INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Republic of Serbia

(ICSID Case No. ARB/18/8)

PROCEDURAL ORDER NO. 3

Members of the Tribunal
Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Baiju S. Vasani, Arbitrator
Prof. Marcelo G. Kohen, Arbitrator

Secretary of the Tribunal
Ms. Anna Toubiana

Assistant to the Tribunal
Mr. Rahul Donde

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24 June 2019

Table of Contents

I. PROCEDURAL BACKGROUND 1
II. THE PARTIES' POSITIONS 1
a. Respondent's Position 1
b. Claimants' Position 3
III. DISCUSSION 5
1. Preliminary matters 5
2. Legal Framework 6
3. Analysis 7
IV. DECISION 11

I. PROCEDURAL BACKGROUND

1. In accordance with the Revised Annex A to Procedural Order No. 1 of 19 December 2018 (the "**Procedural Calendar**"):

   a. On 19 April 2019, the Respondent filed its Counter-Memorial with Request for Bifurcation in which it requested bifurcation (the "**Request**" and the "**Counter-Memorial**"); and

   b. On 17 May 2019, the Claimants filed their Reply to Request for Bifurcation (the "**Reply**").

2. On 23 April 2019, the Tribunal and the Parties were advised that Ms. Anna Toubiana, ICSID Legal Counsel, would be replacing Ms. Planells-Valero as Secretary of the Tribunal.

3. On 31 May 2019, the ICSID Secretariat advised the Parties that, by majority, the Tribunal had decided to deny the Request. The Parties were directed to follow the non-bifurcated scenario set out under 1(b) in the Procedural Calendar. They were also advised that the reasons for the decision as well as a dissenting opinion would be conveyed separately.

4. This Order sets out the reasons for the denial of the Request. The dissenting opinion of Prof. Kohen is appended.

II. THE PARTIES' POSITIONS

a. Respondent's Position

5. The Respondent submits that the Tribunal has the discretion to decide whether to bifurcate the present proceeding into jurisdictional and merits phases. Here, bifurcation would be the most efficient way to proceed as it would not only lead to a substantial reduction of time and costs, but could also potentially lead to the dismissal of the entire case.

6. The Respondent notes that arbitral tribunals have relied on the three-prong test formulated in *Glamis Gold v. US* when deciding whether to bifurcate proceedings. Applying such test to this arbitration, "all considerations" speak in favor of bifurcation:[1]

   a. The Respondent's objections are substantial and raise serious issues with respect to the Tribunal's jurisdiction;[2]

   b. If any of the Respondent's objections were granted, it would not only result in a substantial reduction of the scope and complexity of the case, but could also potentially result in a dismissal of the entire case. Indeed, if the Respondent's objections "going to the *ratione materiae* jurisdiction and Claimants' lack of standing"[3] were accepted, it would dispose of the entire case. Further, if the jurisdictional objections in respect of Claimant 6 (Sembi) were accepted, the Tribunal would not have to apply the Cyprus-Serbia BIT at all. This would also mean that two claims brought under the Cyprus-Serbia BIT (the non-impairment and umbrella clause claims) would "automatically become moot," leading to a substantial reduction of time and cost;[4]

   c. The Respondent's jurisdictional objections need to be addressed only once, in the jurisdictional phase or, if there is no bifurcation, together with the merits phase. Thus, even if the Tribunal were to bifurcate and eventually deny the objections, there would be no increase in cost or delay. Bifurcation would simply result in re-allocating the time and cost required to address the objections to an earlier phase of the proceedings, the advantage being the "realistic possibility" that the Parties would save the costs of litigating the merits if the jurisdictional objections were accepted;[5]

[1] Counter-Memorial, ¶528.
[2] Counter-Memorial, ¶529.
[3] Counter-Memorial, ¶531.
[4] Counter-Memorial, ¶532.
[5] Counter-Memorial, ¶533.

d. The jurisdictional objections can be resolved without assessing the merits of the dispute.[6]

7. For the foregoing reasons, the Respondent requests the Tribunal to "resolve Respondent's jurisdictional objections as a preliminary matter."[7]

b. Claimants' Position

8. The Claimants oppose the Request, contending that it hinders rather than promotes procedural economy in these proceedings. The Claimants disagree with the Respondent's reliance on the three-prong *Glamis Gold* test and submit that the real test for granting bifurcation is procedural efficiency, which is not met in this case.[8] Even if the Tribunal were to apply the *Glamis Gold* test, the Request would still have to be denied:

a. The jurisdictional objections are frivolous. For instance, the Respondent disputes the Tribunal's *ratione personae* jurisdiction over Claimant 6 (Sembi) on the basis that it does not have a "seat" in Cyprus as required by Article 1(3)(b) of the Serbia-Cyprus BIT.[9] However, the Claimants have already supplied evidence of Sembi's registration with the Cyprus Registry of Companies, which is all that is required under the relevant provisions of the Serbia-Cyprus BIT. Further, the Respondent's *ratione temporis* objection in respect of the commencement of the three-year limitation period under Article 22(2)(e)(i) of the Canada-Serbia BIT is equally frivolous, being based on an erroneous understanding of the relevant provisions of the Canada-Serbia BIT. The same is true of the *ratione voluntatis* objection regarding Mr. William A. Rand's ("**Mr. Rand**") 3.9% indirect shareholding in BD Agro held through MDH Serbia;[10]

[6] Counter-Memorial, ¶534.
[7] Counter-Memorial, ¶536.
[8] Reply, ¶20.
[9] Reply, ¶39.
[10] Reply, ¶52.

b. The Respondent refers to two objections only in support of its argument that bifurcation would result in a substantial reduction in the scope and complexity of the case. This argument is, however, ill-founded:

(i) To succeed on its *ratione materiae* objection in respect of the Claimants' investments, the Respondent would have to establish that the Claimants did not beneficially own and that Mr. Rand did not control the Beneficially Owned Shares.[11] Even if it succeeded on both aspects, Mr. Rand would still have standing to bring claims based on his 3.9% shareholding in BD Agro. The factual and legal complexity of the case would thus remain unaltered;

(ii) Similarly, even if the Respondent were to succeed with its *ratione personae* objection against Sembi with the result that the Tribunal would not have to review the non-impairment and umbrella clause claims under the Cyprus-Serbia BIT, these claims "partially overlap" with the claims for the breach of other substantive standards pursued by Claimants 1 to 5 under the Canada-Serbia BIT.[12] Thus, bifurcation will not achieve any significant reduction of the scope of the proceedings.

c. The hearing in this arbitration will take place at the end of March 2020 whether or not the arbitration is bifurcated.[13] Thus, the duration of the arbitration would remain unaffected if the Tribunal joined the jurisdictional objections to the merits and eventually denied jurisdiction over all claims; the award would be issued at the same time under both the bifurcated and the non-bifurcated scenarios. By contrast, the duration of the arbitration would "dramatically increase" if the Tribunal were to bifurcate the proceedings and uphold jurisdiction.[14] In this scenario, the Tribunal would likely issue its final award by the end of 2024, effectively doubling the length of

[11] Defined in the Claimants' Memorial of 16 January 2019.
[12] Reply, ¶35.
[13] Reply, ¶4.
[14] Reply, ¶3.

non-bifurcated proceedings. Bifurcation "would only create a significant downside risk,"[15] all the more so as Mr. Rand, one of the Claimants and the Claimants' key witness, would be almost 80 years old at the time of the hearing on liability and quantum if that hearing were delayed by three years because of bifurcation;[16]

d. The costs of the arbitration would also dramatically increase if the Tribunal were to bifurcate and then assert jurisdiction over any of the claims. The factual basis for most of the Respondent's objections is "inextricably intertwined" with the merits of the case, as is clear from even a cursory review of the objections.[17] Only two objections could potentially be separated from the merits; the remaining six objections would require the Parties to "plead virtually all of the facts of the case at the jurisdictional stage,"[18] and do so again on the merits if the Tribunal accepts jurisdiction. Further, the Respondent itself relies on documentary and witness evidence relevant to the merits. It is, therefore, evident that the Tribunal would need to hear most of the witnesses and experts at both the jurisdictional and the merits hearings, causing unnecessary expenses. Moreover, the six Claimants advance similar claims based on the same facts. Hence, the scope of evidence and arguments in the merits phase would thus be "almost identical" to those pleaded at the jurisdictional stage, even if some Claimants might be excluded from the proceedings through a jurisdictional decision.[19]

III. DISCUSSION

1. Preliminary matters

9. At the outset, the Tribunal emphasizes that this decision is made on the basis of its understanding of the record as it presently stands. Nothing contained herein shall pre-empt any later finding of fact or conclusion of law.

[15] Reply, ¶5.
[16] Reply, ¶6.
[17] Reply, ¶7.
[18] Reply, ¶11.
[19] Reply, ¶12.

10. As a further preliminary matter, the Tribunal notes that the purpose of this Order is to decide whether to bifurcate the present proceedings between jurisdiction and merits. It is not to decide the jurisdictional objections themselves.

2. Legal Framework

11. The Tribunal's power to rule on the Request arises from the ICSID Convention and the ICSID Arbitration Rules, more specifically from Article 41(2) of the ICSID Convention and Rule 41(4) of the 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 41**
> **Preliminary Objections**
>
> "*(4)* [The Tribunal] *may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.*"

12. It is clear from the wording of these provisions that it is up to the Tribunal to assess whether to bifurcate preliminary objections or not, without it being bound by a presumption either in favor of or against bifurcation.

3. Analysis

13. The Parties disagree on the factors to be considered to decide on bifurcation. The Respondent submits that the Tribunal should take into consideration the three factors identified in *Glamis Gold v. US*[20] paraphrased below:

> (1) whether the objection to jurisdiction is substantial inasmuch as the preliminary consideration of a frivolous objection is very unlikely to reduce the costs of, or time required to resolve the dispute;
>
> (2) whether the objection if granted would result in a material reduction of the next phase, i.e. whether the costs and time required for preliminary proceedings would be justified, even if the objecting party were successful; and
>
> (3) whether bifurcation would be impractical because the jurisdictional issues are so intertwined with the merits that it would be unlikely to produce any savings in time or cost.

14. The Claimants object to this test and submit that "the factors identified by the *Glamis Gold* tribunal are far from being universally accepted, let alone accepted as exhaustive considerations for the assessment of a request for bifurcation."[21] They insist that the Tribunal "should follow the principle of procedural economy as applied to the case at hand."[22]

15. For the Tribunal, the approaches suggested by the Parties essentially aim at one and the same overarching goal, i.e. efficiency in the conduct of the arbitration. As a general matter, the Tribunal considers that it is good practice to deal with jurisdictional objections in a

[20] Exh. RLA-99, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶12(c).
[21] Reply, ¶17.
[22] Reply, ¶20.

preliminary phase to avoid imposing full-fledged proceedings on a party who disputes having consented to arbitration, whenever bifurcation may result in increased efficiency in terms of time and costs. By contrast, if the bifurcation is unlikely to produce efficiency gains, a tribunal should be disinclined to bifurcate.

16. In this context, *Glamis Gold* usefully lists some of the main factors to be taken into account when seeking to assess efficiency. This being so, as other tribunals have observed, the factors identified in *Glamis Gold* are not "stand-alone" criteria,[23] and arbitral tribunals may well refuse to bifurcate jurisdictional objections even if all three factors are satisfied.[24]

17. Reviewing the Request from the perspective of procedural efficiency, the Tribunal first notes that the Respondent's objections do not appear frivolous. The *ratione personae* objection against Sembi for instance will require the Tribunal to examine the meaning of Article 1(3)(b) of the Serbia-Cyprus BIT and determine whether Sembi lacks a seat in Cyprus because it is "*effectively managed*" from Canada.[25] Similarly, the *ratione temporis* objection under the Canada-Serbia BIT would involve an analysis of the relevant Treaty provisions, as well as a review of the record to determine when the three-year limitation period started running. Other objections also raise genuine questions of treaty interpretation among others. As a consequence, the Respondent's objections must be deemed serious, and success on a combination of several objections could result in the denial of jurisdiction over the entire case.

18. In spite of these observations, a closer look at efficiency speaks against bifurcation for the following reasons:

[23] *See*, for instance, *Philip Morris Asia Ltd v. Australia*, where the tribunal considered an additional factor namely whether the jurisdictional objection could be examined "without prejudging or entering into the merits." *Philip Morris Asia Ltd v. Australia* (Procedural Order No. 8 of 14 April 2014), ¶109.
[24] Exh. RLA-101, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. The Republic of India*, PCA Case No. 2016-7, Decision on the Respondent Application for Bifurcation (Procedural Order No. 4), 19 April 2017, ¶77.
[25] Counter-Memorial, ¶481 (emphasis added).

a. The Respondent has raised several jurisdictional objections. If several objections are upheld, it is clear that this may put an end to the proceedings. However, if the objections fail, it is not clear that the scope of the issues to be briefed at the merits stage would be narrowed. This is particularly so here where Claimants 1-5 have initiated this arbitration under the Canada-Serbia BIT, while Claimant 6 has done so under the Cyprus-Serbia BIT. The legal basis of the claims of Claimants 1-5 and of those of Claimant 6 is thus different. However, the factual basis appears to be largely the same for all the claims. If the objections lead to the denial of jurisdiction over the claims brought under one of the Treaties, the Tribunal would nevertheless have to engage in a merits phase and examine the (largely identical) facts underlying the claims brought under the other Treaty, and only marginal efficiencies would be gained through bifurcation. To show a substantial reduction through bifurcation, the Respondent specifically relies on two objections:

   (i) It first relies on its *ratione materiae* objection "concerning Claimants' inability to prove ownership over property rights allegedly conforming 'investment.'"[26] This objection is advanced under both Treaties. However, even if the Respondent were to succeed on this objection, arguably Mr. Rand would still be able to bring claims based on his 3.9% shareholding in BD Agro through MDH Serbia. Thus, the factual (and legal) complexity of the case would remain unaltered, as the Tribunal would in any event have to determine whether the Canada-Serbia BIT has been violated (provided, of course, that the Respondent does not succeed on its separate jurisdictional objection in respect of MDH Serbia, where it alleges that the latter did not waive its right to pursue domestic remedies as required by the Canada-Serbia BIT);

   (ii) The second objection is the Claimants "lack of standing."[27] This *ratione personae* argument appears to be brought only in respect of Claimant 6. Here the

[26] Counter-Memorial, ¶531.
[27] *Id.*

> Respondent submits that "should the Tribunal find that it does not have jurisdiction only with regard to the Cypriot claimant (Sembi), this would not only absolve the Tribunal from applying the Cyprus-Serbia BIT altogether, but it would also mean that two claims raised by Claimants exclusively based on that instrument would automatically become moot."[28] The Claimants themselves admit as much. Yet, it appears that these two claims (non-impairment and umbrella clause) factually overlap with the claims for breach of other substantive standards under the Canada-Serbia BIT. Thus, even if the Respondent were to succeed on this *ratione personae* objection under the Cyprus-Serbia BIT, the scope of the matters before the Tribunal would not be significantly reduced.

b. On the basis of the record as it presently stands, the facts likely to be involved in determining the Respondent's jurisdictional objections appear wide ranging and intertwined with the merits. Indeed, to address the jurisdictional objections going to the Claimants' ownership and control of its alleged investments in Serbia,[29] will probably imply a review of Mr. Rand's alleged investments from inception in 2005 to the alleged expropriation in 2015. The Tribunal may also have to establish whether Mr. Rand had control over BD Agro's and Mr. Obradović's decisions, and the conduct of these individuals with the Privatization Agency. The facts relevant to assess the jurisdictional objections thus do not appear separate and discrete or unrelated to the merits. The Respondent itself has merely submitted that "the issues of jurisdiction raised in the present submission can be resolved without assessing the merits of the dispute"[30] without any further explanation. It has failed to show that its objections would involve reviewing a narrow set of facts that could be dealt with separately.

[28] Counter-Memorial, ¶532.
[29] The Respondent raises *ratione materiae* and *ratione voluntatis* objections on this ground, and also submits that the Claimants have failed to meet the jurisdictional requirements of the ICSID Convention. Counter-Memorial, §§III(A), III(B) and III(E).
[30] Counter-Memorial, ¶534.

c. In support of the preliminary objections, the Respondent invokes factual exhibits as well as witness testimonies.[31] As some of these testimonies are also relevant to the merits, some of these witnesses may have to be called twice if the proceedings are bifurcated and the case proceeds to the merits. Examining the same witnesses twice would not be time and cost efficient.

d. Finally, the dates for a possible hearing on jurisdiction coincide with the dates of the potential hearing on the merits. Hence, the decision on jurisdiction would be issued at the same time whether the proceedings are bifurcated or not. By contrast, if the proceedings are bifurcated and continue on the merits, they will last significantly longer and experience shows that longer proceedings also cost more. It is true that the costs of litigating the merits may be expended for no purpose if in a non-bifurcated proceedings jurisdiction were eventually denied. That consequence could, however, be remedied when allocating the burden of the costs of the proceedings.

19. On the basis of this analysis, the Tribunal comes to the conclusion that it is procedurally more efficient not to bifurcate these proceedings. In reaching this result, it has in particular taken into consideration that the Respondent would suffer no prejudice in light of the content of the objections and of their interaction with the merits, not to speak of the fact that any extra costs possibly incurred in vain could be compensated by way of an award of costs.

IV. DECISION

20. For the foregoing reasons, the Tribunal, by majority, confirms the decision communicated to the Parties on 31 May 2019, namely that it:

(1) Denies the Respondent's request to bifurcate the proceeding between the jurisdictional objections advanced and the merits of the dispute;

[31] In the context of its objection that the Tribunal does not have *ratione materiae* jurisdiction under the Treaties, the Respondent cites the testimonies of Messrs. Obradović, Rand, Markićević and Broshko. *See* Counter-Memorial, §III(A).

(2) Directs the Parties to follow scenario 1(b) in the Procedural Calendar; and

(3) Reserves the costs of this decision for a later stage of these proceedings.

21. Prof. Kohen's dissent is appended.

On behalf of the Tribunal,

[signed]

_____
Professor Gabrielle Kaufmann-Kohler
President of the Tribunal

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DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN

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24 June 2019

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

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

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

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

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

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

[1] This Order, paragraph 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

_____[signed]_____

Prof. Marcelo G. Kohen