaty that considers that such treaty does

[6] This Order, paragraph 15.
[7] This Order, paragraph 15.
[8] This Order, paragraph 18(a)(ii).

not provide grounds for jurisdiction has the right to see that issue settled without the need to discuss the merits at the same time. Having chosen to invoke two different BITs in the case, the Claimants must face the risk of having to discuss the applicability of one of them first. This is all the more relevant in the current case, in which both BITs do not coincide in different aspects. This situation has already required the Parties and the Tribunal to spend time (and consequently, costs) on how to deal with the potentially conflicting provisions between the BITs.[9]

12. The conditions for accepting the preliminary character of the objections are in my view met here: they are of a substantial nature and not frivolous, as the Tribunal unanimously found. It appears that they can be examined before the merits, and if they were accepted, they would end the proceeding or they would limit the scope of the merits of the case.

13. An important element to scrutinise in order to decide on bifurcation is the question of whether the objections can be examined without prejudging the merits of the case. The crucial point here is indeed whether the objections can be separated and decided before touching the core of the merits. The Order mentions that "[t]he Respondent itself has merely submitted that 'the issues of jurisdiction raised in the present submission can be resolved without assessing the merits of the dispute' without any further explanation. It has failed to show that its objections would involve reviewing a narrow set of facts that could be dealt with separately."[10] It is for the Tribunal to determine, on the basis of the elements present in the case file, whether deciding bifurcation would imply deciding the merits at the preliminary objections phase. If this were the case, then the objections would be inextricably linked to the merits and would not have a preliminary character. As submitted by the Claimants, the subject-matter in this case is the alleged expropriation, alleged breach of the obligation to provide fair and equitable treatment, alleged impairment of Sembi's investment by unreasonable and discriminatory measures, and the disregard of the so-called "umbrella clause."[11] Consequently, deciding the objections at a preliminary stage would not imply taking a stance on the alleged expropriation or on the other claims.

[9] See Procedural Order No. 2.
[10] This Order, paragraph 18(b).
[11] Claimants' Request for Arbitration, Section V; Claimants' Memorial, Section VI.

14. The argument related to the age of Mr. Rand is of course of no impact.[12] Whether objections possess a preliminary character cannot be decided on the basis of a claimant's age. If Mr. Rand's witness statement is crucial for the merits and quantum phases, there are means to solve this alleged problem.

15. The majority went on to examine alleged practical negative consequences of bifurcation, such as the need to call some witnesses twice.[13] My question is: can a party claiming that a tribunal lacks jurisdiction be compelled to plead the merits of the case before the tribunal decides if it has such jurisdiction just because there is a possibility that some witnesses could be called twice if the objections are rejected?

16. The majority affirms that "if the proceedings are bifurcated and continue on the merits, they will last significantly longer and experience shows that longer proceedings also cost more. It is true that the costs of litigating the merits may be expended for no purpose if in a non-bifurcated proceedings jurisdiction were eventually denied. That consequence could, however, be remedied when allocating the burden of the costs of the proceedings."[14] However, the opposite is also true: if there is bifurcation and the preliminary objections are rejected, this can also be remedied when allocating the burden of the costs of the proceedings.

17. The Claimants have accepted that the objection to jurisdiction *ratione personae* over Sembi and the objection to jurisdiction *ratione voluntatis* over Mr. Rand's claim relating to his shareholding in BD Agro held through MDH Serbia can be separated from the merits.[15] For Claimants, all the other objections are intertwined with the merits. In any case, assuming that there is a link between the objections and the merits is not enough to disregard the preliminary character of the objections. As the Permanent Court of International Justice stated: "The determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case."[16] Indeed, the opposite situation would be extraordinary. What is

[12] Claimants' Reply to the Request for Bifurcation, paragraph 6.
[13] This Order, paragraph 18(c).
[14] This Order, paragraph 18(d).
[15] Claimants' Reply to Request for Bifurcation, paragraph 9.
[16] *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15.

crucial is whether deciding the preliminary objections would be tantamount to deciding on the subject-matter of the case. As discussed, above, it seems to me that this would not the case here.

18. Claimants have also accepted that the scope of the case could be reduced if some objections were upheld. However, for the Claimants, this reduction of scope would not be "significant."[17] The majority endorsed this view. As explained above, I strongly disagree with the idea that in order to accept bifurcation, the objections must exclusively lead to the end of the proceeding or reduce it "significantly." As mentioned above, an objection to jurisdiction can rightly have the purpose of limiting the scope of the case. Whether this limitation is "substantial" or not is not a decisive factor to treat the objections in a preliminary manner or together with the merits of the case. Nevertheless, I'm not convinced that the preliminary objections raised by the Respondent would not be able to reduce the scope of this case "significantly."

19. Indeed, efficiency plays in favour of accepting bifurcation. If the objections were to be rejected, then the merits of the case would be circumscribed to the alleged expropriation and the other alleged breaches, and if necessary, to quantum. There would be no need to repeat the factual and legal ascertainments made at the jurisdictional phase. If the case continues to the merits, the parties and the tribunal would already have made significant progress in their respective work and the factual and legal assessments necessary for the merits analysis would substantially be reduced. There is no need to come back to issues already decided upon. Time for preparation of written pleadings and for hearing the case would necessarily be reduced. The Tribunal has the capacity, in view of the outcome of the preliminary objections phase, to modify the procedural calendar and shorten it if necessary. This way of proceeding would not only be more efficient, without any extravagant increase of cost and time, but would also be the most orderly manner to address the issues at stake. Additionally, if the case were to continue to the merits but only one BIT was applicable, this would also solve the problem for the Tribunal arising from the difference of treatment of some issues in both BITs, such as transparency.

[17] Claimants' Reply to Request for Bifurcation, paragraph 35.

20. It is for all these reasons, and as a matter of principle, that I felt obliged not to add my vote to those of my colleagues.

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Prof. Marcelo G. Kohen