INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Naftiran Intertrade Co. (NICO) Limited
(*Claimant*)

v.

Kingdom of Bahrain
(*Respondent*)

(ICSID Case No. ARB/22/34)

PROCEDURAL ORDER No. 4
On Respondent's Request for Bifurcation

Members of the Tribunal
Dr. Claus von Wobeser, President of the Tribunal
Prof. Bernard Hanotiau, Arbitrator
Prof. Maxi Scherer, Arbitrator

Secretary of the Tribunal
Ms. Anna Holloway

August 12, 2024

I. PROCEDURAL BACKGROUND

1. The dispute in this matter concerns claims brought by the Malaysian-incorporated Naftiran Intertrade Company Limited ("**NICO**") against the Kingdom of Bahrain ("**Bahrain**" or the "**Respondent**") under the Agreement between the Government of Malaysia and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, dated 15 June 1999 (the "**Bahrain-Malaysia BIT**" or "**Treaty**").

2. The dispute relates to the Respondent's alleged actions or omissions in relation to NICO's claimed investments in two Bahraini banks.

3. On 3 June 2024, the Tribunal issued Procedural Order No. 3, setting forth the procedural calendar for this proceeding.

4. In accordance with the applicable procedural calendar:

   a. On 24 June 2024, Respondent filed a Request for Bifurcation (the "**Request**");

   b. On 8 July 2024, Claimant filed its Answer to the Request for Bifurcation (the "**Answer**");

   c. On 15 July 2024, Respondent field its Reply on Bifurcation ("**Reply**"); and

   d. On 22 July 2024, Claimant filed its Rejoinder on Bifurcation ("**Rejoinder**").

5. Having deliberated, the Tribunal now issues this procedural order setting forth its decisions with respect to Respondent's Request.

II. PARTIES' POSITIONS

A. RESPONDENT

1. Objections Raised

6. Respondent raises four preliminary objections to jurisdiction and/or admissibility (individually "**Objection**" or together "**Objections**").

a. *Objection 1: no investment (no jurisdiction ratione materiae)*

7. NICO's purported investments in Bahrain were the funds deposited into bank accounts at Bahraini banks (Ithmaar Bank and Gulf Finance House) totaling EUR 248,548,972.24 (as of 2009) ("**Funds**") and, on NICO's own case, the Funds were primarily used to carry out short-term transactions akin to fixed-term deposit interest payments, with NICO largely maintaining control and on demand access to the funds.[1] Respondent objects that (1) the Funds deposited do not constitute an "investment" and (2) even if they did, the Funds were not deposited by a Malaysian investor and therefore do not qualify as investments by a Malaysian investor, as the Treaty requires.[2]

8. First, "investment" has an ordinary and inherent meaning that the Tribunal must apply, which requires the putative investment to have subsisted for a certain duration, to have involved 'investment' risk (which differs to normal commercial risk), and to have contributed to the State's economic development. The Funds deposited by NICO do not meet these criteria: (i) the accounts were simply current accounts (and not "mudarabeh" accounts as Claimant has contended) and do not comprise any contribution or commitment of resources to Bahrain; (ii) NICO could withdraw its Funds any time, except during a term-deposit transaction where it had to wait, on average, one month, (iii) there was no investment risk beyond that of a normal commercial transaction – the banks were contractually obliged to return the balance on demand.[3]

9. Respondent asserts that the legal authorities on which NICO relies in this regard are distinguishable, and that authorities in fact support Bahrain's position.[4]

10. Second, Respondent says that NICO did not hold Malaysian nationality when the purported investments were made; NICO was in fact a Jersey company until 4 January 2012, and the deposits were made between 2009 and 2010.[5]

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[1] Request, paras. 11-12.

[2] Request, para. 23.

[3] Request, paras. 24-26 ; Reply, paras. 18.

[4] Request, para. 27.

[5] Request, para. 28.

b. *Objection 2: BIT not in force when measures occurred (no jurisdiction ratione temporis)*

11. Respondent argues that it is settled law that a treaty has no retroactive effect unless it expressly or implicitly contains a contrary intention, and that it is trite that a claimant must have the relevant nationality under the BIT at the time of the alleged breach. Yet the events for which NICO seeks to hold Bahrain accountable principally occurred both before the Treaty entered into force on 28 January 2011 and before NICO was incorporated in Malaysia on 4 January 2012. And the events that occurred after these dates were merely the continued effect of a 2010 event (the CBB Directive). Respondent also states that it asks the Tribunal to identify the precise date range (if any) in respect of which the parties should plead their cases and defenses on the merits.[6]

12. Respondent argues that NICO's response to this Objection "conflates a continuing act with the continuing consequences or effect of an act", and that in fact the later events relied on represent the extended impact of prior acts, not separate breaches.[7]

c. *Objection 3: no qualifying nationality between December 2014 and March 2018 (jurisdiction ratione personae)*

13. Respondent argues on NICO's own case, NICO purportedly abandoned its Malaysian nationality for more than three years (between December 2014 and March 2018), seeking to be domiciled first in the Gambia and then in Nevis, before applying to be reinstated as a Labuan (Malaysian) company by Court Order in March 2018 (the "**Absence Period**"). This covers the period when Bahrain is alleged to have violated the Treaty through the "Third Refusals." In Respondent's view, there are fundamental questions regarding NICO's assertion that it validly re-domiciled in Malaysia with retroactive effect dating back to 4 January 2012.[8]

14. Respondent argues that the Tribunal should resolve certain "threshold questions" in the bifurcated phase, including:

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[6] Request, paras. 30-34.

[7] Reply, para. 18(c).

[8] Request, paras. 35-38.

a. Was NICO incorporated in Malaysia during the Absence Period?

b. What is the effect of the March 2018 Order on NICO's standing and rights under the Treaty?

c. If NICO was not incorporated in Malaysia during the Absence Period, which of NICO's claims (if any) survive as a matter of jurisdiction and should be addressed in any merits phase?[9]

d. *Objection 4: abuse of process*

15. Respondent argues that claims resulting from corporate restructurings designed to gain access to investment treaty protection once a dispute is foreseeable are inadmissible, pursuant to the abuse of process doctrine. In Respondent's view, Claimant's initial nationality changes (from a Jersey company for over 20 years, to a Malaysian company in January 2012 (*after* the dispute with Bahrain had already arisen and *after* NICO had sent a "final legal notice" to the Banks in October 2011 and just *four months after* the BIT had entered into force) strongly suggest abusive behavior, rendering the claims inadmissible. So too do the subsequent changes (seeking to reinstate Malaysian nationality in March 2018, having lost its Malaysian nationality following its attempt to redomicile in the Gambia, *after* the last of the measures of which it complains had taken place, as well as its attempts to "reacquire" Malaysian nationality for the period of 9 December 2014 to 6 November 2018 *ex post facto*).[10]

16. Respondent rejects in this context NICO's suggestion that it always had access to protection under the Bahrain-Iran BIT, given its ultimate ownership by Iranian shareholders. That is because NICO lacks standing under that treaty given that it is not established under the laws of Bahrain or Iran, and NICO's parent company (NIOC) did not make the bank deposits at issue.[11] Moreover, the Bahrain-Iran BIT does not contain

[9] Request, para. 39.

[10] Request, paras. 41-45.

[11] Request, paras. 46-47 ; Reply, para. 18(d).

the same substantive protections as the Bahrain-Malaysia BIT, and Iran is not an ICSID Convention Member State.[12]

2. Standard and Threshold for Bifurcation

17. Respondent contends that the "usual practice" of ICSID tribunals is to bifurcate jurisdictional objections. The guiding principles are those set forth in ICSID Arbitration Rule 44(2), which requires tribunals to consider relevant circumstances including whether bifurcation would "materially reduce the time and cost of the proceeding", whether the determination of the objection would "dispose of all or a substantial portion of the dispute", and whether the objection and the merits are "so intertwined as to make bifurcation impractical." Respondent provides comments on the application of two of these factors, arguing that:

a. When deciding whether bifurcation would "materially reduce the time and cost of a proceeding", tribunals have considered whether the objection is serious and substantial (i.e., has *prima facie* a prospect of success and some factual and legal support);

b. When deciding whether the preliminary objection is "so intertwined as to make bifurcation impractical", tribunals consider whether the party opposing bifurcation has shown that if the objection were to fail, it would be necessary to address the same facts and evidence twice instead of once, rendering the proceedings inefficient.[13]

18. Respondent argues that the Claimant distorts the threshold and standard for bifurcation: in Respondent's view, none of the authorities Claimant cites supports the notion that bifurcation is exceptional and should be denied unless clearly warranted. Rather they recognize that it is within the Tribunal's discretion to decide whether to bifurcate in the particular circumstances. Further, Claimant's reliance on statistics regarding the length

[12] Reply, para. 18(d).

[13] Request, paras. 48-51.

of bifurcated proceedings that proceed to the merits ignores the cases where preliminary objections succeed and the duration/cost of the case is materially reduced.[14]

3. Whether Bifurcation is Warranted

19. In the case at hand, Respondent argues that the elements of ICSID Arbitration Rule 44(2) are met such that bifurcation is warranted:

a. On a *prima facie* assessment, Bahrain's preliminary Objections are "serious" with "at the very least" a *prima facie* prospect of success, and go to the heart of the Tribunal's jurisdiction and the admissibility of the claims.[15] Further, the time and cost of the proceedings would be materially reduced by bifurcation. In particular, Respondent notes that the all of the Objections could be addressed by reference to only a small portion of Claimant's memorial and evidence, such that "the Tribunal can deal with Bahrain's Preliminary Objections without needing to address and determine the issues raised in … 86% of the Memorial, the vast majority of NICO's witness evidence and almost the entirety of its quantum expert report" and "avoid the cost and complexity of dealing with numerous contested merits issues."[16] Moreover, bifurcation would narrow the disclosure phase, further reducing the time and cost of the proceeding.[17]

b. Respondent also contends that the Objections are likely to result in a complete dismissal of NICO's claim (or at least a substantial portion of it): if the Tribunal were to accept in full Objections 1, 2 or 4, the entire case will be dismissed; if it were to accept Objection 2 only in part, or Objection 3, a substantial part of the claim will still be dismissed, substantially narrowing the case that remains to the narrow window of 2012-2014.[18] Respondent argues that NICO does not dispute this as regards Objections 1 and 4, and is wrong to suggest that Objection 2 could only dispose of a part of NICO's case and that Objection 3 would not dispose of

[14] Reply, paras. 5-6.

[15] Request, paras. 54-55.

[16] Request, paras. 56-57

[17] Request, para. 58.

[18] Request, para. 60. *See also* Reply, paras. 19-22.

the majority of NICO's case.[19] Moreover, even if the Tribunal dismissed all the Objections, there is limited risk of any duplication with the merits phase that would follow.[20]

c. Respondent contends that the Objections are "sufficiently distinct from the merits so as to make bifurcation practical and efficient." There is either no overlap with the merits, or any overlap is limited and not of the level to make bifurcation impractical. Specifically, (i) resolving Objection 1 does not require analysis of any facts that go to the merits, and tribunals have routinely bifurcated objections alleging no qualifying investment; (ii) resolving Objection 2 requires only a consideration of discrete legal questions, such as whether the Treaty excludes pre-entry-into-force conduct and whether it protects prior to the acquisition of nationality. Relevant factual analysis is limited and tribunals routinely bifurcate temporal objections; (iii) resolving Objection 3 involves only the assessment of what nationality was held by NICO at various points in time; tribunals routinely bifurcate to address nationality objections; (iv) resolving Objection 4 also requires a limited assessment of the dates of nationality/ domiciling events and the dates of pleaded violations, without having to decide on the merits of these allegations; again other tribunals have bifurcated such objections.[21] In this regard, Respondent rejects as unfounded NICO's suggestion that the Objections are too closely related to the merits.[22]

20. In its Reply, Respondent rejects NICO's argument that the particular procedural calendar in this case demonstrates that no material time or cost savings can be made by bifurcating. Bifurcating would still allow the Tribunal to avoid addressing issues raised in 86% of Claimant's Memorial. Even if the dates for calendars in the two scenarios are not that far apart, not bifurcating still requires extensive and complex questions of liability and quantum to be addressed, at significant cost and time expense. Even if the Objections only exclude parts of NICO's claim, bifurcation is still likely to save costs,

[19] Reply, paras. 19-20.

[20] Request, para. 61.

[21] Request, paras. 62.

[22] Reply, paras. 24-27.

and would also result in a more focused and fairer merits phase. It is not fair to Bahrain, for example, to require it to define its position *vis-a-vis* all the alleged "acts and omissions" when its *ratione temporis* Objection could significantly narrow the case against it. Finally, even if all the Objections were to fail, Respondent argues, the merits phase would still be substantially clarified by the early resolution of the key threshold issues in dispute, allowing for a prompter merits schedule and requiring less time for Award drafting, and NICO will not be prejudiced by bifurcation, in any way that could not be addressed by the Tribunal's discretion as to reasonable costs. Indeed, prior tribunals, including the tribunal in *Emmis v. Hungary*, have rejected the same timing argument that NICO makes.[23]

B. CLAIMANT'S POSITION

1. Context

21. Claimant submits that the Tribunal should consider Respondent's bifurcation request in the context of the case and Bahrain's broader approach to Iranian-owned investments. That context, Claimant submits, is that this case is the third initiated against Bahrain by an Iranian ultimately owned investor, with Iranian-related interests having all been targeted around the same time by Bahrain for political purposes (and with substantial liability having been imposed on Bahrain in the first of these cases). Respondent is raising its assorted Objections principally to "cause delays and await a political shift that would allow a global political settlement to this political taking while buying time to create artificial defenses." Claimant also emphasizes that Bahrain has "caused or allowed by way of their acts and/or omissions" Ithmaar Bank (among other banks) "to prepare the grounds for liquidation, which liquidation Bahrain will then, with the extra time it intends to secure during the bifurcation phase, use in one way or another, notably for its defense on the merits."[24]

[23] Reply, paras. 8-17, 29 (referencing **Exhibit RL-0004**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation dated June 13, 2013).

[24] Answer, paras. 4-9.

2. Standard and Threshold for Bifurcation

22. Claimant accepts the criteria to be applied in considering whether to bifurcate as articulated by Respondent (as set forth in ICSID Arbitration Rule 44(2)), and emphasizes that another criterion considered by ICSID tribunals is whether the objections underlying the request for bifurcation are *prima facie* serious and substantial. However, it takes a different view as to the threshold that must be met in order for bifurcation to be granted. In this regard, it summarizes the history of the ICSID Arbitration Rules addressing bifurcation, and emphasizes that while historically bifurcation may have been the default, most recently bifurcation has been discouraged and/or denied unless clearly warranted, because bifurcation can often *undermine* efficiency (including extending the duration of cases in which bifurcated objections are rejected by, on average, 17 months). In Claimant's view, the Tribunal should decide against bifurcation unless clearly warranted.[25] That has been repeatedly confirmed in authoritative commentary, and the history of the recent ICSID Rules amendment process.[26]

3. Whether Bifurcation is Warranted

23. In this case, Claimant argues, bifurcation is not warranted.

24. First, the agreed procedural calendar in this case definitively establishes that there can be no material savings in terms of time or costs, as, if bifurcation were ordered, there would be a hearing on the preliminary Objections taking place on July 16-17, 2025, less than 5 months prior to the scheduled December 8-12, 2025 dates for a hearing on merits and jurisdiction in the no bifurcation scenario. In Claimant's view, this "alone suffices to defeat any bifurcation requests as no time or cost savings could be achieved" – if the proceeding is bifurcated and the Objections rejected, the ultimate resolution of the dispute would be materially delayed by at least 24 months or so and would necessarily increase costs. By contrast, hearing the Objections with the merits would only delay the resolution of the case by a mere 5 months or so with necessarily limited costs in

[25] Answer, paras. 10-19; Rejoinder paras. 4-5, 8-11.

[26] Rejoinder, paras. 6-7.

comparison (for which Respondent has protection given that NICO's deposits remain withheld in Bahrain).[27] Respondent's reliance on *Emmis v. Hungary* in this regard is, Claimant says, misplaced; that decision was rendered prior to the 2022 Arbitration Rules and was ultimately decided on the basis of non-separability of the issues for which bifurcation was sought from the merits.[28]

25. Second, Claimant argues that none of Respondent's Objections meet the threshold for bifurcation. Their arguments with respect to each of the four Objections are addressed in the subsections below.

a. *Objection 1 (ratione materiae – no investment)*

26. Claimant argues that Respondent's Objection that the Funds are not a qualifying investment does not meet the threshold for bifurcation, in that the Objection has no *prima facie* prospect of success.

27. First, it is incontrovertible that the Funds qualify as an investment under the BIT, which defines "investment' as "any kind of asset" including "movable and immovable property," and "a claim to money." Indeed, other tribunals have found that bank deposits qualify as investments under similarly worded BITs. And leaving aside the BIT's definition, the Funds involved an inherent element of risk (including because NICO held a "mudarabeh" account with Ithmaar, which allows the agent to employ the funds in commerce and to share the profits generated as a result), and necessarily contributed to the Bahrain banking sector, including because of their use as a backup for letters of credit, which would have generated significant fees. On Claimant's case, the Funds would have been used to generate substantial inflow of money into Bahrain as a component of energy and commodity trading.[29] Moreover, the so-called "*Salini* test" is not appliable under modern ICSID case law and is in fact no more than guidance. But, in any event, Respondent has failed to show that this test would not be satisfied here, given the large amount of the Funds relative to the Bahraini GDP, the fees

[27] Answer, paras. 21-22.

[28] Rejoinder, paras. 17-20 (referencing **Exhibit RL-0004**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation dated June 13, 2013).

[29] Answer, paras. 24-29 ; Rejoinder, para/ 34.

generated for the economy by the Funds, the duration of time that the Funds have been in Bahrain, and the risk of NICO not being in control of the funds and being unable to repatriate them, as was in fact realized.[30]

28. Second, the argument that to qualify under the "investment" under the BIT, NICO had to hold Malaysian nationality when the investments were made, is "wholly unfounded" – it is neither required under the BIT nor the ICSID Convention, and under Art 25(2)(b) of the latter, nationality needs to be analyzed at the date of consent. Claimant points to past ICSID cases where tribunals have held that a holding company which has shares in a local subsidiary still has an investment under the BIT "in the shape of local assets" and argues by analogy that in the present case, although the investor is of one nationality and the investment of another, it does not keep the holding company from owning a qualifying investment.[31]

29. In addition, Claimant argues that the Objection in any event would not be right for bifurcation as it could not be decided without examining the intertwined merits of the case, defeating the purpose of saving time or costs. Specifically, the Tribunal will have to examine "circumstance, object, purpose, and use of the Funds at all relevant times" all also relevant to whether Bahrain breached its obligations.[32]

b. *Objection 2 (ratione temporis – claims for actions prior to BIT's entry into force)*

30. Claimant argues that Bahrain's *ratione temporis* Objection does not meet the bifurcation threshold. That is because, first, its resolution could not possibly dispose of the majority of Claimant's case, let alone in its entirety, nor achieve any meaningful cost and time savings. In particular, even if the Tribunal does not have jurisdiction vis-à-vis Claimant's pre-2012 claims, the arbitration would still proceed in respect of the *post*-2012 claims.[33]

[30] Answer, paras. 30-41; Rejoinder, paras. 13-16.

[31] Answer, paras. 47-53.

[32] Answer, pars. 42-46.

[33] Answer, paras. 54-59; Rejoinder, para. 44.

31. Second, NICO already demonstrated in its Memorial, in a manner well beyond the *prima facie* threshold, that NICO in fact can assert claims in respect of events occurring before the January 2011 entry into force of the BIT. This is the case in light of the BIT's explicit protection in Article 10 of investments made "prior to as well as after entry into force" without imposing any other restriction (in contrast with other BITs of Bahrain that limited such retroactive application to exclude breaches that had occurred prior to entry),[34] as well as the fact that the acts and omissions Claimant complains of occurred from 2010 and have continued ever since.[35]

32. Third, resolving this Objection would be intertwined with the facts as the Tribunal would have to make findings as to whether the acts and omissions complained of are of an ongoing nature, again counter to the objective of saving time and resources.[36]

c. *Objection 3 (ratione personae – nationality)*

33. Claimant argues that the *ratione personae* Objection that NICO was not a Malaysian company at the time of alleged breach also cannot meet the standard for bifurcation.

34. First, the Objection does not satisfy the *prima facie* threshold (i.e., it is not relatively likely to succeed). Indeed, Bahrain does not even assert, let alone with the required particularization and substantiation, that NICO would not have been a Malaysian investor at all relevant times, instead merely suggesting that "there is a substantial threshold debate" regarding NICO's nationality and "fundamental unanswered questions" about this. In the face of these questions, NICO has produced a Malaysian court decision, unchallenged by any interested party, confirming NICO's continuous registration since 2012.[37] In Claimant's view, this decision "unequivocally confirmed that NICO's 'transfer to the Republic of Gambia […] is invalid,'" as well as the "Reinstatement of [NICO] into the registry of the Labuan Companies."[38]

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[34] Answer, para. 60; Rejoinder, paras. 35-36.

[35] Answer, paras. 61-62.

[36] Answer, paras. 63-64; Rejoinder, para. 46.

[37] Answer, paras. 72-78 (referencing **Exhibit C-52,** Decision by the High Court of Sabah & Sarawak in the Federal Territory of Labuan, Malaysia dated March 07, 2018).

[38] Rejoinder, paras. 32-33.

35. Second, even if Respondent could prevail in its arguments, NICO still has claims from before and after the period of uncertain registration, so the Tribunal would nevertheless still have to proceed to the merits.[39]

d. *Objection 4 (abuse of process)*

36. Claimant argues that the abuse of process Objection, grounded in NICO's nationality changes, cannot meet the bifurcation threshold.

37. First, the Objection does not meet the *prima facie* threshold; NICO was at all times owned by Iranian entities and thus could have initiated proceedings under the Bahrain-Iran BIT (in force since 2004). Respondent's suggestion that NICO would not have standing under the Bahrain-Iran BIT is misplaced – it is *NIOC* as NICO's ultimate shareholder, that could have initiated an arbitration, relying on its indirect investment via NICO (as permitted under that BIT). Moreover, neither the BIT nor the ICSID Convention allow the Tribunal to dismiss the case on the basis of an abuse of process doctrine. Finally, Respondent cannot establish that the re-domiciliation was promoted and motivated by a desire to attract treaty protection, when the record shows that NICO sought re-domiciliation in Malaysia because of the ineffectiveness at law of its prior re-domiciliation attempts. In support of its arguments, Claimant notes that the cases on which Respondent relies reference a putative claimant not having had treaty protection prior to its change of nationality, and also emphasize that the threshold for the Objection is very high.[40] Claimant also notes that there is no support for Respondent's unparticularized contention that the Bahrain-Iran BIT does not contain the same substantive protections as the Bahrain-Malaysia BIT, and that Respondent's reliance on the fact that Iran is not an ICSID Convention member state is irrelevant – NIOC could still have been able to bring an arbitration against Bahrain to seek redress for Bahrain's actions and omissions.[41]

38. Second, in any event, the abuse of process Objection would involve in-depth investigations into the background, purpose, and intended or purported use of

[39] Answer, paras. 79-84; Rejoinder, paras. 37-39, 46-47.

[40] Answer, paras. 85-96, 99-113; Rejoinder, paras. 40-42.

[41] Rejoinder, paras. 41-42.

Claimant's Funds at all material times, which would largely overlap with the examination of the merits, alone sufficing to deny bifurcation. Moreover, its resolution would require witness and possibly expert evidence, resulting in significant additional time and costs.[42]

III. TRIBUNAL'S ANALYSIS

1. Preliminary Matters

39. As an initial matter, the Tribunal wishes to emphasize that this decision has been made on the basis of its appreciation of the evidentiary record as it currently stands. Nothing contained in this decision shall pre-empt any finding of fact or conclusion of law.

40. Moreover, the Tribunal reminds the Parties that the purpose of this Order is not to decide on any of the jurisdictional Objections or Objections to admissibility of Claimant's claims. Rather, the purpose of this Order is to decide whether to bifurcate the present proceedings between jurisdiction and merits.

2. Legal Framework

41. The Tribunal is empowered to address any preliminary objection in a separate phase of the proceeding under Article 41 of the ICSID Convention and Rule 42 of the ICSID Arbitration Rules:

> **"Article 41**
> ...
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

> **"Rule 42**
> **Bifurcation**
> (1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").
> (2) If a request for bifurcation relates to a preliminary objection, Rule 44 shall apply.
> …."

[42] Answer, para. 98; Rejoinder, para. 45.

42. Pursuant to these provisions, it is for the Tribunal to exercise its discretionary powers to decide whether to bifurcate preliminary objections, and it is well understood that there is no presumption in favor of or against bifurcation in ICSID arbitration. In exercising its discretional power to decide whether to bifurcate, the Tribunal shall consider the factors listed in Rule 44(2), among other relevant circumstances.

> "**Rule 44**
> **Preliminary Objections with a Request for Bifurcation**
> ...
> (2) 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.
> ..."

43. The Parties agree that, in considering whether bifurcation would materially reduce the time and cost of the proceeding, the Tribunal shall consider whether each preliminary Objection is "serious and substantial" on a *prima facie* basis.

44. Claimant further contends that the Tribunal "should decide against bifurcation unless clearly warranted" and that there is a "required high threshold for bifurcation."[43] In this regard, Claimant cites to ICSID statistics indicating that in cases where a tribunal bifurcates the proceeding but ultimately the proceeding ends with a final award on the merits, the duration of the proceeding is significantly longer than cases where jurisdictional and merits issues are heard in a single phase.[44] In response, Respondent submits that Claimant's authorities recognize that it is within the discretion of tribunals to decide whether to bifurcate depending on the circumstances of each case.

45. The Tribunal agrees with Claimant that it is undesirable for a bifurcated proceeding to ultimately exceed the time and cost that would otherwise have been spent in a single stage proceeding, and the Tribunal correspondingly notes that it has exercised its discretion to decide whether to bifurcate with caution. Nonetheless, the Tribunal does not find that there is a "high threshold" that the applicant must meet in order for the

[43] Answer, paras. 17, 19.

[44] Answer, para. 16.

Tribunal to order bifurcation. Tribunals are instead to apply their discretion on a case-by-case basis considering all the relevant circumstances.

3. Respondent's Preliminary Objections

46. This Tribunal shall analyze whether the following four preliminary Objections raised by Respondent, namely, (1) its *ratione materiae* Objection; (2) its *ratione temporis* Objection; (3) its *ratione personae* Objection; and (4) its abuse of process Objection, warrant bifurcation.

a. *Objection 1 (ratione materiae)*

47. As set out earlier in this Procedural Order, Respondent's first jurisdictional Objection pertains to the existence of a protected investment. On one hand, Respondent states that it shall allege that Claimant's cash deposits do not qualify as an "investment" within the meaning of the Treaty and Article 25(1) of the ICSID Convention. According to Respondent, Claimant's investments do not comply with the ordinary and inherent meaning of "investment", which requires Claimant to prove that it (1) "made a contribution lasting for a certain duration"; (2) "participated in the risks of the transaction"; and (3) "contributed to the economic development of Bahrain." Moreover, Respondent alleges that Claimant's investments lack an "element of 'investment risk', i.e., uncertainty as to exposure even where the counterparties discharge their contractual obligations", which Respondent contends is distinct from "ordinary commercial or business risk." In addition, Respondent alleges that Claimant was required to, but did not, hold Malaysian nationality at the time the purported investments were made.[45]

48. For its part, Claimant submits that that Respondent's Objection has no *prima facie* prospect of success, since: (i) the Treaty defines "investment" as "every kind of asset", including "a claim to money" and "movable and immovable property", and notes that past case law "has consistently found that bank deposits qualify as investments under similarly worded BITs"; (ii) the majority of modern ICSID tribunals treat the "*Salini* criteria" (to which Respondent's criteria generally correspond) as mere guidelines at best, and reject its use as a test; (iii) even if such criteria were treated as a test,

[45] Request, paras. 23-25, 28.

Respondent has demonstrated no *prima facie* prospect of success on its preliminary Objection. Claimant further contends that Respondent's first preliminary Objection "could not be decided without examining the merits of the case as is intertwined therewith", since, in essence, deciding upon Respondent's preliminary Objection calls for the Tribunal to analyze the "circumstance, object, purpose, and use of the Funds at all relevant times[.]" On the question of whether NICO was required to hold Malaysian nationality at the time when the investments were made, Claimant submits that Respondent's affirmative contention "is wholly unfounded" and is a "clear attempt to include an additional requirement" to those stated in the Treaty.[46]

49. In the first place, the Tribunal reminds the Parties that for the purposes of deciding on whether to bifurcate, it shall not perform an analysis that goes beyond a *prima facie* review of the seriousness and substantiality of Respondent's Objection. The Tribunal's task at this stage in the proceedings is to determine whether the *ratione materiae* jurisdictional Objection meets the relevant factors to bifurcate the proceedings rather than to determine whether the jurisdictional Objection as such shall be accepted.

50. Whereas the determination of Respondent's *ratione materiae* jurisdictional Objection as a preliminary matter would dispose of the entire case, the Tribunal is not persuaded that bifurcating the proceeding to determine this Objection on a preliminary basis is justified. The Tribunal observes that the Parties do not dispute that NICO, when registered as a Jersey company, deposited EUR 248 million into Bahraini banks. Further, regardless of the legal criteria to be applied to determine the Tribunal's jurisdiction *ratione materiae*, the Tribunal preliminarily finds that even on Respondent's case such bank deposits in the circumstances of the present case are *prima facie* likely to qualify as "investments" in the ordinary and inherent meaning of the term under the relevant BIT. Moreover, despite Respondent's submission that a *prima facie* "serious and substantial" preliminary objection shall be accompanied by "factual and legal support", Respondent has not provided legal support for its contention that

[46] Answer, paras. 25-42, 47-48.

Claimant must have held Malaysian nationality at the moment the investment was made in Bahrain.[47]

51. With these considerations in mind, the Tribunal does not consider based on the information presently before it that to determine Respondent's *ratione materiae* jurisdictional Objection as a preliminary issue is likely to reduce the time and costs of the proceeding.

b. *Objection 2 (ratione temporis)*

52. The essence of Respondent's *ratione temporis* Objection is that the majority of the relevant events underpinning Claimant's claims occurred before Claimant acquired Malaysian nationality (in 2012), and/or before the Treaty entered into force (in 2011). For Respondent, this results in a "serious temporal defect", and therefore Respondent intends to invite the Tribunal to "identify the precise date range (if any) in respect of which the parties should plead their cases and defenses on the merits", as well as to "provide clear guidance on whether NICO can require a merits assessment of the Second and Third Refusals, if … they are merely the continued effect of the CBB Directive (passed in 2010…)."[48]

53. Claimant opposes the bifurcation of the proceeding to treat this issue on a preliminary basis, submitting that to resolve it as such "could not possibly suffice to dispose of the majority of Claimant's case, let alone in its entirety, nor achieve any meaningful cost and time savings", and would only dispose of part of Claimant's case.[49] Claimant further contends that it has proven the Tribunal's *ratione temporis* jurisdiction in respect of events that took place or arose prior to the entry into force of the Treaty (28 January 2011),[50] and contends that in any case Claimant benefitted from treaty protection under the Bahrain-Iran BIT from 2004 onwards. Accordingly, Claimant submits that the determination of the *ratione temporis* jurisdictional Objection as a preliminary objection

[47] Request para 50 ("ICSID tribunals have considered whether the preliminary objection is serious and substantial (i.e., has a prima facie prospect of success and there is some factual and legal support for the objection) …")

[48] Request, paras. 30-34.

[49] Answer, para. 55.

[50] Answer, paras. 60-64.

could not lead to a substantial narrowing or disposal of the issues in dispute, nor lead to material savings in terms of time or cost. Further, Claimant submits that the Objection is not *prima facie* serious or substantial, and that in any case the determination of it would require the Tribunal to make extensive factual inquiries that would be inevitably intertwined with the merits of the dispute.[51]

54. The Tribunal notes that Respondent's preliminary Objection would seek two determinations on the part of the Tribunal: (i) a determination of the precise date range in which the Parties shall plead their cases and defenses on the merits, as well as (ii) a determination of whether the Second and Third refusals consist merely of the continued effects of the CBB Directive, and therefore a determination of whether NICO can require a merits assessment of them.

55. In respect of the former issue, the Tribunal first observes that to determine only this Objection during a preliminary phase would be unlikely to reduce the time and cost of the proceeding. In this regard, Respondent's stated purpose of treating this Objection as a preliminary issue is not to seek to dispose of the proceeding early, or even to significantly narrow the remaining issues in dispute. Rather, Respondent states that it intends for the Tribunal to "identify the precise date range (if any) in respect of which the parties should plead their cases and defenses on the merits."

56. In this regard, the Tribunal does not consider that Respondent's stated purpose for bringing its Objection is, in isolation, a sufficient basis on which to bifurcate the arbitration proceeding, with it in mind that it is generally not for the Tribunal to *direct* the Parties as to how to present their factual or legal cases, particularly when doing so as a preliminary determination would have the effect of significantly extending the duration and cost of the arbitration proceeding.

57. Nonetheless, as discussed later in this Procedural Order, the Tribunal has determined that Respondent's Objection 4 shall be resolved as a preliminary issue. This being the case, the Tribunal considers that the legal questions of whether Claimant may hold Respondent responsible for events that occurred before the Treaty entered into force,

[51] Answer, paras. 55-61, 65-66.

and before Claimant was incorporated in Malaysia, are discrete legal issues that, if dealt with as preliminary issues, would assist the Parties in framing their positions in any later pleadings on the merits of the case and therefore enhance the efficiency of the proceedings.

58. Accordingly, the Tribunal determines that, during the preliminary stage of the arbitration, the Parties shall address, and the Tribunal shall determine, the following legal questions:

a. To what extent does the Treaty apply to acts and omissions that occurred prior to its entry into force?

b. To what extent must Claimant have nationality under the Treaty at the time of the alleged breach?

59. The Tribunal clarifies that as part of these preliminary determinations, it shall not determine its *ratione temporis* jurisdiction over any specific breaches alleged by Claimant.

60. In respect of the latter issue, the Tribunal agrees with Claimant that the resolution of this jurisdictional Objection is so intertwined with the merits of the dispute as to make it impractical to order the bifurcation of the dispute to deal with it as a preliminary issue, and in any case finds that treating this Objection as a preliminary objection cannot substantially narrow the issues in dispute.

61. Accordingly, the Tribunal determines not to treat that issue of its *ratione temporis* jurisdiction as a preliminary matter.

c. *Objection 3 (ratione personae)*

62. Respondent's contention underpinning its *ratione personae* Objection is that during the period of December 2014 to March 2018 (the so-called "Absence Period"), Claimant purportedly abandoned its Malaysian nationality and instead held out that it was registered in the Gambia (as of 9 December 2014), and later in Nevis (as of 19 August 2016), before Claimant subsequently re-registered in Malaysia in March 2018. Respondent therefore intends to ask the Tribunal to resolve certain "*threshold issues*"

arising from Claimant's corporate history, including whether Claimant was incorporated in Malaysia during the Absence Period, what effect (if any) the re-registration in Malaysia might have on Claimant's standing and rights under the Treaty, and which of Claimant's claims "survive as a matter of jurisdiction."[52]

63. In response, Claimant contends that Respondent's preliminary Objection fails to meet the standard of *prima facie* serious and substantial, since "Bahrain does not even assert, let alone with the required particularization and substantiation, that NICO would not have been a Malaysian investor at all relevant times", and that Respondent merely presents the Tribunal with "open questions." Moreover, Claimant contends that the *prima facie* standard has not been met since the Malaysian courts have already confirmed in March 2018, without subsequent challenge, that Claimant has "been continuously registered as a Malaysian company since 2012". Claimant further contends that, regardless of the foregoing, the resolution of the *ratione personae* Objection would not have the effect of disposing of the majority of Claimant's case, nor would it achieve significant cost and time savings, since Claimant alleges "multiple independent breaches" starting in 2010, many of which predate December 2014.[53]

64. The Tribunal agrees with Claimant's observation that Respondent does not sufficiently particularize the issues that it contends should be dealt with as preliminary issues. Indeed, Respondent's position in its Request and Reply does not detail any specific objection to the Tribunal's jurisdiction, rather it calls for the Tribunal to address certain non-exhaustive, potential questions pertaining to Claimant's corporate history and draw its own conclusions regarding Claimant's standing and rights, as well as the extent to which certain claims might fall within the Tribunal's *ratione personae* jurisdiction.

65. Nonetheless, as set out below, the Tribunal has determined that Respondent's Objection 4 shall be resolved as a preliminary issue. This being the case, the Tribunal notes that the questions of whether NICO was incorporated in Malaysia during the Absence Period, and the effect of the 2018 Malaysian Court Decision[54] on NICO's standing and

[52] Request, paras. 35-39.

[53] Answer, paras. 72-76. 79-82.

[54] **Exhibit C-52,** Decision by the High Court of Sabah & Sarawak in the Federal Territory of Labuan, Malaysia dated March 07, 2018).

rights under the Treaty are discrete issues that are not excessively intertwined with the merits. The Tribunal considers that making certain determinations in respect of these questions at this preliminary stage would assist the Parties in any later pleading of their cases in relation to the relevant timeframe and therefore enhance the efficiency of the proceedings.

66. Accordingly, the Tribunal determines that during the preliminary stage of the arbitration, the Parties shall address, and the Tribunal shall determine, the following questions:

a. Was NICO incorporated in Malaysia and hence did it benefit from protection under the Treaty from December 2014-March 2018?

b. What effect, if any, does the 2018 Malaysian Court Decision have on Claimant's standing and rights under the Treaty?

67. The Tribunal further determines that it and the Parties shall not address the following question suggested by Respondent in its Request during the preliminary stage: "[i]f NICO was not incorporated in Malaysia during the Absence period, which of NICO's claims (if any) survive as a matter of jurisdiction and should be addressed in any merits phase?" The Tribunal considers that such question is so intertwined with the merits as to make a preliminary determination of it impractical.

d. *Objection 4 (abuse of process)*

68. Respondent contends that Claimant's claims are inadmissible pursuant to the doctrine of abuse of process, since Claimant's claims resulted from a 2012 corporate restructuring designed to gain access to investment protection under the Treaty after the dispute had become foreseeable. In particular, Respondent submits that by the time NICO changed its nationality to Malaysia in January 2012, the CBB had been issued, the First Refusals had already taken place, and NICO had in October 2011 already sent a "Final Legal Notice" to each of the relevant Bahraini Banks.[55]

[55] Request, paras. 42-43.

69. In addition, Respondent alleges that NICO sought to return to Malaysia in 2018 as a "*conscious choice*" in order to present its "*fully cooked*" Treaty claims as a further act of abusive behavior, and that Claimant's alleged efforts to reacquire Malaysian nationality *ex post facto* to cover the period of December 2014 to March 2018 constitute a further breach of the abuse of process doctrine. Respondent stresses that to resolve this Objection on a preliminary basis would result in the complete dismissal of Claimant's claims.[56]

70. In turn, Claimant submits that the abuse of process allegations cannot stand on various levels. In particular, Claimant states that NICO, via its shareholder NIOC, "was at all times owned by Iranian entities and thus could have initiated arbitration proceedings under the Iran-Bahrain BIT", which allegedly has no less favorable protections than the Treaty.[57] (The Tribunal notes Respondent's counter submission that it shall explain in due course that NIOC would be unable to claim for damage to "indirect investments", such as NICO's funds, under the Iran-Bahrain BIT.[58])

71. Claimant also contends that the doctrine of abuse of process shall not be applied by any tribunal to deny jurisdiction or declare inadmissible claims brought by a foreign investor that otherwise meet the express requirements of the BIT, and that even if the abuse of process doctrine were applicable, it could only succeed in "very exceptional circumstances" in light of all the circumstances of the case, which simply do not exist here. In particular, Claimant insists that there is no evidence that its decision to re-domicile to Malaysia was motivated by treaty shopping, and that this is confirmed by witness testimony and multiple contemporaneous documents. Accordingly, Claimant contends that Respondent has failed to plead a *prima facie* case for abuse of process.[59]

72. Finally, Claimant contends that to bifurcate the proceeding to resolve the abuse of process Objection as a preliminary issue would result in significant additional time and costs, in light of the alleged likely need to produce witness and even expert evidence,

[56] Request, paras. 44-46.

[57] Answer, paras. 85-86.

[58] Reply, fn. 35.

[59] Answer, paras. 87-96.

and would be duplicative since the Tribunal would have to perform "an in-depth investigation into the background, purpose, and intended or purported use of Claimant's Funds at all material times", which would allegedly "largely overlap with the merits."[60]

73. In the first place, the Tribunal notes that any analysis of questions pertaining to the merits of the abuse of process Objection, such as in respect of the motives of NICO when re-domiciling to Malaysia, or whether the Iran-Bahrain BIT and the Treaty provide similar substantive protections, go beyond the scope of this decision.

74. Claimant correctly identifies that to analyze whether an abuse of process took place would involve a detailed review of Claimant's contemporaneous motives, which involves very careful consideration of the information available to Claimant prior to and at the time of its restructuring(s). Nonetheless, the Tribunal finds that such a review would not be so inextricably linked to the merits of the proceeding that it would be impractical to resolve the Objection as a preliminary matter. Rather, the abuse of process Objection is a discrete issue.

75. Furthermore, the Tribunal preliminarily agrees with Respondent that in the present case the allegation of abuse of process is *prima facie* serious and substantial. If the Tribunal upholds the Objection, the entire dispute would be disposed of, and resolving this admissibility Objection as a preliminary issue has the potential to significantly reduce the cost of the proceeding, as it would entirely avoid the need for the Parties to present positions on jurisdiction, merits, or quantum; and any document production ordered in the preliminary stage would be limited.

76. Accordingly, applying the Rule 44(2) criteria, the Tribunal considers Respondent's request for bifurcation of this Objection to be well founded. The Tribunal therefore determines that Respondent's Objection 4 shall be dealt with as a preliminary issue.

IV. DECISION

77. On the basis of the foregoing, the Tribunal makes the following decisions:

[60] Answer, para. 98.

a. Respondent's Request for Bifurcation is granted. Respondent's Objection 4 shall be dealt with as a preliminary issue; as well as certain elements of Respondent's Objections 2 and 3, as detailed herein at paras. 58 and 66. Specifically:

    i. As regards Objection 2, the following questions will be addressed:

        1. To what extent does the Treaty apply to acts and omissions that occurred prior to its entry into force?

        2. To what extent must Claimant have nationality under the Treaty at the time of the alleged breach?

    ii. As regards Objection 3, the following questions shall be addressed:

        1. Was NICO incorporated in Malaysia and hence did it benefit from protection under the Treaty from December 2014-March 2018?

        2. What effect, if any, does the 2018 Malaysian Court Decision have on Claimant's standing and rights under the Treaty?

b. Respondent's Objection 1, and the remaining issues of Respondent's Objections 2 and 3 shall be joined to the merits (if any);

c. The Tribunal hereby reserves its decision on costs;

d. The Tribunal directs the Parties to abide by the procedural calendar established under Scenario 1B of Annex A attached to Procedural Order No. 3.

On behalf of the Tribunal,

[signed]

Dr. Claus von Wobeser
President of the Tribunal
Date: 12 August 2024