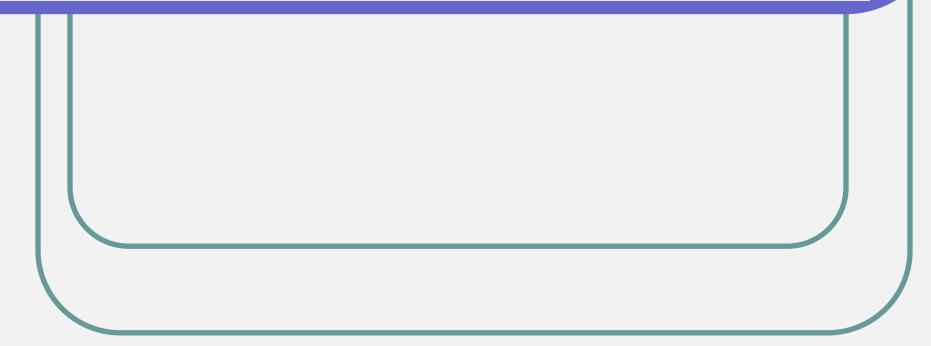
Vojtěch Trapl 16 November 2012

To bifurcate or not to bifurcate?



To bifurcate or not?

- If the decision is made to bifurcate, why then?
- Is the bifurcation somehow a fork in the road?
- Who is to determine this, the Arbitral Tribunal or the parties to the dispute?
- Is the bifurcation simply a procedural tool? Or does this also relate to the subject matter of the dispute?
- Should a plea on jurisdiction and a specific claim be given more or less importance as to the issue of bifurcation?
- Should the Arbitral Tribunal first deal with the most important claim as a basic claim for the dispute?
- Or does the Arbitral tribunal have to deal with all possible claims at the same time without bifurcation?

UNCTAD report 2010

357 disputes in investment arbitration by

- 225 at the International Centre for Settlement of Investment Disputes (ICSID)
 - 91 ad hoc cases under the UNCITRAL Arbitration Rules
 - 19 cases at the Stockholm Chamber of Commerce
 - 8 cases at the Permanent Court of Arbitration
 - 5 cases at the ICC
 - 4 other ad hoc cases
 - 1 case at the Cairo Regional Centre for International Commercial Arbitration

Pleas on lack of jurisdiction in investment arbitration based on the issues of the facts

ratione personae

- The dispute must oppose a Contracting State and a national of another Contracting State
- ratione materiae
 - The dispute must be a legal dispute arising directly out of an investment

ratione voluntaris

• The Contracting State and the investor must consent in writing that the dispute be settled through given arbitration

• ratione temporis

• The Treaty must have been applicable at the relevant time

Ronald S. Lauder v The Czech Republic (UNCITRAL)

The issue of jurisdiction was joined to the merits **Final Award** (on the merits and jurisdiction) No monetary compensation granted

CME Czech Republic B.V. (CME) v The Czech Republic (UNCITRAL

Proceedings bifurcated between liability and quantum first

Partial Award (on liability)

Final Award (on the merits)

Compensation 269,814,000 USD plus interest

Eastern Sugar B.V. v the Czech Republic (UNCITRAL)

Prima facie jurisdiction Decision on jurisdiction reserved until the merits phase The plea on lack of jurisdiction rejected **Final Award** (on the merits)

Compensation of EUR 25,400,000 plus interest

Saluka Investments B.V. v The Czech Republic (UNCITRAL) Arbitration bifurcated Decision on Jurisdiction over Counterclaims: Jurisdiction over counterclaim rejected Jurisdiction as to further claims reserved The dispute was settled without reaching any further award

Phoenix Action, LTD. v The Czech Republic (ICSID Case No. ARB/06/5)

Proceedings not bifurcated

Final Award

The dispute was not within the jurisdiction of the ICSID and the competence of the Tribunal

William Nagel v The Czech Republic (SCC No. 049/2002)

Arbitration bifurcated Questions of damages reserved for a possible further phase <u>Final Award</u>

All claims were dismissed

Austrian Airlines AG v The Slovak Republic (UNCITRAL)

Proceedings were bifurcated **Final Award** (on Jurisdiction) Tribunal lacked jurisdiction over all claims

Oostergetel, Laurentius v The Slovak Republic (UNCITRAL) not published

Proceedings were bifurcated Award on jurisdiction - jurisdiction was upheld

Final Award

All claims were rejected

