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. 5

DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN

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29 August 2019

1. I deeply regret needing to append this statement of dissent for a rather narrow question, which nevertheless raises a fundamental issue for international arbitration.

2. The case, as initiated by the Claimants, involves the application of the Canada-Serbia BIT to five of six Claimants, while for the remaining one (Claimant 6, Sembi Investment Limited, hereinafter "**Sembi**") it is the Cyprus-Serbia BIT that is applicable. The two BITs do not coincide in matters of publicity. I agreed to propose to the Parties a uniform system of transparency with the understanding that everything that would not be agreed upon should be governed by the applicable rules of each BIT and those of the ICSID Convention and Rules. The Parties agreed on a substantive number of issues.[1] The applicability of the transparency rules of the Canada-Serbia BIT to the first five Claimants has been out of discussion. The Respondent accepted, with respect to Sembi, the publication of the award and the public nature of the hearings. This acceptance constitutes the basis for its implementation. The Parties' disagreement was limited to the question of the disclosure of the record of the entire proceeding with regard to Sembi.

3. I do believe that the Tribunal has to apply the transparency rules of the Canada-Serbia BIT to the Canadian Claimants in full. But I do not believe that we can extend this treatment to Sembi.

4. The majority contends that, since the Serbia-Cyprus BIT does not contain any provision on transparency, "it neither mandates nor prohibits transparency".[2] This is a curious reasoning. It supposes the existence of a legal gap. This is a reversal of a basic foundation of international law, particularly in the field of international arbitration. State consent is required when there is no other source of obligation. In this field, a State is not obliged to do anything if it has not consented thereto. The so-called principle of freedom (the "**Lotus principle**" as it is known in public international law)[3] by virtue of which what is not prohibited is permitted, certainly applies to the conduct of States. It does not apply to arbitral tribunals. To impose on States to explicitly reject a given pattern of conduct so as

[1] PO No. 5, paragraph 25.

[2] PO No. 5, paragraph 24.

[3] The Case of the S.S: "Lotus", P.C.I.J. Series A No. 10, pp. 20-21.

not to be obliged to conform to it is the exact opposite of the principle of freedom and has no ground in the existing international legal system. Furthermore, it has not been invoked that the publicity of the record of arbitral proceedings is an existing rule of general customary law. One of the elements that distinguish arbitration from the permanent international judiciary is the essentially private character of the former, unless otherwise decided by the parties. With respect to permanent international judiciary bodies, the matter is explicitly addressed in the relevant instruments. While for some human rights courts, States have accepted in the relevant convention the publicity of the documentation submitted during the procedure,[4] for other international courts and tribunals, the possibility to render the written procedure public is explicitly mentioned in the Rules, after having heard the views of the parties and not before the opening of the oral phase.[5] Within the WTO dispute settlement system, confidentiality is the rule.[6] It is clear that the ICSID Convention and Rules do not contain a documentation publicity regime.

5. The Tribunal does not have the power to impose on a State something to which it has not consented. In other words, what States have not consented to cannot be imposed on them under the pretence that they have not excluded it. Limitations to sovereignty cannot be interpreted extensively. In order to have the transparency regime agreed between Serbia

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 40(2): "Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise." In the Inter-American system, the matter is covered in the Rules of the Court: Inter-American Court of Human Rights, Rules of Procedure, Article 32(1)(b): "The Court shall make public: […] documents from the case file, except those considered unsuitable for publication". No rule relating to the publicity of the records of the cases is found in the relevant instruments of the African Court of Human and Peoples' Rights. In the African Court's practice, the records are not public.

[5] International Court of Justice, Rules of Court, Article 53(2): "The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings". International Tribunal for the Law of the Sea, Rules, Article 67(2): "Copies of the pleadings and documents annexed thereto shall be made accessible to the public on the opening of the oral proceedings, or earlier if the Tribunal or the President if the Tribunal is not sitting so decides after ascertaining the views of the parties".

[6] World Trade Organization, Dispute Settlement Understanding, Article 18(2): "Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."

and Canada applied to the Cypriot investor in the absence of a transparency rule in the Cyprus-Serbia BIT, the Tribunal needs the agreement of Serbia.

6. My distinguished colleagues tried to solve this crucial problem by considering that "there is no doubt that issues of transparency and confidentiality are matters of procedure,"[7] and that consequently, the Tribunal has the power to decide upon them on the basis of Article 44 of the ICSID Convention. I strongly disagree. Confidentiality and transparency are not "matters of procedure" for which Article 44 of the ICSID Convention would be applicable, thus leaving the Tribunal with entire freedom to decide in case nothing is mentioned in the Convention, in the Rules, in the applicable BIT or in case there is no agreement between the parties. In my view, matters of procedure concern pleadings, evidence, time limits, form of decisions, but not the confidentiality and transparency of the procedure itself.

7. The fact that the manner in which the record of the hearings shall be kept is a matter discussed in the preliminary procedural consultation with the parties does not transform it into a matter of procedure on which the tribunal has the freedom to decide. This is the moment in which, beyond what is provided in the relevant instruments, an agreement of the parties can be reached (or not).

8. The path followed by the majority is a dangerous precedent of enlargement of the powers of ICSID arbitral tribunals beyond what has been agreed by the authors of the Convention. Even assuming that publicity would be a procedural issue and that there would be a lacuna, the Tribunal could not fill the gap by going beyond the basic framework of the applicable treaties and one of the foundations of its very existence: consent. If the relevant applicable BIT is silent, the rules of the ICSID Convention apply. And the ICSID Convention neither provides for the publicity of the records of the proceedings without the consent of the parties, nor authorises the tribunals to decide so.

9. If the position of the majority were true, then the ICSID Convention and Rules would have adopted the strange policy that, in order to have the award published and conduct public

[7] PO No. 5, paragraph 27.

oral hearings, the consent of the parties is explicitly required,[8] while for the publicity of the record of the case, it would be up to tribunals to decide.

10. The majority insists upon efficiency in order to justify its choice. I am aware that it will be complicated to make a distinction and apply some publicity rules to Claimants 1-5 and others to Sembi. But it has been the Claimants' choice to initiate a single proceeding under two different BITs. The Parties made their choice. It is for the Parties to undergo the actual or potential consequences of this choice. The Tribunal cannot impose the burden of a regime to which the Respondent has not consented simply because of the Claimants' choice. As I indicated in my statement of dissent to Procedural Order No. 3, efficiency cannot be achieved at the price of disregarding consent. I also have to recall that the Respondent raised a preliminary objection to jurisdiction *ratione personae* over Sembi and my colleagues decided not to bifurcate.[9] In other words, the Respondent is compelled to discuss the merits of Sembi's claim and to render public the documentation concerning its claim while it is possible that the Tribunal does not have jurisdiction to deal with it.

11. I have my own views about the need for transparency in international arbitration in general and in international investment arbitration in particular. I am aware of some current trends in this regard, in particular some proposals aiming at modifying the existing ICSID Arbitration Rules in order to include the publicity of the record of the cases under certain conditions.[10] Obviously, the Tribunal cannot decide *sub specie legis ferendae*. Parties may have good or bad reasons not to wish to render the record public. In the context of this arbitration, the question is not for me to analyse whether or not the Respondent should have accepted to extend the transparency regime adopted in the Canada-Serbia BIT to the Cyprus-Serbia BIT. The task of the arbitrator is to exercise his/her jurisdiction within the strict limits of the consent given by the Parties.

12. In deciding to apply to the arbitral relationship between Serbia and Sembi a publicity rule to which neither Serbia nor Cyprus have consented in their BIT or in the ICSID

[8] ICSID Convention, Article 48 (5); ICSID Arbitral Rules, Article 32 (2).

[9] Cf. PO No. 3 and Dissenting Opinion of Professor Marcelo G. Kohen.

[10] *See* ICSID, Proposal for Amendment of the ICSID Rules, Working Paper 3, August 2019, Rule 63, p. 350.

Convention–the only basis of jurisdiction for that relationship–the Tribunal has exceeded its powers.

[signed]

Professor Marcelo G. Kohen