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Bifurcation Of Proceedings In ICSID Arbitration: Where Do We Stand?

Inna Uchkunova (International Moot Court Competition Association (IMCCA)) · Thursday, August 15th, 2013

and Oleg Temnikov

Foreword

The tribunal in *Mesa Power Group, LLC v. Canada* (PCA Case No. 2012-17, Procedural Order No. 2, 18 January 2013) recently stated with regard to bifurcation of proceedings that:

> "[I]t is good… to let the parties 'know where they stand'… at an early stage and not to impose the burden of full fledged proceedings on a party that disputes being subject to arbitration." (para. 16)

The issue of bifurcation of proceedings in investment arbitration has been little explored partly due to the limited number of publicly available decisions. Additionally, there are no "absolute rules" in that the power to bifurcate falls within the tribunal's discretion. (*Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, (ICSID ARB/11/28), Decision on the Respondent's request for bifurcation, 2 November 2012, para. 30)

In view of this, do we really know where we stand?

I. Characteristics

The term "bifurcation" most often refers to the separation of jurisdictional issues from the merits and is defined as "a separate jurisdictional phase to consider the jurisdictional and admissibility objections raised by the Respondent." (*Itera International Energy LLC and Itera Group NV v. Georgia*, (ICSID ARB/08/7), Decision on admissibility of ancillary claims, 4 December 2009, para. 34)

There are, however, other possible scenarios for division of proceedings, such as splitting the merits into liability and quantum phase. For example, the proceedings in *Toto Costruzioni Generali S.P.A. v. Lebanon* (ICSID ARB/07/12) consisted of a jurisdictional phase and a merits phase. In *LG&E v. Argentina* (ICSID ARB/02/1) the proceedings were split between jurisdiction, liability and damages. By contrast, in *Patrick Mitchell v. Congo* (ICSID ARB/99/7) the tribunal disposed of

the issues of jurisdiction, liability and quantum in one single award.

II. Types of bifurcation and relevant considerations

Within the scope of the present research only a handful of publicly available decisions on bifurcation were identified. The relevant considerations outlined by past tribunals will be discussed in the next sections. Two main types of bifurcation are examined.

A. Bifurcation of jurisdictional issues

The tribunal's power to bifurcate jurisdictional issues derives from Article 41(2) of the ICSID Convention. In deciding whether to bifurcate jurisdictional issues a tribunal has to balance the rights of the parties. On the one hand, the Respondent shall not be put to the burden of defending the entire case when it is obvious that the tribunal lacks jurisdiction.

On the other hand, the objections raised by the Respondent may be a mere dilatory tactic. Consequently, the tribunal has to weight "the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice." (Apotex Holdings Inc. and Apotex Inc. v. United States of America, (ICSID ARB(AF)/12/1), Procedural order deciding bifurcation, 25 January 2013, para. 10)

Additionally, it must be pointed out that statistics show that bifurcation does not, in fact, lead to reduction of time and costs. As noted by one author, the time for conclusion of the (then known) forty-five bifurcated ICSID cases was 3.62 years compared to non-bifurcated cases which took an average 3.04 years to conclude. (Greenwood, L.; *Does Bifurcation Really Promote Efficiency?*, 28:2 J. Int'l Arb. (2011) 105, at 107)

In terms of procedure and under the available information, it would seem that the deadline for requesting bifurcation of jurisdictional issues is the same as that set out in Arbitration Rule 41(1) concerning objections to jurisdiction, namely "no later than… the time limit fixed for the filing of the counter-memorial." In principle, the Respondent would make a request for bifurcation, although there are cases in which the parties had reached an agreement on bifurcation (*Electrabel S.A. v. Hungary*, (ICSID ARB/07/19), Decision on jurisdiction, applicable law and liability, 30 November 2012, para. 1.22) and in *Suez v. Argentina* the tribunal seemingly bifurcated the merits on its own motion. (*Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina*, (ICSID ARB/03/17), Decision on liability, 30 July 2010, para. 244)

In case the tribunal grants the request for bifurcation, it shall also decide whether to suspend the proceedings on the merits. Under Arbitration Rule 41(3) the tribunal has discretion and may choose not to suspend the proceedings on the merits, as did the tribunal in *Tulip Real Estate v. Turkey* (para. 56). In such hypothesis however, the Respondent may find itself "fighting on two fronts" and bifurcation will be rendered practically useless.

The tribunal in Tulip Real Estate v. Turkey has pointed to the following considerations governing bifurcation of jurisdictional issues:

> "(i) whether it is desirable to bifurcate for reasons of procedural economy; and (ii) whether the preliminary objection is intimately linked to the merits; and (iii) whether

> a determination of the preliminary objection is capable of resulting either in the dismissal of the entire case or reducing significantly its scope and complexity." (*Tulip Real Estate v. Turkey*, para. 30)

It follows that, for the tribunal to grant a request for bifurcation, it must be satisfied that:

First, the objection raised by the Respondent is a proper jurisdictional objection. For example, in *Glamis Gold, Ltd. v. The United States of America* the tribunal refused bifurcation finding that "an objection asserting that claimant has not suffered a loss… is not a plea as to jurisdiction." ((UNCITRAL) Procedural Order No. 2, 31 May 2005, para. 23)

Secondly and importantly, the objection shall not be intertwined with the merits, otherwise the tribunal would risk prejudging the merits or deciding in the absence of sufficient information. Similarly, in *Tulip Real Estate v. Turkey* the tribunal rejected bifurcation of one of the objections raised by Turkey contending that the tribunal lacked jurisdiction since the investor's claims are contract not treaty claims. In this regard, while recognizing that the relevant test for establishing jurisdiction is the so-called *prima facie* test, the tribunal held that this objection is "intimately linked to the merits." (*Tulip Real Estate v. Turkey*, para. 37)

Thirdly, the objection must be dispositive of the case, that is, it must be capable of resulting either in the dismissal of the entire case or reducing significantly its scope and complexity. This consideration follows from the principle of procedural economy. As already noted, the Respondent shall not be put to the burden of defending the entire case on the merits if the investor's claims are frivolous and there is no consent to jurisdiction in the first place.

In view of the above considerations, the tribunal in *Tulip Real Estate v. Turkey* ordered bifurcation of only one out of the three objections raised by the Respondent, namely that relating to the mandatory negotiation period provided for in Article 8(2) of the relevant BIT. (See para. 55(c)) This decision is, however, controversial since "[t]ribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature." See *SGS Société Générale de Surveillance S.A. v. Pakistan*, (ICSID ARB/01/13), Decision on jurisdiction, 6 August 2003, para. 184)

Consequently, there are quite a limited number of objections which can uncontroversially meet the above requirements, but clear guidance is lacking due to the scant information. Tribunals have been very hesitant in their use of bifurcation and this hesitation often finds expression in, for example, reservations for re-joinder to the merits contained in the orders (*Mesa Power Group, LLC v. Canada*, para. 17) or exhortations to the effect that in case the objection turns out to be frivolous the tribunal would apply the 'loser pays' principle in allocating costs. (*Apotex v. USA*, para. 12)

B. Bifurcation of the merits

When bifurcation of the merits is ordered, the tribunal will proceed to a quantum phase only if liability is found to exist. Thus, the parties would be spared the effort and costs of quantifying damages if it eventually turns out that the actions complained of are not attributable to the host State.

The tribunal's power to bifurcate the merits into liability and quantum phases is derived from Article 44 of the ICSID Convention. The tribunal in *Suez v. Argentina* explained that "bifurcation

of the merits phase of an ICSID case into determination of liability and a determination of damages is not common… The Tribunal relies on Article 44…" (*Suez v. Argentina*, para. 245)

The Tribunal in *Siag v. Egypt* has also held that:

> "The ICSID Arbitration Rules do not expressly preclude the bifurcation of the merits phase of an ICSID arbitration. It is not however the usual practice of ICSID Tribunals to do so. The Tribunal considers that it would require compelling reasons to order such a bifurcation, particularly when, as is the case here, it was previously agreed that the merits phase would be heard as a whole, and a timetable had been directed to give effect to that agreement." (*Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, (ICSID ARB/05/15), Procedural order No. 3, reprinted in part in the Award dated June 1, 2009, para. 116.)

Often the parties would agree as to bifurcation of the merits. In such cases it is unlikely that the tribunal will reject the request. Additionally, in *Suez v. Argentina*, the tribunal seems to have decided on bifurcation *proprio motu* as a form of case management.

Within the scope of the present research only one case was identified providing information as to the considerations which guided the tribunal in its decision to bifurcate the merits. Thus, the tribunal in *Suez v. Argentina* referred to the "complexity of th[e] case and the extraordinarily voluminous nature of the record" as well as hardship in defining the mission of the independent expert. (*Suez v. Argentina*, para. 244)

Except for that, little is known as to the considerations of a tribunal in cases in which the one party requests and the other objects bifurcation of the merits or what is the deadline for requesting such bifurcation.

Conclusion

Information on ICSID tribunals' decisions on bifurcation is largely lacking since most of them are not publicly available. Additionally, as statistics show, bifurcation does not always ensure time-saving. This topic is in need of further clarification so that this procedural device may work properly and ensure effective case management.

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