

**B R E D I N P R A T**

**BY E-MAIL**

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Paris, 26 April 2017

**Re: PCA Case No 2012-07 / Mohamed Abdel Raouf Bahgat (Egypt) v. The Arab Republic of Egypt (Egypt)**

Dear Members of the Tribunal,

We write with reference to Claimant's letter of 14 April 2017 in which Claimant requests the dismissal of Respondent's allegedly new objections to jurisdiction, and to the PCA's email of 21 April 2017 granting Respondent leave to respond to Claimant's letter.

Respondent's objections to the Tribunal's jurisdiction formulated in its Reply on Jurisdiction of 23 March 2017 ("Reply") are not "new", rather, they strictly respond to arguments raised in Claimant's earlier memorials **(1)**. Moreover, the case law relied on by Claimant does not in fact support his case **(2)**. Claimant's reliance on the principle of estoppel is equally unavailing **(3)**. For these reasons, Respondent respectfully submits that Claimant's request must be dismissed and Claimant be directed to respond to Respondent's arguments in its Rejoinder on Jurisdiction and during the upcoming Hearing on Jurisdiction.

**1. Respondent's objections to the Tribunal's jurisdiction are not "new"**

PO No. 1 and PO No. 3 provide that Respondent's Reply Memorial shall be "in rebuttal to the Claimant's Counter-Memorial ... and Supplementary Counter-Memorial".<sup>1</sup> The objections and arguments raised in Respondent's Reply are raised exclusively in rebuttal to the arguments put forward in Claimant's Counter-Memorial on Jurisdiction of 30 August 2013 ("Counter-Memorial") and Supplementary Counter-Memorial on Jurisdiction of 14 December 2016 ("Supplementary Counter-Memorial"). They are not "new".

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<sup>1</sup> See PO No. 1, ¶ 2.15; PO No. 3, ¶ 5.

*First*, Respondent’s objection based on Claimant’s dual nationality is made in rebuttal to Claimant’s Supplementary Counter-Memorial, which for the very first time in this proceeding invoked the SAC Judgment as a final and binding authority on Claimant’s Finnish nationality. Given that the SAC Judgment was issued on 14 November 2016 and that Claimant relied on the SAC Judgment for the first time in his Supplementary Counter-Memorial, Respondent could not have developed its dual nationality defence before its Reply. To recall, the SAC Judgment fundamentally departed from the decisions of the Finnish Immigration Service and the Helsinki Administrative Court, which unanimously held that Claimant had automatically lost his Finnish nationality as a result of his voluntary reacquisition of Egyptian nationality in 1997.<sup>2</sup> Claimant argued in his Supplementary Counter-Memorial that the SAC Judgment “decided that the Claimant has always remained a Finnish citizen since 1971 and that his Finnish nationality has not changed between 1971, when he received Finnish citizenship ... and 23 April 2013”,<sup>3</sup> and that the SAC Judgment thus “demolishes the Respondent’s position taken in its Request for Bifurcation to the effect that the Claimant lost his Finnish nationality automatically in 1997 when he took on Egyptian nationality”.<sup>4</sup> Claimant concluded that therefore “the Tribunal has jurisdiction *ratione personae* under both the 1980 and 2004 BITs”.<sup>5</sup> Respondent’s jurisdictional objection based on Claimant’s dual nationality set forth in its Reply is nothing else but a reply specifically tailored to the arguments made by Claimant in his Supplementary Counter-Memorial in reliance on the SAC Judgment. As Claimant rightly notes, the 1976 UNCITRAL Arbitration Rules allow jurisdictional objections to be made in response to the discovery of new evidence.<sup>6</sup> This is further confirmed by the case law relied on by Claimant.<sup>7</sup> It follows that Respondent’s dual nationality objection raised in rebuttal of the SAC Judgment relied on by Claimant for the first time in his Supplementary Counter-Memorial is perfectly admissible.

*Second*, Respondent’s arguments relating to Claimant’s failure to comply with the jurisdictional requirements laid down in Article 7 of the 1980 BIT do not constitute a new and stand-alone objection to jurisdiction. Rather, they are arguments made in support of Respondent’s objection to the Tribunal’s jurisdiction under the 1980 BIT which was raised in Respondent’s Request for Bifurcation of 26 January 2013 (“Request for Bifurcation”), and in rebuttal to Claimant’s argument set forth in his Counter-Memorial that the Tribunal has jurisdiction under the 1980 BIT to adjudicate Claimant’s claims.<sup>8</sup> As already explained in Respondent’s Request for Bifurcation, Claimant has failed to comply with the jurisdictional requirements in the 1980 BIT because the offer to arbitrate contained in that Treaty was repealed and replaced by the offer to arbitrate contained in the 2004 BIT.<sup>9</sup> Moreover, Claimant has also failed to comply with the jurisdictional requirements of the 1980 BIT because he has failed to take recourse to local remedies as required under the 1980 BIT.<sup>10</sup> Respondent thus merely responds to Claimant’s Statement of Claim in which Claimant argues that the use of local remedies is an option, rather

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<sup>2</sup> Respondent’s Reply on Jurisdiction, 23 March 2017, ¶¶ 34-37.

<sup>3</sup> Claimant’s Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶ 20(a).

<sup>4</sup> Claimant’s Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶ 15.

<sup>5</sup> Claimant’s Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶ 21.

<sup>6</sup> Claimant’s Letter of 14 April 2017, p. 3.

<sup>7</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic (UNCITRAL)*, Second Award on Jurisdiction, 4 June 2014, ¶¶ 115-116 (To preclude a respondent from making a jurisdictional objection after it submitted its statement of defence when that objection concerned facts which arose only after the date on which that statement was filed would involve a grave injustice ... the 1976 UNCITRAL Rules do not bar a party from raising a jurisdictional objection based upon facts which came into existence ... only after the filing of a statement of defence”).

<sup>8</sup> Claimant’s Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶¶ 4.3-4.7.

<sup>9</sup> Respondent’s Request for Bifurcation, 26 January 2013, ¶¶ 134-139.

<sup>10</sup> Respondent’s Reply on Jurisdiction, 23 March 2017, ¶¶ 174-182.

than a condition, of submitting claims to arbitration under the 1980 BIT, and that in any event Claimant has complied with this requirement by filing his Notice of Dispute on 8 July 2011.<sup>11</sup>

*Third*, Respondent's argument that the 1980 BIT does not confer jurisdiction on a UNCITRAL Tribunal because it provides for *ad hoc* arbitration only is also not a new objection to jurisdiction. Rather, it is an argument made in support of Respondent's objection to the Tribunal's jurisdiction under the 1980 BIT which was raised in its Request for Bifurcation, and in rebuttal to Claimant's argument set forth in his Counter-Memorial that the Tribunal has jurisdiction under the 1980 BIT to adjudicate Claimant's claims.<sup>12</sup> Developing further arguments in a second round of briefing in support of an objection which had already been raised in previous submissions is perfectly admissible. As held by the tribunal in *Allard v. Barbados*, "Article 21(3) of the UNCITRAL Rules does not require that every single jurisdictional argument be raised in the Statement of Defence, only that the plea of lack of jurisdiction be made".<sup>13</sup> Were it otherwise, second rounds of briefing on a particular point would be of no use.

It follows that none of Respondent's allegedly new objections to jurisdiction are in fact new. Rather, they have been raised strictly in response and rebuttal to arguments advanced by Claimant in his previous submissions in support of the Tribunal's jurisdiction in this case. Therefore, Respondent's objections to jurisdiction and jurisdictional arguments set forth in its Reply fully comply with the requirements of PO No. 1, PO No. 3 and the 1976 UNCITRAL Arbitration Rules and are admissible.

## 2. The case law relied on by Claimant does not support his case

Claimant cites an array of case law in alleged support of the inadmissibility of Respondent's allegedly new objections. In fact, none of the cases relied on by Claimant support the dismissal of Respondent's jurisdictional objections and arguments as inadmissible.

In *CME v. Czech Republic*, the respondent "expressly did not raise the defence of lack of jurisdiction".<sup>14</sup> Instead, respondent argued that the claimant's 1997 acquisition of shares in CNTS, a Czech television services company which the claimant claimed constituted its investment, had to be dealt with by the tribunal when dealing with the merits of the claimant's claim.<sup>15</sup> Therefore, the tribunal concluded that "the Respondent's argument that the investment of the Claimant in the Czech Republic was not made until May 21, 1997 must be dealt with by the Tribunal in accordance with the Respondent's express pleadings as a substantive defense, not as a defense to jurisdiction".<sup>16</sup> Therefore, Claimant's reliance on this case in support of its allegation that "numerous" arbitral tribunals have dismissed out of time objections to jurisdiction is unavailing.

Claimant's reliance on *Jan Oostergetel v. Slovakia* and *Autopista v. Venezuela* is similarly unavailing. In *Jan Oostergetel v. Slovakia*, the respondent raised new objections to jurisdiction - which it had not raised during the jurisdictional phase of the arbitration - in its post-hearing brief after the hearing

<sup>11</sup> Claimant's Statement of Claim, 10 November 2012, ¶ 2.34.

<sup>12</sup> Claimant's Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶¶ 4.3-4.7.

<sup>13</sup> Peter A. Allard v. The Government of Barbados (UNCITRAL), Award on Jurisdiction, 13 June 2014, ¶ 87.

<sup>14</sup> CME Czech Republic B.V. (The Netherlands) v. The Czech Republic (UNCITRAL), Partial Award, 13 September 2001, ¶ 378.

<sup>15</sup> CME Czech Republic B.V. (The Netherlands) v. The Czech Republic (UNCITRAL), Partial Award, 13 September 2001, ¶ 378.

<sup>16</sup> CME Czech Republic B.V. (The Netherlands) v. The Czech Republic (UNCITRAL), Partial Award, 13 September 2001, ¶ 381.

on the merits.<sup>17</sup> In *Autopista v. Venezuela*, the respondent raised a new objection to jurisdiction in its submissions on the merits well after the jurisdictional phase of the proceeding and after the tribunal's decision on jurisdiction.<sup>18</sup> It is not disputed that the jurisdictional phase of the present proceeding is currently still ongoing, with Claimant's Rejoinder on Jurisdiction and the Hearing on Jurisdiction still to come. Therefore, any jurisdictional arguments made in Respondent's Reply were not raised "after the jurisdictional phase" of the present proceedings, nor after the Tribunal's decision on its jurisdiction. Claimant's reference to *Jan Oostergetel v. Slovakia* and *Autopista v. Venezuela* therefore misses the mark.

Finally, Claimant's reference to *Euram v Slovakia* also lends no support to Claimant's case, in fact, if anything, it actually supports the admissibility of Respondent's jurisdictional objection and arguments. In that case, the tribunal found that to "preclude a respondent from making a jurisdictional objection after it submitted its statement of defence when that objection concerned facts which arose only after the date on which that statement was filed would involve a grave injustice",<sup>19</sup> and that therefore the "1976 UNCITRAL Rules do not bar a party from raising a jurisdictional objection based upon facts which came into existence ... only after the filing of a statement of defence".<sup>20</sup> The tribunal went on to conclude that the new jurisdictional objection in that case was based upon facts (namely the claimant commencing proceedings in the Slovak courts) which came to be known by respondent only once it had submitted its statement of defence, that respondent's objection was not raised belatedly and that the objection had to be therefore admitted.<sup>21</sup>

It follows that according to the jurisprudence of international tribunals relied on by Claimant, Respondent's dual nationality objection as well as its arguments made in support of its jurisdictional objections already raised in its Request for Bifurcation are perfectly admissible.

### 3. Claimant's reliance on the principle of estoppel is unavailing

Claimant's estoppel argument is clutching at straws. As regards Respondent's dual nationality objection, Claimant's estoppel argument is not only entirely at odds with Article 21(3) of the 1976 UNCITRAL Arbitration Rules which, as noted above, does not bar a party from raising a jurisdictional objection based upon facts which came into existence only after the filing of the statement of defence (such as the SAC Judgment of 14 November 2016), but would, if followed to its logical conclusion, effectively deny Respondent the right of defence.

As regards Respondent's argument in support of its jurisdictional objection that the Tribunal has no jurisdiction under the 1980 BIT on the basis that the 1980 BIT provides for ad hoc as opposed to UNCITRAL arbitration, Claimant's estoppel argument is equally unavailing. Respondent cannot be estopped from or be held to have waived its right to object to the Tribunal's jurisdiction merely because it participated in the appointment of the Tribunal. In any event, Claimant will have ample opportunity to respond to Respondent's arguments on whether

<sup>17</sup> Jan Oostergetel and Theodora Laurentius v. The Slovak Republic (UNCITRAL), Final Award, 23 April 2012, ¶ 137.

<sup>18</sup> *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award, 23 September 2003, ¶¶ 89-90.

<sup>19</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic* (UNCITRAL), Second Award on Jurisdiction, 4 June 2014, ¶ 115.

<sup>20</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic* (UNCITRAL), Second Award on Jurisdiction, 4 June 2014, ¶ 116.

<sup>21</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic* (UNCITRAL), Second Award on Jurisdiction, 4 June 2014, ¶¶ 117-127.

the Tribunal has jurisdiction under the 1980 BIT and whether the jurisdictional prerequisites of the 1980 BIT have been complied with in its upcoming Rejoinder on Jurisdiction as well as during the Hearing on Jurisdiction.

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For the reasons set out above, Respondent respectfully submits that Claimant's misguided attempt to have Respondent's dual nationality objection and its jurisdictional arguments declared inadmissible on their form - because he fears that they will succeed on their substance - must fail.

Yours sincerely,



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