THE INVESTMENT TREATY ARBITRATION REVIEW

Seventh Edition

Editor
Barton Legum

THE LAWREVIEWS

THE INVESTMENT TREATY ARBITRATION REVIEW

SEVENTH EDITION

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in the field of investment treaty arbitration.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This seventh edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Honlet Legum Arbitration
Paris
May 2022

Part II

Admissibility and Procedural Issues

Chapter 6

BIFURCATION

Rebeca E Mosquera[1]

In investor-state dispute settlement (ISDS), bifurcation is commonly referred to as the separation of jurisdictional issues from the merits of a case.[2] Typically, it is the responding party that would request bifurcation of the proceedings to address preliminary matters, jurisdictional issues or admissibility questions.[3] The general sentiment is that there is

1 Rebeca E Mosquera is a senior associate at Reed Smith LLP.

2 Definition provided by the International Centre for Settlement of Investment Disputes (ICSID), Arbitration Services Section, available at https://icsid.worldbank.org/services/arbitration/convention/process/bifurcation (last accessed 19 Mar. 2022). Mindful that arbitration proceedings can be bifurcated between jurisdiction and merits with quantum (bifurcation) or between jurisdiction, merits and quantum (trifurcation), this chapter focuses on bifurcation of jurisdictional objections and, at times, comments on bifurcation of preliminary questions.

3 See, e.g., *Abertis Infraestructuras, S.A. v. Argentine Republic*, ICSID Case No. ARB/15/48, Procedural Order No. 2 (27 Mar. 2017), para. 42 ('The Tribunal declares by majority vote, with Mr. Debevoise abstaining, that the Request for Bifurcation filed by Argentina is admissible and, in accordance with Article 41 of the ICSID Convention, orders the following: a. Separate the jurisdictional phase from the merits phase.'); *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2 (21 Apr. 2017), para. 17 ('As to Article 10.20.4 of the CAFTA-DR, the Respondent has confirmed that its Bifurcation Request is made pursuant the initial part of this provision on the "tribunal's authority to address other objections as a preliminary question"'); *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Procedural Order No. 2 (21 Feb. 2018), para. 27 ('Having considered the Parties' positions on bifurcation, and as indicated to the Parties in prior communications, the Tribunal finds that bifurcation of the Respondent's preliminary objections on jurisdiction is warranted on several grounds'); *Patel Engineering Limited v. The Republic of Mozambique*, PCA Case No. 2020-21, Procedural Order No. 3 (14 Dec. 2020), para. 64 ('After carefully analyzing Mozambique's objections to jurisdiction in light of the above criteria and in the interests of procedural economy and efficiency, the Tribunal decides not to bifurcate the proceedings'). However, claimants can also submit requests to bifurcate proceedings. See, e.g., *The Renco Group, Inc. v. The Republic of Peru*, PCA Case No. 2019-46, Procedural Order No. 3 (Bifurcation) (17 Sep. 2020) (Renco II), paras. 2.2. ('The Tribunal accepts the Claimants' proposed bifurcation. The Tribunal considers that the various issues to be decided on jurisdiction and liability are prima facie serious and substantial and stand to dispose of, or at least significantly narrow, the issues to be decided in respect of remedies even if the Claimants should prevail'); *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Procedural Order No. 2 (Decision on Bifurcation) (25 Feb. 2022), paras. 1, 15 and 52 ('For the avoidance of doubt, the Tribunal does not consider that a claimant's application to bifurcate a jurisdictional objection is per se unacceptable. To the contrary, the Tribunal's view is that considerations of fairness and procedural efficiency apply equally irrespective of whether the respondent or the claimant applies for bifurcation').

a tendency to request bifurcation as a delaying tactic.[4] However, when warranted, the bifurcation of a case permits a tribunal to address and render a decision on preliminary issues that could substantially narrow down the issues to be dealt with at the merits phase or even dispose of the entire case. For the most part, claimants will oppose a request for bifurcation, fearing that their claims may be extinguished at the outset.

Tribunals, on their own initiative, can also order the bifurcation of claims.[5] Notwithstanding, when the jurisdictional objections are closely intertwined with the merits of the case, bifurcation should be denied.

This chapter examines (1) whether previous and current arbitration rules offer any guidance to tribunals facing a request to bifurcate, (2) the evolution of the *Glamis Gold* three-part test as the basis for the recently approved 2022 International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules (the 2022 ICSID Arbitration Rules)[6] on bifurcation, and (3) based on recent quantitative analysis, whether bifurcation is effective in achieving procedural economy and reducing costs.

I RULES GOVERNING BIFURCATION IN ISDS

For the purposes of this chapter, the current United Nations Commission on International Trade Law Arbitration Rules (the UNCITRAL Rules) and the 2022 ICSID Arbitration Rules are explored in the context of whether they offer guidance to tribunals regarding how or when to grant or deny a request for bifurcation, with a particular focus on the 2022 ICSID Arbitration Rules.

Requests for bifurcation are not uncommon in the ISDS system.[7] Article 41 of the ICSID Convention and Rule 41 (Preliminary Objections) of the 2006 ICSID Arbitration Rules expressly provide for bifurcation and confer on the tribunal the power to determine whether to deal with an issue as a preliminary question or to join it to the merits of the dispute.

Similarly, the UNCITRAL Rules permit bifurcation. Article 21(4) of the 1976 version of the Rules states, in relevant part, that 'the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question'.

Tribunals applying the 1976 UNCITRAL Rules have suggested that the language contained in these Rules in respect of bifurcation called for a presumption in favour of bifurcation. Indeed, in *Mesa Power v. Canada*, the tribunal found that the use of the words 'should rule' in Article 21(4) meant that 'when a Party raises an objection to jurisdiction, the

4 Z Obeid, M Baig, M Lewis and M Paschou, 'Initial Stages of a Dispute: The State's Perspective' in M Mangan and N Rubins (eds), *The Guide to Investment Treaty Protection and Enforcement* (1st ed. 2022), commentary by P Pinsolle, p. 58. The commentator recognises that 'it is a very difficult decision to make for any civil servant or minister not to object to jurisdiction. Not objecting to jurisdiction will subsequently be criticised if the case is lost on the merits'.

5 See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on liability (30 Jul. 2010), para. 244.

6 To avoid confusion, this chapter refers to the ICSID Arbitration Rules as amended, and effective as of 10 April 2006, as the 2006 ICSID Arbitration Rules.

7 C Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary* (2nd ed. 2009), 537–38 ('In the practice of ICSID tribunals, treatment of jurisdictional issues as preliminary questions is standard procedure').

presumption is in favor of addressing the objection as a preliminary question'.[8] Similarly, the tribunal in *Pey Casado v. Chile (II)* agreed 'with Respondent that Article 21(4) of the [1976] UNCITRAL Rules creates a presumption in favor of bifurcation'.[9] But even in light of this presumption, not every tribunal has been persuaded that bifurcation applies automatically. In fact, some tribunals have highlighted that the choice of whether to bifurcate is left widely to the tribunal's discretion and have held that 'the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings'.[10]

The UNCITRAL Rules were revised in 2010, striking down the presumption in favour of bifurcation contained in the 1976 version. Article 21(4) of the 1976 Rules was replaced with Article 23(3) of the 2010 version,[11] which states, in relevant part, that the arbitral tribunal 'may rule on a plea' that the arbitral tribunal does not have jurisdiction 'either as a preliminary question or in an award on the merits'.

Pursuant to the 2010 revision, tribunals have agreed that the presumption in favour of jurisdictional bifurcation was discarded and, instead, a clear discretionary power was conferred on them. The tribunal in *Phillip Morris v. Australia* admitted as much when finding that the change in the wording of the UNCITRAL Rules (from 'should' bifurcate in the 1976 version to 'may' bifurcate in the 2010 version) conveyed a wider discretion on the tribunal and did not amount to a presumption in favour of bifurcation.[12]

8 *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2 (18 Jan. 2013), para. 16.

9 *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile II*, PCA Case No. 2017-30 (PCA Case No. AA662), Procedural Order No. 2 (29 Nov. 2017), para. 63.

10 See, e.g., *Glamis Gold Ltd. v. The United States of America*, Arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA) pursuant to the UNCITRAL Arbitration Rules, Procedural Order No. 2 (Revised) (31 May 2005) (*Glamis Gold v. USA*), paras. 9–11; *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation (3 Aug. 2020) (*Red Eagle v. Colombia*), para. 40 ('According to ICSID Arbitration Rule 41, the Tribunal has discretion to bifurcate or not depending on the circumstances of each case. The Tribunal may bifurcate a proceeding to decide a preliminary objection. ICSID Arbitration Rule 41 does not establish a presumption in favor or against bifurcation. ICSID Arbitration Rule 41 is silent on the circumstances, criteria or factors that the Tribunal may take into account in the consideration of objections to its jurisdiction').

11 The 2013 version of the UNCITRAL Rules incorporated the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration, as such, Art. 23(3) remained unchanged.

12 *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Decision on Bifurcation (14 Apr. 2014), para. 101; see, also, *The Burmilla Trust, The Josias Van Zyl Family Trust and Josias Van Zyl v. The Kingdom of Lesotho*, PCA Case No. 2016-21, Procedural Order No. 1: Suspension, Bifurcation and Procedural Timetable (3 Nov. 2016), para. 43 ('Article 23(3) of the current UNCITRAL Rules, which this Tribunal must apply, does not appear to contemplate any presumption, leaving the Tribunal with an even discretion to decide whether to bifurcate proceedings or not'); *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural Order No. 10 (17 Dec. 2012), para. 9 ('The [2010] UNCITRAL Arbitration Rules do not, however, establish any right to (or even a presumption in favor of) bifurcation, leaving this to the discretion of the Tribunal'); Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation (31 Jan. 2018), para. 38 ('The Tribunal begins its analysis by setting

Regardless of the wording used, neither the 2006 ICSID Arbitration Rules nor the UNCITRAL Rules offer any guidance to tribunals on the criteria they should apply when deciding whether to bifurcate arbitration proceedings.[13]

The 2022 ICSID Arbitration Rules, which come into effect on 1 July 2022,[14] however, are very clear. Unlike the previous version (dated 2006), the 2022 Rules contain two specific procedures for bifurcation: the first is in Rule 42, which covers requests for bifurcation in general, and the second is in Rule 44, which deals with requests for bifurcation in connection with preliminary objections. The 2022 ICSID Arbitration Rules, in connection with bifurcation, are clearly the result of the consistent case law developed by tribunals during all the years in which the applicable legal framework provided little guidance. In addition, the 2022 amendments bring the ICSID Arbitration Rules in line with modern international investment agreements (IIAs) containing procedures whereby a tribunal must address and decide preliminary questions.[15]

II EVOLUTION OF THE GLAMIS GOLD TEST

i The path to the 2022 ICSID Arbitration Rules[16]

Because neither the 2006 ICSID Arbitration Rules nor the UNCITRAL Rules prescribe specific criteria for tribunals to apply when deciding whether and when to bifurcate arbitral proceedings, the tribunal in *Glamis Gold Ltd v. The United States of America* outlined a three-part test.[17] *Glamis Gold* is possibly the most-referred-to case regarding the criteria a tribunal should apply when considering a request to bifurcate. In particular, based on its own three criteria, the *Glamis Gold* tribunal denied the United States' request for bifurcation.[18]

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out the applicable standard in relation to the issue of application as raised in this case. Articles 17.1 and 23.3 of the UNCITRAL Rules give discretion to the Tribunal to decide jurisdictional objections. Neither of those provisions imposes a presumption in favor or against bifurcation. Thus, in accordance with Article 17.1, the overarching principle that shall guide the Tribunal's decision is procedural fairness and efficiency, having regard to the totality of circumstances').

13 See, e.g., *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 Decision on Respondent Request for Bifurcation (14 Dec. 2017), para. 99 ('Neither the ICSID Convention nor the Arbitration Rules sets forth a legal standard applicable to the decision of whether to join preliminary objections to the merits or instead to hear them in a preliminary phase. The ICSID Convention and the Arbitration Rules leave this decision entirely to the discretion of tribunals'); *Red Eagle v. Colombia*, footnote 10, para. 40 ('ICSID Arbitration Rule 41 is silent on the circumstances, criteria or factors that the Tribunal may take into account in the consideration of objections to its jurisdiction').

14 The World Bank has stated that it is amending the ICSID rules and regulations to 'modernize, simplify, and streamline the rules, while also leveraging information technology to reduce the environmental footprint of ICSID proceedings. The process draws on the lessons learned from hundreds of ICSID cases', available at https://icsid.worldbank.org/resources/rules-amendments (last accessed 22 Apr. 2022).

15 See, e.g., 2012 U.S. Model Bilateral Investment Treaty, Art. 28; U.S.–Panama Trade Promotion Agreement (31 Oct. 2012), Art. 10.20(4); U.S.–Colombia Trade Promotion Agreement (2012), Art. 10.20(4); U.S.–Peru Trade Promotion Agreement (2009), Art. 10.20(4)

16 This chapter does not aim to engage in a full analysis of the amended and recently approved ICSID Arbitration Rules.

17 *Glamis Gold v. USA*, op. cit note 10.

18 ibid., paras. 16 and 25.

Indeed, the tribunal was not persuaded that bifurcation of the proceedings would result in procedural economy and cost efficiency for the parties, precisely because the issues to be bifurcated were so intertwined with the merits of the case.[19]

To obtain increased efficiency, the following factors should be included in the analysis:

a the tribunal should take the claims as alleged by the claimant;

b the 'plea' must be one that goes to the 'jurisdiction' of the tribunal over the claim;[20] and

c the tribunal should consider, as a preliminary matter, an objection to the jurisdiction of the tribunal if doing so would increase the efficiency of the proceedings. To assess the efficiency, certain other considerations are relevant, namely whether:

- the jurisdictional objection is substantial and not frivolous;
- granting bifurcation would result in a substantial reduction of the next phase in the proceedings; and
- the jurisdictional objection is so intertwined with the merits of the case rendering bifurcation impractical.[21]

Since *Glamis Gold*, most tribunals have followed this test when deciding on a request to bifurcate proceedings.[22] However, the test has evolved over time. Indeed, the tribunal in *Standard Chartered Bank v. TANESCO* took account of three slightly similar issues when considering the respondent's request to bifurcate, namely whether (1) the objection asserts a matter of jurisdiction or goes to the merits of the case, (2) the matter is discrete and separable from the merits of the case, and (3) bifurcation was likely to promote 'procedural economy', saving time and money.[23] The tribunal in *Emmis v. Hungary* considered whether the claimants could be prejudiced by the bifurcation application. In doing so, the tribunal reasoned that it was within its discretion to compensate the claimants if they were successful in opposing the application.[24]

19 id.

20 Here, the *Glamis Gold* tribunal emphasised that the presumption in favour of bifurcation contained in Article 21(4) of the 1976 UNCITRAL Rules extended only to requests to bifurcate in connection with objections to the jurisdiction of the tribunal and not to bifurcating the proceedings between liability and damages phases.

21 For more detail as to how different tribunals have analysed these prongs, see M Carlson and P Childress, 'Bifurcation in Investment Treaty Arbitration' in Barton Legum (ed.), *The Investment Treaty Arbitration Review* (Sixth edition, Law Business Research Ltd, 2021), 48–57.

22 See, e.g., *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Procedural Order No. 2 Decision on Bifurcation (5 Oct. 2015), paras. 56–58 (the tribunal accepted to be guided, in its analysis of whether or not to bifurcate jurisdictional objections, by the criteria set out in *Glamis Gold* and *Emmis* (see note 24, below); *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania II*, ICSID Case No. ARB/15/41, Procedural Order No. 3 on Bifurcation (11 Oct. 2016), para. 56; *Josias Van Zyl, Josias Van Zyl Family Trust and Burmilla Trust v. Kingdom of Lesotho*, PCA Case No. 2016-21, Procedural Order No. 1 on Suspension, Bifurcation and Procedural Timetable (3 Nov. 2016), para. 46.

23 *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Procedural Order No. 5 (29 May 2012), para. 9.

24 *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Application for Bifurcation (13 Jun. 2013), paras. 37 and 51–56.

Nowadays, tribunals typically decide requests for bifurcation on a case-by-case basis.[25] One tribunal, in *Gavrilovic v. Croatia*, observed that each case must turn on its own facts.[26] Consequently, the tribunal refused to 'be placed in the "straightjacket"' of considering the application to bifurcate 'by reference to the Glamis Gold factors, and nothing further'.[27] From canvassing present case law, it can be concluded that, to a great extent, tribunals have judiciously applied – with very little change – the *Glamis Gold* test to decide whether to bifurcate proceedings.[28]

There is little doubt that case law on bifurcation developed since *Glamis Gold* has paved the way for the 2022 amendments to the ICSID Arbitration Rules. Among the suggested changes was a proposal for an express rule allowing bifurcation of proceedings.[29] In fact, Working Paper 1 admits that:

> *ICSID case law . . . has identified certain factors to be considered [f]or jurisdictional objections . . . (i) whether the objection is closely intertwined with the merits of the claim; (ii) whether the objection is capable of disposing of the entire case; (iii) whether the objection has merit and is not frivolous; and (iv) whether procedural economy would be served by dealing with the objection prior to the merits.*[30]

During consultations for the 2022 amendments, several member states commented that 'bifurcation should be allowed more often, or automatically, when jurisdictional objections are raised'.[31] This notion was rejected, considering that each tribunal should take into account the facts of the case to determine whether bifurcation is proper.[32] To be sure, the approved 2022 ICSID Arbitration Rules do not contain any provision for automatic bifurcation. Further comments included, inter alia, the introduction of a time limit for submitting requests to bifurcate;[33] the proposal of a deadline of 30 days after the last submission for the tribunal to issue a decision granting bifurcation, or not (which was later shortened to 20 days);[34] and a proposal that the merits phase of the case be automatically suspended if

25 B Daly, E Goriatcheva and H Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press, 2016), paras. 5.63–5.64.

26 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation (21 Jan. 2015), para. 66.

27 id.

28 See, e.g., *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2 (21 Apr. 2017), para. 18; *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Decision on the Respondent Application for Bifurcation (Procedural Order No. 4) (19 Apr. 2017), para. 76; *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile II*, PCA Case No. 2017-30 (PCA Case No. AA662), Procedural Order No. 2 (29 Nov. 2017), para. 66.

29 ICSID, 'Backgrounder on Proposals for Amendment of the ICSID Rules', p. 3, https://icsid.worldbank.org/sites/default/files/publications/Amendment_Backgrounder.pdf (last accessed 28 Apr. 2022).

30 Proposals for Amendment of the ICSID Rules – Working Paper 1, Volume 3 (2 Aug. 2018) (Working Paper 1), para. 393.

31 ibid., para. 392.

32 id.

33 ibid., para. 396.

34 ibid., para. 400; see, also, Proposals for Amendment of the ICSID Rules – Working Paper 2, Volume 1 (1 Mar. 2019) (Working Paper 2), para. 272.

the tribunal decides to bifurcate jurisdictional objections.[35] It should be noted that only preliminary objections with a request for bifurcation will automatically suspend the merits of a case, unless the parties agree otherwise.[36]

In this sense, Rule 42(4) (Bifurcation) and Rule 44(2) (Preliminary Objections with a Request for Bifurcation) of the 2022 ICSID Arbitration Rules codify the current case law on bifurcation, including, naturally, the *Glamis Gold* test:

> *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 questions to be bifurcated would dispose of all or a substantial portion of the dispute; and*
> *(c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.*

Almost 17 years after the *Glamis Gold* case, its three-part test, developed through consistent case law, is codified in the 2022 ICSID Arbitration Rules.

ii Mandatory bifurcation provisions in IIAs

Significantly, in arbitrations under the ICSID Arbitration Rules, before the amendments, tribunals would rely for their authority to bifurcate (or not) proceedings on Rule 41(2), which states as follows:

> *The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own jurisdiction.*

During the amendment discussions, Rule 41 evolved into Rule 42, which addresses bifurcation in general, and Rule 44, which addresses bifurcation of preliminary objections. As previously mentioned, these amendments bring the Rules in line not only with the case law developed since *Glamis Gold* but also with modern IIAs containing procedures to address preliminary objections.

For instance, Article 10.20(4) of the United States–Peru Trade Promotion Agreement (USPTPA) states, in pertinent part, that:

> *Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made.*

Once a tribunal receives an objection under Article 10.20(4) of the USPTPA, it must suspend the proceedings on the merits and establish a schedule to address the objection. In deciding the objection, the tribunal must assume as true all the facts submitted by the claimant and may also consider other facts not in dispute.[37]

35 Working Paper 1, op. cit. note 30, above, para. 402.

36 2022 ICSID Arbitration Rules, Rule 44(3)(a).

37 United States–Peru Trade Promotion Agreement (2009) (USPTPA), Art. 10.20(4)(b)–(c).

It is important to highlight that the procedure contained in Article 10.20(4) USPTPA addresses only preliminary objections and not jurisdictional objections. As a consequence, the tribunal in *Renco v. Peru* (*Renco I*) concluded that the plain language of Article 10.20(4) excludes objections as to the competence of the tribunal:[38]

> *[T]he Tribunal has concluded that the plain language of Article 10.20.4, interpreted in accordance with the ordinary meaning of the terms in their context, clearly shows that objections as to competence are not included within the scope of Article 10.20.4 objections.*

In spite of the foregoing, tribunals retain the authority to hear any preliminary objections to their competence under the applicable arbitration rules.[39]

III IS BIFURCATION REDUCING TIME AND COSTS?

The main focus of tribunals when granting a request for bifurcation is procedural economy and saving costs. Notwithstanding the lack of available information, there is enough evidence to suggest that the bifurcation of proceedings may not necessarily translate into a more efficient or cost-effective proceeding. This is essentially true where jurisdictional objections have been unsuccessful in bifurcated proceedings and the case continues to the merits phase. To that end, some authors have engaged in determining whether bifurcation is achieving its overarching goal of procedural efficiency and avoiding increased costs. Largely, they have concluded that the additional time and expense were substantial in cases where bifurcation objections were not successful.[40]

A quantitative analysis rendered in 2019 found that bifurcated cases took at least one more year than non-bifurcated cases.[41] Furthermore, the study found that the average duration of cases where jurisdictional objections were unsuccessful was five years and two months.[42] Another study demonstrated that, on average, legal costs for the claimant increased by approximately US$2.3 million in bifurcated proceedings with the caveat that 'the real factor driving costs was case length generally – not bifurcation in particular'.[43] Remarkably, there was no significant variation in legal costs for the respondent in bifurcated and non-bifurcated cases (between US$3.4 million and US$3.7 million).[44]

38 *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4 (18 Dec. 2014) (*Renco I*), para. 181; see, also, *Renco I*, Partial Award on Jurisdiction (15 Jul. 2016), para. 15.

39 *Bacilio Amorrortu (USA) v. The Republic of Peru*, PCA Case No. 2020-11, Submission of the United States of America (13 Jul. 2021) (*Amorrortu v. Peru*), para. 10.

40 See, e.g., N Calamita and E Sardinha, 'The Bifurcation of Jurisdictional and Admissibility Objections in Investor-State Arbitration' in *The Law and Practice of International Courts and Tribunals*, 16 (2017), p. 50.

41 L Greenwood, 'Revisiting Bifurcation and Efficiency in International Arbitration Proceedings', 36(4) *J. Int'l Arb.* 424 (Kluwer Law International 2019).

42 id.

43 S Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press, 2019), p. 276 (emphasis added).

44 id.

In 2018, during a review of cases concluded between 1 January 2015 and 30 June 2017, ICSID found that the average duration, depending on the type of proceedings, was as follows:

a joint proceedings – 1,382 days (roughly three years and nine months);

b bifurcated proceedings with an award declining jurisdiction – 749 days (about two years);

c bifurcated proceedings continuing to the merits – 1,893 days (slightly more than five years); or

d merits-only proceedings – 829 days (about two years and two months).[45]

Consistent with these results, ICSID cautioned that, '[f]rom the perspective of duration, this indicates that bifurcation is not the best option for all cases with jurisdictional objections. Parties and Tribunals should therefore carefully consider whether to bifurcate jurisdictional objections or join them to the merits'.[46]

There is no question that tribunals are the last defender in determining whether bifurcation is warranted when costs and procedural efficiency are on the line. As such, tribunals should take to heart the vast discretionary power vested in them when deciding whether to bifurcate proceedings.

Considering further the increased costs resulting from the duration of a case, a closer examination of the 2022 ICSID Arbitration Rules reveals that Rule 44 comprehends more demanding time limits in comparison with Rule 42. Some authors consider that the contrast may rest on the fact that there is more case law concerning bifurcation between jurisdiction and the merits, from which tribunals can draw when setting deadlines.[47]

Rule 44(3)(c) of the 2022 ICSID Arbitration Rules requires that:

> *If the Tribunal decides to address the preliminary objection in a separate phase of the proceedings, it shall:*[48]
>
> . . .
>
> *(c) render its decision or Award on the preliminary objection within 180 days after the last submission . .*

In turn, Rule 42(3)(e) of the 2022 ICSID Arbitration Rules indicates that:

> *The following procedure shall apply to a request for bifurcation other than a request referred to in Rule 44:*
>
> . . .
>
> *(e) the Tribunal shall fix any time limit necessary for the further conduct of the proceeding.*

45 Working Paper 1, op. cit note 30, above, pp. 899–902. Indeed, Working Paper 1 of the Proposals for Amendment of the ICSID Rules noted that bifurcated proceedings are, on average, longer and more expensive than non-bifurcated proceedings (ibid., para. 393).

46 ibid., p. 902.

47 C Molina Esteban, 'Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy' in S Brekoulakis (ed), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Kluwer Law International; Sweet & Maxwell 2021, Volume 87 Issue 1), p. 7.

48 Emphasis added.

In essence, Rule 44 offers a welcome development to parties waiting for prolonged periods for a decision on preliminary objections. However, no such requirement is imposed on tribunals under Rule 42. Arguably, Rule 12 (Time Limits Applicable to the Tribunal) may remedy the issue. Still, under Rule 12 a tribunal has the ability to request the parties for extensions to render an order, decision or award, provided it advises them of the 'special circumstances justifying the delay'.[49]

From a review of current case law, in which bifurcation was granted to address preliminary questions (and jurisdictional objections), it became apparent that tribunals are taking substantially more than 180 days (or 5.9 months) to render a decision or award on preliminary and jurisdictional objections.[50]

Renco I presents a rather complex and lengthy procedural history.[51] Here, the tribunal granted bifurcation of the proceedings to address preliminary objections under Article 10.20(4) USPTPA[52] and objections to the waiver submitted by Renco. According to the tribunal, the waiver issue constituted a condition and limitation on Peru's consent to arbitrate.[53] On 2 September 2015, the tribunal held a hearing on Peru's objections regarding the waiver provision issue. Afterwards, the tribunal requested further brief submissions in connection with the hearing. The parties' last submissions in connection with Peru's objections were between 23 and 27 October 2015 and on 24 November 2015. A partial award on the waiver issue was rendered on 15 July 2016 and a final award on 9 November 2016. In abstract, it took the tribunal close to nine months after the last submission of the parties to render a partial award on Peru's waiver objection, and close to one year to render a final award. Inconsistent with the aforementioned 2018 ICSID study, where, on average, bifurcated proceedings with an award declining jurisdiction had a duration of around two years, *Renco I* took six years.

Significantly, the tribunal reasoned that the respondent's actions during the proceedings may have played a significant part in the lengthy duration of the proceedings. In the partial award, the tribunal noted that it was:

> *troubled by the manner in which Peru's waiver objection ha[d] arisen in the context of th[e] arbitration. The arbitration had already been on foot for quite some time before Peru filed its Memorial on Waiver in July 2015. By this stage over four years had passed since Renco filed its Notice of Arbitration; the Tribunal had already issued Procedural Order No. 1, which recorded the*

49 In practice, parties seldom oppose tribunals' requests for additional time to render a decision.

50 Working Paper 2, op. cit. note 34, above, para. 295 ('One State stated that the time limit of 180 days is too long and could be shortened to 90 days. This proposal was not adopted as it might be difficult to meet given the complexity of the issues. However, the 180 days is the outer limit for a ruling and the timing of the decision or Award should be discussed with the parties').

51 See *Renco I*'s procedural history, available at https://www.italaw.com/cases/906 (last accessed 24 Apr. 2022).

52 On 18 December 2014, the tribunal rendered a decision on Peru's Article 10.20(4) preliminary objections, holding that they were jurisdictional in nature and, in consequence, fell outside the scope of Article 10.20(4). Only Peru's Article 10.20(4) objection regarding the claimant's alleged failure to state a claim for breach of the investment agreement survived. Renco I, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20(4) (18 Dec. 2014), para. 254. However, the tribunal later found that it lacked jurisdiction and dismissed the case. In consequence, Peru's only Article 10.20(4) objection was never addressed. *Renco I*, Final Award (9 Nov. 2016), para. 35.

53 Renco I, Partial Award on Jurisdiction (15 Jul. 2016), para. 142.

> *agreed briefing schedule for the arbitration; Renco had filed its Memorial on Liability; the Parties had exchanged voluminous submissions in connection with Renco's challenge to the scope of Peru's Preliminary Objections; and the Tribunal had issued a substantive decision on December 18, 2014 in relation to the Scope of Peru's Preliminary Objections under Article 10.20(4). Clearly, it would have been preferable for all concerned if Peru had raised its waiver objection in a clear and coherent manner at the very outset of these proceedings. Instead, they emerged piecemeal over a relatively lengthy period of time.* [54]

Renco I was dismissed when a majority of the tribunal held that it could not allow Renco to cure its defective waiver because it saw a lack of an arbitration agreement, and thus a lack of any power to let Renco fix the problem with its waiver.[55] As such, the only remaining option for Renco was to file a new arbitration with a proper waiver; on 23 October 2018, Renco filed a notice of arbitration before the Permanent Court of Arbitration.[56] By the time *Renco I* was dismissed on jurisdictional grounds, the claimant had incurred nearly US$4 million in attorneys' fees.[57]

In another case, *Amorrortu v. Peru*,[58] the tribunal decided on 21 January 2021 to bifurcate the proceedings to address preliminary objections under Article 10.20(4) USPTPA and jurisdictional objections under Article 23(3) of the applicable UNCITRAL Rules.[59] On 9 August 2021, the tribunal held a one-day hearing on preliminary objections and the parties submitted post-hearing briefs on 10 September 2021. At the time of writing, the tribunal is yet to render a decision on preliminary objections.[60]

To avoid situations like *Renco I*, the 2022 ICSID Arbitration Rules also contemplate time limits for submitting requests for bifurcation. For example, under Rule 42(3), a party seeking to submit a request for bifurcation (other than a request referred to in Rule 44) should present the request 'as soon as possible' and the tribunal should 'fix any time limit necessary for the further conduct of the proceeding'. In turn, Rule 44 contemplates a 45-day time limit to file a request for bifurcation.[61] Notably, the 45-day time limit now embodied in Rule 45 was increased from an initial 30-day limit. During the consultation meetings on the amendments to the ICSID Arbitration Rules, some states commented that the 30-day limit did not provide sufficient time to prepare a request for bifurcation.[62]

54 ibid., para. 123.

55 ibid., para 152.

56 See *Renco II*'s procedural history, available at https://pca-cpa.org/en/cases/235/ (last accessed 26 Apr. 2022).

57 *Renco I*, Claimant's Submission on Costs (15 Aug. 2016), paras. 34–35.

58 *Amorrortu v. Peru*, op. cit. note 39, above.

59 id., Procedural Order No. 3 (21 Jan. 2021), para. 13.

60 See *Amorrortu v. Peru*'s procedural history, available at https://pca-cpa.org/en/cases/244/ (last accessed 24 Apr. 2022).

61 2022 ICSID Arbitration Rules, Art. 44(1)(a)(i)–(iii).

62 Working Paper 2, op. cit. note 34, above, para. 286; see, also, Working Paper 1, op. cit. note 30, above, para. 397.

IV CONCLUSION

It is clear that when deciding a request to bifurcate, tribunals must consider the overarching question of whether fairness and procedural efficiency would be preserved or improved. In this sense, tribunals must be mindful of the discretionary power vested in them to decide whether to bifurcate proceedings. Nearly 17 years of arbitral legal precedents have now been codified since *Glamis Gold* in 2005, and given that time is the driving force when it comes to costs, it is yet to be seen whether the time limits set forth in the 2022 ICSID Arbitration Rules will improve the effectiveness of bifurcation and whether other rules will follow.

Appendix 1

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Rebeca E. Mosquera is a senior associate in the international arbitration practice of Reed Smith's New York office. She has been described as 'undoubtedly one of the names to be regarded for arbitration in the US', Rebeca regularly represents clients in international commercial and investment arbitration disputes under the rules of the International Chambers of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA), the International Centre for the Settlement of Investments Disputes (ICSID), UNCITRAL, and ad hoc proceedings.

Rebeca has received several accolades and awards for her work in international arbitration. She has been recognised by Latinvex as one of Latin America's Top 100 Female Lawyers. Who's Who Legal lists Rebeca as one of the eight 'Most Highly Regarded' international arbitration non-partners in the Americas, as well as a Future Leader in Arbitration. More recently, Rebeca was honoured among the New York Law Journal's Rising Stars, which recognises the region's most promising lawyers.

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Clients describe Rebeca as 'a tremendous professional who can work under pressure in leading teams and complex cases' and whom 'possesses complete knowledge of the arbitration process and is able to design the correct strategy depending on the case at hand'.

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