Kluwer Arbitration Blog

Not By Proxy Alone: Bifurcation and the Petroleum Marketing Commission v. USA Tribunal

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With Procedural Order No 4 on Bifurcation (hereinafter "PO 4"), the Tribunal of *Alberta Petroleum Marketing Commission v. USA* issued a decision on bifurcation at the request of the Respondent following, as many others, *Glamis Gold*. While in *Glamis Gold* the request to bifurcate proceedings was rejected, this Tribunal decided to grant the application. The Tribunal gave a complete and thorough reasoning of why the requirements of *Glamis Gold* would point to the granting of bifurcation in this case. This post summarizes the PO 4 and offers insights on how decisions on bifurcation could be refined.

Background

Alberta Petroleum Marketing Commission ("Claimant") alleged that the United States of America ("Respondent") had violated the rights of one of its enterprises granted by the North American Free Trade Agreement ("NAFTA") and the Annex 14-C United States-Mexico-Canada Agreement ("USMCA," providing rules for both legacy investment claims and pending claims). The arbitration was initiated under Article 1120(1) of the NAFTA and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 ("the Rules"). The Claimant asserted that (i) its Keystone XL pipeline project was a protected investment under the combined reading of NAFTA Chapter 11 and paragraphs 1-6(b) of Annex 14-C of the USMCA and (ii) its rights had been infringed with the revocation of two key permits.

The Respondent proceeded to ask for bifurcation on 16 May 2024, one month after the submission by the Claimant of its memorial and supporting documentation. In its request, the Respondent contended that the Tribunal did not have jurisdiction on two grounds: *ratione temporis* and *ratione materiae*. The Respondent claimed, under the *ratione temporis* objection, that Annex 14-C of the USCMA only applies to breaches of rights under the NAFTA (terminated six months before the breach asserted by the Claimant). On the ground of *ratione materiae*, the Respondent further submitted that the Claimant "cannot demonstrate that it had an 'investment' (as defined by NAFTA)."

The Parties' Submissions

The Claimant in turn submitted its observations to the Respondent's requests, asking for them to be denied, while the Respondent instead submitted a reply to the observations of the Claimant. As the Tribunal could note, the parties were not in radical disagreement on the understanding of the Tribunal's power to grant the request of bifurcation of proceedings under Article 21(4) of the Rules. The main contention, instead, was on how the Tribunal should proceed in considering whether it should exercise such power.

While the Respondent asserted that the Rules provided a general presumption for bifurcation of pleas concerning jurisdiction, the Claimant supported an interpretation of the provision that looked outside the mere text of the Rules, as well as an approach proper to a "modern tribunal" (i.e., not presuming bifurcation). The Claimant's ultimate request was to avoid an interpretation favoring a presumption of bifurcation, asking the Tribunal to consider the use of its discretion.

Both parties largely agreed that the test to consider whether bifurcation was to be decided by the Tribunal was to be based on the criteria laid in *Glamis Gold*:

> "(1) whether the Respondent's two objections are substantial or frivolous; (2) whether, if successful, the disposition of these objections would result in a material reduction in the next phase of the proceedings; and (3) whether bifurcation is practical, considering the extent to which the jurisdictional objections are intertwined with the merits" (PO 4, para. 60).

The Tribunal's Decision

The Tribunal granted the request for bifurcation, affirmed the presence of a presumption in favor of bifurcation contained in the Rules, and noted that this is the set of rules that the Claimant decided to arbitrate with, instead of the ICSID Rules which provide for no presumption of bifurcation. The Tribunal thus used a textual interpretation of the Rules to proceed in its decision, remembering that the rules grant a discretion to decide otherwise if it deemed fit.

Ratione temporis, the Tribunal found that the request of the Respondent was not so frivolous, because the question that the Respondent had offered the Tribunal was "plainly substantial" with respect to the interpretation and termination of the relevant international instruments. It also deemed that granting bifurcation would enable a gain in efficiency which "outweighs any potential delay" if the objections on jurisdiction will not be successful, noting that in such case the Tribunal has the power to compensate the Claimant with costs. Finally, it also considered that addressing this issue does not entail any consideration of the merits of the Claimant's claim of expropriation and therefore it is qualified to be decided as a preliminary bifurcated issue.

With respect to the objection *ratione materiae*, the Tribunal found this issue too to be capable to be decided as a preliminary issue in a bifurcation. The Tribunal found also this objection "substantial," because it encompasses relevant matters of treaty interpretation and interrelation of provisions. While admitting that to make this decision it will have to consider some elements of the "factual record" (such as the instruments upon which the Claimant alleges the entitlement of a qualified and protected investment), it stated that it will be doing so only for the purpose of deciding the preliminary issue. The Tribunal also rejected the claim that the matter is intimately

connected with the determination of damages. The Tribunal's interest in the substantive part of the case, it claimed, would be only relevant for determining whether the project is a protected investment under the combined reading of the international agreements. Lastly, it found that also the determination of this objection would promote efficiency, since it is capable of being dispositive of an entire claim, and therefore capable of saving time and costs potentially otherwise wasted.

Approaches by Proxy Help, but Valuation May Go Beyond (and Other Key Issues)

The Tribunal's Approach

The Tribunal adhered to a reasoning which respects the text and the spirit of the Rules that one can infer from reading the *travaux* (and in particular paras. 29-43, where delegates voiced that jurisdictional matters should be addressed as a first step). Furthermore, it applied the approach of other tribunals in deciding bifurcation matters under the Rules: while acknowledging the preference for bifurcation within the Rules, there is no thorough explanation of the nexus between this presumption and how the tests applied relate to it. Unlike this Tribunal, however, others have been also quite vague and not so precise when applying the tests used.

The Tribunal also highlighted, albeit implicitly, that there is a hierarchy of powers, and that discretion comes through the language of the instruments that are higher within the hierarchy. It also likely assumed that if it was to find jurisdiction, interests on damages would be calculated so as to include the time needed by the Tribunal to finish the preliminary bifurcated phase. Furthermore, the Tribunal pragmatically and correctly underlined that if jurisdiction was to be found, the extra burden on the Claimant arising from the bifurcation could be compensated through a decision on costs.

Unresolved Issues

A host of unanswered questions arises from the above considerations: why should the Respondent compensate the Claimant if it exercised a *bone fide* right of request and presented a "substantial" objection, just because the Tribunal found jurisdiction to be present only later? Are there other concerns investment tribunals should address if their hierarchy of powers so provides? This last issue may not have been addressed often so far, but there might be cases of rights which cannot be compensated by simply granting costs and are nonetheless protected by an investment treaty. This is the case where, for example, a sovereign claims that the investor has violated an environmental standard, and this has led to alleged expropriative measures. Hypothetically, undue bifurcation may delay the process and cause more public relations damage to the investor or its stakeholders. Should these consequences be considered?

Not by Proxy Alone—Possible Solutions

A tribunal may have, under its framework of powers, a duty of responsibility of efficient administration of proceedings which includes limiting damages to the investor derived by an inefficient arbitration. "Efficiency" should not relate only to the proceedings, but to the overall value they generate for stakeholders versus the inputs absorbed. Consequently, a comprehensive decision might have to include analyses using a sort of "but for" formula: "what might occur to the proceedings and relevant stakeholders in case or absence of bifurcation?"

Finally, I would like to touch upon one last issue: bifurcation should occur only if this will likely generate benefits. This is generally the case when the overall negative risks and costs arising from a possible failed bifurcation are less than the overall positive risks and benefits that the prospect of a successful bifurcation offers. The three-pronged test used somehow captures this condition but does not necessarily represent the best approach possible, albeit being cost-effective. In conclusion, arbitrators should try to do the math when appropriate and impute cashflows and estimate probabilities.

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