

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Tayeb Benabderrahmane

v.

State of Qatar

(ICSID Case No. ARB/22/23)

PROCEDURAL ORDER NO. 6
Request for Bifurcation

Members of the Tribunal

Ms. Lucinda Low, President of the Tribunal
Prof. Andreas Bucher, Arbitrator
Mr. Makhdoom Ali Khan, Arbitrator

Secretary of the Tribunal

Dr. Jonathan Chevry

July 1, 2024

I. INTRODUCTION AND PROCEDURAL HISTORY

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of the French Republic and the Government of the State of Qatar on the reciprocal encouragement and protection of investments (the “**BIT**” or the “**Treaty**”)¹ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”).
2. The Claimant is Mr. Tayeb Benabderrahmane, a national of Algeria and France (the “**Claimant**”), and the Respondent is the State of Qatar (“**Qatar**” or the “**Respondent**”). The Claimant and the Respondent are collectively referred to as the “**Parties.**”
3. On April 2, 2024, the Respondent submitted a Request for Bifurcation (the “**Bifurcation Request**” or “**Request**”) to the Tribunal.
4. On April 30, 2024, the Claimant submitted a Reply to the Respondent’s Request for Bifurcation (“the **Reply**”).
5. On May 16, 2024, the Respondent submitted a Rejoinder to the Claimant’s Reply to the Respondent’s Request for Bifurcation (the “**Rejoinder**”).
6. On May 30, 2024, the Claimant submitted a Reply to the Rejoinder (the “**Rejoinder Reply**”).
7. The Tribunal, having reviewed the parties’ submissions and considered the issues raised, now issues its decision on the Bifurcation Request. For the reasons set forth below, the Request is denied.

¹ Signed at Doha on July 8, 1996.

II. THE PARTIES' SUBMISSIONS

8. This section summarizes generally the submissions of the parties. Additional submissions of particular relevance to the Tribunal's analysis will be discussed in the following section as appropriate. The Tribunal has carefully considered all of the parties' arguments, and the fact that a specific point may not be mentioned in this Order should not be taken as an indication that it was not considered.

A. SUBMISSIONS OF THE RESPONDENT

9. The Respondent's Bifurcation Request is based on two jurisdictional objections, as follows:

- a. First, that "the Tribunal does not have jurisdiction because the Claimant does not have, or has not made, an investment in Qatar within the meaning of the France-Qatar BIT, or within the meaning of Article 25 of the ICSID Convention such that this is not a dispute "arising directly out of an investment".
- b. Second, that "the Tribunal has no jurisdiction because even if the Claimant had assets that would otherwise qualify as an 'investment', that investment was not made in accordance with Qatari law and hence is not protected pursuant to the express terms of the Treaty."²

10. The Respondent argues that these are "manifestly" serious objections, that if successful would result in the complete dismissal of the claim, and are entirely separate from the merits of the claim. As a result, the Respondent submits, it would be wasteful and inefficient not to bifurcate.³

11. In support of these two objections, the Respondent reviews the relevant definition of "investment" in the Treaty,⁴ highlighting the need under the Treaty language as it reads it

² Bifurcation Request, para. 5.

³ Bifurcation Request, para. 6.

⁴ Exhibit CL-03.

- for investments to have been “made” by the Claimant in Qatar, the need for assets in the territory of the Respondent to constitute rights that exist under domestic law, and the existence of an express legality requirement in the Treaty.⁵
12. The Respondent also highlights the criteria under the ICSID Convention for an “investment” to be found to have been made.⁶
 13. The Respondent goes on to factually dispute the Claimant’s asserted status in Qatar as a freelance consultant, arguing that he was in its territory as an employee of a privately held real estate business,⁷ and further disputes that the investments on which the Claimant relies in his Memorial are sufficient to constitute an “investment” under either the Treaty or the ICSID Convention.⁸ Respondent then disputes the relevance of the legal authorities on the issue of investment cited by the Claimant in his Memorial.⁹
 14. As to illegality, the Respondent references three laws of Qatar which it asserts have particular relevance to the Claimant or his activities: (1) Law No. 25 of 2004 on Combating Concealment of Illegal Commercial, Economic and Professional Practices by Non-Qataris; (2) Law No. 1 of 201 on Regulating Non-Qatari Capital Investment in the Economic Activity; and (3) Law 25 of 2005 relating to the Commercial Registry.¹⁰ It submits that these laws would apply to the Claimant or his activities based on Claimant’s own factual position and were not complied with, and that these are not technical or trivial infractions but serious ones that would render his asserted activities in Qatar illegal.¹¹
 15. The Respondent therefore submits that efficiency requires bifurcation.¹²

⁵ Bifurcation Request, paras. 8-9.

⁶ Bifurcation Request, para. 10.

⁷ Bifurcation Request, paras. 11-12.

⁸ Bifurcation Request, paras. 13-20.

⁹ Bifurcation Request, paras. 21-24.

¹⁰ Bifurcation Request, paras. 25-33.

¹¹ Bifurcation Request, paras. 34-38.

¹² Bifurcation Request, para. 39.

16. In its Rejoinder, the Respondent asserts that the Claimant has failed to grapple with its submissions and has made insufficiently substantiated assertions about the asserted intertwining of the jurisdictional objections and the merits.¹³ In the Respondent’s view, the separateness of the jurisdictional issues from the merits is “clear”.¹⁴ The Respondent reiterates that the objections are serious and substantial, and criticizes the Claimant for his lack of engagement with them.¹⁵
17. As to the issue of whether its jurisdictional objections are intertwined with the merits, the Respondent argues that the Claimant conflates the question whether the objection as to lack of investment engages some issues of fact with the question whether those issues of fact are inextricably linked to the merits. Respondent disputes that there is an overlap, and submits that the “factual inquiry in respect of the jurisdictional objections is in any event more limited than the Claimant seeks to suggest”.¹⁶ Citing various legal authorities, the Respondent goes on to assert that “no investment” objections have “routinely” been treated as separate from the merits.¹⁷ It also disputes that there should be an ‘all or nothing’ approach to the request, noting that the success of either of its two objections would result in the end of the case.¹⁸ Finally, the Respondent notes its lack of understanding of the relevance of the Claimant’s argument regarding a lack of documents due to their alleged expropriation to the issue of bifurcation.¹⁹
18. Regarding the illegality objection, the Respondent criticizes the Claimant’s lack of engagement with the cited provisions of Qatari law, and dismisses as irrelevant or as a *non-*

¹³ Rejoinder, para. 2

¹⁴ Rejoinder, para. 3.

¹⁵ Rejoinder, para. 5.

¹⁶ Rejoinder, para. 6.

¹⁷ Rejoinder, para. 7, citing *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (ICSID Case No. ARB/12/2), Decision on Respondent’s Application for Bifurcation, June 13, 2013 (RL-028) and *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary* (ICSID Case No. ARB/12/3), Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation, August 8, 2013.

¹⁸ Rejoinder, paras. 8-9.

¹⁹ Rejoinder, para. 10.

sequitur the Claimant’s argument that this issue has not been raised previously, as well as his assertions regarding the knowledge and support of the Qatari authorities regarding his activities.²⁰ As to the Claimant’s argument that issues of fraud or illegality are not suitable for bifurcation, the Respondent disputes that the authorities relied upon by the Claimant establish any such principle.²¹ In the Respondent’s view, the illegality issue is a self-standing one that should be determined on a preliminary basis.²²

19. In terms of fairness and efficiency, the Respondent submits that fairness should be considered in relation to both parties, and disagrees with the submissions of Claimant that bifurcation would result in decisions being based on an incomplete record.²³ It disputes that it has sought bifurcation on the basis of any evidentiary deficiency.²⁴ While admitting that bifurcation might result in some increase in time and costs of the proceedings, it conversely notes that savings in both areas would occur even if only one of the objections is successful. Finally, it disputes that it would not be prejudiced by non-bifurcation.²⁵

B. SUBMISSIONS OF THE CLAIMANT

20. The Claimant takes the view that bifurcation is not a matter of right, but is a discretionary decision based on the facts and circumstances of each case.²⁶ He argues that the question of an investment is “intrinsically linked” to the merits of the case,²⁷ that a considerable factual analysis is required to determine whether there was in fact an investment, taking into account the broad language of the Treaty and the Claimant’s position that he invested not only funds but know-how, goodwill and a clientele. He submits that this will require a review of the Claimant’s investments “from inception to the expropriation”, and cannot be

²⁰ Rejoinder, para. 12.

²¹ Rejoinder, paras. 13-16.

²² Rejoinder, para. 17.

²³ Rejoinder, para. 22.

²⁴ Rejoinder, para. 25.

²⁵ Rejoinder, para. 26.

²⁶ Reply, paras. 8-9.

²⁷ Reply, paras. 12, and Section 3.1.

done without touching on the merits of the case.²⁸ In support of his position that bifurcation is inappropriate when the jurisdictional questions are closely linked to the merits of the case, the Claimant cites various authorities.²⁹

21. As to illegality, the Claimant denies the Respondent's objection, and submits that his investments in Qatar were done "in full compliance with the application [sic] laws and regulations".³⁰ He notes that the Qatari authorities have not previously accused him of breaching local laws, and argues that his economic activities in that State were done with the "full knowledge and even the support" of the Respondent's highest authorities.³¹
22. The Claimant further argues that an objection of this nature should be joined to the merits, so that the Tribunal has the benefit of the full factual context of the dispute.³² He further submits that the Respondent's refusal to comply with the Tribunal's procedural orders has impeded him from fully presenting his case, and that granting bifurcation on the basis of a lack of evidence or witness testimony in Claimant's Memorial would bolster the Respondent's asserted campaign of harassment and deprivation against him and would constitute a denial of justice.³³
23. Finally, the Claimant argues that fairness and efficiency require denial of the request, in particular that the Tribunal would be making a decision based on an incomplete record if it were to bifurcate, and that bifurcation would increase "dramatically" both the time and

²⁸ Reply, paras. 14-21.

²⁹ Reply, paras. 22-24, citing to C. Schreuer, *The ICSID Convention: A Commentary* (2d ed.), Cambridge University Press 2009, at p. 537 (CL-073) ; *Mainstream Renewable Power and others v. Germany*, Procedural Order No. 3 (Decision on Bifurcation), June 7, 2022, at para. 53 (CL-074); and *AIYY Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Procedural Order No. 2 Decision on Bifurcation, 5 October 2015, at para. 61 (CL-075).

³⁰ Reply, para. 28.

³¹ Reply, paras. 28-29.

³² Reply, paras. 30-32, citing to *Minnotte and Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, 16 May 2014, at para. 129 (CL-076) ; *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, at para. 77 (CL-077).

³³ Reply, paras. 38-42.

cost required for this arbitration, including through the need to make additional submissions, and duplicate witness and expert testimony.³⁴

24. Accordingly, he asks the Tribunal to reject the request for bifurcation and join any arguments regarding jurisdiction or admissibility to the merits.³⁵

25. In his Rejoinder Reply, the Claimant argues that the Respondent's request is frivolous, that bifurcation is impractical given how intertwined the objections to jurisdiction are with the merits, and that bifurcation would concern only a limited portion of the dispute.³⁶

III. THE TRIBUNAL'S ANALYSIS

26. The Tribunal's bifurcation decision is governed by ICSID Rule 44(2),³⁷ which gives the Tribunal the power to bifurcate and sets forth a standard of decision as follows:

“In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and

(c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.”

27. The parties largely coincide in their views of the criteria that should be considered by tribunals in determining whether to bifurcate the proceedings. In the Respondent's words:

“5.1 Whether the objection is prima facie serious (or not frivolous) and substantial.

³⁴ Reply, paras. 37-47.

³⁵ Reply para. 48.

³⁶ Rejoinder Reply, paras. 7 *et seq.*

³⁷ ICSID Arbitration Rules 2022 (CL-002).

5.2 Whether the objection to jurisdiction, if granted, results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time of a preliminary proceeding, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings).

5.3 Whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is unlikely that there will be savings in time and cost.³⁸

28. The parties sharply diverge, however, in the application of these criteria to the facts and circumstances of the present case.
29. In terms of the first criterion set forth in paragraph 24 above, the Tribunal cannot conclude on the submissions before it that the Respondent's objections to jurisdiction are frivolous. It agrees with the Claimant that at the stage of a request for bifurcation, the task of the Tribunal is not to consider the objections on the merits. Rather, the Tribunal must assess on the face of the submissions whether or not they are *prima facie* serious or not.
30. Plainly, the jurisdictional objections as to a lack of investment and as to illegality are facially colourable based on the submissions of the Respondent. Whether or not they will ultimately be borne out is a different question to be addressed at a later stage of the proceedings.
31. As to the second criterion set forth in paragraph 24, it is likewise satisfied in the view of the Tribunal. It is evident that the success of either jurisdictional objection would result in the elimination of any need to proceed to the merits of the dispute. The Claimant's submission that bifurcation with respect to any one of the two objections, assuming success, would not lead to a material reduction in the scope and complexity of the case, is plainly incorrect.

³⁸ Bifurcation Request, para. 5. See also Reply, para 7; and Rejoinder Reply, para. 9. Claimant formulates these criteria using slightly different language drawn from the *Glamis Gold* case (*Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, at para. 12 (CL-069), but the key criteria identified are the same.

32. The position is more difficult, however, with respect to the third criterion set forth in paragraph 24. The Tribunal agrees with the Respondent that factual intertwining of jurisdictional and merits issues, rather than mere factual elements of jurisdictional issues, is the relevant consideration. While the Respondent asserts that the jurisdictional objections raise completely separate issues from the merits—which may be true as a legal matter—the Tribunal is not persuaded that they are not factually intertwined in the particular circumstances of this case. For the Tribunal, this interconnection is most readily seen with regard to the first objection—the question whether there is an investment. But the illegality issue, when the parties’ submissions are carefully parsed, may also turn on factual issues including the basis, character, and nature of the Claimant’s activities in Qatar and the posture of the authorities vis-à-vis those activities at the time when the investments or investments were made (in relation to the illegality objection). These issues overlap with the question of whether there was an investment or investments, what these investments consisted of, and ultimately lead to the facts and circumstances surrounding the alleged expropriation of those investments.
33. The Tribunal agrees with the Respondent as a general matter that bifurcation is not an “all or nothing” proposition when more than one objection is raised. Each has to be considered on its own merits. In this case, however, the Tribunal is not persuaded that the issues are as distinct as the Respondent submits them to be. The Tribunal accepts as likely, for example, the submission of the Claimant that the same fact witnesses may be called to address both sets of issues.
34. The question then becomes how does this linkage, or interrelationship, relate to the ultimate touchstones of fairness and efficiency? In this regard, the Tribunal is not persuaded by certain of the arguments submitted by the Claimant relating to fairness, in particular, that he would be deprived by bifurcation of the opportunity to make its case or denied justice, or that the Respondent’s conduct in this matter to date to which the Claimant has objected has relevance to the issue at hand. For the Tribunal, the question is whether there is a sufficient connection between the facts and circumstances that would be relevant and material to the objections and the merits to make it inefficient to treat them separately. On

the somewhat unusual posture of this case, and based on its preceding observations, the Tribunal is persuaded that is the case.

35. The Request is therefore denied.

IV. ORDER

36. For the foregoing reasons, the Tribunal decides as follows:

- a. The Tribunal rejects Respondent's Request ; and
- b. The Tribunal invites the Parties to confer and propose a procedural calendar for the remaining of the proceeding by no later than July 15, 2024.

On behalf of the Tribunal

[signed]
Ms. Lucinda Low
President of the Tribunal
Date: July 1, 2024